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ARTICLES:

HIRSCH LECTURE: GENDER, MASCULINITIES, AND TRANSITION IN CONFLICTED SOCIETIES

NAOMI CAHN*

FIONNUALA NÍ AOLÁIN**

Abstract: This Article uses a gender lens to explore how conflict affects men and women differently. It examines issues related to the emergence of certain kinds of "hyper" masculinity in situations of conflict and how such masculinities continue to function in subsequent peace-building attempts. This Article argues that a failure to account for and be cognizant of these specific masculinities has a significant effect for women in particular and, more generally, on the success of the conflict transition process. Finally, we show how using a gender lens could make a difference by considering the specific example of the impact of violent masculinities on disarmament, demobilization, and reintegration programs.

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INTRODUCTION

The newspapers are filled with information about countries undergoing transition from conflict to post-conflict status with the assistance of the international community. Importantly such a transition is not always a move from war to peace—recall Afghanistan, the Congo, Iraq, or arguably Sudan—but instead, from conflict to less conflict. In this Article we seek to explore the role that gender plays in the construction and implementation of the post-conflict transitional process. We focus on examining the gendered dimensions of societies emerging from extreme, systematic and institutional violence by multiple parties. Our questions in regard to all of these countries, in all of these varying transition processes, is what we term "the gender question." Where are women to be seen, and how are they visible within the processes that define and shape the cessation of communal violence? How should peace processes approach the forms of masculinity that dominate in situations of endemic violence? How should peace processes address the emergence of "hyper" masculinity in such contexts? What does the absence of gender signify, and how does such absence affect the substance of any particular agreement (whether local or international) to end violence? How does the failure to properly ask and answer "the gender question" undermine the short, medium, and long-term reconstruction of post-conflict societies?

In this Article, we first explore how conflict affects men and women differently, and introduce the gender lens that we use throughout our analysis. We then examine issues related to the emergence of certain kinds of "hyper" masculinity in situations of conflict and in subsequent peace-building attempts. Next, we argue that a failure to account for and be cognizant of these specific masculinities has a significant effect for women in particular, as well as the success of the conflict transition process. Finally, we show the critically significant impact of a gender lens by considering the effect of violent masculinities on disarmament, demobilization, and reintegration ("DDR") programs.

I. Conflict and Gender: Women

Conflicts fundamentally affect the lives of men, women, and children. Women face gender-specific issues during and after wars that men do not, including pervasive sexual violence, forced impregnation, reproductive violence, sexually transmitted diseases, and forced abortion. Women and their children experience internal displacement and dominate the refugee populations across conflicts. Women are also differentially affected because of their role as the primary caretaker of the household and family. In this regard, traditional gender dichotomies may be further entrenched and exacerbated during times of extreme violence.

Surprisingly, the transitions born of conflict may yield positive social, economic, and political changes for women. For example, during some conflicts in which aspects of a functioning state and economy continue to exist, women can take on roles as workers and laborers outside of the home, opportunities which would never be available were the society not in conflict. Rosie the Riveter, the archetypal woman who was employed in the Second World War to help with the military effort and subsequently transformed the war experience into economic opportunity in the post-war period for women, exemplifies a well-known American illustration of this phenomenon.[1] In this way, conflict can open up intended and unintended spaces for empowering women, "effecting structural and social transformations and producing new social, economic and political realities that redefine gender and caste hierarchies."[2]

Despite these potentially positive aspects, in most contexts the result of conflict for most women is a negative sum. Economies stall during and after conflict or operate in black and grey markets where women are the least often employed or employable because of their legally enforced second-class status. Across most post-conflict transitions, women are the first to be fired and the last to be hired with the large exception of the false (and temporary) economy built up around the presence of the international community, in which women are paid to fill the "camp follower" positions as housekeepers, cooks, administrators and, of course, for sex. Women and children also constitute the overwhelming number of refugees, and of people displaced from their home communities. The very fact of war can contribute to undermining the limited social stability and security of women in many societies, which is the precursor to any exertion of economic or social autonomy.

We stress that women's roles cannot be essentialized, even in the context of war. Women are frequently violent actors themselves in violent and conflicted societies, both in undertaking primary acts of violence and lending substantial support to men who carry out such actions. Importantly, recognizing that women can be violent has practical consequences. For

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1. Family law and feminist scholars have noted that the post-war opportunities came with a later backlash in the 1950s with a renewed conservatism about the role of women in society and a return to fixed roles in a way that reversed many of the earlier advancements. *See generally* ELAINE TYLER MAY, HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA 49-80 (1999); Laura McEnaney, *Atomic Age Motherhood: Maternalism and Militarism in the 1950s*, *in* WOMEN'S AMERICA: REFOCUSING THE PAST 448 (Linda K. Kerber & Jane Sherron De Hart eds., 5th ed. 2000).

2. Rita Manchanda, *Ambivalent Gains in South Asian Conflicts*, *in* THE AFTERMATH: WOMEN IN POST-CONFLICT TRANSFORMATION 99 (Sheila Meintjes et al. eds., 2001) (citing VEENA DAS, CRITICAL EVENTS: AN ANTHROPOLOGICAL PERSPECTIVE ON CONTEMPORARY INDIA (2000)).

example, it provides the means to acknowledge that women who have also been combatants face an array of social and cultural challenges that simply never arise for men during and after war. Accepting and accommodating a more diverse range of roles for women both in war and post-war facilitates a greater conceptual and practical understanding of the lived intersectionalities of most women's lives. Equally, a practice of gendering our analysis of violence thus "cannot be conceptualized without understanding the process of knowledge production as such epistemic practices intersect with the specific prevailing cultural and political conditions."[3] In reality however, these diverse and highly gendered patterns are rarely identified as co-existing simultaneously for women and not factored into peacemaking agreements and transitional structures.[4]

II. Conflict and Gender: Men

A fairly substantial amount of literature has been generated over the years regarding the forms of masculinity that emerge in times of armed conflict and war.[5] Theorists have identified an organic link between patriarchy, its contemporary outworkings and various forms of masculinity as they arise within societies and institutions. A preponderance of literature across disciplines has deepened our understanding of how masculinities are constructed and differentiated.[6] While war literature across many disciplines has made significant conceptual and practical use of the term "masculinity," the concept has been less applied and understood to be relevant in the post-conflict context. We argue that masculinities study is a diverse and burgeoning field, which has significant insights to offer to the analysis we wish to advance here.[7]

Masculinity theorists and feminist analysis have not always worked in tandem, and it is only relatively recently that feminist scholars have sought to address what masculinity studies has to offer feminist theorizing.[8] In this

3. NADERA SHALHOUB-KEVORKIAN, MILITARIZATION AND VIOLENCE AGAINST WOMEN IN CONFLICT ZONES IN THE MIDDLE EAST 65 (2009).

4. In this context Shalhoub-Kevorkian uses the concept of "frontliners"; women who occupy parallel and sometimes conflicting roles in violent societies. They are both constrained by highly patriarchal systems but, as a result of the limitations placed on men, have access to and agency within the public sphere. *See id.* at 4-5, 62-67, 96-97.

5. *See generally* JOSHUA S. GOLDSTEIN, WAR AND GENDER: HOW GENDER SHAPES THE WAR SYSTEM AND VICE VERSA (2001); NIRA YUVAL-DAVIS, GENDER AND NATION (1997).

6. *See, e.g.*, NANCY J. CHODOROW, FEMININITIES, MASCULINITIES, SEXUALITIES: FREUD AND BEYOND (1994); R.W. CONNELL, GENDER AND POWER: SOCIETY, THE PERSON, AND SEXUAL POLITICS (1987).

7. *See, e.g.*, CONNELL, *supra* note 6; MICHAEL S. KIMMEL, MANHOOD IN AMERICA: A CULTURAL HISTORY (2005).

8. *See, e.g.*, NANCY E. DOWD, REDEFINING FATHERHOOD (2000).

vein, we start by asking the "man" question, interrogating where and how men are situated in relation to the creation, perpetration, and institutionalization of violence. In what ways does hegemonic masculinity work, and how do masculinities operate to benefit even those men who are at the margins of masculinity norms and practice? Somewhat ironically, even within the hierarchies of masculinity, subordinated masculinities can benefit from the social construction of male privilege and value.

While an enormous amount of scholarship has been generated about the varying forms of masculinity and their effects, of particular interest to our analysis is the lens of "hyper" masculinity. In our emphasis on hypermasculinity, we draw on Angela Harris' definition of "a masculinity in which the strictures against femininity and homosexuality are especially intense and in which physical strength and aggressiveness are paramount."[9] We frame our analysis by affirming that other kinds of masculinities coexist with hypermasculinity, but notably in situations of conflict and endemic violence, hypermasculinity plays an enlarged and elevated role. Its social traction is intensified when violence is endemic, and other social strictures are slackened, and the unloosening of these patterns and hierarchies is particularly fraught in the post-conflict process.

One clear parallel for non-conflicted states is to analogize the emergence of hypermasculinity with the role of the military in multiple cultures and societies. The military is closely tied with manhood, and, indeed, militaristic actions are supported by an ideology of male toughness.[10] Self-evidently, men dominate most national and international militaries. By the time the conflict ends, men who have acted militarily and the (generally) male political elite are deeply enmeshed in this cultural vision of manhood. As former combatants in Colombia explained to anthropologist Kimberly Theidon, for example, joining a paramilitary group allowed the men "to 'feel like a big man in the streets of their barrios,' to 'go out with the prettiest young women,' and to 'dress well,' privileges they insist would not have been possible if they weren't carrying a gun."[11] We suggest that the prevalence of this kind of masculinity poses complex issues for undoing violence, for mainstreaming gender equality and for remaking societies that have been fractured and deeply divided.

Post-conflict societies present a unique and under-analyzed site of examination for masculinities. One of the main reasons for the lack of

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9. Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 793 (2000).

10. *See* GOLDSTEIN, *supra* note 5, at 5-6; *see also* Kimberly Theidon, *Transitional Subjects: The Disarmament, Demobilization and Reintegration of Former Combatants in Colombia*, 1 INT'L J. TRANSITIONAL JUST. 66, 76 (2007).

11. Theidon, *supra* note 10, at 76.

attention to masculinities in this domain is the presumption that the post-conflict context is equated to peace and that the absence of war makes moot any analysis of masculinity, which may be presumed "tamed" by the end of violent contestation. This presumption fails to account for the ways in which women experience violence both in conflicted and post-conflict societies. The result of this lack of attention to masculinities means a failure to account for the myriad of ways in which masculinities transform, adapt and reformulate in the post-conflict environment. Consequently, close attention to the forms and impact of masculinities in the post-conflict milieu is critical not only for women's experiences in the process, but also for the success of the transition itself.

Indeed, the post-conflict environment, like conflict, is also "vividly about male power systems, struggles and identity formation."[12] There may be an enormous flux in the male post-conflict fraternity both on an individual and communal level. Moreover, international organizations and institutions, typically headed by male elites, are arriving to reconfigure the transitioning society. So, men who were in power are losing power, other men (domestic and international) are taking their place, and as is often the case when a conflict stalemate arises, internationals (generally culturally and politically differentiated other males) are coming into a society to fill a vacuum.

One enduring question that emerges from the conflict and masculinities literature is why men engage in violence? Without over digressing, we point out that violence, as an aspect of masculinity, is deeply linked to the assertion of social status and the value of self in particular contexts. Violence may literally "make the man" in many societies, and not infrequently the site of the violence is the woman's body. In recognizing such deeply rooted links between the constructions of the masculine self, and the social acceptance of "manhood," we acknowledge the difficulties that arise as we address the end of violence (as a formal legal matter). The end of violence is not a superficial engagement, but may require deep and difficult entanglement with the masculine construction of self in many societies. In post-conflict societies, such conundrums are compounded by the lack of other opportunities available to men to assert positive masculinities, and to have practical and symbolic roles within societies that struggle on the economic margins and are deeply politically dysfunctional.

This question of violence and its ending is central to the post-conflict experience because the cessation of public violence between (generally) male combatants is usually the litmus test by which the success of transition from war to peace is measured. We take issue with the

12. Lori Handrahan, *Conflict, Gender, Ethnicity and Post-Conflict Reconstruction*, 35 SECURITY DIALOGUE 429, 433 (2004).

presumption that the end of *public* violence and the measurement of security based on the safety of *male* combatants should constitute an adequate calculation of peace in any society. While analysis of the causality of violence is central to addressing transformation in the post-conflict environment holistically, issues of causality are extremely complex, dependent on variations in social and cultural contexts. The analysis is also made more complicated by a deeper recognition of the role that masculinities play in giving rise to violence, and the difficulties of transforming such practices on a fundamental level. Nonetheless, greater attention to causality is entirely relevant to addressing women's experience of violence as well as implementing measures in post-conflict societies that meaningfully address the need for women's security.

The causes of violence and conflict in a range of societies are far too complex to explore here.[13] But a number of cluster causalities are useful to identify: first, economic and social insecurity; second, a lack of legal and political status particularly associated with group or ethnic identity; and third, the lack of opportunity for meaningful self-determination (whether external or internal) within the state. In multiple contexts, engaging in violence is a rational choice for men when few other opportunities may be provided to gain economic security (albeit that participation in violence provides a highly tenuous economic existence or longevity), social status and value within their communities, and security (again albeit tenuous and fragile) for their families and communities. As post-conflict literature has begun to explore, there is a strong overlap between all these causal categories and the emergence of certain forms of masculinity in conflicted societies. Without addressing the causalities outlined above within a framework that integrates masculinities, we may also fail to address the ongoing realities of how masculinities closely interconnect with post-conflict social, political, and economic outcomes.

Beyond a more nuanced recognition of international masculinities, we also want to address a more complex set of role assumptions for men and women in post-conflict societies. This requires asking the fundamental question of what does it mean "to be a man" in a violent society, when violence begets status and economic capacity? Even more relevant to our inquiry, what happens to such masculinities when societies transition from violence and move towards democratic or more liberal forms of political engagement? Which men lose and gain in such contexts? As both Brandon Hamber and Amy Maguire have explored in post-apartheid South Africa and transitionary Lebanon, women often bear the brunt of the flux in

13. *See generally* CHRISTIAN P. SCHERRER, GENOCIDE AND CRISIS IN CENTRAL AFRICA: CONFLICT ROOTS, MASS VIOLENCE AND REGIONAL WAR (2002).

masculine roles.[14] The theoretical gains made by women in status and legal protection are much more complex in reality. One female participant in a study of women's experiences of post-conflict security in South Africa has noted:

> I think, in as much as the law of the country allows women to be empowered, that is going to have a spin-off effect on men's behaviour and men's attitudes towards women. In particular, those so-called empowered women. They'll always be the subject of abuse . . . everywhere you go . . . if you are perceived to be an empowered woman you are subject to a lot of abuse from society in general.[15]

The link between formal (generally equality) gains made by women in many post-conflict legislative and constitutional enactments, conjoined with the political displacement of power for many men from the traditional routes provided during armed conflict, creates a complex social and legal terrain. It is upon this territory that women's gains and their intersection with masculinities in flux are played out. Formal gains for women may, in fact, be nullified or significantly constrained by the reality of social and community context, in which the accommodation of men's deeply entrenched social status may outweigh the enforcement of formal legal norms in practice.[16] Moreover, the social realities that women confront in highly patriarchal societies are propped up and perpetuated by masculinities in action—limiting in subtle and crosscutting ways the reach of law.

It is also vital to contextualize the reality of economic fragility faced in post-conflict zones around the world. Countries emerging from conflict are some of the poorest on the planet.[17] They have the highest number of

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14. *See* BRANDON HAMBER, "WE MUST BE CAREFUL HOW WE EMANCIPATE OUR WOMEN": SHIFTING MASCULINITIES IN POST-APARTHEID SOUTH AFRICA 22-24, 26 (2006), http://www.brandonhamber.com/publications/Paper%20Careful%20how%20we%20emancipate.pdf; Amy Maguire, *'Security Starts with the Law': The Role of International Law in the Protection of Women's Security Post-Conflict*, *in* THE ROLE OF INTERNATIONAL LAW IN REBUILDING SOCIETIES AFTER CONFLICT: GREAT EXPECTATIONS 218, 226 (Brett Bowden et al. eds., 2009).

15. Maguire, *supra* note 14, at 226.

16. For an analysis of this dynamic in the context of reparations in transitional societies see Ruth Rubio-Marin, *The Gender of Reparations in Transitional Societies*, *in* THE GENDER OF REPARATIONS – UNSETTLING SEXUAL HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS 63 (Ruth Rubio-Marin ed., 2009).

17. As of 2008, Somalia's Gross Domestic Product (GDP) per capita was $600; Rwanda's GDP per capita was $1000; Burundi's GDP per capita was $400; and Columbia's GDP per capita was $8800. *See* CIA, THE WORLD FACTBOOK, https://www.cia.gov/

refugee populations (who are predominantly female with child dependents) and internally displaced persons.[18] In this context, when one domain of status and economic subsistence is closed off (by the end of violent armed conflict) such societies struggle to replace the dysfunctional economy of war with a functional liberal economy of provision. The tools that for some men provided a means of survival in war are unreliable and may no longer be needed. Men and young boys who are under or uneducated are at a considerable and material disadvantage in such settings. In this space of economic struggle, Gary Barker and Christine Ricardo illustrate the rise in the parallel economics of criminality and "normal" violence, which allow certain forms of masculinity to endure and provide both status and material needs.[19] They note the particular difficulties of confronting violent masculinities in social settings that have operated to seal off men spatially from women and children. This is further compounded in societies that have deeply stratified gender roles, leaving little room for the expression of positive masculinities in either the public or private sphere. The effects of such stratification are also intensified when one accounts for inter-generational transmission of violent norms, as well as in societies where age stratification is intense, creating intense competition for economic and sexual resources as well as opportunities.[20]

III. The Gender Lens

Having explored how conflict affects both men and women, we want to affirm the importance of a gender lens and investigate its impact. The independent value of a gendered assessment of post-conflict processes remains contested. In the legal and political space of ending or transmuting conflict, women still struggle to assert the magnitude of issues that affect them directly. They remain subordinated by dominant discourses that

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library/publications/the-world-factbook/region/region_afr.html (select a specific country from the drop-down menu; then select economy) (last visited Dec. 1, 2009).

18. As of January 2009, Rwanda had 55,062 refugees; Somalia had 1842 refugees and 1,277,200 internally displaced persons; Burundi had 21,093 refugees and 100,000 internally displaced persons; and Columbia had 170 refugees and 3,000,000 internally displaced persons. *See* UNHCR, The UN Refugee Agency, http://www.unhcr.org (select the specific country under "browse by country" to view the "Statistical Snapshot") (last visited Dec. 1, 2009).

19. Gary Barker & Christine Ricardo, *Young Men and the Construction of Masculinity in Sub-Saharan Africa: Implications for HIV/AIDS, Conflict, and Violence*, *in* SOCIAL DEVELOPMENT PAPERS: CONFLICT PREVENTION & RECONSTRUCTION, PAPER NO. 26, at 31-32 (also published as Social Development Paper No. 84, 2005), *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2005/06/23/000012009_20050623134235/Rendered/PDF/327120rev0PAPER0AFR0young0men0WP26.pdf.

20. *Id.* at 12. The limits on access to land in sub-Saharan Africa are pivotal for the transmission of social status, marriage opportunity, and independence for young men.

minimize or ignore the value of placing the needs and views of women at the center of the conversation about ending violent communal behaviors, even though such placement is absolutely central to ending societal violence. It needs constant restatement that women are the group most historically marginalized and excluded from the peacemaking and peace-building processes across all jurisdictions and conflicts.[21] Applying the gender lens is critical to ensuring the effectiveness of policies and practices involved in ending conflicts and ensuring that they do not recur. Without this attention, traditional gender dichotomies may be further entrenched and exacerbated during times of extreme violence and extended in the post-conflict phase.

While women are missing from key roles in peace negotiations and government, they often dominate in civil society movements that create "safe" and neutral spaces in conflicted societies. In this latter role, women often provide the grassroots networking and social support structures that are relied upon by local and international elites to embed peace processes. But this raises the issue of whether those involved in the reconstruction process essentialize women by reducing and collapsing their varied roles into a single dimension that relegates them to "soft" civil society roles, rather than tangible roles entrenched in the political infrastructure. We remain consistently wary of essentializing women as peacemakers and facilitators when we are deeply aware of the complex set of roles women as individuals and as members of broader communities play in enabling and encouraging violence. Such essentialization also underplays the extent to which women play an under-appreciated role in supporting and enabling certain kinds of masculinities to thrive.

Using the gender lens helps us understand that gender must become central to conflict resolution, peace-keeping, reconstruction, and reconciliation efforts. Integrating gender into the post-conflict process is insufficient unless gender is incorporated into all aspects and levels of the newly developing or rehabilitating state. For gender to be absolutely involved it must be addressed in every issue and at every level. In this view, it is insufficient for formal legal norms alone to confront the inequalities, violence, and discrimination that women may have experienced during conflict, or for women to have an impact solely through civil society. Rather, a broadly framed set of imperatives is required which includes legal reform to address harm and exclusion and also takes account of the broader psycho-social and customary practices identified earlier in our analysis of masculinity in action. For example, gender inclusion has often focused almost exclusively on holding war crimes perpetrators

21. On peace agreements generally, see CHRISTINE BELL, PEACE AGREEMENTS AND HUMAN RIGHTS (2000).

accountable for sexual violence. We cannot, however, evaluate the credibility and value of such accountability mechanisms without an eye to the broader transitional and gendered dynamic of the society in question.[22] Moreover, we cannot hope to dislodge practices of violence towards women (before, during, and after conflict) unless we are prepared for a hard interface with the social embeddings of violence in the individual identities and social practices of men.

In its broader context, our approach challenges conventional notions concerning the role, and rule, of law in post-conflict situations. For those of us trained to think in terms of legal solutions; of justice via international, regional, or local tribunals; of prosecutions and investigations; and evidence and trials, these concepts must be tested in countries with a minimally functioning justice system, with no means of protecting victim-witnesses, and with only minimal assurance that genocide and gender-based violence will not recur. In these countries, we must be particularly sensitive to what role the law can and should play in ending impunity and restoring confidence that the war wounds can be healed. An emphasis on the relationship between masculinities and violence in conflicted and post-conflict societies permits us to identify a much broader array of enabling phenomena resulting in women's experiences of systematic violence. In doing so, we become acutely aware that formal legal mechanisms provide only part of the solution.

Finding justice for victims and punishing perpetrators is critical, but there are important contextual issues on how best to proceed to ensure that accountability occurs as countries struggle to establish new governments. In our focus on legal approaches, we must remember the practical realities that confront victims of gender-based violence as they continue with their lives, often living in the same communities as the perpetrators, and thus craft remedies that account for these differing, potentially conflicting, realities which themselves may reflect divergent constituencies: a need for punishment; a need for rehabilitation for both victims and perpetrators; and a need for moving on politically in a divided society.

IV. Sites of Masculinity Struggle in the Post-Conflict Environment—Disarmament, Demilitarization, and Reintegration

To show how a gender lens might matter, we turn to the process of Disarmament, Demilitarization, and Reintegration ("DDR"). DDR efforts are integral parts of peace-making and development processes in multiple

22. For further discussion see CAHN ET AL., ON THE FRONTLINES: GENDER, WAR AND THE POST-CONFLICT PROCESS (forthcoming 2010).

conflict situations.[23] An extensive general literature has emerged on the subject of DDR,[24] as well as more particular case-study analyses, looking at particular countries and how they have reintegrated and demobilized (or not) former combatants.[25] DDR comes with strong instrumental and policy goals. At its essence it may function as the most important preliminary step in ending or limiting violent conflict. It can act instrumentally to facilitate control over armed forces (both state and non-state). Less obviously, DDR can create extraordinary vulnerabilities in societies where guns are "both a threat *and* a source of security."[26] Thus, addressing the full spectrum of

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23. A strong link has been established between disarmament and development. *See generally* David A. Koplow & Philip G. Schrag, *Carrying a Big Carrot: Linking Multilateral Disarmament and Development Assistance*, 91 COLUM. L. REV. 993, 1026-42 (1991); Herbert Wulf, *Disarmament as a Chance for Human Development: Is There a Peace Dividend?* (UNDP, Occasional Paper No. 5, 1992), http://hdr.undp.org/en/reports/global/hdr1992/papers/herbert_wulf.pdf.

24. *See, e.g.*, U.N. Dep't of Peacekeeping Operations [UNDPKO], Lessons Learned Unit, *Disarmament, Demobilization and Reintegration of Ex-combatants in a Peacekeeping Environment: Principles and Guidelines* (2000), *available at* http://www.reliefweb.int/rw/lib.nsf/db900sid/LGEL-5SJHQ2/$file/dpko-ex-comb-dec99.pdf?openelement; Mats R. Berdal, *Disarmament and Demobilisation after Civil Wars: Arms, Soldiers and the Termination of Armed Conflicts*, *in* ADELPHI PAPER 303, at 9, 73-76 (Int'l Inst. for Strategic Stud., 1996); KIMBERLY MAHLING CLARK, FOSTERING A FAREWELL TO ARMS: PRELIMINARY LESSONS LEARNED IN THE DEMOBILIZATION AND REINTEGRATION OF COMBATANTS (USAID 1996), *available at* http://pdf.dec.org/pdf_docs/pnaby027.pdf; Lotta Hagman & Zoe Nielsen, *A Framework for Lasting Disarmament, Demobilisation, and Reintegration of Former Combatants in Crisis Situations*, *in* IPA WORKSHOP REP. (Int'l Peace Acad., Report of Dec. 12-13 Workshop, 2002), *available at* http://www.ipacademy.org/media/pdf/publications/framework_for_ddr.pdf; KEES KINGMA, BONN INT'L CENTER FOR CONVERSION, DEMOBILISATION AND REINTEGRATION OF EX-COMBATANTS IN POST-WAR AND TRANSITION COUNTRIES: TRENDS AND CHALLENGES OF EXTERNAL SUPPORT *passim* (2001), *available at* http://www.bicc.de/uploads/pdf/publications/other/gtz_studien/demob/demobilisation.pdf; Mark Knight & Alpaslan Özerdem, *Guns, Camps and Cash: Disarmament, Demobilization and Reinsertion of Former Combatants in Transitions from War to Peace*, 41 J. PEACE RES. 499 (2004).

25. *See, e.g.*, Kris Brown & Corinna Hauswedell, *Burying the Hatchet: The Decommissioning of Paramilitary Arms in Northern Ireland*, *in* INITIATIVE ON CONFLICT RESOLUTION AND ETHNICITY 22 (Bonn Int'l Ctr. for Conversion, Brief No. 22, 2002); Markus Koth, *To End a War: Demobilization and Reintegration of Paramilitaries in Colombia*, *in* BONN INT'L CTR. FOR CONVERSION: PAPER 43, at 5 (2005); Christopher Alden, *Making Old Soldiers Fade Away: Lessons from the Reintegration of Demobilized Soldiers in Mozambique*, 33 SECURITY DIALOGUE 341 (2002); Jessica Schafer, *'A Baby Who Does Not Cry Will Not Be Suckled': AMODEG and the Reintegration of Demobilised Soldiers*, 24 J. S. AFR. STUD. 207, 208 (1998).

26. Kimberly Theidon, *Reconstructing Masculinities: The Disarmament, Demobilization and Reintegration of Former Combatants in Colombia*, 31 HUM. RTS. Q. 1, 19 (2009).

gendered issues for men and women is a complex and highly variable task. The demobilization, demilitarization, and reintegration, (with equal emphasis on all three elements) of former combatants clearly overlap with the production, control, and maintenance of masculinities in conflicted and post-conflict societies.

DDR programs do not follow one template, but they are typically discussed during the peace process and established after the peace accord has been signed, as one of the first components of implementation.[27] Recall that women are significantly absent or excluded from the peace-making process. Moreover, even where women are present at peace negotiations, the specific negotiation sites in which demilitarization and security are agreed tend to be exclusively male and lack gender parity in representation, going hand in hand with the reality of women's lack of high-level status in the military and/or at the commander level of non-state paramilitary forces.[28] Examples of the integration of demilitarization with the formal peace deal include the Good Friday Peace Agreement in Northern Ireland, various versions of the Colombian peace process, and the demilitarization of former combatants in Mozambique. It is generally agreed that DDR programs should only be undertaken with certain conditions present, such as a peace accord that establishes the framework for DDR, a general sense of confidence in the peace process itself; minimal and meaningful levels of security, ownership of DDR by all relevant stakeholders; and basic guarantees of information and transparency.[29] Given the fractured nature, form, and implementation of peace agreements, however, this rarely happens.

Traditional or "classical" DDR programs, which assume ideal—and rare—conditions, conceive of DDR as a set of technical interventions to assure, for example, effective containment of armed groups, collection and destruction of weapons, division of former combatants into those who will remain in or join the country's armed forces and those to be demobilized,

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27. *See* UNDPKO, *supra* note 24, ¶¶ 10, 12; Berdal, *supra* note 24, at 9, 73-76; CLARK, *supra* note 24; Hagman & Nielsen, *supra* note 24, at 1; KINGMA, BONN INT'L CTR. FOR CONVERSION, *supra* note 24; Koth, *supra* note 25, at 25-26; Knight & Özerdem, *supra* note 24, *passim*.

28. *See* Fionnuala Ní Aoláin, *Women, Security and the Patriarchy of Internationalized Transitional Justice*, 31 HUM. RTS. Q. 1055, 1080-82 (2009).

29. Jason Aplon, Acting Deputy Dir., Office of Dep't Transition Initiatives, Agency for Int'l Dev., U.S. Dep't of State, Presentation at the Program on States and Security at the Ralph Bunche Institute for International Studies: Post-Conflict Peacebuilding: Connecting Research and Policy (Jan. 25, 2008). *See* NICOLE BALL & LUC VAN DE GOOR, DISARMAMENT, DEMOBILIZATION AND REINTEGRATION: MAPPING ISSUES, DILEMMAS AND GUIDING PRINCIPLES 5-6 (2006), http://www.reliefweb.int/rw/lib.nsf/db900sid/HVAN-6UFKQR/$file/cling-ddr-aug2006.pdf?openelement.

and then the effective reinsertion, reintegration, and rehabilitation of those demobilized into their communities of origin.[30] The obvious point of course is that there is a variance of emphasis across most DDR implementations, but a general pattern is that demobilization gains considerable and quick traction while the reintegration and rehabilitation portion draws much less reflection, funding, and applied enforcement from the state and the international community. DDR requires some minimal levels of security as a baseline for establishing the institutional structure for disarmament and for making former combatants feel safe in relinquishing their weapons. It also requires that all parties, including the former combatants and new government as well as international actors, commit to its implementation with consensus as to the basic outline of the process.[31]

The most intensive operations occur post-stabilization, during the transition and recovery period.[32] The actual implementation often starts with combatants voluntarily entering reception centers turning in weapons to begin the demilitarization process.[33] Such programs are typically administered by a multilateral organization and/or the United Nations, and the World Bank and the United Nations are significant financial contributors.[34] These programs, world-wide, cost more than $1.5 billion per year, and they generally occur in some of the poorest countries.[35] Because DDR processes depend on broader developments towards a peaceful environment, they are subject to frequent disruptions, and they seldom proceed in a linear fashion.[36]

The existence of DDR raises complex questions in post-conflict or regime change societies from a gender perspective. For example, disarmament has a high crossover with political decisions and compromises

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30. *See* Lisa J. Laplante & Kimberly Theidon, *Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz*, 28 MICH. J. INT'L L. 49, 57-58 (2006).

31. *See* BALL & VAN DE GOOR, *supra* note 29, at 5-6.

32. Integrated Disarmament, Demobilization and Reintegration Standard, *2.20 Post-conflict Stabilization, Peace-building and Recovery Frameworks*, 5-7 (2006), *available at* http://www.unddr.org/iddrs/02/download/IDDRS_220.pdf.

33. *See, e.g.*, SUSAN MCKAY & DYAN MAZURANA, WHERE ARE THE GIRLS? GIRLS IN FIGHTING FORCES IN NORTHERN UGANDA, SIERRA LEONE, AND MOZAMBIQUE: THEIR LIVES DURING AND AFTER WAR 98 (2004).

34. *See, e.g.*, United Nations Office for Disarmament Affairs, http://www.un.org/disarmament/HomePage/about_us/aboutus.shtml; Escola de Cultura de Pau, DDR 2009: Analysis of Disarmament, Demobilisation and Reintegration (DDR) Programmes in the World During 2008 (2009), *available at* http://escolapau.uab.cat/img/programas/desarme/ddr/ddr2009e.pdf.

35. *See* U.N. Disarmament, Demobilization and Reintegration Resource Centre [UNDDRRC], Country Programmes, http://www.unddr.org/countryprogrammes.php (select desired country; then follow "funding" hyperlink) (last visited Dec. 1, 2009).

36. *See* BALL & VAN DE GOOR, *supra* note 29, at 11.

involving amnesty for human rights and humanitarian law violations, including amnesty for crimes involving sexual violence or violence against women.[37] In contexts where women are the least likely to be present at the negotiation, deals are struck that include amnesty for crimes involving sexual violation, mutilation, reproductive harms, the transmission of sexually transmitted diseases and HIV/AIDS and forced impregnation.[38] The amnesty is often the precursor to the DDR program, and given that gendered harms may not be viewed as necessarily threatening the growing international consensus that certain crimes against humanity cannot be subject to amnesty,[39] the gendered fault line may simply not be noticed or assessed as a fundamental bias to such processes. This challenging nexus between gender and disarmament is important to highlight. Political compromises, including amnesty for serious human rights violations that have occurred during a conflict, mostly made by elite men, often fail to engage with the particular vulnerabilities created for women by partial or excluded accountability.

Gender perspectives are important to DDR for numerous reasons. First, armed conflict affects women and men differently, and that difference is seldom taken into account in designing and implementing DDR programs. The obvious point being that women are often hugely affected in their day-to-day lives by the way in which a DDR program is implemented. The range of effects include the front line exclusions that fail to accommodate women in compensation schemes and the internal effects which may include the return of violent men to their communities with little, if any, recognition of the potential harms that they may visit on their home environments, and little, if any, support to victims when subsequent harms occur. Second, under many existing programs, women and men have unequal access to resources following conflict. Particularly in light of the gender bias and inequalities that underpin many societies, DDR may focus only on male combatants. What this means in practice is that the economic benefits that flow from DDR will rarely flow to women (even when they

37. For example, Section 8 of the Belfast, or "Good Friday" Agreement in Northern Ireland deals with security, referring to the "normalisation" of security arrangements and practices. This is to include the reduction of armed forces, the removal of security installations and emergency powers, and other measures appropriate to and compatible with a normal peaceful society. Northern Ireland Office, *The Agreement*, *available at* www.nio.gov.uk/the-agreement (follow "Agreement" hyperlink to read the full text of the Agreement).

38. *See* THE TRANSITIONAL JUSTICE INSTITUTE, PEACE AGREEMENT DATABASE (2008), http://www.transitionaljustice.ulster.ac.uk/peace_agreements_database.html (select "enter database;" then fill out the search criteria).

39. *See generally* AMNESTY, HUMAN RIGHTS AND POLITICAL TRANSITIONS: BRIDGING THE PEACE AND JUSTICE DIVIDE (2008).

have been combatants in the traditional sense), and the distortion of the post-conflict economy can be linked to DDR payments. Third, achieving peace requires the inclusion of all members of society, male and female, and it is a long-term process. Peace remains elusive after civil wars in most post-conflict situations. Though DDR may be conceived as the means to deliver conflict endings in the short term, we caution that inadequate or poorly managed DDR programs may in fact create further cycles of instability in a post-conflict society, leading inexorably to the perpetration of further communal violence. Finally, adding a gender analysis requires focusing specifically on men and issues of masculinity.[40] By this we mean that close attention must be paid to the psycho-social dimensions that create and elevate the emergence of certain kinds of masculinity in society and rewards those men who exhibit these characteristics. Attention to this dimension requires valuing gender equality as a core dimension of the DDR process and preparing to posit the success of these programs on the extent to which they actually operate to bring about a lessening of overall violence in a society (in both private and public spheres) as well as in handing over arms. We acknowledge, of course, that for DDR interventions to succeed, they must be designed in the context of each country's special circumstances, and consistently deploy gender as a centralizing mechanism.

Accordingly, using a gender perspective leads to a series of additional issues concerning the structure of DDR programs. First, what constitutes disarmament sufficient to satisfy a ceasefire requirement in the political/military sense may not in fact entail the removal of all such weapons from the public and, more importantly, the private sphere.[41] An obvious linking issue is how to measure the success or failure of

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40. *See* U.N. Dept. for Disarmament Affairs in collaboration with the Office of the Special Adviser on Gender Issues and the Advancement of Women, *Gender Perspectives on Disarmament, Demobilization, and Reintegration (DDR)* (March 2001), http://www.un.org/disarmament/HomePage/gender/docs/note4.pdf; Theidon, *supra* note 26. Brandon Hamber emphasizes the importance of not essentializing men, while recognizing the importance of studying masculinities. Brandon Hamber, *Masculinity and Transitional Justice: An Exploratory Essay*, 1 INT'L. J. TRANSITIONAL JUST. 375 (2007).

41. Specifically, according to the UNDP, there are some 550 million small arms circulating in the world today. *See* United Nations, *Human Dev. Report* 2002, at 97 (2002). Only forty-one percent of these weapons are in the hands of the regular armed forces. *See* Press Release, Hans Winkler, State Sec'y, Austrian Federal Ministry for Foreign Affairs, Conflicts Cannot be Resolved Using Arms (June 26, 2006), *available at* http://eu2006.gv.at/en/News/Press_Releases/June/2606WinklerUN.html. Many women express "deep disappointment in the disarmament process." HUMAN RIGHTS WATCH, BETWEEN HOPE AND FEAR: INTIMIDATION AND ATTACKS AGAINST WOMEN IN PUBLIC LIFE IN AFGHANISTAN 4 (2004). For example, security threats have impeded women's ability to travel, study, and work in post-Taliban Afghanistan. *Id.* at 2.

demobilization from a gender perspective.[42] This benchmarking for success through a gender-sensitive lens is markedly absent through many of the programs that are heralded as success stories by the international community. Second, demobilization generally fails to address the deep imprinting of violent masculinities in former combatants and the effects of a militaristic culture on the civilians that surround him in the transitional and post-conflict context.[43] The underlying psycho-social dimensions which, in a conflicted society, have supported the resort to violence and the elevation of particular forms of masculinity that accompany it, are not in any sense undermined or addressed by a formal demobilization process. Thus, a key issue to be addressed concerning violence is what is meant by the term "ending violence." In the parlance of ending public violence or internal conflict, this conversation revolves around decommissioning weapons and getting armed paramilitaries/insurgents to swap violent confrontation for peaceful debate about contested issues. However, this kind of discussion rarely engages with the fundamental requirement of changing deep-seated social attitudes toward the use of violence.[44] Self-evidently, where discharged-but-not-disarmed combatants return to their homes and families with their weapons, the sites of violence may simply move from the public to the private sphere.[45]

V. Attention to Masculinities

As societies transition from violence and move towards democratic or more liberal forms of political engagement, close attention must be paid to masculinities as part of the project of ending violence. Failure to account for and be cognizant of these specific masculinities has significant effects for women, but more generally on the success of the conflict transition processes. DDR programs struggle with "what to do with the 'morass of malignant male muscle' . . . . Men unable to positively manifest masculine

42. Methods for evaluating DDR from a gender perspective are explored further in CAHN ET AL., *supra* note 22.

43. Notably, addressing masculinities requires paying attention to the ways in which women often actively participate in facilitating and supporting men's militarized masculinity. *See* Theidon, *supra* note 26, at 29; *see also* GOLDSTEIN, *supra* note 5, at 306.

44. *See, e.g.*, AMNESTY INTERNATIONAL, THE IMPACT OF GUNS ON WOMEN'S LIVES (2005), *available at* http://www.amnesty.org/en/library/info/ACT30/001/2005/en (follow "Download: PDF") (containing a sustained and detailed cross-jurisdictional study of the "ordinary" impact of gun violence against women). The study notes that "although available data supports the widespread assumption that most direct casualties of gun violence are men, particularly young men, women suffer disproportionately from firearms violence, given that they are almost never the buyers, owners or users of such weapons." *Id.* at 6 (footnote omitted).

45. Ní Aoláin, *supra* note 28.

roles may return to violent and destructive means of expressing their identities."[46] Factoring this psycho-social reality into the design and implementation of DDR programs is a means to avert inevitable structural barriers to the success of a key element of conflict-ending processes.

Masculinities appear in several different ways throughout the DDR and other processes. First, socialization into male roles as both traditional head of household and then—as a result of the conflict—into the assumption of violent roles may be difficult to undo. The complexity and difficulty of this task should not be underestimated by policy-makers, and it underscores that processes and policies sensitively attuned to the dynamics of embedded socialization will reap both immediate and inter-generational benefits.

The magnitude of this socialization lies with the complexity of managing the forms of violence that emerge in many transitional societies, a context that is acutely illustrated in the relationship between disarmament and intimate violence. As a starting point, underlying endemic sexual and domestic violence is never calculated into an overall accounting for the experience of violence during conflict. There is a strong and maintained presumption that sexual violence in war is a thing apart, an experience capable of being parsed out from the "regular and normal" violence that accompany women's lives in many societies. As feminist international scholars have long noted, sexual and gender-based violence rarely conforms to the timelines of peace treaties and ceasefires but endures past them. The kinds of violence and sexual acts perpetrated upon women in conflicted societies endure as a form of entrenched "othering" in such societies, and pervades the way in which women subsequently experience inequality, discrimination, and exclusion. Many observers and commentators on post-conflict societies have asserted that there is a marked rise in the violence that women experience post-conflict.[47] Statistics in a number of post-conflict societies that measure such acts suggest, at least, a marked increase in reported violence.[48] There is, however, still a need for additional empirical evidence to document such an overarching trend, but at the very least, there is room to acknowledge the continued pervasiveness of violence for women when peace is theoretically won. This ongoing violence undoes a pervading premise that women and men experience the post-conflict gains in the same way.

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46. U.N. Dev. Fund for Women [UNIFEM], *Getting it Right, Doing it Right: Gender and Disarmament, Demobilization and Reintegration* 19 (2004), *available at* http://www.iknowpolitics.org/files/Getting_it_Right__Doing_it_Right.pdf.

47. *See* Sheila Meintjes et al., *There Is No Aftermath for Women*, *in* THE AFTERMATH: WOMEN IN POST-CONFLICT TRANSFORMATION, *supra* note 2, at 3, 4-18.

48. *See, e.g.*, Tina Sideris, *Rape in War and Peace*, *in* THE AFTERMATH: WOMEN IN POST-CONFLICT TRANSFORMATION, *supra* note 2, at 148, 153-57.

A. Re-Socializing Men

One of the central quandaries for the DDR process is how to undo the masculinities learned during wartime. Where discharged combatants return to their homes and families, the sites of violence may simply move from the public to the private sphere. From the gendered critique of accountability mechanisms, what we learn is that truth processes may examine the prior violence in the public sphere, but will not engage in any way with the continual violence that is facilitated in the private sphere by non-rehabilitated former combatants. The disconnect between the operation and scope of the transitional justice mechanism and the intimate and everyday realities of living with a former combatant for women could hardly be more starkly contrasted.

This disconnect has been graphically identified in such transitional societies as South Africa.[49] For example, the perceived escalation of domestic violence rates post-apartheid have raised deep concerns about the relationship between pre-existing apartheid violence and its spill-over to a transitional society. There is some evidence that post-conflict societies do (at least) statistically experience greater proportions of domestic and intimate violence.[50] Thus, increased reporting at the end of conflict may not mean absolute empirical increases in violence per se; rather, it may simply mean that reporting is possible where it was not previously, and in fact, the forms of violence may be more muted. Nonetheless, while it remains open to further empirical investigation to assess the fullness of the relationship between violence during conflict and increased violence post-conflict, what remains clear is that there is a continuum of violence for women and that the end of conflict is not the end of gendered violence. The normality of ongoing violence for women is itself broadly sustained through political transformations.

The reassertion of violence in the private sphere during the transitional phase may constitute a form of compensation for male combatants, for their loss of public status and hegemony.[51] This is graphically shown by the psychological phenomena of the returning warrior who has, through conflict, normalized the use of violence and views the home as another site in which to exercise power and control through physical force.[52]

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49. See *supra* Part II for further discussion.

50. *See* MONICA MCWILLIAMS ET AL., TACKLING DOMESTIC VIOLENCE: A POLICY FOR NORTHERN IRELAND (1995); *see generally supra* notes 47-48.

51. *See, e.g.*, Anu Pillay, *Violence Against Women in the Aftermath*, *in* THE AFTERMATH: WOMEN IN POST-CONFLICT TRANSFORMATION, *supra* note 2, at 35, 36-45.

52. *See* Fionnuala Ní Aoláin & Catherine Turner, *Gender, Truth, and Transition*, 16 UCLA WOMEN'S L.J. 229, 252 (2007).

DDR programs can help to separate manhood from its violent and military meaning by providing positive, non-violent role models and means for achieving status. Kimberly Theidon observes that many of the former combatants in Colombia told her they were "tired" of combat; she suggests that "the DDR program [could] make more explicit what these men gain in the transition from combatant to civilian."[53] In the Congo, for example, the DDR program is collecting information on how programs that involve men can dissolve gender stereotypes.[54] Offering vocational education and creating employment opportunities in both the public and private sectors can serve to channel aggressive energy into more productive uses.[55] It is also evident that integrating men more positively into their family and parenting responsibilities offers some means to redress the complex roles that men must manage in the post-conflict context. Here, relatively simple moves, such as ensuring that families and children are integrated into the DDR process, can operate as positive transitionary measures to support both men and women and open up spaces for social transformation. Another important and related move is to extend and broaden the categories of combatants for the purposes of DDR programs, ensuring that women who have provided support roles to military or paramilitary forces (as well as women who have been involved in direct hostilities) are included and fully integrated into structured DDR programs.[56] This would assist both in ensuring that women combatants are not doubly marginalized by their involvement in military and paramilitary organizations, and that the opportunity is provided to affirm the status of women combatants (who frequently languish and suffer the post-conflict stigma of non-conforming gender roles as society returns to "normal") and to include women fully in the benefits that flow materially and otherwise from demilitarization.

Re-socializing men requires integrating the information known about the effects of hyper and other forms of heightened masculinities into the planning and delivery of what are generally internationally constructed and supported DDR programs. It means moving the emphasis away from

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53. Theidon, *supra* note 26, at 32.

54. *See* MDRP—Multi-Country Demobilization & Reintegration Program, Regional Activities, http://www.mdrp.org/regional_act_main.htm (last visited Dec. 1, 2009); *see also* MDRP—Multi-Country Demobilization & Reintegration Program, *MDRP Launches Learning for Equality, Access and Peace Program*, http://www.mdrp.org/PDFs/N&N_16_07.pdf (last visited Dec. 1, 2009).

55. *See* PEACEBUILD—THE CANADIAN PEACEBUILDING NETWORK, EMERGING ISSUES: YOUTH, GENDER AND THE CHANGING NATURE OF ARMED CONFLICT 13, 15 (2008), http://www.peacebuild.ca/documents/Report-Youth-and-Gender-Conflict-FINAL-draft-EN-Feb-29_FINAL.pdf.

56. On the multiple roles of female combatants see generally MIRANDA ALISON, WOMEN AND POLITICAL VIOLENCE: FEMALE COMBATANTS IN ETHNO-NATIONAL CONFLICT (2009).

merely handing over guns to neutral arbitrators and instead integrating psychological and reflective counseling into the demilitarization of combatants. It requires a commitment to gender integration for DDR programs, literally bringing the wives, partners, and children of combatants where possible into the demobilization space, and utilizing the social connectedness of men to their families and children to affirm individual and group capacity for a different and positive masculinity. It mandates modeling for such men—bringing into the demilitarization space men who have the capacity to act as accepted role models and who offer a different life perspective, functioning in a post-conflict yet perhaps still violent society. Ultimately, and far more difficult, it requires providing other economic and social opportunities for men to express masculinities in ways that are not socially and politically destructive. As a result, there is a significant overlap between the reconstruction of violent masculinities in post-conflict societies with the provision of meaningful economic opportunities for men (and women).

B. Attention to Male Victimization

It is also important to acknowledge that men and boys may also have been victimized throughout the conflict, possibly by abduction, possibly by sexual violence as well as the violent ritualization that frequently accompanies male initiation into predominantly male military fraternities. As is generally noted in the context of sexual violence experienced by women, under-reporting is rife in this regard, and we do not have a deep understanding of the form, dynamics, and scale of sexual violence that men experience in times of conflict. There is some nascent literature that suggests a link between sexual violence of men by men and deeply rooted practices of feminization.[57] In this telling, sexual violence experienced by men is a direct playing out of wider social (and violent) practices that are generally directed toward women. For many men who experience rape, the result is to undermine their own masculinity in fundamental ways and put in doubt their sexual identity. Sexual violence experienced by men is, we know, significantly underreported, although empirical proof other than anecdotal evidence is difficult to establish. The statistics of the Peruvian Truth and Reconciliation Commission ("TRC") suggest that men may underreport (even as the statistics illustrate that women are the most prevalent victims of sexual violence). Of the 538 cases of sexual violence

57. UN OCHA, DISCUSSION PAPER 2: THE NATURE, SCOPE AND MOTIVATION FOR SEXUAL VIOLENCE AGAINST MEN AND BOYS IN ARMED CONFLICT 1, 3, 4 (2008), http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId=1092305.

reported to the TRC, 527 correspond to women and only eleven were attributed to male victims.[58]

Equally evident in this context are the unique vulnerabilities of young men and male children who have been conscripted into militias, insurgent groups or paramilitary forces. As the initial indictments from the International Criminal Court illustrate in relation to the harms visited upon child soldiers, acts of sexual violation were intentional and systematic, clearly intended to break bonds between children and their families/communities of origin and force relationships of dependency and shame into the paramilitary organizations.[59] All of these multiple contexts of male victimization (made more complex by the victims' parallel roles as perpetrators) require melding into the programmatic structure of DDR programs. In particular, DDR programs need to develop special counseling and training programs addressing the harms experienced directly and more broadly, forcing difficult conversations about men's roles post-conflict.[60]

Male victims may feel caught between the hypermasculinization of war and their own feelings of vulnerability and stigma.[61] Recognizing that gender-based issues are not merely instrumental goals for the benefit of women can help in developing programs to aid this population. These programs might include specially trained counselors, targeted educational opportunities for boy soldiers, and specific health care measures. Like others undergoing the DDR process, they too will benefit from forms of economic empowerment that may help them resolve their feelings of victimization.

CONCLUSION

There is a need for a fuller recognition that gender cannot be fully addressed in the post-conflict environment by addressing women's rights in legal documents. Gender must be addressed in multiple ways, including

58. *See* Colleen Duggan et al., *Reparations for Sexual and Reproductive Violence*, 2 INT'L J. TRANSITIONAL JUST. 192, 202 (2008).

59. *See, e.g.*, Warrant of Arrest, Prosecutor v. Thomas Lubanga Dvilo, Case No. ICC-01-02-01/06, (Feb. 10, 2006), *available at* http://www.icc-cpi.int/iccdocs/doc/doc191959.PDF.

60. *See* UNITED NATIONS, OPERATIONAL GUIDE TO THE INTEGRATED DISARMAMENT, DEMOBILIZATION AND REINTEGRATION STANDARDS, OG 5.10, 195-96 (2006), http://www.unddr.org/iddrs/05/download/IDDRS_510.pdf (last visited Dec. 1, 2009); Megan Bastick, *Integrating Gender in Post-Conflict Security Sector Reform*, *in* GENEVA CENTRE FOR THE DEMOCRATIC CONTROL OF ARMED FORCES: POLICY PAPER NO. 29, at 18 (2008).

61. *See* Jeffrey Gettleman, *Symbol of Unhealed Congo: Male Rape Victims*, N.Y. TIMES, Aug. 5, 2009, at A1, *available at* http://www.nytimes.com/2009/08/05/world/africa/05congo.html.

through close attention to masculinities as part of the high-priority (and funded) measures to end violence. Programs specifically focused on disarming and reintegrating former combatants need to account for masculinities in their mandates and program deliveries.

Notwithstanding the cultural, legal, and social variations between countries facing post-conflict issues, the core issues around the centrality of gender remain universal. In undertaking this analysis, we are convinced that addressing gender and the differing needs of men and women is not only good policy and practice on its own merits, but that it meets the first principle of conflicted and post-conflict societies—namely, ensuring that violence ends for all, is not reignited, and is sustainable far into the future.

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THE ESTATE AND GIFT TAX IMPLICATIONS OF SELF-SETTLED DOMESTIC ASSET PROTECTION TRUSTS: *CAN YOU REALLY HAVE YOUR CAKE AND EAT IT TOO?*

PHYLLIS C. SMITH*

Abstract: Self-settled asset protection trusts are wealth preservation trusts coupled with the spendthrift provisions. This type of trust permits the settlor to have the benefit of treating the trust as a separate entity thereby protecting his assets from creditors while maintaining a pecuniary interest, as well as some level of control over what ultimately happens to the trust property. By providing asset protection from potential creditors while still having the ability to maintain a beneficial interest in the trust, the settlor can essentially "have his cake and eat it too." The typical domestic self-settled asset protection trust may not be treated as an asset of the settlor for creditor claims. Whether these assets should be treated as owned by the settlor for the purpose of inclusion in the gross estate of the decedent for estate tax purposes is the focus of this Article. The author asserts that it is appropriate to include certain property settled in a domestic asset protection trust ("DAPT") in the settlor's gross estate for estate tax purposes because of the control the settlor retains over the trust assets up until his death.

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> "If government have a right of demanding ad libitum and of taxing us themselves to the full amount of their demand if we do not comply with it, this would leave us without anything we can call property."[1] Thomas Jefferson

INTRODUCTION

The phrase, "you can't have your cake and eat it too," in its original form, intended to provide a deeper message about life, not dessert.[2] Simply

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1. Thomas Jefferson Famous Quotes, http://thinkexist.com/quotation/if_government_have_a_right_of_demanding_ad/169535.html (last visited Dec. 1, 2009).

2. The original phrase, "[w]olde ye bothe eate your cake, and haue your cake?" is attributed to John Heywood and was recorded as early as 1546. THE YALE BOOK OF QUOTATIONS 614 (Fred R. Shapiro ed., 2006) (quoting JOHN HEYWOOD, DIALOGUE OF

put, you cannot have it both ways; you can either keep the cake or eat the cake. For once you have eaten the cake, the cake is gone, so it is not possible to then still have (possess) the same cake. In recent years, some states have enacted legislation designed to permit certain propertied persons to essentially have it both ways. These legislative acts permit property owners to transfer certain property to irrevocable trusts, known as self-settled asset protection trusts ("APTs"). These trusts are designed to protect trust property from certain creditor claims and still permit the settlor to maintain an interest in the trust.[3]

APTs are wealth preservation trusts coupled with spendthrift provisions to protect the settlor's assets from future creditors.[4] A self-settled APT is a spendthrift trust created by the settlor to provide a benefit to himself as well as other beneficiaries.[5] By providing asset protection from potential creditors while still having the ability to maintain a beneficial interest in the trust, the settlor essentially has it both ways. The settlor has the benefit of treating the trust as a separate entity thereby protecting his assets from creditor claims; meanwhile, he maintains a pecuniary interest in the trust, as well as some level of control over what ultimately happens to the trust property.

The typical self-settled domestic asset protection trust ("DAPT") may not be treated as an asset of the settlor for creditor claims. Whether these assets should be treated as owned by the settlor for the purpose of inclusion in the gross estate of the decedent for estate tax purposes is the focus of this Article. The author asserts that it is appropriate to include certain property settled in a self-settled DAPT in the settlor's gross estate for estate tax purposes because of the control the settlor retains over the trust assets up until his death. The remainder of this Article will discuss the evolution of

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PROVERBS 1546). In the modern version, the clauses are reversed. *See* PAUL BRIANS, COMMON ERRORS IN ENGLISH USAGE, http://wsu.edu/~brians/errors/eatcake.html.

3. David G. Shaftel, *Comparison of the Twelve Domestic Asset Protection Statutes*, 34 AM. C. TR. & EST. COUNS. J. 293, 293-306 (2009). Currently thirteen states Alaska, Colorado, Delaware, Iowa, Missouri, Nevada, New Hampshire, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, and Wyoming each offer a version of a self-settled domestic asset protection trust ("DAPT"). *Id.*

4. *See* Bryan Nichols, Note, *"I See the Sword of Damocles Is Hanging Above Your Head!" Domestic Venue Asset Protection Trusts, Credit Due Judgments, and Conflict of Law Disputes*, 22 REV. LITIG. 473, 478 (2003). "It is common knowledge that every gainful opportunity presents the potential for misfortune. If life is beset by potential misfortune, then it is worthwhile to create ways in which we can invest our energies and ward off financial threats at the same time." *Id.* at 475.

5. *See* Michael Sjuggerud, Comment, *Defeating the Self-Settled Spendthrift Trust in Bankruptcy*, 28 FLA. ST. U. L. REV. 977, 979 (2001) ("When a settlor creates a trust for his own benefit, it is said to be 'self-settled.'").

self-settled DAPTs, the estate and gift tax implications of DAPTs based on the various state statutes, and conclude with policy reasons why the property in a DAPT should be included in the gross estate of the settlor.

Alaska and Delaware, the original states to enact statutes from which other states model their domestic self-settled trust statutes, are natural choices for any in-depth analysis regarding self-settled trusts. Specific provisions from other statutes are also chosen for discussion because of some unique factors those statutes contain that distinguish them from the Alaska and Delaware Acts.

While there will be a somewhat extensive discussion on some of the commonalities that exist between self-settled DAPTs and offshore asset protection trusts ("OAPTs"), the purpose is not to attempt to justify or challenge the DAPTs or OAPTs, but rather to analyze the retained powers the settlor has retained over a portion of the trust. Furthermore, by focusing on the retained power and how the creditor protection features, the author asserts that the settlor of a DAPT still maintains a level of control that demonstrates indicia of ownership which should cause the trust assets to be treated as property of the settlor, specifically for transfer tax purposes.

I. Public Policy Regarding Self-Settled Trusts

A. Historical Treatment of Self-Settled Trusts

APTs, in general, have been available for those who can afford the costs of trust acquisition and trust administration to protect their wealth from potential creditors.[6] In the past, the self-settled versions of these trusts were only available through offshore jurisdictions.[7]

The primary objective of an APT is to protect assets against creditor claims.[8] The source of asset protection is the spendthrift provision drafted

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6. *See generally* James T. Lorenzetti, *The Offshore Trust: A Contemporary Asset Protection Scheme*, 102 COM. L.J. 138, 140 (1997) ("Although they are relatively uncommon, OAPTs are not entirely new. In 1994, it was estimated that one trillion dollars ($1,000,000,000,000) of foreign trust funds were held in OAPTs."); Elena Marty-Nelson, *Offshore Asset Protection Trusts: Having Your Cake and Eating It Too*, 47 RUTGERS L. REV. 11, 68 (1994) ("Legal fees for launching a foreign trust start at $15,000 for a $1 million account. Added to this are the administration fees of approximately one percent.").

7. *See* Claudia R. Tobler & Ingrid Michelsen Hillinger, *Asset Protection Devices: Twyne's Case Re-Told*, 9 J. BANKR. L. & PRAC. 3, 4, 17-18 (1999) ("Until very recently, creditors of a settlor could reach assets in a self-settled spendthrift trust in any state without proof of the settlor's intent to hinder, delay or defraud his creditors. The spendthrift clause was simply unenforceable against the settlor's creditors.").

8. *See* Elena Marty-Nelson, *Taxing Offshore Asset Protection Trusts: Icing on the Cake?*, 15 VA. TAX REV. 399, 400-01 (1996) [hereinafter Marty-Nelson, *Taxing Offshore Asset Protection Trusts*] ("Most . . . ('OAPTs') are created by U.S. persons for reasons that

into the trust.[9] A spendthrift is someone who spends money recklessly or is very wasteful with money.[10] Therefore, a spendthrift provision is designed as a protective measure to limit a spendthrift's access to assets within the trust. Spendthrift provisions, in general, are deemed legitimate based on the theory that the owner of assets may dispose of his assets in any manner he deems appropriate, including protecting the assets from a beneficiary's creditors.[11]

It is illogical to then imagine that if the settlor himself is the spendthrift that he may place restrictions against his access to his own money, and still be able to successfully shield his assets from his creditors by reason of those restrictions. As such, according to the common law, a spendthrift clause in a self-settled trust does not provide protection of the trust assets from creditor claims.[12] United States courts have historically permitted settlors to create spendthrift provisions within the trust for the benefit of a third party, but have not allowed such spendthrift provisions to co-exist with a self-settled trust.[13]

The leading authorities that serve as models for most state statutes regarding property interests and transfers to trusts, the Restatement and the Uniform Trust Code, have also consistently drafted model rules forbidding a person from enjoying his property while shielding such property from his creditors.[14] The primary policy reason for this prohibition is that a settlor

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have little to do with . . . tax consequences. The appeal of the foreign jurisdiction is, in most circumstances, the protection from potential creditors afforded by an OAPT, which is generally greater than that found in its domestic counterpart.").

9. A spendthrift provision is generally a provision that prohibits the voluntary or involuntary alienation of the trust property. *See* RESTATEMENT (SECOND) OF TRUSTS § 152 (1959).

10. BLACK'S LAW DICTIONARY 1530 (9th ed. 2009) (defining the term as "[o]ne who spends lavishly and wastefully; a profligate").

11. Nichols, *supra* note 4 ("Spendthrift trusts are deemed legitimate on the theory that the grantor reigns supreme as the owner of his assets and may therefore vest such assets in whomever he wishes and have his ownership rights insulated from the beneficiary's creditors.").

12. Sjuggerud, *supra* note 5 ("The common law rule, followed by the vast majority of American jurisdictions, is that a self-settled trust is ineffective against the claims of creditors.").

13. Nichols, *supra* note 4; *see also In re* Jordan, 914 F.2d 197, 198-99 (9th Cir. 1990) (citing *In re* White, 61 B.R. 388, 392 (Bankr. W.D. Wash. 1986)). *But see* Ritchie W. Taylor, *Domestic Asset Protection Trusts: The Estate Planning Tool of the Decade or a Charlatan?*, 13 BYU J. PUB. L. 163, 168 (1998) (stating that all but two states protect trust assets from creditor claims of tort victims where the trust was a traditional spendthrift trust).

14. *See* RESTATEMENT (THIRD) OF TRUSTS § 58 (2003) ("A restraint on the voluntary and involuntary alienation of a beneficial interest retained by the settlor of a trust is invalid."). The Uniform Trust Code § 505(a)(2) states:

should be able to set whatever limits he chooses when making a gift to another, including spendthrift provisions.[15] However, a settlor should not be able to use his assets for his own pleasure and shield those assets from beyond the reach of his creditors.[16]

B. Current Spendthrift Legislation

Most states have enacted some type of spendthrift legislation.[17] States without statutes addressing the spendthrift provisions of self-settled trusts still follow the common law rules regarding self-settled trusts, which do not impose the spendthrift trust laws upon trusts in which the settlor has retained an interest, at least to the extent of that retained interest.[18] Therefore, historically, where settlors created a

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> Whether or not the terms of a trust contain a spendthrift provision . . . [w]ith respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

In the comments that follow, the drafters state "Subsection (a)(2), which is based on Restatement (Third) of Trusts Section 58(2) and cmt. e (Tentative Draft No. 2, approved 1999), and Restatement (Second) of Trusts Section 156 (1959), follows traditional doctrine in providing that a settlor who is also a beneficiary may not use the trust as a shield against the settlor's creditors." UNIF. TRUST CODE § 505(a)(2) (2005). A spendthrift provision is ineffective against a beneficial interest retained by the settlor. *See* RESTATEMENT (THIRD) OF TRUSTS § 58 cmt. e (Tentative Draft No. 2, approved 1999). This is a necessary corollary to section 505(a)(2), which allows a creditor or assignee of the settlor to reach the maximum amount that can be distributed to or for the settlor's benefit. This right to reach the trust applies whether or not the trust contains a spendthrift provision. UNIF. TRUST CODE § 505(a)(2) (2005).

15. *See* Karen E. Boxx, *Gray's Ghost—A Conversation About the Onshore Trust*, 85 IOWA L. REV. 1195, 1199 (2000) ("Generally, while U.S. courts will allow a [settlor] to establish a spendthrift trust for the benefit of a third party, . . . a [settlor] cannot set up such a trust for his or her own benefit.").

16. *See id.* ("[A] trustor should be able to set whatever limits she chooses when making a gift to another, including spendthrift provisions, but should not be able to place her assets beyond her own creditor's reach, while still retaining use of those assets.").

17. *See* Marty-Nelson, *supra* note 6, at 29 ("Half [of the states] have enacted some type of spendthrift legislation."); David M. Repp, *Asset Protection (For the Rich and Not) in Iowa*, 56 DRAKE L. REV. 105, 113 (2007) ("Since the Supreme Court's decision [to recognize spendthrift trusts] in 1875, every state has adopted or enacted some form of a spendthrift trust provision . . . .").

18. *See* Repp, *supra* note 17 ("The United States Supreme Court broke from English common law in 1875 by authorizing the use of spendthrift trusts.").

self-settled trust, the assets therein were treated as continuously owned by the settlor for the purpose of satisfying creditor claims.[19] A trust was typically deemed to be a self-settled trust if the settlor was a beneficiary of the trust, retained dominion and control, and/or retained a right to financial support from the trust.[20]

II. Tax Treatment of Self-Settled DAPTs

A. Potential Impact by Government Branches

There are three primary entities that possess the potential to have the greatest impact on the tax treatment of a transfer from a DAPT at the settlor's death. The first entity is the legislative branch. There is no specific code section that directly addresses Congress's tax treatment of domestic asset protection self-settled trusts. While different states across the country continue to create their versions of these APTs, Congress has yet to directly engage in a discussion regarding the specific tax treatment of transfers from these specific types of trusts. Certainly enough time has passed for Congress to address these newly enacted state legislative acts on a federal level, hence the inaction may be due to Congress' belief that there is no reason to act because §§ 2036 and 2038 adequately address the matter with the retained interest provisions.[21] It is also likely that Congress has not addressed the matter because their constituents may not want the matter addressed, or members of Congress simply do not believe the issue is important enough to address at the moment. While the author asserts that §§ 2036 and 2038 cause inclusion of DAPT assets in the gross estate of the settlor, Congress should directly confront the tax treatment of transfers to and from DAPTs through specific legislation designed for trusts where creditor access is restricted while the settlor still retains certain powers.

The next entity is the judicial branch. The actions taken by this branch are largely dictated by the action or inaction of the other government branches. At different levels of the judiciary branch, courts, varying by jurisdiction, will likely treat transfers from certain self-settled trusts differently. Those few states with statutes providing for DAPTs will be

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19. *See* Paul M. Roder, Note, *American Asset Protection Trusts: Alaska and Delaware Move "Offshore" Trusts onto the Mainland*, 49 SYRACUSE L. REV. 1253, 1265 (1999). Generally, creditors of the settlor can reach any interest a settlor has in a self-settled trust.

20. *See* Taylor, *supra* note 13. Courts have traditionally considered a trust self-settled if one of several factors are present from the settlor: the settlor is a beneficiary, retains dominion and control over the trust corpus, retains and reserves a general power of appointment in himself, or creates the trust for his was created for the settlor's own purpose.

21. I.R.C. §§ 2036, 2038 (2006).

directly at odds with the majority of states that still do not permit self-settled DAPTs. Take for example a settlor who lives and has possession of real property located in Florida, but holds this property in a DAPT settled in Alaska. Whether the court permits creditor access in one jurisdiction verses the other is important because creditor access is a factor in determining whether the property should be includable in the gross estate of the decedent after his death.[22]

The final participant is the executive branch. Specifically the Internal Revenue Service ("IRS") has thus far issued private letter rulings ("PLRs") on very narrow issues regarding income and gift taxation which may give a hint, but no clear indication, of how the IRS will treat DAPTs for estate tax purposes. Since PLRs are not binding, except for the individual seeking the PLR, we cannot rely on a ruling provided in a PLR, even if the individual disclosed all pertinent information for purposes of the PLR. In short, there is no real way to predict how the IRS will treat the settlor's interest in a self-settled DAPT for estate tax purposes as the discussion in this Article will reflect.

B. The Advent of DAPTs

Since 1997, a number of states have created some version of a self-settled spendthrift trust with varying criteria.[23] Some of the common features of these trusts are irrevocability or restrictions on revocation, spendthrift provisions, and permissible distributions to the settlor of the income interest while limiting exposure to creditor claims.[24] High net worth individuals gravitate towards these trusts to protect and preserve a portion of their riches.[25]

These domestic self-settled APTs are noted for their asset protection features, which in some cases have been tested and upheld.[26] Because of the focus on the possibility of being sued and the speculation of the impending death of the estate tax, APTs in general have became

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22. For the detailed discussion of the creditor access to assets and how it impacts whether a completed transfer has occurred, see *infra* text accompanying note 97.

23. Shaftel, *supra* note 3 (comparing the twelve domestic asset protection statutes). Currently, there are thirteen states that offer some version of the self-settled DAPT: Alaska, Colorado, Delaware, Iowa, Missouri, Nevada, New Hampshire, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, and Wyoming. *Id.*

24. Throughout this Article, the author references the person who creates the trust as creator, donor, settlor, grantor, or trustor; these terms are interchangeable.

25. Nichols, *supra* note 4, at 476.

26. *See* Taylor, *supra* note 13 (citing Herzog v. Comm'r, 116 F.2d 591, 594 (2d Cir. 1941) (holding that the discretionary trust was a valid spendthrift trust because the settlor was not the only income beneficiary of the trust)).

increasingly popular over the last decade while tax planning may have received less attention.[27] Now that it appears that speculation surrounding the demise of the estate tax was premature, a question lingers as to whether the settlor has relinquished enough control to deem the transfer a completed gift to the self-settled DAPT. In reviewing the taxability of any property transferred to a self-settled DAPT, the debate is whether the transfer should be appropriately taxed during the lifetime of the settlor as a gift, or whether the transfer should be appropriately taxed at the death of the settlor through his estate.

III. The Influence of the Self-Settled APT

The Alaska DAPT made its debut in 1997.[28] Since that time, a number of states have enacted statutes permitting self-settled trusts in the United States.[29] This section of the Article will address the evolution of these trusts and how the offshore version played a major role in their migration to the United States.

A. The Evolution of Asset Protection Instruments

A number of different categories of asset protection instruments have been available for decades.[30] Some of the traditional methods of asset protection include the use of limited liability corporations ("L.L.C."), limited liability partnerships ("L.L.P."), and family limited partnerships ("F.L.P.").[31] The use of L.L.C.s, L.L.P.s, and F.L.P.s as asset protection instruments originated for legitimate businesses purposes, with the added benefit of protection from personal liability from the creditors of the business.[32] As such, these asset protection instruments have the distinction of serving a legitimate purpose; accordingly, they have been honored, and continue to be honored. For that reason, L.L.C.s, L.L.P.s, and F.L.P.s are available as legitimate asset protection instruments if the entity is properly established and administered.[33]

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27. *See id.* at 164 ("Currently, asset protection trusts are the most popular method of using offshore financial centers to achieve asset protection. It is estimated that over $1 trillion of foreign trust funds are in asset protection trusts.").

28. *See* Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1051 (2000) ("In 1997, the Alaska legislature amended its trust law to permit [self-settled trusts].").

29. Shaftel, *supra* note 3, at 293.

30. *See* Nichols, *supra* note 4, at 476.

31. *Id.*

32. *Id.*

33. Tobler & Hillinger, *supra* note 7, at 5-6. With partnerships in general, there is a general partner who is fully liable for debts of the partnership and the limited partners are

B. Self-Settled OAPTs

Because of the litigious nature of the United States society, many professionals seek refuge for their accumulated wealth as they fear the possibility of a lawsuit.[34] Professionals such as doctors, lawyers, and business owners are more susceptible to lawsuits—primarily malpractice suits. Therefore, it is not surprising that they sought protections for their personal assets by establishing offshore trusts.[35] "[B]y 1994 it was estimated that over $1 trillion were invested in OAPTs."[36] The primary purpose of the typical offshore trust is to shield assets from potential future creditors.[37]

Self-settled OAPTs are another category of asset protection instruments that have been available for decades.[38] OAPTs have been favored over L.L.C.s, L.L.P.s, and F.L.P.s for the added layers of protection they provide against virtually all creditors, not just those creditors associated with the business.[39] This is because the court is forced to deal with the settlor who may be willing to suffer contempt charges in exchange for keeping his assets within the trust.[40] If an international treaty

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liable to the extent of their interest in the partnership. Opponents of the F.L.P.s argue the use of F.L.P.s is an abuse of partnership law by families to shift income tax liability from high-income tax bracket family members to the lower-income tax bracket family members.

34. Roder, *supra* note 19, at 1254.

35. *Id.*

36. *Id.*

37. *Id.*

38. Marty-Nelson, *supra* note 6, at 12. Offshore asset protection trusts ("OAPTs") are trusts established under foreign laws by United States Citizens designed to lawfully remove assets from a settlor's balance sheet without creating adverse federal transfer tax consequences or losing all control over assets. *Id.* at 12-13.

39. *See* Marty-Nelson, *Taxing Offshore Asset Protection Trusts*, *supra* note 8, at 401.

40. *See In Re* Lawrence 227 B.R 907 (Bankr. S.D. Fla. 1998). Following the stock market crash in 1987, Stephan Lawrence experienced a margin deficit with Bear, Stearns and disagreed about the extent of the margin. Just before an arbitrator granted an award in favor of Bear, Stearns for an amount in excess of $20,000,000 Lawrence settled an offshore asset protection trust with approximately $7,000,000 in the Jersey Channel Islands and amended the same trust to change the situs. The trust was amended again to add spendthrift and anti-duress provisions after Lawrence was aware of the impending order. As Sterns attempted to collect his judgment, Stern claimed impossibility as a defense to repatriating the assets. The court held Lawerence in contempt and sentenced him to jail. *See also In re* Lawerence, No. 05-20485, 2007 WL 5080506 (S.D. Fla. Nov. 19, 2007) where the court released Lawrence after he served six years of incarceration. The court believed that more time would not compel Lawrence to comply with the contempt order.

or agreement does not exist between the offshore jurisdiction and the United States, it becomes extraordinarily difficult to force repatriation of the assets.[41]

For instance, judgments that may be obtained by creditors in the American court system will be unenforceable in foreign jurisdictions that do not have a treaty or agreement with the United States.[42] Another reason that a foreign jurisdiction contributes to the difficulty in reaching the trust assets is the "debtor friendly" legal system which is often present in the offshore jurisdictions that market self-settled APTs.[43] These features tend to make the offshore trust more attractive to those seeking ways to protect their assets than the domestic L.L.C.s, L.L.P.s, and F.L.P.s.

In order to maximize the efforts of shielding the assets, an offshore trust is the logical choice because it is more difficult for a creditor to enforce a court order in a foreign jurisdiction than in a domestic jurisdiction.[44] Additionally, the public receives legal information regarding APTs from practitioners specializing in the field who clearly have a vested interest in promoting these trusts as a great resource.[45]

On the other hand, having an offshore trust does not solve all of the problems related to protecting assets. Certainly the OAPTs tend to frustrate the purpose of the American trust laws against self-settled trusts; however, OAPTs are not risk free.[46] Because of the nature of the offshore trust business, a foreign trustee, who is normally not known personally by the settlor, is ordinarily employed to administer a trust.[47] Therefore, it may become difficult for the settlor to truly give up all control over the property. An example of such can be found in a case from the Ninth Circuit, *FTC v. Affordable Media, L.L.C.* where the court held the Andersons (defendants) had a self-settled OAPT of which they were co-trustees with a foreign

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41. Roder, *supra* note 19, at 1256.

42. *See id.*

43. *Id.* at 1257.

44. *Id.* at 1256-57. As a sovereign nation, a foreign jurisdiction is not required to comply with a court order issued by a United States court because those court orders are not recognized in the Offshore Asset Protection jurisdictions. *Id.* at 1256.

45. Marty-Nelson, *supra* note 6, at 14-15 ("Virtually all of the . . . literature on offshore asset protection trusts has been contributed by practitioners specializing in the field. As such, the literature paints a fairly rosy picture of OAPTs. OAPT specialists tout them as a panacea against virtually all creditor risks.").

46. *Id.* at 66-71. As previously mentioned, one of the foundational principles of American trust law is that a settlor should not be able to transfer his assets to a trust, enjoy the benefits of the trust, and still shield those assets from his creditors. Additionally, when investing money in a foreign jurisdiction, settlors could face problems due to the political climate of the foreign jurisdictions. *Id.* at 66.

47. *See id.* at 67.

trustee.[48] When the Andersons failed to repatriate funds from their OAPT to satisfy the judgment against them, the court held them in contempt.[49]

In this case, the defendants were involved in a Ponzi scheme that caused investors to lose all of their money while the defendants transferred the commissions they earned in the Ponzi scheme to an OAPT in the Cook Islands.[50] The district court entered a preliminary injunction against the defendants and required the defendants to obtain an accounting of and to repatriate their foreign assets.[51] The defendants then submitted a request for an accounting and a copy of the court order to the foreign trustee and further requested repatriation of the trust assets to be deposited with the court.[52] When the foreign trustee received the request, it invoked the "event of duress" clause, automatically removing the defendants as co-trustees of the trust, and refused to comply with the court order.[53] The defendants then asserted that it was impossible to comply with the court order because the foreign trustee had refused to repatriate the funds based on the prohibitive language in the trust and the court held them in contempt.[54]

In asserting the defense of impossibility, the defendants relied on the Supreme Court ruling in *United States v. Rylander*, which held, in part, that a valid defense to a contempt charge is the inability to comply with a court order due to a lack of possession or control of the evidence or document in question.[55] For that reason, the Andersons probably believed they had prepared for all contingencies that might arise and require them to repatriate the funds. While the court had no jurisdiction to repatriate the

48. FTC v. Affordable Media, L.L.C., 179 F.3d 1228, 1241 (9th Cir. 1999) (compelling the defendants to take action because they were subject to the personal jurisdiction of the court).

49. *Id.*

50. *See id.* at 1231-32.

51. *See id.* at 1232.

52. *See id.* The trust was structured such that, while the defendants were the original co-trustees, they were to be automatically removed under the "event of duress" clause. *See id.* at 1239 n.9 ("Under the trust agreement, an event of duress includes the issuance of any order, decree or judgment of any court or tribunal in any part of the world which in the opinion of the protector will or may directly or indirectly, expropriate, sequester, levy, lien or in any way control, restrict or prevent the free disposal by a trustee of any monies, investments or property which may from time to time be included in or form part of this trust and any distributions therefrom.") (internal quotation omitted).

53. *See id.* at 1232.

54. *See FTC*, 179 F.3d at 1239.

55. *See* United States v. Rylander, 460 U.S. 752, 757 (1983).

trust assets, the Ninth Circuit looked to the level of control the Andersons retained over the trust and upheld the contempt order.[56]

By naming themselves as trust protectors, the Andersons had the ability to control distributions.[57] Naming themselves as trust protectors was a factor the court used to determine that the Andersons retained enough control to repatriate the funds if they desired to do so.[58] If the Andersons had known the trustee personally or had better access to the trustee, perhaps they would have been more willing to give up the necessary control over the trust assets in order to render the trust assets totally out of their control. The Andersons probably feared that they would have little recourse if the foreign trustee depleted the trust assets and disappeared, because they would have been required to pursue an action against the trustee in the Cook Islands, hire a foreign attorney, etc., and potentially lose the claim in addition to their trust assets. In addition, with millions of dollars at stake, maintaining some level of control was probably a significant factor in the Andersons' decision to appoint themselves as trust protectors over the trust; this likely provided them with some assurance that they would still have a fortune when their creditor worries were over.

Nonetheless, OAPTs typically have features similar to those described in the Anderson trust. Though not all of the these features were present in the Anderson trust, nor are they present in all OAPTs such features are as follows: irrevocability, settled in a foreign jurisdiction with a foreign trustee, restriction on the ability to repatriate the trust funds, reversionary interest in the settlor, and the settlor maintaining some measure of control

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56. *See FTC*, 179 F.3d at 1242 ("The district court's finding that the Andersons were in control of their trust is well supported by the record given that the Andersons were the protectors of their trust. A protector has significant powers to control an offshore trust.") (citing Gideon Rothschild, *Establishing and Drafting Offshore Asset Protection Trusts*, 23 EST. PLAN. 65, 70 (1996) ("The use of a trust protector or advisor is common among foreign trusts. This person . . . has the power to replace trustees and veto certain actions by the trustees.")).

57. Restatement (Third) of Trusts § 64 (2003). A trust protector is an advisor to the trustee of a trust. The trust protector is generally given the power to terminate the trust, veto distributions, modify or clarify terms for the purpose of achieving tax or non tax objectives, improving administration to facilitate the settlor's objectives, or adding or altering a beneficiary's rights.

58. *Id.* at 1241-43. The district court judge stated,

> [a]s I look at the totality of the scheme of what I see before me at this time, I have no doubt that the Andersons can if they wish to correct this problem and provide the means of putting these funds in a position that they can be accountable if the final determination of the Court is that the funds should be returned to those who made these payments.

Id. at 1242.

over the trust as a member of a committee of advisors or as a trust protector.[59] These features certainly make the foreign trust very attractive as an asset protection vehicle. In addition, foreign countries that offer OAPTs tend to be debtor friendly; therefore, making it more difficult and expensive for a creditor to pursue an action against the debtor.[60] Until 1997, no domestic jurisdiction offered a level of security for trust assets comparable to the OAPT.

In order to provide ease in navigating the relevant asset protection statutes and various provisions incorporated therein, we will follow James Smith, a fictitious client who seeks advice from an associate at the law firm of Estate Planners Authority. James Smith is a wealthy businessman who has various assets with an estimated value of five million dollars. He is not married, but he has two children from a prior marriage, he lives in Florida, and has heard about APTs and seeks advice as to whether he should transfer his property to such a trust.

James Smith was referred to Estate Planners Authority because the firm has experts licensed to practice in a variety of jurisdictions including Alaska, Delaware, and Nevada. James is specifically interested in finding out more information regarding the trust laws in these states. He is worried about the possibility of being sued, but he does not have any pending court actions against him or creditors seeking payment. He expressed an additional goal of avoiding estate taxes in order to pass as much property as possible to his family upon his death. Though he is a multi-millionaire, he does need to maintain control over some of the income that will used to fund the trust in order to maintain his high standard of living since the vast majority of his wealth is comprised of investments in income producing property.

IV. Alaska Trust Act ("ATA")[61]

A. Introduction

The ATA was first enacted in 1997[62] and was subsequently amended and expanded in 1998,[63] 2003,[64] 2004,[65] 2006,[66] and 2008.[67] The current

59. Marty-Nelson, *supra* note 6, at 12-13.
60. Roder, *supra* note 19, at 1255-57.
61. 1997 Alaska Sess. Laws 006.
62. *Id.*
63. 1998 Alaska Sess. Laws 105.
64. 2003 Alaska Sess. Laws 138.
65. 2004 Alaska Sess. Laws 082.
66. 2006 Alaska Sess. Laws 066.
67. 2008 Alaska Sess. Laws 007.

version of the statute provides, in pertinent part, that a person who transfers property in trust with a written instrument "may provide that the interest of a beneficiary of the trust, including a beneficiary who is the settlor of the trust," not voluntarily or involuntarily alienate the property before the delivery of such property to the beneficiary by the trustee.[68]

The statute further states, in pertinent part, that if a trust has the aforementioned spendthrift provisions, an existing creditor or subsequent creditor is prevented from satisfying a claim against a beneficiary of the trust unless the settlor is the beneficiary and the creditor was a creditor of the settlor *at the time* the trust was created.[69] These exceptions to the restrictions on creditors of the settlor provide creditors with a very narrow opportunity to gain access to the trust.

These exceptions are debtor friendly, as are their offshore counterparts, in that unless the creditor can prove that James, as the settlor of the trust: (1) made a fraudulent transfer; (2) retained the power to revoke or terminate the trust without the consent of a person having a substantial adverse interest; or, (3) included a provision that the trust's income or principal must be distributed to him, then the assets are protected from the creditor's claims.[70]

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68. ALASKA STAT. § 34.40.110(a) (2008).

> A person who in writing transfers property in trust may provide that the interest of a beneficiary of the trust, including a beneficiary who is the settlor of the trust, may not be either voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary by the trustee. Payment or delivery of the interest to the beneficiary does not include a beneficiary's use or occupancy of real property or tangible personal property owned by the trust if the use or occupancy is in accordance with the trustee's discretionary authority under the trust instrument. A provision in a trust instrument that provides the restrictions described in this subsection is considered to be a restriction that is a restriction on the transfer of the transferor's beneficial interest in the trust and that is enforceable under applicable nonbankruptcy law . . . .

Id.

69. *Id.* § 34.40.110(b) (emphasis added). "If a trust contains a transfer restriction allowed under (a) of this section, the transfer restriction prevents a creditor existing when the trust is created or a person who subsequently becomes a creditor from satisfying a claim out of the beneficiary's interest in the trust . . . ." *Id.*

70. *See id.* Section (b) of the statute specifically states:

> [U]nless the creditor is a creditor of the settlor and
>
> (1) the settlor's transfer of property in trust was made with the intent to defraud that creditor, and a cause of action or claim for relief with

Armed with this information, James Smith asks the firm to establish a trust to which he may transfer his assets, shield those assets from creditors, and facilitate his ability to receive some, but not all, trust income. He emphasizes that the transfer should minimize estate taxes as well as ensure

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respect to the fraudulent transfer complies with the requirements of (d) of this section;

(2) the trust . . . provides that the settlor may revoke or terminate all or part of the trust without the consent of a person who has a substantial beneficial interest in the trust and the interest would be adversely affected by the exercise of the power held by the settlor to revoke or terminate all or part of the trust; in this paragraph, "revoke or terminate" does not include a power to veto a distribution from the trust, a testamentary nongeneral [special] power of appointment or similar power, or the right to receive a distribution of income, principal, or both in the discretion of a person, including a trustee, other than the settlor, or a right to receive a distribution of income or principal under (3)(A), [or] (B) . . . of this subsection;

(3) the trust . . . requires that all or a part of the trust's income or principal, or both, must be distributed to the settlor; however, this paragraph does not apply to a settlor's right to receive the following types of distributions, which remain subject to the restriction provided by (a) of this section until the distributions occur:

(A) income or principal from a charitable remainder annuity trust or charitable remainder unitrust; in this subparagraph, "charitable remainder annuity trust" and "charitable remainder unitrust" have the meanings given in 26 U.S.C. 664 (Internal Revenue Code) as that section reads on October 8, 2003, and as it may be amended;

(B) a percentage of the value of the trust each year as determined from time to time under the trust instrument, but not exceeding the amount that may be defined as income under AS 13.38 or under 26 U.S.C. 643(b) (Internal Revenue Code) as that subsection reads on October 8, 2003, and as it may be amended;

(C) the transferor's potential or actual use of real property held under a qualified personal residence trust within the meaning of 26 U.S.C. 2702(c) (Internal Revenue Code) as that subsection reads on September 15, 2004, or as it may be amended in the future; or

(D) income or principal from a grantor retained annuity trust or grantor retained unitrust that is allowed under 26 U.S.C. 2702 (Internal Revenue Code) as that section reads on September 15, 2004, or as it may be amended in the future; or

(4) at the time of the transfer, the settlor is in default by 30 or more days of making a payment due under a child support judgment or order.

Id.

protection of his assets from creditors. James understands that this will not be an inexpensive endeavor; however, he is certain that, in consideration of the totality of the circumstances, he will be able to better protect his assets from creditor claims, and that he may reduce his tax liability as well if his goals are accomplished.

Further, James also wants to know what would happen should a situation develop where he might be sued, for instance, if he were involved in a car accident where he was wholly at fault. Assuming that the applicable exclusion rate[71] is $3.5 million for estate tax and the gift tax remains at $1 million, James wants to know what the possible consequences are during his lifetime and after death. In navigating the statute and applying the terms to James's desired goals, the first step is to establish whether the gift tax is applicable at the time of the proposed transfer, or whether it is more appropriate to impose the tax at his death.

B. Gift Tax Implications

1. Introduction

Internal Revenue Code ("IRC" or "the Code") § 2501 imposes a tax on a transfer of property by gift.[72] Taxable gifts are defined as "the total amount of gifts made during the calendar year, less [permissible] deductions/"[73] Transfers include transfers to a trust by direct or indirect gift.[74] Based on these definitions, it appears that as long as our client, James Smith, does not retain discretionary control over the trust property, it should be fairly simple to draft an instrument in such a way as to make the transfer a completed gift. For the purpose of this illustration, we will presume this trust instrument includes the maximum powers the Alaska statutes permit in order to discuss those specific problematic powers. To make the transfer qualify as a completed gift for federal transfer tax purposes, James must relinquish dominion and control over the property in trust therefore one of the challenges is to determine whether such control still remains with the settlor.

The Alaska statute permits James to name himself as a permissible beneficiary and include a spendthrift clause restricting his voluntary and

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71. The applicable exclusion rate is the dollar amount determined by Congress to permit a decedent's estate to pass free of estate taxes. BLACK'S LAW DICTIONARY 115 (9th ed. 2009).

72. I.R.C. § 2501 (2006) (providing, in pertinent part, a tax "imposed for each calendar year on the transfer of property by gift during such calendar year by an individual resident").

73. *Id.* § 2503(a).

74. *Id.* § 2511(a).

involuntary alienation of the trust assets.[75] An independent trustee[76] will likely be named and be given absolute discretion regarding payments of income and principal to the settlor/beneficiary, i.e., James, in accordance with the statute. The trust instrument will likely have language stating that there are no express or implied agreements between James, as the settlor, and the trustee regarding payments to James, as the beneficiary.[77] Of particular interest is the fact that the Alaska statute permits the settlor to possess a testamentary nongeneral power of appointment[78] over the trust property, and still permits the trust property to qualify for the protections of the statute.[79]

2. Possession of a Power of Appointment

Possession of a testamentary nongeneral power of appointment in a trust has some significant benefits to the power holder. For instance, the power holder is permitted to decide the ultimate beneficiary amongst a group of predetermined beneficiaries of the trust assets without any further restrictions. Therefore, the power holder may alter the beneficial interest of a beneficiary or terminate the interest of a beneficiary altogether without that nongeneral power being treated as substantial enough interest to treat the property subject to the power as that of the power holder.[80] In our example, once James establishes and funds his trust, he may maintain a testamentary nongeneral power of appointment over the trust; possession of that power alone does not cause the trust to be treated as his asset for purposes of satisfying a car accident victim's claim. While a settlor may not maintain a general power of appointment in a self-settled DAPT one example of how a power of appointment may be used to achieve optimum tax goals is best illustrated in the case of a general power of appointment retained by a settlor, in a grantor trust.[81] As a grantor trust, the trust will not

75. ALASKA STAT. § 34.40.110(a) (2008).

76. I.R.C. § 674(c) (providing an independent trustee is defined as "a trustee or trustees, none of whom is the grantor, and no more than half of whom are related or subordinate parties who are subservient to the wishes of the grantor").

77. This is anticipated since if there are express or implied agreements, the trust would not qualify for certain favorable tax treatment as well as favorable creditor treatment.

78. A general power of appointment is defined as "a power which is exercisable in favor of the individual possessing the power . . . , his estate, his creditors, or creditors of his estate." I.R.C. § 2041(b). Powers of appointment that not considered general are nongeneral.

79. ALASKA STAT. § 34.40.110(b)(2) (2008).

80. I.R.C. § 2041(b).

81. Section 674 of the IRC states, "[t]he grantor shall be treated as the owner of any portion of a trust in respect of which the beneficial enjoyment of the corpus or the income

be treated as a separate entity from the grantor, and the grantor will continue to be taxed on the income generated by the trust.[82] Because the income tax code and regulations are separate and apart from the estate and gift tax code and regulations, the grantor trust rules are one example of the dissension between the two taxing systems.[83] Ordinarily, it would not seem beneficial to pay a tax on property that a person has decided to part with. However, estate planners routinely recommend that a settlor intentionally treat a trust as a grantor trust because the settlor is then permitted to use his other assets to pay the income tax obligation of the trust.[84]

This technique is effective because by using other assets owned by the grantor to pay the income tax obligation, the grantor essentially makes two gifts.[85] The first gift is the payment of the income tax obligations of the trust. This allows for the second "gift," which is the trust's continual increase in value for the ultimate beneficiaries without increasing the gift tax obligation for the additional value.[86] Despite the fact that the trust is deemed a grantor trust because of the retained control for income tax purposes, this retained control is not enough to automatically eliminate the

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therefrom is subject to a power of disposition, exercisable by the grantor or a nonadverse party, or both, without the approval or consent of any adverse party."

82. Section 671 of the IRC states:

> Where it is specified in this subpart that the grantor or another person shall be treated as the owner of any portion of a trust, there shall then be included in computing the taxable income and credits of the grantor or the other person those items of income, deductions, and credits against tax of the trust which are attributable to that portion of the trust to the extent that such items would be taken into account under this chapter in computing taxable income or credits against the tax of an individual.

Id. § 671. *See also* Marty-Nelson, *Taxing Offshore Asset Protection Trusts*, *supra* note 8, at 419.

83. *See* Marty-Nelson, *Taxing Offshore Asset Protection Trusts*, *supra* note 8, at 416.

84. *See id.*

85. *See id.* at 417.

86. *Id.* at 416-17 ("When properly configured, intentional grantor trusts boost the economic value of a donor's transfer of assets to donees dramatically. The trust is structured such that the grantor of an intentional grantor trust is responsible for paying income taxes on trust income even though the underlying assets generating that income have already been transferred to the donee. Accordingly, since the donor is paying his own tax obligation, that tax payment is not deemed an additional gift subject to gift taxes. Careful planning is often required, since the benefits of intentional grantor trusts can rise or fall depending on the family unit's particular tax picture. The essential benefit of an intentional grantor trust, however, is that additional 'gifts' (in the form of income tax payment) are not subject to any additional gift tax."). The second "gift" of appreciation is not really a gift as defined for transfer tax purposes, but is an additional benefit by the recipient.

transfer's status as a completed gift.[87] Therefore, an exploration of both the estate and gift taxing statutes and regulations are in order.

Generally, whether James's DAPT is afforded the protections of the Alaska statute, and whether his creditors would have the ability to access the trust to satisfy creditor claims, is not important for this discussion. However, the reason for the substantial discussion here is because conventional wisdom dictates that when the settlor's property is beyond the reach of his creditors, the transfer is treated as a completed gift, and is therefore taxable at the time of transfer.[88] The effective rate of taxation imposed for a transfer by gift is lower than the effective rate imposed on a transfer through the estate, this is an important consideration as to whether a settlor would prefer to have the transfer treated as a complete transfer made during life as opposed to having the transfer occur at his death.[89] The effective rate refers to the fact that the gift tax is "tax exclusive," and therefore the applicable tax is payable on the actual amount of the gift transferred, and the transferor will use other assets to pay the tax owed.[90] On the other hand, the estate tax is "tax inclusive" in that the assets used to pay the tax are included in the calculation to determine the applicable tax, so fewer assets are ultimately transferred.[91] So while the gift tax is imposed earlier in time, the overall wealth transferred from the settlor to his beneficiaries is potentially much higher.[92]

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87. *Id.*

88. *See* Taylor, *supra* note 13.

89. *See* Marty-Nelson, *Taxing Offshore Asset Protection Trusts*, *supra* note 8, at 416-17.

90. *See id.* at 420-21.

91. *See id.*

92. *See id.* at 417. This Article provides a comparison of two examples to demonstrate the impact of the grantor trust status. The examples are as follows:

> [1.] *Outright gift.* In year [one], a parent transfers $1,000,000 outright to her adult son. With a ten percent return, by year [two], the gift generates income of $100,000. Both parent and son are in the highest individual tax bracket of 39.6%. Given these figures, the federal tax liability on the $100,000 would be about $40,000. If the parent is intent on the son benefiting not just from the initial gift but also from all the income generated by that gift, the parent can agree to pay the income tax liability attributable to the gift. In that case, the parent pays the $40,000 income tax liability and the son benefits from the full $1,100,000 by year [two]. The parent's payment of the son's income tax liability would, however, be deemed a gift from the donor/parent subject to gift tax liability. In the event the parent has used all of her unified credit and already makes annual exclusion gifts to the son, the $40,000 tax payment to the Service, [sic] would be subject to gift tax liability. If the [fifty-five percent] gift tax rate applied, $22,000 would be due on the parent's payment of the son's liability.

In general, the IRS looks to state law to determine legal interests and rights and the scope by which a creditor may gain access to the property of a debtor.[93] The Supreme Court has established that the role of the states is to determine property rights and interests, while the federal government determines which interests should be taxed.[94] With respect to creditor access and the extent to which such access determines how the subject property is treated for gift tax purposes, state law determinations should ordinarily receive deference. With DAPT laws, however, there may be a conflict of interest between a state's obligation to determine property rights and the state's pecuniary interest in such property. [95] Therefore, despite the label the state may attach to a certain property interests, the property should still be treated as owned by the settlor for transfer tax purposes.

For instance, Alaska is able to generate revenue through trust administration fees. Alaska trust statutes require some or all of the property to be physically located in the State of Alaska. The statutes also reserve exclusive jurisdiction over Alaska trusts in the courts. The state laws of Alaska govern validity, construction, and administration of Alaska trusts.[96]

> [2.] *Intentional Grantor Trust.* Assume the same facts as in the previous case, except that instead of an outright gift, the parent transfers the initial $1,000,000 to an intentional grantor trust and names the son as the beneficiary. In this case, the parent would be liable for the income taxes under the grantor trust rules. As in the first example, the parent would pay the $40,000 in income tax. By year [two], the son becomes the beneficiary of the trust assets worth $1,100,000. Unlike example one, however, the payment of the $40,000 income tax would not be considered a gift subject to gift tax liability, because the parent would be paying her own obligation.

Id. at 417-18.

93. *Id.* at 427.

94. Paul L. Caron, *The Role of State Court Decisions in Federal Tax Litigation: Bosch, Erie, and Beyond*, 71 OR. L. REV. 781, 782 (1992).

95. Amy Lynn Wagonfeld, Note, *Law For Sale: Alaska and Delaware Compete for the Asset Protection Trust Market and the Wealth that Follows*, 32 VAND. J. TRANSNAT'L L. 831, 834-35 (1999) ("It seems that the Alaska and Delaware legislators may be willing to ignore what is fair to creditors in order to bring money into their states. In fact, these legislators may be putting the interests of their respective states, as well as the interests of wealthy asset protectors, before the rights of creditors, previously held concepts of fairness, and what has been the prevailing law in this country. If estate planners and asset protectors elect to utilize trusts under these new statutes, Alaska and Delaware stand to be the depositories of massive amounts of wealth. This will translate into financial growth in each state through increased business among banks, attorneys, accountants, financial advisors, and any other professions that will assist clients in establishing and managing these trusts, the benefits of which will trickle down throughout each state's economy.").

96. ALASKA STAT. § 13.36.035(a), (c) (2008).

These restrictions will make the trusts easier to manage from a trustee's perspective because the trustee will have to deal only with the laws of Alaska when determining his duties and obligations as trustee; these are the rational bases for incorporating such requirements into the Alaska trust statutes. Requiring the property to be physically located in Alaska protects the debtor because the risk that another jurisdiction will not honor the trust, or otherwise place restrictions on the debtor with property physically located in that other jurisdiction, is virtually eliminated. These rational bases, however, do not override the clear pecuniary interest the state has in keeping the trust administration funds coming to and remaining in the State of Alaska.[97]

The ATA makes specific, restrictive provisions for creditors to challenge DAPTs in order to gain access to the trust property therein.[98] In section 13.36.310, the statute states unless there is a violation under section 34.40.110,[99] a trust otherwise falling under laws of Alaska

> is not void, voidable, liable to be set aside, defective in any fashion, or questionable as to the [donor's] capacity, . . . on the grounds that the trust . . . defeats a right, claim, or interest conferred by law on a person by reason of a personal or business relationship with the [donor] . . . or by way of a marital or similar right.[100]

When cross-referenced with section 34.40.110(b),[101] this provision states that the transfer to the trust is valid unless: (1) the conveyance was made with the intent to hinder, delay, or defraud creditors or other persons; (2) the donor had the power to revoke or terminate the trust without the consent of persons with substantial interests; (3) all the income or principal will be paid to donor; or, (4) the donor is in default by thirty or more days for child support payments pursuant to a court order.[102]

In order to challenge the validity of the trust, creditors must circumvent a very high burden. This is important because one of the key considerations in determining when a transfer is complete for gift tax purposes is whether state law allows creditors to pierce the trust to satisfy

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97. Jeremy M. Veit, Note, *Self-Settled Spendthrift Trusts and the Alaska Trust Act: Has Alaska Moved Offshore?*, 16 ALASKA L. REV. 269, 269 (1999). One of the primary motivations to establish the ATA was to stimulate economic development in Alaska by attracting millions of dollars in trust investments by providing asset protection trusts ("APTs") which had only been available offshore.

98. *See* ALASKA STAT. § 13.12.205.

99. *Id.* § 34.40.110.

100. *Id.* § 13.36.310.

101. *Id.* § 34.40.110(b).

102. *Id.* §§ 13.36.310, 34.40.110(b).

claims.[103] If assets are subject to claims of the settlor's creditors, then the transfer of property to an irrevocable inter vivos trust may be challenged as to whether a completed gift has occurred, even if it is a discretionary trust at least to the extent the assets are subject to the settlor's creditors.[104] Therefore, creating the trust to protect against creditor claims may have a direct impact on whether the transfer is treated as a completed gift for transfer tax purposes.[105]

The potential for a windfall for the settlor's beneficiaries is enormous and inequitable. For instance, the settlor may make a transfer by gift when the settlor believes the property has high appreciation potential. Once the transfer is made by completed gift, any appreciation that occurs afterward will neither be subject to estate taxation from the settlor's estate at his death, nor additional gift taxation for the added value.[106] As long as the settlor ensures that the lifetime transfer is a completed gift, he may be able to avoid the estate transfer tax at his death. The settlor may do so by declining to retain any of the prohibited powers. Such maneuvering along the lines of estate and gift taxation should not be permitted where the settlor has released property from one hand, while retaining it with the other.

By retaining a testamentary nongeneral power of appointment over trust property in a self-settled trust, the settlor essentially gives away the property without really giving up all rights regarding the property. Possession of a testamentary nongeneral power, though limited, is still a reservation of power whereby the settlor has retained the right to decide who will ultimately own or possess the property, but the settlor may not choose to appoint the property to his estate or creditors with this limited power. Despite the fact that a creditor will not be able to reach the transfer for satisfaction of claims, that retention of a nongeneral power of appointment should still disqualify this transfer as a completed gift.

The settlor's possession of a nongeneral power of appointment signifies a retained right to decide what will happen to the property, which

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103. Rev. Rul. 76-103, 1976-1 C.B. 293.

104. *See id.* "The transfer of property to an irrevocable inter vivos trust created in, and administered under the laws of, a state in which the trust is deemed a 'discretionary trust' whose assets are subject to claims of the grantor's creditors, does not constitute a completed gift." *Id.*

105. *See id.* "If and when the grantor's dominion and control of the trust assets ceases, such as by the trustee's decision to move the situs of the trust to a State where the grantor's creditors cannot reach the trust assets, then the gift is complete for Federal gift tax purposes . . . ." *Id.*

106. Marty-Nelson, *Taxing Offshore Asset Protection Trusts*, *supra* note 8, at 415-16.

is an important property right.[107] Although the provisions of the Alaska statutes protect the property from creditors,[108] the same protections are not extended to retained powers under the Code.[109] Under the provisions of the Code, the possession of a general power alone is enough to create an interest in the property that is subject to taxation in the gross estate for estate tax purposes.[110] The Code does not have a similar provision stating that the possession of special power would cause inclusion in the gross estate for estate tax purposes.[111]

Because the possession of a general power is a property interest, the provisions of the Code[112] state that the exercise or release of a general power of appointment shall be treated as a transfer by the person who holds the power—in this case, the settlor.[113] The exercise of a general power requires the settlor to affirmatively act by exercising the power and appointing the property to a third party beneficiary.[114] A release of a general power occurs when the holder of the power affirmatively acts to release the power.[115] By giving up the right to make an appointment pursuant to the power, the settlor is treated as if he actually made the appointment and "transferred" the property to the default beneficiary named in the trust.[116] The Code does not have similar provisions for the holders of nongeneral powers of appointment.

Even with a default beneficiary named, a particular beneficiary cannot be certain he will actually receive the property until the testamentary nongeneral power is either exercised or not. Therefore, it is proper to treat these assets subject to such power as continuing as a property interest to the settlor for gift tax purposes, if there are no other limitations on the settlor. The assets subject to the testamentary nongeneral power should also be treated as continuous property interest of the settlor because of the level of

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107. Treas. Reg. § 25.2511-2(b) (as amended in 1999). This provision requires the Owner to part with dominion and control over the property and to leave himself no benefit of the transfer. *Id.*

108. ALASKA STAT. § 34.40.115 (2008).

109. I.R.C. § 2514(b) (2006).

110. *Id.* § 2041.

111. *See infra* note 138 and accompanying text for further discussion.

112. I.R.C. § 2514(b).

113. *Id.* § 2514(e). This provides that a "lapse of a power of appointment created after October 21, 1942, during the life of the individual possessing the power shall be considered a release of such power."

114. *See* Treas. Reg. § 25.2514-1 to -3.

115. *See id.*

116. *See id.*

control the settlor has retained. Control is a major factor in determining whether an effective transfer has occurred for gift tax purposes.

Even so, at least one transfer made pursuant to the ATA has been validated as a completed transfer for gift tax purposes. In PLR 98-37-007,[117] a request was made to determine whether a proposed transfer made to a trust, pursuant to the provisions of the Alaska trust statutes, was a completed gift for transfer tax purposes. The facts, in relevant part, of the PLR state:

> [The] Donor propose[d] to create [a t]rust, to be administered under the laws of [Alaska], for the benefit of herself and her [beneficiaries]. The trustee [would] have sole and absolute discretion to pay . . . part or all of the income and/or principal of [the] trust to Donor and the Donor's living descendants.

The Donor "requested a ruling that the transfer by Donor of property to [the t]rustee to be held under the [t]rust agreement . . . be a completed gift for federal gift tax purposes."[118]

The IRS issued PLR 98-37-007 indicating that the transfer was a completed gift based on the representation that the trustee had "sole and absolute discretion" to pay income or corpus to the donor or any other beneficiary of the trust.[119] Furthermore, the IRS came to this decision based on the fact that there were no express or implied agreements between the donor and the trustee as to how the trustee would exercise his "sole and absolute discretion."[120] For gift tax purposes, a taxable gift has occurred in this situation because the donor presumably gave up complete control and dominion of the trust assets.[121]

In the facts of the PLR, however, there is no mention of a retained power of appointment, general or otherwise. Therefore, this PLR, as the only authority revealing the position of the Treasury Department, offers no protection to settlors seeking to establish a self-settled DAPT with a retained power of appointment for the settlor. This is because the possession of such a power is a substantial change in the position from that of the transferor described in the PLR.

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117. I.R.S. Priv. Ltr. Rul. 98-37-007 (Sept. 11, 1998).

118. *Id.* The circumstances involved a Donor, a resident of the state, proposing to create an irrevocable trust for the benefit of herself and her descendants. *Id.* Trustee, the only trustee, would have the power to pay income and/or principal to one or more of the living beneficiaries of the trust. *Id.*

119. *Id.*

120. *Id.*

121. *See supra* note 107.

Therefore, for federal transfer tax purposes, if the donor retains a nongeneral power of appointment, the transfer should not be treated as a completed gift, regardless of whether the power of appointment is exercised. As such, the donor should still be deemed as having a sufficient property interest in the property despite the fact that creditors are denied access to the trust funds to satisfy their claims under state law. It is important to note that within PLR 98-37-007,[122] the IRS specifically refused to take a position regarding the estate tax consequences of this transaction.[123] Since the IRS refused to take a position on whether the facts indicated in the PLR support a conclusion that the property held in a self-settled trust would be included in the gross estate of the decedent, even in the absence of a power of appointment, it is safe to say that the debate is far from over.

Consequently, even with a transfer labeled as a completed gift during the lifetime of the settlor, it does not end the discussion of whether the retained interest in that transferred "gift" should be includable in the gross estate of the settlor for estate tax purposes. The next section of this Article will discuss possible estate tax consequences for a donor who has transferred property to an APT and retained powers authorized by the ATA.

C. Estate Tax Implications

1. Comparison to the Gift Tax

While many may use the term "estate and gift tax" as if the two taxing systems are one in the same, a better explanation is to say the two taxing systems are on opposite sides of the same coin. One purpose of the estate tax is to raise revenue while combating wealth concentration.[124] One purpose of the gift tax is to serve as a backstop to prevent persons from avoiding the estate tax by giving away all of their property while on their deathbeds.[125] As a result, an evaluation from an estate tax perspective is different from an evaluation of the gift tax; as a consequence, the same property that may have been the subject of a purported inter vivos gift may also be the subject of analysis for inclusion in a decedent's gross estate for estate tax purposes. For the estate tax analysis, the focus is whether the

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122. I.R.S. Priv. Ltr. Rul. 98-37-007 (Sept. 11, 1998).

123. *Id.* The specific language states, "[w]e are expressly not ruling on whether the assets held under the Trust agreement at the time of Donor's death will be includable in Donor's gross estate for federal estate tax purposes." *Id.*

124. *See* Reginald Mombrun, *Let's Protect Our Economy and Democracy from Paris Hilton: The Case for Keeping the Estate Tax*, 33 OHIO N.U. L. REV. 61, 69 (2007).

125. Marty-Nelson, *Taxing Offshore Asset Protection Trusts*, *supra* note 8, at 419.

decedent had *any* interest in property.[126] That taxable property interest ranges from a right to make decisions about the property to actually exercising a reversionary interest in the property and re-vesting the property in the settlor.

As a result, in evaluating the taxability of a particular transfer, the different property interests must be addressed individually. As previously mentioned, one of the provisions under the Alaska statute authorizes the settlor to draft an instrument granting himself a testamentary nongeneral power of appointment. Such a power does not subject the property that is the subject of that power to the claims of the settlor's creditors.[127]

2. Possession of a Power of Appointment

While possession of a testamentary nongeneral power of appointment protects the property from creditors in the State of Alaska, possession of such power will almost certainly, and should, cause inclusion in the gross estate from an estate tax perspective. Usually a person who holds a general power of appointment will be subject to taxation under § 2041, whether or not the power is actually exercised.[128] Ordinarily, the mere possession of a general power of appointment is an interest in property. For estate tax purposes, the right to decide who will enjoy the beneficial interest in property is enough of a property interest to require inclusion in the gross estate of the power holder.[129]

Referring back to the provisions in the Alaska statute, the statute permits a donor to grant himself a nongeneral power of appointment. It is worth noting that the IRC was drafted to deal with third parties who are granted a power of appointment by a settlor, not settlors who grant themselves such powers. This makes sense because it would be unnecessary for the settlor to appoint himself a power to make decisions regarding property that he previously owned simply because the property is held in a trust. The settlor would simply retain the property if he was not ready to part with it. The property, therefore, should properly be taxed under the provisions of § 2033 as an interest in property if the property is not ultimately transferred.[130]

Therefore, despite the label that the Alaska legislators attach to the property interest, if the settlor retains a testamentary nongeneral power of

126. I.R.C. § 2033 (2006) (emphasis added).

127. ALASKA STAT. §§ 34.40.115, 34.40.110(b) (2008).

128. *See* I.R.C. § 2041. Section 2041 provides a definition of a general power of appointment for estate tax purposes which is, in relevant part, a power exercisable in favor of the individual possessing the power, his estate, or the creditors of his estate. *Id.*

129. *Id.* § 2036(a).

130. *See id.* § 2033.

appointment in the trust property, the fact of the matter remains that the settlor still has some level of control, though diminished, of the trust property subject to such power after the transfer. For that reason, the property subject to such power should continue to be treated as a property interest of the settlor. Consequently, if James Smith retains a testamentary nongeneral power of appointment over the assets in his trust, the trust property may well be protected from his creditors from a state law property. On the other hand, for purposes of the federal transfer tax system, the property subject to that power should be deemed as a property interest held by James; therefore, possession alone of such a power should be enough to cause the property subject to the power to be included in his gross estate for estate tax purposes.

To permit the settlor to pretend that the property subject to the testamentary nongeneral power of appointment in his DAPT is not really an asset under his control is unjustified and patently unfair. For example, James has $5 million in assets prior to establishing his self-settled DAPT. Assume asset protection is as high a priority as tax savings, further assume that he funds the trust with $3.5 million of his wealth. Though the transfer will be subject to a gift tax, James now has the ability to accumulate more wealth while shielding the $3.5 million not only from his own creditors, but also from the creditors of the other beneficiaries named in the trust while still possessing the right to decide who will ultimately possess the property.[131]

To then pretend that the settlor has no such power for the purpose of subjecting the property to estate taxation is disingenuous. The Ninth Circuit's treatment of the Andersons as owners of a self-settled trust in *FTC v. Affordable Media, L.L.C.* is an excellent example of how such a transaction should be analyzed, even though the facts of that case surrounding the taxpayers are in the extreme.[132] The court focused on the totality of the circumstances, instead of the actual terms of the trust agreement, in deciding how best to view the powers retained by the settlor.[133]

If we return to our facts with James Smith, the focus should be centered on his retained control over the transferred property. Whether or not James actually exercised the testamentary nongeneral power, the fact

131. The first million dollars will be subject to the gift tax, though no transfer tax will be due for that amount. For that amount that exceeds the first million, two and a half million dollars, would be subject to the gift and that transfer tax would be due for that taxable year.

132. 179 F.3d 1228, 1242-44 (9th Cir. 1999).

133. *Id.* ("Given that the Andersons' trust is operating precisely as they intended, we are not overly sympathetic to their claims and would be hesitant to overly-restrict the district court's discretion, and thus legitimize what the Andersons have done.").

that he *could* exercise the power brings uncertainty to the beneficiaries as to whether they will actually receive any part of the trust funds. As such, the property should be included in the estate of the power holder, i.e., James, notwithstanding the labels and definitions attached to the transaction.

As previously mentioned, § 2041 does not specifically address the consequences of a settlor's retention of a nongeneral power of appointment by a settlor. It is appropriate to consider whether § 2033 provides the applicable authority for including the property subject to such power in the settlor's gross estate for estate tax purposes because one could argue that the settlor never really released this property from his power.[134] If the settlor is successful in excluding the property from his gross estate for estate tax purposes, the settlor's release of his nongeneral power of appointment over the property while on his deathbed would not subject the property to the three year look back period under § 2035.[135] By analyzing the specific purpose of the nongeneral power, it appears that §§ 2036 and 2038 would also encapsulate the powers retained by a settlor under the title of a nongeneral power of appointment and indeed more appropriately subject property to inclusion in the settlor's gross estate for estate tax purposes.[136]

It is appropriate to consider the powers available and the property interest in the nongeneral power of appointment.[137] Under normal circumstances, where James establishes a trust for the benefit of a third party, the easy solution to circumvent the tax problems associated with possession of a general power of appointment is to grant the appointee a nongeneral (special) power. Where a third party beneficiary is the holder of a special power of appointment, the beneficiary does not possess a sufficient interest to cause inclusion of the property in his gross estate at death.[138]

In determining whether the estate tax is applicable to a transfer of property to a DAPT, where the grantor retains a special power of appointment, §§ 2036, 2038, and 2041 must be explored.[139] Section 2041,

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134. *See* I.R.C. § 2033 (2006).

135. See I.R.C. § 2035(b).

136. *See id.* §§ 2036, 2038.

137. *See* Treas. Reg. § 20.2041-3(c) (as amended in 1997). Only the possessor of a general power of appointment would have this interest included in his gross estate for estate tax purposes. A power is not a general power if it is exercisable only in favor of one or more designated persons or classes other than the appointee or his creditors, or the appointee's estate or the creditors of his estate.

138. Nongeneral powers are also known as limited or special powers.

139. *See generally* I.R.C. §§ 2036, 2038, 2041.

as previously discussed, clearly applies to possessors of a general power of appointment, but not where the donor of the power attempts to appoint himself as a general power holder. Section 2041 also does not provide for inclusion of the assets subject to a special power of appointment for those in possession of such a power.

The Code reflects the fact that Congress believes individuals possessing a special power of appointment do not possess sufficient power to be treated as owners of the property; therefore, possession of such power is not subject to taxation.[140] Perhaps the simple solution for a settlor is to grant himself a special power of appointment. In this regard, at least one of the permissible beneficiaries will have some level of assurance that he will receive a benefit from the trust. This is due to the power holder's limited decision making capacity regarding to whom he can choose to pass the trust property. If we accept the terminology and definitions of the Alaska statutes, then the analysis ends here. The tax treatment of a true special power of appointment was addressed by the Code and specifically exempted from inclusion for estate tax purposes.[141]

The Treasury Regulations state that if a donor retains a testamentary nongeneral power of attorney to appoint the trust property to beneficiaries among the donor's descendants, no portion of the trust is considered a completed gift.[142] The author asserts that by defining the special power as a testamentary nongeneral power of appointment, the ATA is attempting to provide the appearance that the trust has been completely transferred before death, and then permits a testamentary act by the decedent which results in the ultimate transfer of the trust property at the death of the decedent. Thus, a transfer of property to a trust, whereby a special power of appointment is retained by the donor, should not result in a completed gift at the time of the transfer when the power is retained by the settlor within the trust provisions of a self-settled trust.

Since the donor does not have the right to exercise this power during life, the only way to convert this transaction into a completed gift during life is to relinquish the special power of appointment.[143] In the event the donor dies during the three years after such relinquishment, § 2035[144] would then cause inclusion in the gross estate of the donor if the property would have been subject to the provisions of IRC §§ 2036 and/or 2038.

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140. *See supra* note 138.

141. There is no taxing authority that would authorize taxation to the holder of a special power of appointment.

142. *See* Treas. Reg. § 25.2511-2(b) (as amended in 1999).

143. By releasing the retained power, the donor has not given up the remaining power held over the transferred property and such transfer would not be deemed a completed gift.

144. I.R.C. § 2035.

On the other hand, the special power of appointment contemplated by the Code was a power bestowed upon a third party by the donor, not a power that the donor granted to himself. Therefore, by definition, the special power retained by the donor in accordance with the authority granted by the ATA should not be treated as a special power deserving special tax treatment under the Code. When the power is created by the donor and vested in himself, the fact remains that the donor dictated the terms; regardless of gift tax consequences, the donor retained a property interest over the trust property after the transfer. As such, possession of such a power by the donor should cause inclusion in the donor's gross estate.

A similar situation was further addressed in PLR 2002-47-013[145] where a donor sought a ruling regarding inter vivos transfers to an irrevocable trust where he retained a special testamentary power of appointment. The IRS took the position that by reason of the donor's special power of appointment, the donor maintained the ability to change beneficiaries of the trust, and thus possessed dominion and control over the trust property; therefore, the transfer was not deemed completed for gift tax purposes. Consequently, this property was includable in the donor's gross estate at death.

Next, to determine whether assets of a self-settled DAPT subject to a special power of appointment should be included in the gross estate of the decedent, a careful analysis of IRC §§ 2036 and 2038 is warranted. In general, § 2036 requires the value of the decedent's gross estate to include property when the decedent's transfer possess the following features: (1) a transfer is made; (2) in trust or otherwise; (3) where the transferor retains the right to use, possess, or enjoy the property; and (4) for his lifetime or time period which does not end before his death.[146] An additional property interest included under § 2036 is whether the transferor possesses the right to determine who shall enjoy or posses the property at the time of the transferor's death.[147]

By retaining a special power of appointment, a donor will not likely cause inclusion of his trust assets in his gross estate under § 2036(a)(1). Inclusion also will not be warranted based on a donor's possession of a

145. I.R.S. Priv. Ltr. Rul. 2002-47-013 (Nov. 22, 2002). The IRS also stated its position in PLR 2001-48-028 that under section 2514, only the exercise or release of a general power is subject to tax. I.R.S. Priv. Ltr. Rul. 2001-48-028 (Aug. 27, 2001). However, when a person transfers property and retains a special power to appoint to others, the person's special power of appointment is enough dominion and control to treat the transfer as an incomplete gift.

146. I.R.C. § 2036(a).

147. *Id.* § 2036(a)(2).

special power of appointment because this retained power will not be considered a retained interest to possess or use the property for life.[148] By retaining a special power of appointment, a donor's trust property may be subject to estate tax inclusion under § 2036(a)(2).[149] Returning to the scenario with our client, James Smith, for a moment, his retention of a special power of appointment is likely to affect inclusion of the trust assets in his gross estate. At a minimum, possession of special power of appointment gives him the testamentary right to designate who will enjoy the property after his death.[150] This possession of a right to decide who will possess the property should cause inclusion in the gross estate pursuant to § 2036(a)(2). This is because even with a special power of appointment, which limits the possessor to making an appointment within a specific group or entity, the power holder still possesses the right to decide who amongst the group or entity will receive the property.

While § 2036(a)(2) provides enough support to cause inclusion in the gross estate, further support involves the applicability of § 2038.[151] Section 2038[152] generally requires the value of the gross estate to include property of which the decedent has made a transfer, in trust or otherwise, where the power to alter, amend or revoke is subject to change by the decedent alone or in conjunction with someone else, on the date of the decedent's death.[153]

Sections 2036 and 2038 generally work together in order to prevent a person from transferring property to a trust and retaining the use or enjoyment of, or the authority to make decisions regarding, the trust property while also escaping estate taxation. The sections then prevent a person from avoiding a transfer tax at death because he did not technically "own" the property at the time of death. To determine whether these code sections are applicable, the pertinent powers available under the provisions of the ATA statute will be stated and Code §§ 2036 and 2038 will be individually applied to those provisions where applicable. Under § 2038, the gross estate includes property where the decedent, who was also the donor of the trust, retained an interest whereby the enjoyment of that

148. *Id.* § 2036(a)(1).

149. *Id.* § 2036(a)(2).

150. Treas. Reg. § 20.2036-1(b)(3) (as amended in 2008). The regulation states "the phrase 'right to designate the person or persons who shall possess or enjoy the transferred property or the income therefrom' includes a reserved power to designate the person or persons to receive the income from the transferred property, or to possess or enjoy nonincome-producing property" for the proscribed period. *Id.*

151. I.R.C. § 2038.

152. *Id.*

153. *Id.* § 2038(a)(1).

property was subject to change on his date of death, whether that power was alone or in conjunction with another person.[154]

While the donor has not specifically retained the right to change the enjoyment of the trust, he nonetheless possesses that right by retaining a testamentary special power of appointment. For example, if James were to exercise a testamentary special power of appointment, special through his will, he may appoint the property to one or both of his children. Therefore, he decides who will ultimately possess or use the property.

As long as the donor possesses the right to exercise a power of appointment, that power should be treated as a retained power that affects inclusion in his gross estate. In a careful analysis of the statute, despite the fact that the donor has an irrevocable trust, § 2038(a)(1)[155] may result in estate tax inclusion if the donor retains a special power of appointment because he essentially retains the right to alter or amend a beneficiary's interest in the trust. The IRS utilizes a "substance over form" approach which readily demonstrates that the donor's retained power to alter provokes inclusion of the donor's trust assets in his gross estate.

So far, a brief analysis of the estate and gift tax implications lead to the conclusion that estate tax consequences are likely to result from the retention of a special power of appointment retained by the settlor if this power is included in the trust instrument. Although there are times when a settlor may decide to intentionally cause assets to be included in his gross estate for estate planning purposes, there should not be a policy that encourages or otherwise supports the position that a settlor may enjoy the benefits of his trust property, and then pretend that the property belongs to another when he is no longer in a position to enjoy it himself.

V. Delaware Qualified Dispositions in Trust Act ("QDTA")[156]

A. Comparison to the ATA

Delaware's QDTA was enacted in July 1997, just a few months after the ATA was enacted.[157] Delaware's QDTA has similar features to that of the ATA in that it also permits the settlor (transferor)[158] to establish

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154. *See id.*

155. *Id.*

156. DEL. CODE. ANN. tit. 12, § 3570 (2007).

157. 1997 Alaska Sess. Laws 006. The ATA was enacted on April 2, 1997.

158. DEL. CODE ANN. tit. 12, § 3570(10) (2007). The statute defines transferor as

> a person who, as the owner of the property, as a holder of a power or appointment which authorizes the holder to appoint in favor of the holder, the holder's creditors, the holder's estate or the creditors of the

spendthrift provisions[159] within the irrevocable trust instrument, permits discretionary payments to the settlor,[160] and permits the settlor to hold a power of appointment.[161] The Delaware QDTA, as well as the ATA, each provide for exclusive jurisdiction for challenges as to the "validity, construction and administration of the trust[s]" in the relative state jurisdictions.[162]

There are also some statutory provisions that are not included in the ATA. First, section 3573 provides limitations on qualified dispositions with respect to certain specified creditors.[163] Section 3570(7) provides a definition of a "qualified disposition," which is a "disposition by or from a transferor to a qualified trustee or qualified trustees, with or without consideration, by means of a trust instrument."[164] Therefore, there is a special category of creditors who may be authorized to make a valid claim against the trust. The circumstances under which these creditors may make a valid claim, and the application of the provision, are very limited.

One of the limited exceptions for creditor access is based on whether there is a court order for child support or alimony.[165] If the basis for making the transfer to the trust is to avoid paying a child support or alimony obligation, then the transfer to the trust will not be protected, at least to the extent that the funds are needed to satisfy the obligation.[166] The other exception provides for creditor access to the trust to satisfy a claim where a person "suffers death, personal injury or property damage" as a result of the settlor's action or inaction.[167]

Referring back to our example in which James wishes to seek asset protection against future creditors even where the liability may be due to

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holder's estate, or as a trustee, directly or indirectly makes a disposition or causes a disposition to be made.

Id.

159. *See id.* § 3570(11)(c).

160. *Id.* § 3570(11)(b)(3).

161. *Id.* § 3570(11)(b)(2).

162. *See id.* § 3570(11)(a); *see also* ALASKA STAT. § 13.36.035(c).

163. *See* DEL. CODE ANN. tit. 12, § 3573(1) (including as special creditors "any person to whom the transferor is indebted on account of an agreement or order of the court for . . . support or alimony [payment] to spouse [or] former spouse" and child support to the extent of these obligations); *see also id.* § 3573(2) (stating the other creditor with this special exemption is "any person who suffers death, personal injury or property damage" as a result of transferor's actions or omissions before the date of the transfer to the trust, assets to satisfy this obligation are available to the extent of the obligation).

164. *Id.* § 3570(7).

165. *Id.* § 3573(1).

166. *See id.*

167. *Id.* § 3573(2).

his own fault, in the instance where he causes injuries to a victim in a car accident, or commits some other tortious act such as malpractice, James may rest assured that the assets he transfers to the trust will still be protected from a judgment against him unless the transfer is perceived as a fraudulent transfer. Even if he causes the accident and the victim suffers serious bodily harm, James's trust assets will still be out of the reach of the court since the accident will have occurred after the date the trust was established and settled subject to the fraudulent transfer provisions. On the other hand, if the tort claim were a valid qualified disposition where the statute provides creditor access, even under these limited circumstances, the self-settled DAPT may be more vulnerable to inclusion in the gross estate for estate tax purposes if there is a pattern of permitting creditor access on a number of occasions for predictable claims such as those associated with malpractice or reckless driving. As previously discussed, if assets are subject to claims of the settlor's creditors, then the transfer of property to an irrevocable inter vivos trust may not constitute a completed gift.[168]

B. Estate and Gift Tax Consequences for the Settlor as Trust Advisor

Second, Delaware's QDTA provides the settlor the opportunity to appoint himself as a trust protector or trust advisor. Specifically, section 3570(8) provides for the settlor to appoint himself as the trust protector or advisor, which permits him to appoint and replace trustees.[169] Section

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168. Rev. Rul. 76-103, 1976-1 C.B. 293. "The transfer of property to an irrevocable inter vivos trust created in, and administered under the laws of, a state in which the trust is deemed a 'discretionary trust' whose assets are subject to claims of the grantor's creditors, does not constitute a completed gift." *Id.*

169. DEL. CODE ANN. tit. 12, § 3570(8)(c). This provision states:

> [N]either the transferor nor any other natural person who is a nonresident of this State nor an entity that is not authorized by the law of this State to act as a trustee or whose activities are not subject to supervision as provided in paragraph a. of this subsection shall be considered a qualified trustee; however, nothing in this subchapter shall preclude a transferor from appointing one or more advisers, including but not limited to: 1. Advisers who have authority under the terms of the trust instrument to remove and appoint qualified trustees or trust advisers; 2. Advisers who have authority under the terms of the trust instrument to direct, consent to or disapprove distributions from the trust
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> . . . .

Id.

3570(8) provides a definition of a qualified trustee.[170] A qualified trustee must arrange and maintain custody of some or all of the qualified disposition trust property for a valid trust.[171]

A trust advisor has the power under the statute to remove and appoint qualified trustees, and if the trust instrument allows, the trust advisor may "direct, consent to or disapprove distributions from the trust."[172] In order to properly analyze this provision we must cross-reference with section 3570(8)(a) and determine if the transferor can be a proper "qualified trustee."[173] This provision specifically prohibits the transferor from being named as a qualified trustee if he is a non resident.[174]

On the other hand, possessing the power to remove and appoint qualified trustees in a self-settled trust appears to give the settlor the indirect power to control distributions. Presumably, by controlling the trustee, the trust protector may control distributions. With such a power, should the settlor then be considered the de facto trustee? The position of trust advisor appears to give the settlor the type of dominion and control that ordinarily disqualifies the transfer as a completed gift. The settlor is never in any real danger of not having access to the funds should it become necessary in his future to gain access to such funds.

For estate tax purposes, retention of a power by the donor of a power of appointment again requires an analysis under §§ 2036[175] and 2038[176] with respect to the retained power. In a similar transaction, the IRS took the position that a trustee's power should be attributed to the donor because the power to fire the trustee likely causes the trustee to bend to the donor's will.[177] The IRS's attempts to defend this position failed in the courts. For example, in *Estate of Wall v. Commissioner*,[178] a settlor created an

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170. *See id.* § 3570(8)(a). A qualified trustee is defined as a natural person, resident of the state of Delaware, authorized by law to act as trustee and subject to the supervision of "the Bank Commissioner of the State and the Federal Deposit Insurance Corporation, Comptroller of Currency, or the Office of Thrift Supervision or any successor thereto." *Id.*

171. *See id.* § 3570(8)(b).

172. *Id.* § 2570(8)(c).

173. *See id.* § 3570(8)(a).

174. *See id.* § 3570(c).

175. I.R.C. § 2036 (2006).

176. *Id.* § 2038.

177. Rev. Rul. 81-51, 1981-1 C.B. 458 (revoked by Rev. Rul. 95-58, 1995-2 C.B. 191). In this revenue ruling the IRS maintained the position that the power to remove and replace the trustee was a retained power that caused the trust property to be includable in the gross estate under §§ 2036(a)(2) and 2038(a)(1).

178. 101 T.C. 300, 301-02 (1993). The issue in this case was "whether property held by three irrevocable inter vivos trusts created by the decedent, Helen S. Wall (Mrs. Wall), . . . [was] includable in her gross estate under [§] 2036(a)(2) or [§] 2038(a)(1) because in

irrevocable trust and retained the power to remove the trustee and appoint another corporate trustee. The court held that because a trustee owes a fiduciary duty to the beneficiaries of the trust, not to the settlor, the court would not presume that the trustee would behave counter to his fiduciary duty.[179]

The IRS acquiesced to this ruling in Revenue Ruling 95-58, which states that a settlor may retain the power to appoint a successor trustee, as long as the successor trustee is not a subordinate or related party.[180] The ruling further stated that holding the power to name a successor independent trustee, without something more, would not be considered a reservation of power over the property subject to taxation.[181]

The Treasury Regulations provide further guidance. The Regulations describe a consequence where the decedent retains the power to remove or discharge a trustee, so such power is treated as a retained right subject to estate taxation.[182] The example provided, however, describes a situation where the decedent removes the trustee and appoints himself instead.[183] In reference to our client James Smith, it appears that naming himself as trust protector may be enough to avoid a prohibited retention of power; this may therefore be enough to avoid inclusion of the trust assets in the gross estate for estate tax purposes.

The Delaware statute permits the settlor to have the power to remove a trustee, an important right for someone who has an interest in the trust, while prohibiting the possibility of the settlor having the ability to name

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creating the trusts Mrs. Wall reserved the right to remove the sole trustee, a corporation, and appoint a successor corporate trustee." *Id.*

179. *Id.* at 313.

180. Rev. Rul. 95-58, 1995-2 C.B. 191. The IRS "reconsidered whether a grantor's reservation of an unqualified power to remove a trustee and appoint a new trustee[,] other than [himself, was] tantamount to a reservation by the grantor of the trustee's discretionary powers of distribution." *Id.* The IRS held that possession of the power to remove the trustee and appoint an individual or corporate successor trustee was not enough retained control to be tantamount to control over discretionary distributions of income and to warrant inclusion of the trust assets in the gross estate of the decedent. *Id.*; *see also* Estate of Vak v. Comm'r, 973 F.2d 1409, 1410-14 (8th Cir. 1992). In this case, Donor transferred stock to an irrevocable trust and named his son and daughter-in-law as joint trustees. *Id.* Donor retained the right to remove trustees with or without cause and name successor trustees who were not related or subordinate to Donor. *Id.* The court held that Donor retained no power to recall the gift and the right to replace Trustee was limited to a right to appoint an independent trustee so the transfer qualified as a completed gift. *Id.*

181. *Id.*

182. Treas. Reg. § 20.2036-1(b)(3) (as amended in 2008) ("If the decedent reserved the unrestricted [right] to remove or discharge the trustee at any time and appoint himself as the trustee, the decedent is considered as having the powers of the trustee.").

183. *Id.* § 20.2036-1(b)(3).

himself, or anyone who is related or a subordinate party[184] to the settlor, to serve as a successor trustee. Based on the court rulings, revenue rulings, and regulations, it appears that James is allowed to retain the right to remove and name a qualified trustee or trust protector without invoking a transfer tax for gift or estate tax purposes, particularly given the prohibition in the Delaware statutes that prevent him from naming himself or a subordinate party.

On the other hand, these aforementioned regulations and rulings were made in cases that did not involve self-settled trusts. For that reason, the types of trusts involved are not substantially similar in a factual manner because the settlor is also a permissible beneficiary of a self-settled trust. Therefore, these regulations, rulings, and cases should not be applicable precedent to protect the transaction where the settlor retains the right to remove a trustee where he is also a beneficiary of the trust.

The right to remove a trustee or trust protector and replace him with another, even if James is only permitted to appoint an independent trustee or trust protector, should still be treated as a retained power under the same theory applied to the Andersons.[185] The court looked to the totality of the circumstances regarding the level of control the Andersons possessed by virtue of the trust advisor positions they held in their offshore trusts. Specifically, the court looked to the history of transfers and found that if the Andersons had wanted to repatriate the transfers, then they could have done so.[186]

While the court did not specifically find that the Andersons possessed a retained power, the court determined that by virtue of holding the position of trust protector over the self-settled trust, the Andersons still had control over the distributions and upheld the contempt charge for failure to comply with the restraining order to repatriate the trust assets.[187] As such, the settlor who continues to hold the position of trust protector should automatically be treated as having control over the distributions in those cases where he has the right to remove a trustee and appoint a new trustee,

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184. DEL. CODE ANN. tit. 12, § 3537 (2007) (citing I.R.C. § 672 (2006)). This provision provides a definition of related and subordinate parties, which means any nonadverse party who is the settlor's spouse if living with grantor, father, mother, issue, brother, or sister, employee and etc. I.R.C. § 672(c).

185. FTC v. Affordable Media, L.L.C., 179 F.3d 1228, 1242 (9th Cir. 1999).

186. *Id.* at 1242-43 ("The Andersons had previously been able to obtain in excess of $1 million from the trust in order to pay their taxes. Given their ability to obtain, with ease, such large sums from the trust, we share the district court's skepticism regarding the Andersons' claim that they cannot make the trust assets subject to the court's jurisdiction.").

187. *Id.* at 1243.

or have any influence or control over distributions; therefore, the transfer to the trust should not be treated as a complete gift.

Even if the settlor does not retain the position as trust protector, he should still be treated as having control over the distributions if he were to retain the right to replace the trustee. While recognizing that the ruling in *Wall* is good law, *Wall* did not involve a self-settled trust, so the settlor was not also a beneficiary of the trust involved. When the settlor is also a beneficiary, the trustee should find it more difficult to say no to a settlor's request for a distribution when he realizes that he could be replaced if he denies such requests. When the settlor is not a beneficiary of the trust, the trustee may still be reluctant to act contrary to the settlor's "wishes," but the pressure the trustee may feel is different and not subject to the same type of reasoning that a trustee may feel in denying a distribution to the settlor of the settlor's "own money." As such, the right to remove a trustee in a self-settled trust should be treated as a retained right to control distributions. As previously mentioned, by controlling the transfers through the position as the trust protector, or by controlling the trustee with the "Sword of Damocles," the retention of the right to replace a trustee in a self-settled APT should be treated as a retained right subject to taxation under § 2036(a)(2) or § 2038 of the IRC.

C. Estate and Gift Tax Consequences for a Settlor with Veto Power

The Delaware QDTA statutes provide for the power to veto a particular distribution. An analysis of the power to direct, consent, or veto a distribution gives rise to an analysis of §§ 2036(a) and 2038. With a veto provision written into the trust instrument, the transferor retains the power to determine who will enjoy or possess the property or income from the trust. The statute does not have restrictions regarding who the transferor can veto nor any limiting circumstances that restrict his power to veto. In the Treasury Regulations we find that where a donor makes a transfer, whether in trust or otherwise, and he reserves any power over the disposition, the gift may be wholly or partially incomplete, depending on the circumstances.[188]

188. Treas. Reg. § 25.2511-2 (as amended in 1999). This regulation states a "gift tax is not imposed upon the receipt of the property by the donee, nor is it necessarily determined by the measure of enrichment resulting to the donee from the transfer." *Id.* § 25.2511-2(a). The tax is based on the transfer by the donor and attaches when the "donor has so parted with dominion and control as to leave him no power to change his disposition, whether for his own benefit or for the benefit of [others]." *Id.* § 25.2511-2(b).

An example of tax treatment of a retained power to change beneficiaries was addressed in *Estate of Sanford*.[189] The Court held that a donor's gift is not complete for gift tax purposes until the donor relinquishes the retained right to change the beneficiaries of the trust.[190] While a right to veto a distribution is not the same as a right to change a beneficiary, a right to veto will necessarily alter who will receive the property, thereby altering a beneficiary's right to receive the property.

The regulations further state a gift is incomplete in every instance in which the donor reserves the power to name new beneficiaries, or to change the interest of beneficiaries as between themselves, unless limited by an ascertainable standard.[191] As mentioned, the Delaware statute, on its face, does not provide any limits to the power to veto. By retaining the power to deny a beneficiary a disposition from the trust, which is an important property right, it is clear that the transferor has not parted with dominion and control over the property to make the transfer to the trust a completed transfer for gift tax purposes.

Also, by naming himself as a trust protector, James Smith may have the power to veto distributions which should cause the transfer to be treated as an incomplete gift, thus likely causing inclusion in the settlor's gross estate. Inclusion is warranted because the settlor has the power to divert the assets away from a particular beneficiary through the exercise of a veto power. This retained power to veto is evidence that the settlor has not parted with dominion and control over the trust property. As such, his interest in the trust property should be included in his gross estate for estate tax purposes.

As previously mentioned, the QDTA statute requires the trust to be irrevocable and subsequently provides a very generous definition of irrevocability.[192] The statute allows for the "transferor's potential or actual receipt of income, including rights to such income retained in the trust instrument,"[193] and the "transferor's potential or actual receipt or use of principal *if*. . . a qualified trustee [is] acting [within his] discretion[,[194] or

189. 308 U.S. 39 (1939). In this case a taxpayer created multiple trusts for named beneficiaries, other than himself, and reserved the power to revoke the trust and to designate new beneficiaries, other than himself. *Id.* at 41-42.

190. *See id.* at 43-44.

191. Treas. Reg. § 25.2511-2(c).

192. See DEL. CODE ANN. tit. 12, § 3570(11)(b)(1) (2007) which provides the opportunity for a transferor "to veto a distribution from the trust." Section 3570(11)(b)(2) provides for a testamentary nongeneral power of appointment retained in the transferor within the trust instrument.

193. *Id.* § 3570(11)(b)(3).

194. *Id.* § 3570(11)(b)(6)(A) (emphasis added).

p]ursuant to a standard that governs [] distribution of principal [that] does not confer upon the transferor a substantially unfettered right to the receipt or use of the principal."[195]

The first aspect for discussion is the transferor's option to indicate in the trust instrument that he will retain the right to receive income from the trust, but only in accordance with the trustee's discretion.[196] If the income stream is regular and not limited by an ascertainable standard, the transfer probably will not represent a completed gift because, in viewing the transaction, the transferor has retained a right to receive income after the transfer. In such a situation, the transfer should be treated as a retained interest by the transferor, and not as a completed gift; therefore, it will be subject to estate taxation at the death of the transferor.[197]

The estate tax consequences implicated by a right to receive income and/or principal specified in the trust instrument, as allowable by the QDTA, are distinguished from that of the gift tax. A good place to start the estate tax discussion is with § 2036(a)(1), which includes property where the settlor has retained the right to receive income or principal for his life, a period "not ascertainable without reference to his death or for a period that does not end before his death."[198] For estate tax purposes, this right to receive or use an income interest, if drafted in to the trust instrument, should cause inclusion under § 2036(a)(1) even if the right is limited by the trustee's discretion. This is so because the settlor still has a right to receive the income from the trust until the moment of his death—at least that amount that would be subject to the trustee's discretion, especially if the settlor has the right to remove the trustee.

The same analysis applies to the right to receive and use the principal. If the trustee has the discretion to distribute the entire corpus to the settlor, then the transaction should not be deemed as a completed transfer. The qualification in the statute that the settlor must not have a substantially unfettered right to receipt and use of the trust corpus leaves a substantial amount of leeway for the settlor to retain the right to receipt and use of the principal of the trust. This generous definition of irrevocability is meaningless as stated because it may not apply to a situation where the settlor has mild unfettered rights. Regardless of the degree of substantially similar rights, if the settlor retains those rights in the trust instrument, the

195. *Id.* § 3570(11)(b)(6)(B).

196. *See id.* § 3570(11)(b)(3).

197. Treas. Reg. § 20.2036-1(a)(ii) (as amended in 2008).

198. I.R.C. § 2036(a)(1) (2006).

property interest should still be treated as his own property until he has completely released dominion and control over such property pursuant to § 2036(a)(1) and (a)(2).[199]

The estate tax evaluation invokes § 2038(a)(1).[200] This provision requires the value of all property to be included in a decedent's gross estate to the extent the decedent made a transfer, by trust or otherwise, where enjoyment was subject to change by a decedent acting alone or with someone else possessing the power to alter, amend, revoke, or terminate or where such powers were released during the three year period preceding the decedent's death.[201] This transfer also invokes § 2036(a)(2), which requires inclusion if the donor retains the right to determine who will enjoy the property or the income.[202] Although Delaware QDTA offers almost unrestricted control over the trust property by allowing the settlor the right to direct or veto a distribution, retain the right to receive income or principal to the trust, retain a testamentary special power of appointment over the property, and while still providing protection against creditor claims if drafted into the trust agreement, a likely consequence of retaining any of these rights is inclusion in the donor's gross estate for tax purposes.

VI. Nevada Spendthrift Trust Act ("STA")[203]

A. Comparison to the ATA and Delaware's QDTA

Nevada is the home of the final self-settled DAPT statute evaluated in this Article. In 1999, Nevada amended its laws to provide for self-settled spendthrift trusts. As with the ATA and Delaware's QDTA, the Nevada STA trust provides protection from creditors while leaving a certain level of control and benefit to the settlor. To create the self-settled trust in accordance with Nevada's STA, the trust must meet the following requirements: (1) irrevocability; (2) no requirement to make distributions of any part of the income or principal to the settlor; and, (3) no intention to "hinder, delay or defraud known creditors."[204]

The statute further explains that "[a] writing [i]s irrevocable even if the settlor may prevent a distribution from the trust or holds a testamentary special power of appointment," and the writing does not "require" a

199. *See id.* § 2036.

200. *See id.* § 2038(a).

201. *See id.* § 2038(a)(1).

202. *See id.* § 2036(a)(2).

203. NEV. REV. STAT. ANN. § 166.010 (2009).

204. *Id.* § 166.040.

distribution if the settlor may receive it only at the discretion of others.[205] These provisions are consistent with provisions of the ATA and the Delaware QDTA, except that this statute makes the discretionary provision of the trust the default, even if not mentioned by the instrument. It appears from the language that the statute is designed to provide extra protection to settlors against creditor claims and cover the key provisions under the Code for favorable transfer tax treatment.

B. Voluntary Alienation of Trust Property

The estate and gift transfer tax implications and analysis are essentially the same as previously discussed with Delaware's QDTA. The interesting tax-related distinction is found in section 166.120, which provides explanations regarding restraints on alienation.[206] According to this provision, an exception to the normal restraint on alienation is declared "when the trust does not provide for the application for or the payment to *any beneficiary* of sums out of capital or corpus."[207] "In such cases, the corpus or capital of the trust estate, or the interest of the beneficiary therein, may be anticipated, assigned or aliened [sic] by the beneficiary voluntarily, but not involuntarily or by operation of law or by any process or involuntarily at all."[208]

By making this limited exception contingent upon the fact that there is no provision for any type of payment to any beneficiary of the trust, the statute provides a very narrow window for a beneficiary to voluntarily alienate the corpus. Where there are multiple beneficiaries and the beneficiary making a voluntary transfer happens to be the settlor, then estate and gift tax consequences may evolve from this transaction even though the trust is irrevocable and distributions are fully discretionary by the trustee.

As previously discussed, IRC § 2511 imposes a tax on transfer to a trust by completed gift.[209] The key to whether a completed gift has been made in such a transaction is establishing whether the transferor actually reserved a right if he did not leave a provision for any payment to a beneficiary. Since the settlor, as a beneficiary, has the power to voluntarily alienate his interest, there is a possibility that beneficiaries, other than the settlor, will not receive any part of the trust.

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205. *Id.*

206. *Id.* § 166.120.

207. *Id.* (emphasis added).

208. *Id.*

209. I.R.C. § 2511 (2006).

Referring back to our client, James Smith, and applying the STA to his facts, let's assume James is married and transfers property to the trust naming himself, his wife, and his children as permissible beneficiaries. Assume further that when the instrument is drafted, James excludes any provision for distribution of the corpus. Without a provision for payment of the corpus, James may completely alienate or assign his interest in the property at any time. Furthermore, James has the right to revest beneficial title in himself by alienating the property in favor of one of his creditors or to otherwise satisfy his own financial obligations.[210]

As a result, §§ 2038 or 2033 would likely cause the trust property to be included in James's gross estate. Section 2038(a)(1) requires inclusion where the right to alter or terminate is vested in the transferor on his date of death.[211] The fact that his right exists under state law because payment of the corpus was not drafted into the instrument should not limit the application of § 2038.[212] Section 2033 may also be implicated as it requires the value of all property, to the extent of the decedent's interest, to be included in his gross estate.[213] This provision allows the broadest range of inclusion. The estate includes the value of the decedent's beneficial interest at the time of death. However, in this type of trust, the decedent's beneficial interest could very well include the value of the entire trust.

CONCLUSION

The purpose of this Article is to demonstrate the transfer tax implications of self-settled DAPTs. Specifically, in certain situations settlors of such trusts should be treated as the owner of specific property interests for the purpose of determining estate tax liability. By focusing on the level of control that the settlor retains in a given circumstance, the degree of dominion and control retained is evidence that the settlor may not have truly parted with a portion of the property to qualify for treating that portion as a completed transfer for transfer tax purposes.

A transferor who controls a trust by serving as a trust protector, or by retaining a veto power or a nongeneral testamentary power of appointment, continues to exercise the kind of control over the trust property that subjects the property under this control to estate taxation when the settlor dies. Since it is clear that these trusts with these powers are likely to continue to exist, and become even more popular in the foreseeable future,

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210. *See* Treas. Reg. § 25.2511-2 (1999).

211. *See* I.R.C. §§ 2038(a)(1), 2033.

212. *See id.*

213. *See id.* § 2033.

because of the trust market dollars they may bring to states, there are clear policy considerations for applying some uniform tax treatment to these trusts.

First, no person should have the ability to place his assets in trust and establish provisions to avoid both valid claims made against him in a court of law and estate tax consequences at death, unless he has truly parted with the property. The rationale for the rule prohibiting a person from putting his own property in a spendthrift trust with himself as the beneficiary "is that a person cannot put his property beyond the reach of his creditors and still have the use of it for his own personal benefit, but if the money comes from someone else, then the beneficiary's creditors are not deprived of any property that the beneficiary would necessarily have had."[214]

On the other hand, a person earning or inheriting wealth should be able to transfer the property in a manner that would result in paying the least amount of tax. There is nothing illegal about minimizing tax liability, and with proper planning a person should have the ability, within the confines of the law, to protect his assets for family members for as long as possible.

Finally, the state treatment for these trusts should be considered and given deference, where deference is warranted. However, as states continue to enact legislation that gives more control to the settlor, while still treating the property as a separate entity, more scrutiny is required when evaluating these trusts' provisions for transfer tax purposes. Mindful that the primary goal of these self-settled trusts is asset protection, these trusts permit the settlor to retain a substantial amount of control that should be specifically recognized as a valid property interest for transfer tax purposes.

By enacting laws that allow persons who transfer property to trusts designed to protect the transferor's property from creditor claims, and still permit the transferor to maintain an interest, state legislators are permitting these persons to essentially "have their cake and eat it too." While the states benefit from such legislation by means of generated revenue, there is no real benefit to the U.S. Government in foregoing potential revenue from estate taxation. As such, there should be strong support for mandating the inclusion of these particular trust assets in the decedent's gross estate for estate tax purposes.

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214. *In re* Cassada, 86 B.R. 541, 544 (Bankr. E.D. Tenn. 1988).

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NOTES:

THE CONSTITUTIONALITY OF STOP-LOSS AND WHY IT IS BETTER FOR THE COUNTRY THAN THE DRAFT*

*Tim Donahue***

Abstract: Since the end of the Vietnam War, the United States military forces have been entirely comprised of volunteers. It is thought that a military made of professional soldiers will be better trained and more qualified to defend the United States. However, with the onslaught of war in Iraq and Afghanistan the military has experienced increased difficulty in attracting new recruits. In order to maintain troop levels, the military has turned to a policy called "stop-loss."

Stop-loss is the involuntary extension of soldiers' contracts by the President. In short, the President can require that military personnel be kept with their units even though their end of time in service (ETS) date has lapsed. Stop-lossed soldiers are required to stay with their units and have been deployed to combat zones in Iraq and Afghanistan. Since the invasion of Afghanistan in 2001, over 58,300 soldiers have been stop-lossed, and currently 13,000

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** Candidate for Juris Doctor, New England School of Law (2010). M.S., Marketing Analytics, Bentley College – McCallum Graduate School of Business (2007). B.S., Marketing, magna cum laude, Bentley College (2006). I would like to thank my family for their support throughout my school career. I would also like to express my respect and gratitude to all the service members who have served and are currently serving our country. A special thanks to those service members who volunteered their time and stories, without which this article would not have been possible. This article is in honor of my late grandfather, former PFC Daniel F. Donahue, Jr., United States Army, who as a member of the famed Merrill's Marauders – 475th Ranger Battalion, Mars Task Force, fought valiantly in the Pacific Theater during World War II, and former Corporal William D. Friel, United States Army, who served honorably in the 340th Military Police Company at Fort Meade, Maryland during the Korean War.

soldiers are serving under stop-loss orders. The policy has faced harsh criticism from many and has been called a backdoor draft. Stop-loss has been challenged several times in court and has been upheld as constitutional each time. Recently, Secretary of Defense Robert Gates announced that the Army would be phasing out the use of the policy by 2011.

However, the critics of the policy, as well as Secretary of Defense Gates, are overlooking the benefits that stop-loss provides. Stop-loss is preventing the country from having to reinstate the draft, the forced conscription of America's youth. In addition, stop-loss ensures unit cohesion and allows the military to retain soldiers with specialized skills.

This Note calls for the military to continue the stop-lossing of soldiers and argues that while stop-loss is a hardship on the individual soldier, it is actually beneficial to the country as a whole. This is a position that has never been explored in detail before. Other articles concerning stop-loss challenge the policy's constitutionality and call for its immediate end.

Including interviews with both current and former members of the Armed Forces, veterans of Iraq, Afghanistan, and Vietnam, this Note supports rulings of the Ninth Circuit Court of Appeals, as well as the District Court for the District of Columbia, that stop-loss is constitutional. This Note explores how professional soldiers are trained in leadership, survival, and how to fight in a war zone, while draftees are still fundamentally civilians and often lack dedication and discipline. Using insight from a stop-lossed Army Sergeant and a Ranger Qualified First Lieutenant currently stationed in Baghdad, this Note explains that certain members of the military support the idea of stop-loss and are resistant to fighting alongside soldiers who did not volunteer for service.

Using the backdrop of the historical resistance to conscription and military discipline problems with drafted soldiers in the past, this Note argues that having professional soldiers fight wars is the most effective way to succeed in military operations. Finally, this Note offers constructive criticism of the stop-loss policy and outlines ways to improve stop-loss without having to resort to a draft. As long as the United States continues to have a presence on foreign soil, there will be a need for well-trained professional soldiers. Currently, stop-loss is the best way to achieve this.

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INTRODUCTION

Since the end of the Vietnam War, the United States military has been a venture comprised entirely of volunteers.[1] It is thought that a military force made up solely of volunteers will be better trained and more qualified to defend the United States.[2] President Nixon, who ultimately ended the draft, saw an all-volunteer military as a way to alleviate some of the public pressure that had been placed upon the military during the Vietnam War.[3]

Today, those who wish to enter into the military are allowed the freedom to choose between branches, and once in that branch, which component they will enter.[4] These professional soldiers are trained how to

1. *See* William A. Kamens, *Selective Disservice: The Indefensible Discrimination of Draft Registration*, 52 AM. U. L. REV. 703, 730 (2003).

2. *See id.*

3. Neal Devins, *Bring Back the Draft?*, 19 GA. ST. U. L. REV. 1107, 1120 (2003).

4. Elizabeth Cameron Hernandez, *The United States Army Reserve: Welcome to the Hotel California* We are all just prisoners here, 12 ROGER WILLIAMS U. L. REV. 904, 910 (2007). Components are designated as "active duty, reserve, or National Guard." *Id.*

lead troops, fight in a war zone, and survive in the harshest of conditions.[5] However, with the onslaught of war in Iraq and Afghanistan, the military has found it harder to recruit new soldiers into its ranks.[6] In order to maintain troop levels, the military has resorted to a policy known as stop-loss.[7]

The stop-loss policy allows the President of the United States to "suspend any provision of law relating to promotion, retirement, or *separation* applicable to any member of the armed forces whom the President determines is essential to the national security of the United States."[8] In short, the President can require that military personnel be kept with their units even though their end of time in service (ETS) date has lapsed.[9]

The stop-loss policy has come under fire recently and some are calling it a "backdoor draft."[10] The policy has even made its way into

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5. *See infra* text accompanying notes 205-09 (discussing the professional soldier).

6. *See* Eric Schmitt, *Guard Reports Serious Drop in Enlistment*, N.Y. TIMES, Dec. 17, 2004, at A32, *available at* 2004 WLNR 14248058 (discussing the new and larger bonuses that soldiers are being offered in order to entice them to enlist in the National Guard).

7. *See* Hernandez, *supra* note 4, at 911-12 (discussing the evolution of the modern stop-loss policy after the end of the Vietnam War).

8. 10 U.S.C. § 12305 (2006) (emphasis added).

9. Josh White, *Soldiers Facing Extended Tours: Critics of Army Policy Liken It to a Draft*, WASH. POST, June 3, 2004, at A1. Interview with Matthew Benson, E-5 Sergeant, United States Army, in Boston, Mass. (Jan. 20, 2009) [hereinafter Interview with SGT Benson] (notes on file with author). In order to protect the anonymity of military personnel, some of their names have been changed but their ranks have not. Sergeant Benson served a total of nineteen consecutive months in Afghanistan. *Id.* He was stop-lossed after his first fifteen-month tour in Afghanistan in order to keep him in Afghanistan with his unit. *Id.* His contributions to this article have been invaluable. *Id.* He currently lives with his wife and child in upstate New York. *Id.* He stated that if a soldier's ETS date is within ninety days of his unit's deployment to an active war zone that soldier will be stop-lossed and required to remain with his unit through their deployment. *Id.* The soldier will also be given a new ETS date. *Id.*; Interview with John Hayes, E-5 Sergeant, United States Army, in Boston, Mass. (Jan. 20, 2009) [hereinafter Interview with SGT Hayes] (notes on file with author). Sergeant Hayes served fifteen months in Afghanistan and was a member of a unit that saw soldiers get stop-lossed, although he was not. *Id.* He is currently a member of an ROTC program at a small private college in the Northeast and plans to return to active military duty, as an officer, upon graduation. *Id.* "Soldiers will be notified ninety days before their units are to deploy, and by policy, all soldiers must then serve with their units until ninety days after they return. If a soldier's scheduled service end date falls within that window, he or she will be forced to serve the entire tour." *Id.*

10. White, *supra* note 9. During the presidential campaign of 2004, Sen. John Kerry stated that, "the military should not force soldiers to fight." *Id.* Kerry went on to say that, "[y]ou have what is a backdoor draft that has been put into effect . . . [p]eople serving beyond the time of their voluntary service are no longer volunteers." *Id.*

mainstream American culture with the 2008 release of the Paramount Pictures film *Stop-Loss*.[11] With so much media attention being paid to the policy, many are calling for its immediate end.[12] Several lawsuits have been filed challenging the constitutionality of the stop-loss policy, but courts have sided with the military and Congress on the issue.[13]

Those who are opposed to the stop-lossing of military personnel overlook both the advantages of the policy,[14] as well as the ever-present idea that often elicits an even more passionate response from many Americans: the draft.[15] The idea of involuntarily drafting young men to serve in the military during times of war has been a topic that citizens have harshly opposed since the inception of the first Conscription Act[16] all the way through to the Vietnam War.[17]

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11. STOP-LOSS (Paramount Pictures 2008). *Stop-Loss*, the film, follows the story of fictional Staff Sergeant Brandon King upon his return to Texas after serving a tour of duty in Iraq. *Id.* On the date King believes he will be released from the Army, he is told he has been stop-lossed and will be sent back to Iraq. *Id.* Although portions of the film are inaccurate in their portrayal of the stop-loss procedure (most specifically King being notified on his ETS date that he will be stop-lossed–he would have been told well in advance of that date), the film gives a view of the policy through the eyes of a disillusioned soldier and gives those unfamiliar with the policy a glimpse of what it can do to soldiers and their families. *Id.*

12. *See, e.g.*, White, *supra* note 9 ("One Army brigade commander, speaking on the condition of anonymity, said: 'A soldier just said to me, "What happened to the volunteer force? This is a draft."'").

13. *See* Doe v. Rumsfeld, 435 F.3d 980, 988-89 (9th Cir. 2006) (holding that a National Guardsman's challenge to the stop-loss policy was without merit); Santiago v. Rumsfeld, 425 F.3d 549, 560 (9th Cir. 2005) (discussing that the extension of an Army sergeant's contract for eight years did not breach his enlistment contract); Qualls v. Rumsfeld, 412 F. Supp. 2d 40, 45 (D.D.C. 2006) (noting that the failure to notify recruits about the stop-loss policy does not justify a rescission of the enlistment contract); *infra* Part III (discussing the lawsuits filed in opposition of the stop-loss policy).

14. Interview with SGT Benson, *supra* note 9. One of the main rationales behind the policy is to keep unit cohesiveness and not place inexperienced soldiers with experienced units that are about to deploy. *Id.* Sgt. Benson stated, "if I was allowed to get out of the Army right in the middle of the deployment [and] one of the lesser experienced guys in my platoon would have had to fill my shoes . . . []while he may have done a decent job, it is not something that I would have wanted on my conscience[]." *Id. See infra* Part IV.B (outlining the benefits of the stop-loss policy).

15. *See* Carl Hulse, *Military Draft? Official Denials Leave Skeptics*, N.Y. TIMES, July 3, 2004, at A1, *available at* 2004 WLNR 5521974 ("'If the world spun madly out of control, where would they get the boots on the ground?'").

16. Conscription Act of 1863, ch. 75, 12 Stat. 731. *See infra* text accompanying notes 28-37 (discussing the opposition to the Conscription Act of 1863).

17. *See infra* text accompanying notes 68-79 (detailing the public outcry to the draft and the Vietnam War); *see, e.g.*, United States v. O'Brien, 391 U.S. 367, 386 (1968) (upholding

The government's recent announcement that it will phase out the stop-loss policy by 2011 makes the idea of bringing back the draft much more of a reality than an abstract idea.[18] This Note will argue that although stop-loss is a grave hardship on those soldiers who are stop-lossed, learning from the history of this country's resistance toward conscription, bringing back the draft would be a far greater detriment to the country.[19] Part I discusses conscription and public resistance to involuntary military service in the United States throughout history, starting with the Civil War through the Vietnam War. Part II explains the stop-loss policy, how it came about, and how it is implemented. Part III discusses both the legal and scholarly opposition that has been mounted to end the stop-lossing of soldiers; Part III also outlines how the courts' rulings, holding that the policy is constitutional, were correct and well-reasoned. Part IV will argue that stop-loss, while a tragic event for the soldier and his family, is necessary because the stop-loss policy is preventing the draft from being reinstituted in the United States, and the draft would be far worse for the country as a whole. Finally, Part V discusses how improvements can be made to the current stop-loss policy and suggests an alternative to both stop-loss and the draft.

I. The History of Conscription in the United States[20]

A. The Early Years of Conscription

Conscription, the involuntary drafting of individuals to serve in the military,[21] has been used in the United States during five different periods of time: "the [Civil War], World War I, World War II, the Korean War, and in the Vietnam War."[22] The roots of the policy can be traced to the

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the conviction of O'Brien for burning his draft card on the steps of a courthouse). Although *O'Brien* is chiefly cited as a First Amendment, freedom of expression case, O'Brien burned his draft card to express his disdain for the American military's draft procedure and the war that was breaking out in Vietnam. *Id.* at 369-70.

18. *See* Adam Levine, *Gates: 'Stop-Loss' Phasing Out, Families of Fallen to Get Travel Aid*, CNN, Mar. 18, 2009, http://www.cnn.com/2009/US/03/18/pentagon.stoploss.ending/index.html?iref=mpstoryview.com.

19. *See infra* Part IV (discussing how stop-loss only affects certain individuals, while the draft affects the nation as a whole).

20. *See* Timothy J. Perri, *The Economics of US Civil War Conscription*, 10 AM. L. & ECON. REV. 424, 426-27 (2008). Perri states that during the colonial period, individual colonies drafted individuals for the Continental Army. *See id.* However, for the purposes of this article the discussion of the American draft will begin with the Civil War.

21. *See* BLACK'S LAW DICTIONARY 567 (9th ed. 2009). Black's Law Dictionary defines the draft as "[t]he compulsory enlistment of persons into military service." *Id.*

22. Perri, *supra* note 20, at 425.

outbreak of the Civil War in the 1860s, when President Abraham Lincoln saw the need to fill the ranks of the Union Army, and Congress passed what became commonly known as the Conscription Act (the "Act").[23] The Act stated, "all able-bodied male citizens . . . between the ages of twenty and forty-five years . . . shall be liable to perform military duty in the service of the United States when called out by the President."[24]

Opposition to the Act was widespread and hostile,[25] especially over two specific clauses: (1) any man drafted could avoid service by providing an able-bodied substitute; and (2) any man drafted could pay a sum not exceeding $300 in order not to serve.[26] These two provisions of the Act fueled the idea that the Civil War was "a rich man's war, but a poor man's fight."[27]

The tensions over the draft finally erupted in the New York City Draft Riots of 1863.[28] Less than two weeks after General Pickett's fatal charge ended the Battle of Gettysburg,[29] New York City held its first draft under the Act.[30] The riots were "largely instigated by the city's lower and working classes who feared . . . conscription."[31] Over the course of five days, armed mobs overran New York City[32] in what has been described as "the greatest instance of domestic violence in United States history."[33] As described by the Secretary of New York's Prison Association, "[w]hen the

23. Conscription Act of 1863, ch. 75, pmbl., 12 Stat. 731.

24. *Id.* § 1.

25. *See infra* text accompanying notes 28-37.

26. Conscription Act of 1863 § 13.

27. Peter Blanck, *Civil War Pensions and Disability*, 62 OHIO ST. L.J. 109, 157 (2001) (citing Thomas R. Kemp, *Community and War: The Civil War Experience of Two New Hampshire Towns*, *in* TOWARD A SOCIAL HISTORY OF THE AMERICAN CIVIL WAR, EXPLORATORY ESSAYS 31, 48 (Maris A. Vinovskis ed., 1990)). For an in-depth analysis of class during the Civil War, see DAVID WILLIAMS, RICH MAN'S WAR: CLASS, CASTE, AND CONFEDERATE DEFEAT IN THE LOWER CHATTAHOOCHE VALLEY (1998).

28. *See* IVER BERNSTEIN, THE NEW YORK CITY DRAFT RIOTS: THEIR SIGNIFICANCE FOR AMERICAN SOCIETY AND POLITICS IN THE AGE OF THE CIVIL WAR 3 (1990).

29. *See* STEPHEN W. SEARS, GETTYSBURG 440-79 (2003).

30. *See* BERNSTEIN, *supra* note 28, at 6-7.

31. Scott E. Dunn, Book Note, *Copperheads: The Rise and Fall of Lincoln's Opponents in the North*, 197 MIL. L. REV. 173, 175 n.20 (2008). For a visual depiction of the New York City Draft Riots, see GANGS OF NEW YORK (Miramax Films 2002).

32. BERNSTEIN, *supra* note 28.

33. Paul Rosenzweig, *On Liberty and Terror in the Post-9/11 World: A Response to Professor Chemerinsky*, 45 WASHBURN L.J. 29, 31 n.13 (2005).

great riot occurred in 1863 . . . every hiding-place and nursery of crime discovered itself by immediate and active participation in the operations of the mob."[34]

The mob began with attacks on conscription offices that soon escalated into attacks on African Americans, the group the mob saw as being responsible for the war.[35] The riot was finally quashed when 10,000 Union troops,[36] which had just fought at the Battle of Gettysburg, were brought in to disperse the mob.[37] The backlash seen in New York City over the Civil War Draft would not be the last time Americans expressed their disdain over conscription.[38]

B. The Draft in the 20th Century

1. Conscription During World War I

With the outbreak of World War I in Europe, Congress passed the Selective Draft Act of 1917, which brought back the draft in the United States for the first time since the Civil War.[39] However, this time Congress did not allow citizens to avoid service by paying a fee or providing a substitute,[40] although an exception was allowed for conscientious objectors who were opposed to the war on religious grounds.[41]

While the public outcry against the draft did not culminate in riots as it did during the Civil War,[42] there was a fair amount of dissention across

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34. JACOB A. RIIS, HOW THE OTHER HALF LIVES: STUDIES AMONG THE TENEMENTS OF NEW YORK 59 (David Leviatin ed., 1996).

35. *See* ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 32-33 (Henry Steele Commager & Richard B. Morris eds., 2002) (discussing the racial tension between poor, working-class immigrants, and African Americans who were seen by the poor as the cause for the Civil War).

36. THE MILITARY DRAFT HANDBOOK: A BRIEF HISTORY AND PRACTICAL ADVICE FOR THE CURIOUS AND CONCERNED 17 (James Tracy ed., 2006) [hereinafter Tracy, DRAFT HANDBOOK].

37. FONER, *supra* note 35, at 33.

38. *See infra* text accompanying notes 42-53, 58-65, 68-79 (discussing the issues that arose over the drafting of soldiers for World War I, World War II, the Korean War, and the Vietnam War).

39. *See* Selective Draft Act of 1917, ch. 15, 40 Stat. 76.

40. *Id.* § 3; *see also* Eugene Kontorovich, *Liability Rules for Constitutional Rights: The Case of Mass Detentions*, 56 STAN. L. REV. 755, 830 & n.264 (2004).

41. Selective Draft Act of 1917 § 4.

42. *See supra* text accompanying notes 28-37 (discussing the New York City draft riots).

the country.[43] The most fervent of anti-conscription protests took place in the rural South, where many deserters fled to avoid prosecution.[44] The most notable act of draft resistance occurred in Oklahoma in 1917, during a series of incidents that became known as the Green Corn Rebellion.[45] Communities in Oklahoma sent groups of citizens out to "destroy railroad bridges and cut telephone and telegraph wires . . . to keep their areas free of military recruiters."[46]

In addition to protests, the Selective Draft Act faced legal opposition.[47] The plaintiffs in the case were required by the Selective Draft Act to present themselves for duty and by failing to do so were prosecuted and subsequently found guilty.[48] The plaintiffs argued that the drafting of men was a form of involuntary servitude, which would be a violation of the Thirteenth Amendment.[49] The Court unanimously rejected this argument[50] and stated that the Constitution expressly allows for Congress to "declare [w]ar,"[51] as well as the power "[t]o raise and support [a]rmies."[52] Of the men "who refused to comply with the draft requirements during World War I [many] were imprisoned, including 142 who received life sentences, seventeen who were given death sentences (though later commuted), and one who escaped execution by agreeing to travel to the front lines to retrieve the wounded."[53]

2. Conscription During World War II and Korea

Although the United States did not officially enter World War II until the Japanese attack on Pearl Harbor on December 7, 1941,[54] Congress

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43. Tracy, DRAFT HANDBOOK, *supra* note 36, at 20 ("The Civil War riots were not repeated, although there were protests.").

44. *Id.* at 21.

45. *Id.* The rebellion was named "for the time of year when the corn crop would first sprout." *Id.*

46. *Id.*

47. *See generally* Arver v. United States (Selective Draft Law Cases), 245 U.S. 366 (1918).

48. *Id.* at 376.

49. *Id.* at 390; U.S. CONST. amend. XIII, § 1 (outlawing slavery in the United States).

50. *Selective Draft Law Cases*, 245 U.S. at 390.

51. U.S. CONST. art. I, § 8, cl. 11.

52. *Id.* at cl. 12. The convictions of the plaintiffs in the *Selective Draft Law Cases* were upheld under the Supreme Court's ruling. *See Selective Draft Law Cases*, 245 U.S. at 390.

53. César Cuauhtémoc García Hernández, *Radical Environmentalism: The New Civil Disobedience?*, 6 SEATTLE J. FOR SOC. JUST. 289, 309 n.201 (2007).

54. President Franklin D. Roosevelt, Address to Congress (Dec. 8, 1941), *available at* http://www.ibiblio.org/pha/Infamy_Speech/Thumbnail_Display_page.html.
President Roosevelt famously stated:

passed the Selective Training and Service Act of 1940 (STSA).[55] The STSA "established peacetime conscription" in the United States, which for the first time allowed for the drafting of soldiers when the country was not at war.[56] Once the United States entered the war, 10.1 million men would eventually be drafted, which constituted sixty-three percent of the U.S. Armed Forces.[57]

Even though the United States had been attacked at Pearl Harbor,[58] many still opposed the drafting of young men to serve overseas.[59] The most notable of these pacifist movements was the Union Eight, a group of students at the Union Theological Seminary.[60] Members of the Union Eight refused to register with the Selective Service and were sent to the federal penitentiary at Danbury, Connecticut to serve sentences of one year and one day.[61] The acts of the Union Eight and other pacifist groups helped "galvanize[] radical pacifism into a coherent movement."[62]

The U.S. military once again had to call upon draftees to fill the ranks when conflict broke out in Korea.[63] The Korean War led to the drafting of 1.7 million Americans.[64] The pacifist movement began to take a stronghold among certain members of the populous and by 1952, 7777 men were registered as Conscientious Objectors to the War.[65]

> Yesterday, December 7th, 1941 — a date which will live in infamy — the United States of America was suddenly and deliberately attacked by naval and air forces of the Empire of Japan . . . . I ask that the Congress declare that since the unprovoked and dastardly attack by Japan on Sunday, December seventh, a state of war has existed between the United States and the Japanese empire.

55. Selective Training and Service Act of 1940, Pub. L. No. 76-783, 54 Stat. 885.

56. Melissa Murray, *When War Is Work: The G.I. Bill, Citizenship, and the Civic Generation*, 96 CAL. L. REV. 967, 971 (2008).

57. Tracy, DRAFT HANDBOOK, *supra* note 36, at 23.

58. *See* Roosevelt, *supra* note 54.

59. Tracy, DRAFT HANDBOOK, *supra* note 36, at 24 (discussing the objections of many religious groups to the war).

60. JAMES TRACY, DIRECT ACTION: RADICAL PACIFISM FROM THE UNION EIGHT TO THE CHICAGO SEVEN 4-5 (1996).

61. *Id.* at 11. The Union Eight were far from model prisoners and used their time to continue the fight against the war. *See id.* at 12. The group would refuse to eat or work and demanded the prison be desegregated, and eventually they were confined to their cells. *Id.*

62. *See id.* at 13.

63. Selective Service Act of 1948, Pub. L. No. 80-759, 62 Stat. 604 (codified at 50 U.S.C. app. § 451 (2000)); Tracy, DRAFT HANDBOOK, *supra* note 36, at 29. The Draft was reinstated on June 24, 1948, two years before conflict began in Korea. *Id.*

64. Tracy, DRAFT HANDBOOK, *supra* note 36, at 29.

65. *Id.*

3. The Vietnam Era

When war broke out in the small Southeast Asian country of Vietnam, America once again called upon its young men to take up arms.[66] To provide the necessary soldiers for the war effort, Congress passed the Military Selective Service Act of 1967, which once again brought back the draft in the United States.[67] However, due to changing times, the Vietnam War produced a "storm of opposition . . . in Congress, on university campuses, in churches, in the press, and across the nation."[68] "[T]he draft resistance movement targeted a system of conscription that . . . few Americans would defend as fair and equitable."[69] Draft resistance took many forms including the burning of draft cards,[70] draft card turn-in demonstrations,[71] flag burnings and desecrations,[72] and even crossed over into mainstream media through the use of anti-war and anti-draft songs.[73]

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66. *See* ROBERT S. MCNAMARA ET AL., ARGUMENT WITHOUT END: IN SEARCH OF ANSWERS TO THE VIETNAM TRAGEDY 1 (1999) (discussing the number of U.S. soldiers that perished (58,000) in the Vietnam War).

67. *See* Military Selective Service Act of 1967, Pub. L. No. 90-40, 81 Stat. 100 (codified at 50 U.S.C. app. § 451 (2000)). This was the last draft in the United States; President Richard Nixon, with urging from Secretary of Defense Melvin Laird, officially ended the draft on June 30, 1973. ROBERT K. GRIFFITH, JR., THE U.S. ARMY'S TRANSITION TO THE ALL-VOLUNTEER FORCE 1968-1974, at 181 (1996). The United States switched over to an all-volunteer force with assurances from Laird to the President that an all-volunteer military could be a success. *Id.*; *see infra* Part I.B.4 (discussing the end of the draft era in the United States and the transition to the all-volunteer military).

68. GEORGE MCGOVERN & WILLIAM R. POLK, OUT OF IRAQ: A PRACTICAL PLAN FOR WITHDRAWAL NOW 16 (2006).

69. MICHAEL S. FOLEY, CONFRONTING THE WAR MACHINE: DRAFT RESISTANCE DURING THE VIETNAM WAR 10 (2003). Foley's book chronicles the draft resistance movement during the Vietnam War and uses examples of the inequities in the draft process with Muhammed Ali and Bill Clinton as prime examples of how influence and race played a major role in the drafting of soldiers. *Id.* at 10-12.

70. *See generally* United States v. O'Brien, 391 U.S. 367 (1968) (describing how O'Brien and other individuals burned their draft cards on the steps of the South Boston Courthouse and were subsequently tried and convicted of violating the Military Selective Service Act of 1967).

71. WARREN GOLDSTEIN, WILLIAM SLOANE COFFIN, JR.: A HOLY IMPATIENCE 196 (2004) (discussing the draft card turn-in that took place in Washington D.C.).

72. *See generally* Long Island Vietnam Moratorium Comm. v. Cahn, 437 F.2d 344 (2d Cir. 1970) (striking down a New York State statute that banned placing anything on the American flag on the grounds that the statute was overbroad).

73. *See* CREEDENCE CLEARWATER REVIVAL, *Fortunate Son*, *on* WILLY AND THE POOR BOYS (Fantasy Records 1969) (describing the view of the Vietnam War through the eyes of a young man who is being drafted but does not have the political or monetary influence to stop it); COUNTRY JOE & THE FISH, *The "Fish" Cheer/I-Feel-Like-I'm-Fixin'-to-Die Rag*, *on* I-FEEL-LIKE-I'M-FIXIN'-TO-DIE (Vanguard Records 1967) (describing how the government

One of the most notable draft and war resistance moments occurred at Kent State University on May 4, 1970.[74] Students on the campus were protesting the American invasion of Cambodia, which President Richard Nixon had just announced.[75] The Ohio National Guard was called in to disperse the crowd and eventually fired on the students, killing four and wounding nine others.[76] Students eventually filed suit against then Governor John J. Gilligan for his oversight of the Ohio National Guard.[77] The Supreme Court ultimately deemed that the case was a political question and therefore non-justiciable,[78] but the national stigma attached to the Kent State shootings, as well as the Vietnam War, would not fade from the annals of history.[79]

4. The End of the Draft Era in the United States

Amidst pressure from the public, and with assurances from Secretary of Defense Melvin Laird that an all-volunteer force would be successful, President Richard Nixon officially ended the draft on June 30, 1973.[80] In 1980, President Jimmy Carter reinstated the process of having all males

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wanted students to leave their books behind in order to pick up guns and fight); BARRY MCGUIRE, EVE OF DESTRUCTION (Dunhill Records 1965) (describing how eighteen-year-olds were being sent overseas to fight but could not even vote yet).

74. KENT STATE/MAY 4: ECHOES THROUGH A DECADE 1 (Scott L. Bills ed., 1988).

75. *Id.*

76. *Id.*

77. Gilligan v. Morgan, 413 U.S. 1, 3 (1973).

78. *See id.* at 8-12 (discussing the Political Question Doctrine using the test from Baker v. Carr, 369 U.S. 186 (1962)). The modern era political question test includes six parts:

> [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; . . . [2] a lack of judicially discoverable and manageable standards for resolving it; . . . [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; . . . [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; . . . [5] an unusual need for unquestioning adherence to a political decision already made; . . . [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217.

79. *See, e.g.*, SANDRA GURVIS, WHERE HAVE ALL THE FLOWER CHILDREN GONE? 28-29 (2006). John Filo captured the image of Mary Vecchio, a fourteen-year-old runaway, screaming while kneeling over the body of slain Kent State student Jeffrey Miller. *Id.* The photo won Filo the Pulitzer Prize. *Id.*

80. *See* sources cited *supra* note 67.

over the age of eighteen register with the Selective Service.[81] The new Selective Service Act eliminated the requirement that those registered always carry proof of their registration with them.[82] In addition, draft cards were no longer issued to young men upon registration.[83] However, no U.S. citizen has been drafted for military service since the Vietnam War, and the U.S. military has relied solely upon volunteers to fill its ranks.[84]

II. Stop-Loss: Where the Policy Comes From and How It Is Implemented

A. 10 U.S.C. § 12305—Authority of President to Suspend Certain Laws Relating to Promotion, Retirement, and Separation[85]

The Presidential power to stop-loss soldiers can be found in 10 U.S.C. § 12305,[86] which was passed in 1983.[87] This section states, "the President may suspend any provision of law relating to promotion, retirement, or *separation* applicable to any member of the armed forces who the President determines is essential to the national security of the United States."[88] Therefore, the President can suspend separation dates of soldiers if he deems those soldiers necessary to the war effort.[89] Often the soldiers that are stop-lossed are those who have special skills the military values[90] or occupy leadership positions.[91]

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81. Proclamation No. 4771, 3 C.F.R. 82 (1980); *see* Terri L. Mascherin et al., *Reforming the Illinois Criminal Code: Where the Clear Commission Stopped Short of Its Goals*, 41 J. MARSHALL L. REV. 741, 764-65 (2008).

82. Selective Service System: Fast Facts, Draft Cards, http://www.sss.gov/FSdraftcd.htm (last visited Dec. 1, 2009).

83. Mascherin et al., *supra* note 81, at 765.

84. *See* Kamens, *supra* note 1, at 729-30.

85. 10 U.S.C. § 12305 (2006).

86. *Id.*

87. Santiago v. Rumsfeld, 425 F.3d 549, 555 (9th Cir. 2005).

88. 10 U.S.C. § 12305(a) (emphasis added).

89. *See id.*

90. Interview with Victor Hansen, Associate Professor of Law, New England School of Law, in Boston, Mass. (Feb. 2, 2009) [hereinafter Interview with Professor Hansen] (notes on file with author). Professor Hansen is a former Lieutenant Colonel in the United States Army. After completing an ROTC program in college, he served four years as an armor commander in Germany after which he attended law school. He served the remainder of his time in the Army as an officer in the Judge Advocate General's (JAG) Corps, rising to the rank of Lieutenant Colonel. Professor Hansen served a total of twenty years in the Army and now teaches at New England School of Law. He has written several articles about the military and military policy after the attacks of September 11, 2001.

91. *See* Interview with SGT Benson, *supra* note 9. Sergeant Benson was stop-lossed and required to stay with his unit as a Non-Commissioned Officer (NCO).

Stop-loss was first implemented during the Persian Gulf War when the military used the process to maintain unit cohesion prior to the invasion of Iraq.[92] The military was uncertain how long a conflict with Iraq would last and stop-lossed soldiers out of fear that the war would be a long and drawn-out effort.[93] In Operation Iraqi Freedom and the war in Afghanistan combined, over 58,300 soldiers have been affected by stop-loss orders.[94] As of February 2009, 13,000 soldiers remained under stop-loss orders.[95] Although President Obama has set an August 2010 pull out date for U.S. forces in Iraq,[96] there are still plans to increase troop deployments to Afghanistan, which will result in a continual need for soldiers.[97]

B. The Enlistment Contract—the DD Form No. 4/1

Every soldier, regardless of which branch, signs the same enlistment contract.[98] When a person decides to enlist in the military, that person will often go to a recruiting office to meet with a recruiter.[99] After meeting with

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92. Interview with Professor Hansen, *supra* note 90. Professor Hansen stated that as member of the JAG Corps, he and other JAG attorneys were unfamiliar with the stop-loss policy before the government began implementing the process and that the JAGs had to search through the enlistment contracts in order to find the provision that allowed soldiers to be stop-lossed. *Id.*

93. *Id.*

94. Tom Vanden Brook, *DOD Data: More Forced to Stay in Army*, USA TODAY, Apr. 23, 2008, *available at* http://www.usatoday.com/news/military/2008-04-21-stoploss_N.htm.

95. *See 'Stop-Loss' Soldiers Still Waiting for Pay*, UNITED PRESS INT'L, Feb. 23, 2009, http://www.upi.com/Top_News/2009/02/23/Stop-loss_soldiers_still_waiting_for_pay/UPI-14511235397770/.

96. Peter Baker, *Obama's Iraq Withdrawal Plan Gains G.O.P. Support, Including McCain's*, N.Y. TIMES, Feb. 27, 2009, at A8, *available at* 2009 WLNR 3820031. While President Obama has announced a pull out date of August 2010, that does not mean a complete end to U.S. troops in Iraq. *Id.* The plan calls for the removal of about 90,000 of the 142,000 troops currently stationed in Iraq, with hopes of eventually leaving "a residual force of 35,000 to 50,000 troops" in Iraq. *Id.*

97. Interview with Professor Hansen, *supra* note 90 (stating that troops being pulled out of Iraq will most likely "make a left-hand turn into Afghanistan"); John Barry & Evan Thomas, *Obama's Vietnam*, NEWSWEEK, Feb. 9, 2009, at 30, 31 (discussing how the number of troops in Afghanistan is still a far cry from the half a million troops that were sent to Vietnam, but that the 642 deaths suffered are more than those incurred by U.S. forces in their first nine years of involvement in Vietnam).

98. *See* Enlistment/Reenlistment Document Armed Forces of the United States, DD Form No. 4/1, § 10(c), *available at* http://usmilitary.about.com/library/pdf/enlistment.pdf [hereinafter DD Form No. 4/1].

99. *See* Interview SGT Hayes, *supra* note 9; JAMES BRADY, WHY MARINES FIGHT 177 (2007) (discussing how a teenager went to the recruiting office to sign up for the Marines). Brady is a former Marine First Lieutenant who was the commander of a rifle platoon during

the recruiter, the recruit is then given the DD Form No. 4/1 and is told to sign on the line.[100] If the recruit has questions concerning the policies in the contract, the recruiter will briefly explain the sections the recruit has questions on but often does not elaborate.[101] Once the recruit has signed the contract, the military holds the recruit accountable for all sections of the contract,[102] just like any person who signs his or her name to a contract is bound by his or her signature.[103]

Paragraph 10(c) of the contract informs the recruit that he or she could be stop-lossed.[104] The paragraph states that "in time of war or national emergency declared by the Congress, [the recruit] may be required to serve on active duty (other than for training) for the entire period of the war or emergency and for six (6) months after its end."[105] This section of the contract was subject to Congress's declaration of war,[106] a power given to Congress by the U.S. Constitution.[107] This power, however, has also now been given to the President by Congress through the Authorization for Use of Military Force (AUMF).[108]

C. The Authorization for Use of Military Force

Following the attacks of September 11, 2001, Congress passed the AUMF.[109] The AUMF gives the President of the United States the authority:

> [T]o use all necessary and appropriate force against those nations, organizations, or persons he determines planned,

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the Korean War, and is a member of the Chosin Few who fought in harsh winter conditions at the Chosin Reservoir in Korea. *Id.* at 297-302. His book chronicles the stories of Marines from World War I through the current Iraq War, and is mostly told in the words of the Marines themselves. *See generally id.*

100. *See* Interview with SGT Hayes, *supra* note 9.

101. Interview with SGT Benson, *supra* note 9 (discussing how when Benson inquired about the stop-loss provision the recruiter told him that it was nothing to worry about).

102. *See* Interview with SGT Benson, *supra* note 9 (describing how Benson was stop-lossed according to the provisions of the enlistment contract).

103. Ray v. William G. Eurice & Bros., 93 A.2d 272, 278 (Md. 1952) ("The law is clear, absent fraud, duress or mutual mistake, that one having the capacity to understand a written document who reads and signs it, or, without reading it or having it read to him, signs it, is bound by his signature in law . . . .").

104. DD Form No. 4/1, *supra* note 98.

105. *Id.*

106. *Id.*

107. U.S. CONST. art. I, § 8, cl. 11.

108. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 note (2006)).

109. *Id.*

> authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.[110]

In essence, the President of the United States is the Commander in Chief of the U.S. military, a power granted to him by the Constitution,[111] and with the enactment of the AUMF has the express authority from Congress to declare war on anyone he determines was involved in the attacks on the World Trade Center on September 11, 2001.[112] The AUMF was passed on September 18, 2001, and two days later President George W. Bush declared the "'War on Terror.'"[113] Since President Bush declared the War on Terror, the military has implemented the stop-loss policy to maintain troop levels in Iraq and Afghanistan.[114]

The constitutionality of the AUMF was challenged in *Doe v. Bush*, a John Doe lawsuit originally filed in the U.S. District Court for the District of Massachusetts.[115] The suit was brought by active-duty military personnel, the "parents of military personnel," as well as several "members of the U.S. House of Representatives."[116] The plaintiffs argued that it was unconstitutional for the President to declare war on Iraq.[117] The District Court ultimately determined that the case was a political question and this issue was constitutionally delegated to the legislative and executive branches of government.[118] Therefore, the court dismissed the plaintiffs' claims as non-justiciable.[119]

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110. *Id.*

111. U.S. CONST. art. II, § 2, cl. 1.

112. *See* § 2(a), 115 Stat. 224.

113. Megan Gaffney, Boumediene v. Bush: *Legal Realism and the War on Terror*, 44 HARV. C.R.-C.L. L. REV. 197, 198 (2009).

114. *See supra* text accompanying notes 94-97 (discussing the number of soldiers that have been stop-lossed since the beginning of the conflicts in Iraq and Afghanistan). The AUMF was amended with Pub. L. No. 107-243, 116 Stat. 1498 (2002) (codified at 50 U.S.C. § 1541 note (2006)). This resolution gave the President the power to utilize the military in order to "defend the national security of the United States against the continuing threat posed by Iraq." *Id.* § 3(a)(1).

115. Doe v. Bush (*Doe I*), 240 F. Supp. 2d 95, 96 (D. Mass. 2002).

116. Doe v. Bush (*Doe II*), 323 F.3d 133, 134 (1st Cir. 2003).

117. *See Doe I*, 240 F. Supp. 2d at 96 ("The plaintiffs seek to enjoin the President from launching a military invasion of Iraq, asserting that Congress has neither declared war nor taken any action that would give the President the power to wage such a war.").

118. *Id.*

119. *See id.* at 96-97.

The plaintiffs appealed to the Court of Appeals for the First Circuit.[120] The First Circuit ultimately determined that the case was not a political question, but rather that it was not fit for judicial review[121] and affirmed the dismissal of the plaintiffs' claims.[122] The decision was handed down on March 13, 2003;[123] the United States began the war with Iraq six days later by bombing Baghdad on March 19, 2003,[124] followed by the invasion of ground troops just after midnight on March 20, 2003.[125]

III. The Constitutionality of Stop-Loss: Scholarly and Legal Opposition to Implementation of the Stop-Loss Program

The current stop-loss policy has been challenged several times in recent years, but a lawsuit has yet to reach the Supreme Court.[126] Two cases, *Doe v. Rumsfeld*[127] and *Santiago v. Rumsfeld*,[128] were heard by the Court of Appeals for the Ninth Circuit,[129] while the third case, *Qualls v. Rumsfeld*, was heard by the U.S. District Court for the District of Columbia.[130] In each case the courts determined that the stop-loss policy was constitutional.

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120. *See Doe II*, 323 F.3d at 133.

121. *Id.* at 138-39 ("For various reasons, this issue is not fit now for judicial review. For example, should there be an attack, Congress may take some action immediately. The purported conflict between the political branches may disappear. '[T]hat the future event may never come to pass augurs against a finding of fitness.'" (quoting McInnis-Misenor v. Me. Med. Ctr., 319 F.3d 63, 72 (1st Cir. 2003))).

122. *Id.* at 144.

123. *Id.* at 133.

124. John F. Burns, *Threats and Responses: Iraq; Defiant Response*, N.Y. TIMES, Mar. 20, 2003, at A1, *available at* 2003 WLNR 5218700 ("Iraqi television broadcast a speech by a defiant Saddam Hussein this morning, a few hours after the first blasts on Baghdad.").

125. *See* EVAN WRIGHT, GENERATION KILL 57 (2008) (describing how the First Recon Marines entered Iraq in Humvees on the morning of March 20, 2003). Wright was a Rolling Stone reporter embedded with the First Recon Marines, who were the tip of the spear during the invasion in Iraq in 2003. Wright rode in the lead Humvee with the Marines and chronicled their trip from Kuwait to Baghdad. His book was made into a seven-part mini-series that aired on HBO during the summer of 2008. For a visual representation of the U.S. invasion into Iraq see *Generation Kill: Get Some* (HBO television broadcast July 13, 2008).

126. *See* cases cited *supra* note 13.

127. 435 F.3d 980 (9th Cir. 2006).

128. 425 F.3d 549 (9th Cir. 2005).

129. *Doe*, 435 F.3d at 980; *Santiago*, 425 F.3d at 549.

130. 412 F. Supp. 2d 40 (D.D.C. 2006).

A. *Qualls v. Rumsfeld*[131]—the Battle Over the Stop-Loss Provision in the Enlistment Contract

The first modern era stop-loss challenge came in 2005, when David W. Qualls challenged the extension of his contract.[132] Qualls, who had been a member of the Army from 1986 until 1994, enlisted in the National Guard for a term of exactly one year in July of 2003.[133] In October 2003 he was called to active duty, was immediately subject to stop-loss, and had his ETS date changed to December 24, 2031.[134] Qualls and seven other members of the Army who were subject to stop-loss brought suit against then Secretary of Defense Donald Rumsfeld and requested an immediate release from active military service.[135] Qualls claimed that the Army's extension of his contract was a breach of the contract, that the Army's failure to disclose to him that he could be stop-lossed was a misrepresentation, and that the Army deprived him of due process.[136]

In dismissing Qualls's claim that the Army failed to notify him that his contract could be extended and therefore breached the contract he signed, the court stated that the six-month extension mentioned in the contract provided "general notice of the possibility of involuntary extension."[137] The court refuted Qualls's claim that the country was not in a "state of war" by stating that the AUMF was a congressional declaration of war.[138]

Turning to Qualls's misrepresentation claim, the court focused on the National Guard website that advertised the "Try One" program.[139] The program allowed for members of the military who had already served to enlist for a term of exactly one year after which time their commitment would end.[140] "The court did not review the merits of a possible claim of fraud and misrepresentation, because it found that Qualls's claim was facially insufficient."[141] In order to succeed on a claim for fraud or misrepresentation, Qualls needed to show: "(1) a false representation or non-disclosure of material facts, (2) made with knowledge of its falsity, (3)

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131. 357 F. Supp. 2d 274 (D.D.C. 2005).

132. *See generally id.*

133. *Id.* at 278.

134. *Id.*

135. *Id.*

136. *Id.* at 280, 285.

137. Hannah Dyer, Comment, *Keeping Faith: The United States Military Enlistment Contract and the Implementation of Stop-Loss Measures*, 34 PEPP. L. REV. 791, 809 (2007).

138. *Qualls*, 357 F. Supp. 2d at 284.

139. *Id.* at 285.

140. *Id.*

141. Dyer, *supra* note 137, at 810.

with an intent to induce reliance, and (4) reasonable reliance on that representation."[142] The court found that Qualls did not "prove his own reasonable reliance on any affirmative representations or omissions."[143]

Finally, the court dismissed Qualls's due process claim, holding that even if the extension of his contract did "deprive[] him of due process" he was given notice in his enlistment contract.[144] Furthermore, the court noted "the Army's decision to extend Qualls was not arbitrary or capricious, because Qualls was treated like similarly situated enlistees subject to the standard terms of the enlistment contract and statutes that permit involuntary extension."[145]

In her Comment *Keeping Faith: The United States Military Enlistment Contract and the Implementation of Stop-Loss Measures*, Hannah Dyer argues that the court was too quick in dismissing Qualls's claims.[146] She points out that "[t]he court's analysis paid little attention to the misrepresentation and due process arguments, in favor of a lengthy notice analysis, in its decision on breach."[147] The error in Dyer's argument is two-fold: (1) by going into detail on the breach of contract claim, the court also addressed the due process claim,[148] and (2) Qualls did not produce enough evidence on his own behalf to warrant the court to go into much detail on the claim.[149] By showing that there was no breach of contract, the court also demonstrated that no deprivation of due process existed because Qualls was given notification he could be stop-lossed in his contract.[150] In regard to Qualls's misrepresentation claim, the court stated, "Qualls . . . offered no evidence of his own reliance on the Army's representations, or, for that matter, his own reliance on the Army's alleged omissions."[151] Without more from Qualls, there was nothing else for the court to determine on this matter.[152]

142. *Qualls*, 357 F. Supp. 2d at 284.
143. Dyer, *supra* note 137, at 811.
144. *Qualls*, 357 F. Supp. 2d at 285.
145. *Id.*
146. Dyer, *supra* note 137, at 813-14.
147. *Id.* at 813.
148. *See Qualls*, 357 F. Supp. 2d at 282-84.
149. *Id.* at 285.
150. *Id.*
151. *Id.*
152. *See id.*

B. *Santiago v. Rumsfeld*[153]—the Oregon National Guardsman

Emiliano Santiago enlisted in the Army National Guard on June 28, 1996 for an eight-year term.[154] By 2004, Santiago was a sergeant doing his monthly commitment activities at Pendleton, Oregon.[155] In April of 2004, Santiago's unit "received a 'mobilization alert order'" and in May "the commander of Santiago's company 'announced to the soldiers that the unit was going to deploy, and that the entire unit was under stop-loss.'"[156] On June 11, Santiago learned that his enlistment was not going to end on June 27, 2004, his original ETS date, but rather his new ETS date was December 24, 2031.[157]

Santiago argued that the military breached his enlistment contract, that his unit was on alert and not active duty, making stop-loss non-applicable to him, and that his constitutional due process rights were violated.[158] In regard to Santiago's contract claim, the court stated that "traditional principles of contract law" govern enlistment contracts.[159] The court ruled that the contract clearly stated that the terms of Santiago's enlistment were "subject to existing federal laws and regulations that may not be spelled out in the contract," and 10 U.S.C. § 12305, the stop-loss provision, was one such statute; therefore, the contract was not breached.[160]

In dismissing Santiago's claims that because he was on alert and not active duty, therefore stop-loss should not apply to him, the court held that the plain language of 10 U.S.C. § 12305 states, "the President may suspend any provision of law relating to promotion, retirement, or separation applicable to *any member of the armed forces* who the President determines is essential to the national security of the United States," and therefore, this applied to soldiers on alert or active duty.[161] Finally, in dismissing Santiago's due process claim, the court held that "[i]f Santiago's rights under his enlistment contract [had] not been violated, it is difficult to see

153. 425 F.3d 549 (9th Cir. 2005).

154. *Id.* at 552.

155. *See id.*

156. *Id.* at 553.

157. *Id.* Santiago's ETS date in 2031 was set for administrative convenience. *Id.* at 559. "The stop-loss policy makes clear that soldiers 'will generally be mobilized for an initial period of [twelve] months, but may be extended for a cumulative period up to, but not to exceed, [twenty-four] months.'" *Id.*

158. *Id.* at 554, 556, 559.

159. *Santiago*, 425 F.3d at 554.

160. *Id.* at 555.

161. *Id.* at 557, 559.

how his constitutional claim—which is essentially a variation of his breach of contract claim—can prevail."[162]

In her article, Hannah Dyer argues that Santiago's reading of the 10 U.S.C. § 12305 was proper.[163] Santiago read an exception into the statute that would exempt him from stop-loss because "[i]n [his] view, the words 'during any period members of a reserve component are serving on active duty' were meant to provide a limitation."[164] However, in reading the statute so narrowly, both Santiago and Dyer ignore the portion of the statute that states "the President may suspend any provision of law relating to promotion, retirement, or separation applicable to *any member of the armed forces* who the President determines is essential to the national security of the United States."[165] Clearly the court determined that this portion of the statute superseded the portion Santiago cited,[166] and although Santiago was only on alert, the President felt his retention was "essential to the national security of the United States."[167]

C. *Doe v. Rumsfeld*[168]—the California National Guardsman

In May of 2003, an eight-year Army veteran, who would eventually bring a claim under the name John Doe, signed on with the National Guard under a "Try One" program which "allowed active duty veterans to enlist for a one-year term before making a further service commitment."[169] Doe signed on again for another one-year term in February of 2004, making his new ETS date May 1, 2005.[170] In July of 2004, Doe's unit was ordered to active duty to support Operation Iraqi Freedom.[171] Due to the activation of his unit, Doe was told his new ETS date would be March 31, 2006, almost eleven months past his initial ETS date.[172] Doe was never sent to Iraq due to a medical condition, which led him to be hospitalized in California.[173] Doe filed suit in October of 2004, and the district court dismissed his

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162. *Id.* at 559; *see* text accompanying notes 147-51 (discussing why Qualls's contract claims were rejected for the same reasons).

163. *See* Dyer, *supra* note 137, at 819.

164. *Id.* at 816.

165. 10 U.S.C. § 12305 (2006) (emphasis added).

166. *See Santiago*, 425 F.3d at 557-58.

167. 10 U.S.C. § 12305.

168. 435 F.3d 980 (9th Cir. 2006).

169. *Id.* at 983.

170. *See id.*

171. *Id.*

172. *Id.*

173. *Id.*

motion for a temporary restraining order on October 5, 2004, and proceeded to dismiss the remainder of his claims on March 15, 2005.[174]

Doe appealed to the Court of Appeals for the Ninth Circuit arguing that the President's extension of his contract was improper under 10 U.S.C. § 12305.[175] Doe argued that the laws governing his ETS date had to be suspended,[176] "and that the section only provides that the President 'may' suspend these laws; suspension does not occur as an operation of law."[177] Doe claimed that "the President never 'exercise[d] his authority under section 12305 by suspending laws relating to separation,' nor did he subsequently '[make] the necessary determination[s] that a soldier [was] essential to national security.'"[178] Without following these steps, Doe claimed that a soldier's contract could not be extended.[179]

The Ninth Circuit dismissed Doe's claim that the President had to follow specific steps by stating that MILPER (Military Personnel)[180] Message No. 03-040, which was issued on November 21, 2002, "operationalized the [stop-loss] policy."[181] The MILPER Message stated: "The provisions of regulations governing voluntary retirements, separations, and REFRADs of officers and enlisted soldiers . . . are suspended . . . ."[182] Therefore, this message served as both the suspension of law and a valid extension of Doe's contract.[183]

Dyer takes issue with the court's reasoning in *Doe*[184] and claims that the court oversimplified Doe's claim.[185] She states, "[t]he court determined that the MILPER Message served to both suspend and extend, but gave no reason why the court should consider such a simultaneous declaration as satisfying the specific statutory language requirement of a suspension."[186]

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174. *Doe*, 435 F.3d at 983-84.

175. Brief of Appellant at 6, Doe v. Rumsfeld, 435 F.3d 980 (9th Cir. 2006) (No. 05-15680) [hereinafter Doe's Brief].

176. *Id.* at 8.

177. Dyer, *supra* note 137, at 821.

178. *Id.* (quoting Doe's Brief, *supra* note 175, at 8).

179. *See id.*

180. Dana Chase, *Person Authorized to Designate Disposition (PADD) Update*, 2006 ARMY LAW. 25.

181. Doe v. Rumsfeld, 435 F.3d 980, 984 (9th Cir. 2006).

182. MILPER Message No. 03-040, TAPC-PDT-PM (Nov. 21, 2002), *available at* http://www.armyg1.army.mil/MilitaryPersonnel/Hyperlinks/Adobe%20Files/MILPER%2003%20040.pdf. REFRAD stands for "Release from Active Duty." Sutton v. United States, 65 Fed. Cl. 800, 805 (Fed. Cl. 2005).

183. *Doe*, 435 F.3d at 985.

184. Dyer, *supra* note 137, at 826.

185. *Id.*

186. *Id.*

Dyer's argument is that the statute makes no specific mention that simultaneous actions can satisfy the stop-loss policy.[187] However, Dyer ignores the fact that the statute does not say the opposite either: that simultaneous actions cannot satisfy the provisions of stop-loss.[188] Since the country was in a state of emergency, as declared by President Bush, the court felt that stop-lossing Doe was "essential to the national security of the United States"[189] and that the President had followed the proper steps in stop-lossing Doe.[190]

D. Stop-Loss Cases in the Aggregate

The district court in *Qualls* stated in its conclusion an important factor applicable to all the stop-loss cases: that great harm to the military would result if the plaintiffs were successful.[191] The court concluded that even though Qualls was one individual allowing him out of his contract "would open the door" to similar lawsuits and would ultimately threaten the military.[192] "In the aggregate, the harm to the Army, though 'somewhat removed and abstract,' is nonetheless real in that it 'present[s] the possibility of substantial disruption and diversion of military resources.'"[193]

IV. Why Stop-Loss Is Better for the Country Than the Draft

Although the United States has historically used the draft to fight wars,[194] since the end of the Vietnam War the military has not drafted anyone into its ranks.[195] Rather than draft civilians, the military has relied on volunteers[196] and has molded them into professional soldiers.[197] Having professional soldiers is a benefit not only to the military, but the country as a whole.[198] Drafting civilians leads to many problems both within the military[199] and the general population.[200] Ultimately, due to the issues

187. *Id.*

188. *See* 10 U.S.C. § 12305 (2006).

189. *Id.*

190. Doe v. Rumsfeld, 435 F.3d 980, 984-85 (9th Cir. 2006).

191. Qualls v. Rumsfeld, 357 F. Supp. 2d 274, 286-87 (D.D.C. 2005).

192. *See id.* at 286.

193. *Id.* (quoting Parrish v. Brownlee, 335 F. Supp. 2d 661, 669 (E.D.N.C. 2004)).

194. *See supra* Part I.A-B.

195. *See supra* Part I.B.4 (discussing the end of the draft era in the United States).

196. Kamens, *supra* note 1, at 730.

197. *See infra* text accompanying notes 205-15 (discussing the professional soldier).

198. *See infra* Part IV.A.

199. *See infra* text accompanying notes 216-21 (describing disciplinary problems with soldiers during the Vietnam War).

surrounding the drafting of civilians, stop-loss is a more effective means of maintaining troop levels.[201]

A. Soldiers Are Professionals; Draftees Are Civilians.

The draft leaves the military full of soldiers who are "still fundamentally civilians and [do] not understand the purposes of . . . war[], they and their families often become disillusioned or even deeply alienated."[202] Fighting in a war zone is not something everyone, even highly trained personnel, is equipped to handle.[203] It would seem counterintuitive to place civilians in a war zone and ask them to perform acts that even professional soldiers may have trouble doing.[204]

Soldiers are professionals trained in leadership, survival, and how to fight in a war zone.[205] War itself is "a profession [that is] highly specialized" and cannot merely be done by anyone.[206] In his book, *Why Marines Fight*, former Marine First Lieutenant James Brady states, "[n]ot all men are meant to fight in wars and fewer still do it well."[207] Serving in the military and being deployed to a war zone are events that ultimately shape the life of the soldier.[208] "'Fighting in a war—and particularly the

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200. *See supra* text accompanying notes 68-79 (detailing resistance to the draft and Vietnam War).

201. *See infra* Part IV.A-B.

202. CHALMERS JOHNSON, THE SORROWS OF EMPIRE: MILITARISM, SECRECY, AND THE END OF THE REPUBLIC 59 (2004).

203. E-mail from Jeffrey Maranich, First Lieutenant, United States Army, to Tim Donahue, Juris Doctor Candidate, New England School of Law (Dec. 8, 2008, 11:09 EST) (on file with author). First Lieutenant Maranich graduated from the United States Military Academy at West Point and served on the ground in Iraq. *Id.* He stated that the worst thing he saw during his time in Iraq was witnessing a seven-year-old child fire a semi-automatic weapon at him, and all the training in the world did not prepare him for that. *Id.* The First Lieutenant now works in the private sector and lives with his wife and four children in suburban Arizona. *Id.*

204. *See id.*

205. *See, e.g., id.*

206. BRADY, *supra* note 99, at 4.

207. *Id.*

208. *See, e.g.*, Interview with David J. Prybyla, Lieutenant Colonel, United States Army (Retired), in Boston, Mass. (Feb. 9, 2009) [hereinafter Interview with LTC Prybyla] (notes on file with author). LTC Prybyla served two tours of duty in Vietnam after he voluntarily joined the service following his college graduation. *Id.* His first tour of duty was as a First Lieutenant with the 173rd Airborne Brigade as a platoon leader, company executive officer, and company commander. *Id.* During his first tour, he was wounded by shrapnel and awarded his first of two Purple Hearts. *Id.* His second tour of duty was as a Captain where he served as a battalion senior advisor to an Army Republic Vietnam (ARVN) infantry battalion. *Id.* He was wounded by rifle fire during his second tour of duty and received his

drawn-out service in [a] war[] of attrition such as . . . Iraq—carries with it a heavy cost that affects you for the rest of your life.'"[209]

In addition to the toll that war takes even on professionals, soldiers in today's military are resistant to the idea of drafting civilians.[210] According to Ranger Qualified First Lieutenant Anthony Dales, the Army "need[s] professional and dedicated soldiers[, and] it takes two [professional] soldiers to guard and correct one [under qualified] soldier."[211] A major part of unit cohesion is trust, and soldiers rely upon other members of their units to survive in a combat zone.[212] Many active military personnel harbor some disdain, even towards reservists, who make up a large portion of the U.S. fighting force.[213] Even though reservists have volunteered to be members of the military, they are often seen as being underprepared and not as well trained as full-time soldiers.[214] In some situations reservists, because of their lack of training, react to situations inappropriately.[215]

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second Purple Heart. *Id.* He served a total of eighteen years and ten months and retired due to wounds he received during his second tour of duty. *Id.* During his distinguished military career, LTC Prybyla was awarded two Purple Hearts, two Silver Stars, and three Bronze Stars for valor. *Id.* LTC Prybyla is the father of two sons and now lives with his wife in Florida. *Id.*

209. BRADY, *supra* note 99, at 26 (quoting an interview with Sen. James Webb of Virginia, a Vietnam veteran and father of Lance Corporal James Webb who served in Iraq).

210. Interview with Anthony Dales, Ranger Qualified First Lieutenant, United States Army, in Boston, Mass. (Mar. 3, 2009) [hereinafter Interview with 1LT Dales] (notes on file with author). As this is being written in March 2009, 1LT Dales is serving a twelve-month tour of duty with the First Cavalry in Iraq and is currently stationed at the Brigade Headquarters in Baghdad. *Id.* He is a 2007 graduate of Texas A&M University, where he served as a member of the ROTC program and the Texas A&M Corps of Cadets. *Id.* He is scheduled to return to the United States in February 2010. *Id.*

211. *Id.* 1LT Dales also expressed that the military would be better served by just giving the money it would spend on draftees to the professional soldiers as benefits and incentives. *Id.*

212. *See* BRADY, *supra* note 99, at 243-46 (describing how a Marine threw himself on top of wounded Marines in order to shield them from enemy fire).

213. *See* Interview with Cody R. Williams, Lance Corporal, United States Marine Corps (Retired), in Boston, Mass. (Mar. 3, 2009) [hereinafter Interview with LCPL Williams] (notes on file with author). Lance Corporal Williams served five years active duty with the U.S. Marine Corps. *Id.* He is a third generation Marine who served from 1996 to 2001. *Id.* He is now a law student in the Boston area. *Id.*

214. *Id.*

215. *See* WRIGHT, *supra* note 125, at 280-83 (describing how Marine reservists lit a friendly village on fire). *But see* Interview with Professor Hansen, *supra* note 90 (explaining that at the beginning of the wars in Iraq and Afghanistan reservists were often viewed by their active duty counterparts with less respect, as the wars continued reservists have played key roles, and they often gained the respect of their active duty counterparts); Interview with LTC Prybyla, *supra* note 208 (discussing that once in battle in Vietnam he could not recall

Disciplinary problems also become an issue when soldiers are forced into service as opposed to volunteering for the military.[216] Looking at statistics from the Vietnam era, when 1.9 million Americans were drafted,[217] the discipline records show a drastic increase in soldiers going absent without leave (AWOL).[218] Incidents in "which soldiers were AWOL for more than thirty days rose from about fifteen per thousand troops in 1966 to approximately seventy per thousand by 1972."[219] The military had approximately 1.5 million incidents of soldiers going AWOL during Vietnam, and at the War's peak "an American soldier was going AWOL every two minutes, and deserting every six minutes."[220] Over the course of the Vietnam War "[a]pproximately 100,000 U.S. soldiers were discharged for 'absence offenses'" and "more than 450,000 received less-than-honorable discharges for other reasons, ranging from drug abuse to disciplinary problems."[221] It is fair to extrapolate that if the draft were reinstated, these same types of disciplinary problems would occur again with soldiers who did not volunteer for service.[222] The idea of having untrained, undisciplined soldiers in the ranks of the military can be summed up by the words of Ranger Qualified First Lieutenant Anthony Dales; when asked if he would want to serve with draftees, he stated: "We want people that want to be here."[223]

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what members of his platoon were draftees or were volunteers and that they all fought admirably). Please note that the author does not mean to be disrespectful in any way towards any soldier, reservist or regular, who has fought in any war. The author is using the example written by Evan Wright to show that the rift between reservist and regular soldiers does exist and could potentially get worse if soldiers are drafted and forced into service. The author has great respect for anyone who has served the United States in any form or fashion.

216. *See* Interview with Professor Hansen, *supra* note 90 (discussing how the number of courts martial increased during the years that the United States was fighting in Vietnam).

217. Tracy, DRAFT HANDBOOK, *supra* note 36, at 14.

218. KEVIN HILLSTROM & LAURIE COLLIER HILLSTROM, THE VIETNAM EXPERIENCE 135 (1998).

219. *Id.*

220. *Id.* ("AWOL and desertion offenses accounted for a total loss of roughly one million man-years of military service . . . in 1968 alone, absenteeism was costing the military the equivalent of ten combat divisions of fifteen thousand men each.").

221. *Id.* at 134.

222. *See supra* text accompanying notes 216-21; *see also* Interview with LCPL Williams, *supra* note 213 (discussing how Lance Corporal Williams joined the Corps because of its discipline and his willingness to accept the discipline and challenge himself through it).

223. Interview with 1LT Dales, *supra* note 210.

B. The Advantages of the Policy

There are several advantages to stop-loss that opponents of the policy are too quick to ignore.[224] First, the policy allows the military to retain soldiers who have specialized skills.[225] Many soldiers that are stop-lossed possess leadership skills[226] or other abilities such as speaking foreign languages or working with highly technical pieces of equipment.[227] Retaining these individuals in a time of war is important for the military because finding and training their replacements would be both time consuming and costly.[228]

Second, stop-loss maintains unit cohesion.[229] The policy is "a way to promote continuity within deployed units and to avoid bringing new soldiers in to fill gaps left in units by those who would otherwise have gone home when their enlistments ran out."[230] Stop-loss avoids putting under-qualified soldiers in positions that they may not be able to handle.[231] One stop-lossed soldier even stated:

> [I] wouldn't want to leave [my] buddies with someone less qualified to fill [my] position. In other words, if I was allowed to get out of the Army right in the middle of the deployment [and] one of the lesser experienced guys in my platoon would have had to fill my shoes . . . []while he may have done a decent job, it is not something that I would have wanted on my conscience[].[232]

The ability to trust soldiers in combat is a factor that can never be underestimated, and it is important for units to keep their continuity throughout their tours of duty; stop-loss ensures that this continuity will not be disrupted.

V. Improvements and an Alternative to Stop-Loss

Although stop-loss has been proven to be constitutional and beneficial to the military, there are still weaknesses in the program. In order to

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224. *See infra* text accompanying notes 225-32.

225. *See* Interview with Professor Hansen, *supra* note 90.

226. *See* Interview with SGT Benson, *supra* note 9.

227. Interview with Professor Hansen, *supra* note 90.

228. *See id.*

229. Monica Davey, *The Conflict in Iraq: Challenging the Army: The Troops; Eight Soldiers Plan to Sue Over Army Tours of Duty*, N.Y. TIMES, Dec. 6, 2004, at A15, *available at* 2004 WLNR 13139239.

230. *Id.*

231. *See* Interview with SGT Benson, *supra* note 9.

232. *Id.*

improve the effectiveness of the policy, several changes should be made. In addition, some believe it is not plausible to have a draft in the United States today, and that an alternative for both stop-loss and the draft needs to be found.

A. Improvements to the Stop-Loss Policy

A glaring weakness in the stop-loss policy is that because stop-lossed soldiers are technically "getting out of the [military]" they are not eligible to be promoted during their stop-loss tours.[233] Often platoons end up with more non-commissioned officers (NCOs)[234] than the platoon is slotted for.[235] This leads to NCOs not being able to build their leadership skills because stop-lossed soldiers are still in their ranks.[236] If the military could find a way to promote the stop-lossed soldiers, it could avoid leadership conflicts and produce better soldiers.[237]

Another weakness with stop-loss is the pay stop-loss soldiers receive, which the government has tried to address.[238] Although the military has agreed to pay soldiers bonuses up to $500 per month for the time they are stop-lossed, these bonuses have yet to be paid.[239] Congress appropriated an extra $72 million to aid in the payment of bonuses to soldiers in October 2008, but soldiers are still awaiting their payments.[240] As Representative John Murtha stated, "'if the Defense Department is going to insist on holding servicemembers under stop-loss orders, then they should be compensated for their service.'"[241]

Finally, the military could do a more effective job of explaining the program to new recruits.[242] Recruiters often inadequately explain the stop-loss provision in the contract, and when recruits do ask questions about stop-loss, recruiters gloss over the subject in order to have the recruit sign

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233. *Id.*

234. Krystyna M. Cloutier, *Marching Toward War: Reconnoitering the Use of All Female Platoons*, 40 CONN. L. REV. 1531, 1559 (2008).

235. Interview with SGT Benson, *supra* note 9 (discussing how his platoon ended with six or seven E-5 [enlisted rank 5] sergeants when the platoon was only slotted for three).

236. *Id.*

237. *Id.*

238. *See* Gregg Zoroya, *Soldiers Still Waiting for Tour Bonuses: Nearly 13,000 Affected by the 5-Month Delay*, USA TODAY, Feb. 23, 2009, at 1a, *available at* http://www.usatoday.com/news/military/2009-02-22-stop-loss-pay_N.htm.

239. *Id.*

240. *Id.*

241. *Id.* (quoting Rep. John Murtha of Pennsylvania).

242. *See* Interview with SGT Benson, *supra* note 9; Interview with SGT Hayes, *supra* note 9.

the contract.[243] Since the contract does not outline in detail what stop-loss is and how it is implemented, it would be beneficial to require recruiters to inform the recruit exactly what the program is and how it could affect them.[244] Such measures could limit soldiers' suits against the military for inadequate disclosure of the stop-loss provision during recruiting.[245]

B. An Alternative to Stop-Loss—Universal Compulsory Service

In the United States, some believe that if the military ceases the stop-lossing of soldiers a draft will be imminent in order to fight the wars in Iraq and Afghanistan.[246] However, the United States could adopt the policies of other countries that require compulsory civil service of all citizens.[247] In Israel, all males and females are required to serve two years in the military upon turning eighteen.[248] Serbia requires a six-month compulsory military service of all males before the age of thirty-five.[249]

While compulsory military service may not be plausible in the United States,[250] some sort of compulsory service to the country may help draw more individuals into the military if it is one of the choices of service provided.[251] One project, suggested by retired Army Lieutenant Colonel David J. Prybyla, involves having "[e]ach [citizen upon turning eighteen years of age,] . . . submit a 'dream sheet' for the service that [he or she] would like to perform."[252] Individuals could choose between service in the "military, Peace Corps, infrastructure work projects, forestry service, hospital programs, etc."[253] The program would require a two-year "term of service," and would ultimately make the country stronger and it may

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243. *See* Interview with SGT Benson, *supra* note 9; Interview with SGT Hayes, *supra* note 9.

244. *See* DD Form No. 4/1, *supra* note 98.

245. *See supra* Part III.A (discussing Qualls's battle with the Army over the enlistment contract).

246. *See, e.g.*, Interview with LTC Prybyla, *supra* note 208.

247. *See* Interview with SGT Benson, *supra* note 9 (discussing compulsory civil service in Israel).

248. *Id.*

249. *See* Associated Press, *Sports People: Pro Basketball; Deferment for Divac*, N.Y. TIMES, Sept. 19, 1989 at B10, *available at* 1989 WLNR 2104392 (discussing professional basketball player Vlade Divac).

250. *See* Interview with LTC Prybyla, *supra* note 208 (discussing how Americans have become content to allow others to fight for them).

251. *Id.* (describing a system in which every citizen upon turning eighteen should be required to do some form of civil service whether it be military, peace corps, or working on infrastructure within the United States).

252. *Id.*

253. *Id.*

encourage those who choose to serve in the military to reenlist once their term of service is up.[254] Lieutenant Colonel Prybyla believes that by serving the country, young adults will have a better understanding of how political decisions affect the country and will ultimately give America's youth a better appreciation for the United States.[255]

CONCLUSION

Although the United States has made a commitment to withdraw most of its troops from Iraq by August of 2010,[256] there are still plans to increase troop deployments to Afghanistan.[257] With a planned military presence on foreign soil, the United States will continue to need soldiers to fill the ranks of the armed services.[258] The announcement by Secretary of Defense Robert Gates on March 18, 2009 that the military will phase out stop-loss by 2011, now puts even more pressure on the military to come up with a solution in order to maintain troop levels.[259] Although stop-lossing of soldiers may not be the most effective way to ensure the adequate number of soldiers, it has been proven to be constitutional and is better for the nation as a whole than the drafting of civilians. Soldiers are professionally trained in warfare, leadership, and survival, and have volunteered for their positions. Draftees, on the other hand, are still fundamentally civilians,

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254. *Id.*

255. *See id.* Lieutenant Colonel Prybyla stated:

> By virtue of serving my country via the military I have had the experiences of a lifetime. To be able to live in cultures other than that of my birthright has given me an awareness of how great a country I live in. We are not perfect by any means. But, my [three] years in Germany and [two] years in Turkey gave me an appreciation for what we have beyond a casual vacation to these same places. I have seen first hand how our political decisions affect the people in the countries where I have lived. I have made friends in these countries and was able to engage them in discussions that I would never have been able to had I not lived there. More importantly, when the tour of duty was over in these countries, I was ready to come home to the country I missed [the United States].

Id.

256. Baker, *supra* note 96.

257. *See* Barry & Thomas, *supra* note 97, at 31.

258. *See id.*

259. *See* Levine, *supra* note 18.

often cause disciplinary issues,[260] and cost the military massive amounts of manpower through desertion and forced discharges.[261]

By ceasing the stop-loss policy, the government is now placing soldiers at risk of being outmanned[262] and fighting a war with no clear direction.[263] The outcome many fear the most is that Afghanistan will become another Vietnam, and as Daniel Ellsberg, the contractor who "leaked the Pentagon papers, used to say about Vietnam, '[i]t was always a bad year to get out of Vietnam[,]' [t]he same is all too true for Afghanistan."[264] In order to avoid becoming bogged down in another Vietnam, it is imperative that the government continue to ensure that troop levels remain high, and stop-loss is the best way to ensure this.

The drafting of civilians, while it has been used in the past to fight U.S. wars,[265] is something the country is no longer prepared to accept.[266] While stop-lossing soldiers often leads to personal tragedy for individual soldiers, these men and women have volunteered for service and signed a contract with the knowledge that they could be stop-lossed. With many servicemen and women still overseas fighting for the United States, it is important that the military give them the troop support they need to be victorious and, as of right now, stop-loss is the best way to achieve this goal.

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260. *See supra* text accompanying notes 216-21 (discussing AWOL soldiers and discipline problems during the Vietnam War).

261. *See supra* note 220 and accompanying text; *supra* text accompanying note 221.

262. *See* Hernandez, *supra* note 4, at 904.

263. *See* Levine, *supra* note 18; *see also* Barry & Thomas, *supra* note 97, at 31.

264. Barry & Thomas, *supra* note 97, at 35.

265. *See supra* Parts I.A-B.3 (describing conscription from the Civil War through the Vietnam War).

266. *See* Interview with LTC Prybyla, *supra* note 208 (discussing how Americans have become content to allow the government to take care of the country when "times are bad"). "In regards to the draft, we do not have the moral backbone to sacrifice [two] years of our lives to make our nation strong. We have found it easier to pay someone else to protect us than to accept personal responsibility." *Id.*

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NOBLE IN THEORY, VAIN IN PRACTICE: A CRITIQUE OF LEVEL ONE SEX OFFENDERS IN MASSACHUSETTS

Jenai J. Cormier[*]

Abstract: The Jacob Wetterling Act, Megan's Law, and the Adam Walsh Act give states authority to develop sex offender registration schemes for the legitimate state purpose of community protection. These federal mandates are designed to protect children, some of society's most vulnerable members, from sex crimes. Sex crimes are unique in nature. They invade a person's autonomy to an extent that no other crime can. What was lost or damaged often cannot be recovered through traditional retributive measures. Sex offender registries were enacted to address this uniqueness. However, registration schemes are only effective if they are narrowly tailored to the legitimate state purpose of community protection. Massachusetts has decided to adopt a classification system in which offenders are categorized based on their risk of reoffense. Level One is designated to those offenders who pose a very low risk of reoffense; Level Two is designated to those who pose a moderate risk; Level Three is designated to those who pose a high risk to the community. The Level One designation in Massachusetts is not narrowly tailored to the important state purpose of community protection because it does not include those offenders who pose a risk to the community.

This Note focuses on the Level One classification in the Massachusetts sex offender registration scheme. Given the unique nature of sex offenses, the federal government has permitted states to implement their own sex offender registration statutes to protect children, society's most vulnerable members. To be classified as a Level One offender in Massachusetts, there must be a low risk of reoffense. Therefore, the Legislature has determined that the public interest is not served by public dissemination of Level One information. The public interest is not served by having Level One, low risk

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offenders register. There are liberty interests implicated by the mere act of registration, which are not outweighed by the legitimate state interest of community protection. Therefore, the registration scheme is not narrowly tailored to serve the purpose of public protection. Massachusetts should remove the Level One designation and only require those offenders who pose a moderate or high risk of reoffense to register. Alternatively, Massachusetts should permit public dissemination of Level One information if the offense involved a child. The Massachusetts sex offender registration scheme needs to be remodeled so that it is narrowly tailored to the legitimate state purpose of public protection and can more efficiently and effectively protect society's most vulnerable members.

INTRODUCTION

The horrific death of Megan Kanka incited fury throughout the country.[1] Megan Kanka was a seven-year-old New Jersey girl who was sexually assaulted and strangled to death.[2] The person responsible for this tragic death was Jesse Timmendequas, a convicted pedophile who moved in across the street from the Kanka family with no notice to the local community that he was a convicted sex offender.[3] The police department, at that time, "was prohibited from disclosing the presence of this child molester because . . . the law did not allow the release of sex offender information to the public."[4] In response, the federal government enacted a community notification plan permitting states to release this information to their local communities.[5] Since its inception, every state has adopted its own version of Megan's Law.[6]

In 1996, Massachusetts adopted a form of Megan's Law that addressed community notification of sex offenders by using a risk of reoffense model.[7] The Sex Offense Registry Board ("SORB") requires

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1. Nicole Marie Nigrelli, *The Sex Offender Registry: Is It Attacking People That Were Not Meant to Be a Part of the Law?*, 4 SUFFOLK J. TRIAL & APP. ADVOC. 343, 344 (1999).

2. *Id.*

3. *Id.*

4. Parents for Child Safety—Megan's Law, http://www.parentsforchildsafety.org/meganslaw.html (last visited Dec. 1, 2009).

5. 42 U.S.C. § 14071 (2006); Nigrelli, *supra* note 1; *see* Charles Montaldo, About.com, History of Megan's Law, http://crime.about.com/od/sex/a/megans_law.htm (last visited Dec. 1, 2009) ("Megan's Law is a federal law passed in 1996 that authorizes local law enforcement agencies to notify the public about convicted sex offenders living, working or visiting their communities.").

6. Nigrelli, *supra* note 1, at 344-45 & n.15 (citing all fifty states and their corresponding state statutes); *see* Montaldo, *supra* note 5 (noting that "all states have passed some form of Megan's Law").

7. MASS. GEN. LAWS ch. 6, § 178K (2008); Nigrelli, *supra* note 1, at 346.

convicted sex offenders to register under one of three classifications.[8] Level One is designated when the "risk of reoffense is low and the degree of dangerousness posed to the public is not such that a public safety interest is served by public availability of registration information."[9] Level Two is designated when the "risk of reoffense is moderate and the degree of dangerousness posed to the public is such that a public safety interest is served by public availability of registration information."[10] Level Three is designated when the "risk of reoffense is high and the degree of dangerousness posed to the public is such that a substantial public safety interest is served by active dissemination of registration information."[11] When determining the risk of reoffense, the SORB accordingly reviews certain factual matters such as "the offender's criminal history; the circumstances of the sex offense; the presence or absence of physical harm caused by the offense; whether the offense involved consensual conduct between adults; and other matters that demonstrate whether or not the offender poses a risk to reoffend."[12]

Sex offender registration schemes are often subjected to constitutional scrutiny.[13] The desire to protect the public coupled with protecting an offender's rights is often a tricky scale to balance.[14] Recently, in *Humphries v. County of Los Angeles*, the Ninth Circuit held that California's child abuse registration requirements violated Fourteenth Amendment due process rights and were therefore unconstitutional.[15]

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8. 803 MASS. CODE REGS. 1.38 (2008); MASS. GEN. LAWS ch. 6, § 178K(2).

9. 803 MASS. CODE REGS. 1.38; MASS. GEN. LAWS ch. 6, § 178K(2)(a).

10. 803 MASS. CODE REGS. 1.38; MASS. GEN. LAWS ch. 6, § 178K(2)(b).

11. 803 MASS. CODE REGS. 1.38; MASS. GEN. LAWS ch. 6, § 178K(2)(c).

12. 803 MASS. CODE REGS. 1.39; *see* MASS. GEN. LAWS ch. 6, § 178K(1)(a).

13. *See, e.g.*, Humphries v. County of Los Angeles, 554 F.3d 1170, 1185-86 (9th Cir. 2009); Doe v. Sex Offender Registry Bd., 882 N.E.2d 298, 304-05 (Mass. 2008) (holding that the statute as applied to the plaintiff in this case was retroactive and therefore unconstitutional); Doe v. Sex Offender Registry Bd., 857 N.E.2d 473, 480-81 (Mass. 2006) (holding that convicted sex offenders' liberty interests are not fundamental, and the registration requirement does not violate substantive or procedural due process); Roe v. Att'y Gen., 750 N.E.2d 897, 900 (Mass. 2001) (holding that registration procedures enacted in 1999 did not offend due process); Doe v. Att'y Gen., 686 N.E.2d 1007, 1008 (Mass. 1997) (holding that an automatic classification of a Level One sex offender, with no evidentiary hearing, violates procedural due process).

14. *See* Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 340 (2006).

15. *Humphries*, 554 F.3d at 1200, 1202. Please note that this case solely discusses the child abuse registration scheme and not a sex offender registration scheme. *Id.* at 1202. This Note will focus on Massachusetts's Sex Offender Registry Board.

The obvious procedural due process challenge in *Humphries* was that Mr. and Mrs. Humphries, parents accused of child abuse by Mr. Humphries's daughter from a previous marriage, were registered without a conviction, and the registration process did not have adequate measures in place for removal from the registration list upon a finding of "factually innocent."[16] The recent Ninth Circuit decision in *Humphries*, although resolved on due process grounds, reiterated many of the purposes served by registration schemes[17] and the dangers such schemes can pose when they do not further these purposes.[18] In the wake of the *Humphries* decision, registration statutes, such as those which require sexual deviants[19] and child abuse offenders[20] to register with their respective state authorities, should be re-examined to ensure that they further the legitimate state purpose of community protection.

Unlike the Child Abuse Central Index ("CACI") in *Humphries*, the Massachusetts sex offender registration scheme would withstand a procedural due process challenge[21] because Massachusetts requires a conviction before registration.[22] However, the classification process within the Massachusetts sex offender registration scheme is not immune to constitutional scrutiny.[23] The Level One designation in Massachusetts is not tailored to further the legitimate state interest of protecting society's most vulnerable members and therefore should either be eliminated or amended.

Sex offenses, especially violent sex offenses, in which children are the unfortunate and innocent victims, should not go unpunished. Sex offenses differ from other crimes because they invade one's personal

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16. *Id.* at 1184-85.

17. *Id.* at 1193 ("There is no doubt that California has a vital interest in preventing child abuse and that the creation or maintenance of a central index, such as the [Child Abuse Central Index], is an effective and responsible means for California to secure its interest.").

18. *Id.* at 1194 ("[T]he effectiveness of a system listing individuals that pose a danger to children becomes less effective if a larger and larger percentage of the population erroneously becomes listed due to unsubstantiated claims.").

19. *See* MASS. GEN. LAWS ch. 6, § 178D (2008) (establishing a Sex Offender Registry Board that maintains a computerized registration system of all sexual offenders required to register in Massachusetts).

20. *See Humphries*, 554 F.3d at 1176 (describing the Child Abuse and Neglect Reporting Act then existing in California).

21. *Compare Humphries*, 554 F.3d at 1200 (explaining that the CACI violates due process, in part, because of the lack of procedures one can go through to challenge the listing), *with* MASS. GEN. LAWS ch. 6, § 178C (2008) (defining a sexual offender as one who has been convicted of a sexually deviant crime).

22. MASS. GEN. LAWS ch. 6, § 178C.

23. *Id.* § 178K.

autonomy in ways that cannot be rehabilitated through retributive measures.[24] However, a registration scheme that is not tailored to this legitimate state purpose does not effectively or efficiently protect society's most vulnerable members.[25] The Level One classification in Massachusetts does not serve the legitimate state purpose enumerated in Megan's Law because it does not protect society's most vulnerable members, i.e. children and therefore should be eliminated or further amended in order to best serve this purpose.

Part I of this Note will examine the constitutional scrutiny of sex offender registration schemes with a particular emphasis on the attacks of the Level One classification. Part II will discuss the purposes sex offender registries serve. The ways in which these purposes are not furthered by the Level One designation in Massachusetts is discussed in Part IV. The application of Level One status in Massachusetts and in other states is examined in Part III. Also, a unique equal protection argument against the Level One classification is made in Part V. Finally, an alternative model to solve these problems in Massachusetts is discussed in Part VI.

I. History of Constitutional Scrutiny of the Level One Classification in Massachusetts

The constitutionality of sex offender registration statutes has become the subject of many lawsuits by disgruntled sex offenders who try to escape the requirements of the SORB by claiming violations of their constitutional rights.[26] Concerns about the registration scheme being more inclusive than necessary have existed since the inception of the Sex Offender Registration Act ("the Act").[27] Specifically, the Level One designation in Massachusetts was first attacked in 1997.[28]

In 1997, the Level One classification came under the constitutional scrutiny of the Massachusetts Supreme Judicial Court ("SJC") in *Doe v.*

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24. Claire L. Molesworth, Note, *Knowledge Versus Acknowledgment: Rethinking the Alford Plea in Sexual Assault Cases*, 6 SEATTLE J. FOR SOC. JUST. 907, 908 (2008). "Sexual offenses differ from other crimes because they involve a deep psychological trauma that cannot be repaired by monetary reparation (as when property is stolen from a victim) or physical healing (as when a victim suffers physical injury, such as a broken nose in an assault)." *Id.*

25. *See* Nigrelli, *supra* note 1, at 360.

26. *See supra* note 13 and accompanying text.

27. *See* Nigrelli, *supra* note 1, at 360 ("The overbroad risk classifications have included people that pose no risk to minor children or other vulnerable people, but are still considered sex offenders within the meaning of the statute.").

28. *See* Doe v. Att'y Gen., 686 N.E.2d 1007, 1007-08 (Mass. 1997).

Attorney General.[29] The SJC held that a sex offender cannot automatically be classified as a Level One offender without a prior evidentiary hearing.[30] At the time, the Act failed to grant either a hearing or require a finding that the sex offender "present[ed] a risk to children and other vulnerable persons for whose protection the Legislature adopted the registration and notification requirements of the act."[31] The SJC enjoined the Commonwealth from requiring the plaintiff to register and disseminating his information "until a hearing was held and a determination was made after the hearing concerning his threat, if any 'to minors and others for whose protection the act was passed.'"[32] In the ensuing years, the constitutionality of the Act in general would again be scrutinized.[33]

In 1999, the Act[34] was amended.[35] Prior to the 1999 amendments, a Level One offender did not have the right to challenge their risk classification.[36] The most notable changes enacted in 1999 included:

> (i) the Board can relieve the sex offender of the obligation to register if it determines there is no risk of re-offense or danger to the public;

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29. *Id.* at 1007.

30. *Id.* at 1008.

31. *Id.* Note here that the purpose behind the Act—to protect vulnerable persons—is enumerated. *Id.*

32. William R. Keating & James L. Messenger, *Chapter 74: Massachusetts's New Sex Offender Law*, 44 B. B. J. 10, 11 (2000) (quoting Doe v. Att'y Gen., 686 N.E.2d 1007, 1014 (Mass. 1997)).

33. Doe v. Sex Offender Registry Bd., 697 N.E.2d 512, 518-20 (Mass. 1998) (holding that evidentiary hearings must take place before the board (rather than the Superior Court) and that it should use a preponderance of the evidence standard when classifying offenders); *see* Keating & Messenger, *supra* note 32 ("The SJC further held that the Board must establish the appropriateness of the classification by a preponderance of the evidence and that the Board must make specific findings to support individual classification decisions."). Finally in 1999, the SJC once again reviewed the registration scheme provided in the Sex Offense Registration Act. Doe v. Att'y Gen., 715 N.E.2d 37, 39-40, 46 (Mass. 1999) (holding that the registration requirements and notification procedures of the act were "unconstitutional as applied to [the plaintiff] in the absence of . . . an individualized hearing to determine whether he is a present threat to children because of the likelihood that he will reoffend").

34. *See* 1996 Mass. Acts 246.

35. *See* 1999 Mass. Acts 246.

36. *See* Nigrelli, *supra* note 1, at 353 (noting that, in 1999, Level One offenders "[did] not have the right to challenge their risk designation"). *Compare* 1996 Mass. Acts 1125 (stating that only Level Two and Level Three offenders can challenge their classification), *with* MASS. GEN. LAWS ch. 6, § 178M (2008) (failing to distinguish between the level classifications as to who can challenge the level designation).

> (ii) *sex offender information for level one offenders is no longer accessible to the general public through the citizen inquiry provisions*;[37]
>
> (iii) sex offender information for level two and three offenders is only accessible through the citizen inquiry provisions after the sex offender has been finally classified;
>
> (iv) sex offender information for level two offenders is no longer automatically provided to organizations in the community who are likely to encounter the offender (but only pursuant to the citizen inquiry provisions);
>
> (v) sex offenders may register by mail instead of in person; and
>
> (vi) procedural safeguards concerning classification decisions have been enhanced and the appeal of the Board's decision is pursuant to G.L. c. 30A.[38]

Although these amendments were implemented to address the SJC's concerns, illustrated in the string of *Doe* cases,[39] the Act continues to require defense against constitutional attacks.[40] The Superior Court of Massachusetts, in a memorandum ruling, concluded "that those required to register should be afforded an opportunity to establish that their registration does not further the Act's overall purpose."[41] In *Roe v. Reilly*, plaintiffs

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37. *See* ch. 6, § 178J(c); Keating & Messenger, *supra* note 32, at 21 (emphasis added) (noting that the public could "obtain information about level one, two, or three sex offenders in accordance with the citizen inquiry provisions of G.L. c. 178J").

38. Keating & Messenger, *supra* note 32, at 21.

39. *Id.* at 22 ("The Chapter 74 amendments to the Sex Offender Registry address many of the concerns raised by the SJC, notably the need for an evidentiary hearing (with appropriate procedural safeguards) before a sex offender's biographical information is available to the general public . . . ."); *see* Doe v. Att'y Gen., 715 N.E.2d 37, 46 (Mass. 1999) (holding that the registration and notification requirements are unconstitutional in the absence of an individualized hearing to determine whether the sex offender will reoffend and therefore remains a present threat to children); Doe v. Sex Offender Registry Bd., 697 N.E.2d 512, 518-20 (Mass. 1998) (holding that evidentiary hearings must take place before the Board (as opposed to the Superior Court) and that the Board must use a preponderance of the evidence standard when classifying offenders); Doe v. Att'y Gen., 686 N.E.2d 1007, 1008 (Mass. 1997) (holding that an automatic classification of a Level One sex offender, with no evidentiary hearing, violates procedural due process).

40. Keating & Messenger, *supra* note 32, at 22-23 ("Chapter 74's amendments to the Sex Offender Registry have already been challenged in the Superior Court.").

41. Roe v. Reilly, No. 995029A, 1999 WL 1411351, at *5 (Mass. Super. Ct. Nov. 29, 1999).

brought a case claiming that the amendments to SORB violated their due process rights by requiring registration before a hearing was conducted.[42] The Superior Court preliminarily enjoined the Commonwealth from requiring those subject to the Registration Act from registering before a hearing was conducted to determine whether they should be so classified.[43]

II. Purposes Served by Sex Offender Registries

As the SJC noted in *Doe*, the purpose of sex offender registration schemes is to protect society's vulnerable members.[44] Recently, in *Humphries*, the Ninth Circuit elaborated on the similar purposes served by child abuse registration schemes.[45] The Ninth Circuit held that California's registration scheme for child abuse offenders violated due process.[46] This case enumerates the current legitimate state purposes served by registration schemes, which in combination with the purposes enumerated in *Doe*,[47] are used here to critique the Massachusetts sex offender registration scheme.[48]

Humphries, unlike many other child abuse situations, created much sympathy for the falsely accused parents.[49] S.H., Craig Humphries's fifteen-year-old daughter from a previous marriage, made reports that she had been abused by the Humphries for several months.[50] These statements spurred an investigation that ultimately led to the arrest of the Humphries for cruelty to a child and torture.[51] To make matters worse, the Humphries's other two children were removed from their home and placed in protective custody.[52] Both of these children denied the existence of any abuse or mistreatment.[53] Ultimately, the criminal case against the Humphries was dismissed.[54]

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42. Keating & Messenger, *supra* note 32, at 22-23.

43. *Id.* at 23.

44. *See supra* note 31 and accompanying text.

45. *See* Humphries v. County of Los Angeles, 554 F.3d 1170, 1193 (9th Cir. 2009) ("There is no doubt that California has a vital interest in preventing child abuse and that the creation or maintenance of a central index, such as the CACI, is an effective and responsible means for California to secure its interest.").

46. *Id.* at 1176.

47. *See supra* note 31 and accompanying text.

48. *See Humphries*, 554 F.3d at 1193.

49. *See id.* at 1180.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Humphries*, 554 F.3d at 1181.

Prior to this decision, the California registration scheme for child abusers listed suspected child abusers and provided no opportunity for them to remove their innocent names from the list.[55] Despite "findings of two California courts that the Humphries were 'factually innocent'" and that the charges against them were not true, the Humphries were placed on the CACI and were never afforded an opportunity to "clear their names."[56] Consistent with the SJC, the Ninth Circuit held that the failure to give individuals a fair opportunity to challenge the allegations against them violated their constitutional due process rights.[57]

Despite the fact that the Ninth Circuit focused on child abuse registration schemes, many of the same purposes have been applied to sex offender registration schemes.[58] These schemes become less effective if a large percentage of the population is listed erroneously.[59] The primary purpose behind sex offender registration "is to ensure that the public can obtain information necessary to protect themselves and their families from dangerous sex offenders in their communities."[60] Sex offender registrations are designed to protect society's most vulnerable members, such as children.[61]

The Level One designation adopted in Massachusetts in 1996, and later amended in 1999, does not protect vulnerable people because it

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55. *See id.* at 1175.

56. *Id.*

57. *Id.* at 1176; Doe v. Att'y Gen., 715 N.E.2d 37, 46 (Mass. 1999) (holding that the registration and notification requirements are unconstitutional in the absence of an individualized hearing to determine whether the sex offender will reoffend and therefore remains a present threat to children); Doe v. Sex Offender Registry Bd., 697 N.E.2d 512, 518-20 (Mass. 1998) (holding that evidentiary hearings must take place before the Board (as opposed to the Superior Court) and that the Board must use a preponderance of the evidence standard when classifying offenders); Doe v. Att'y Gen., 686 N.E.2d 1007, 1008 (Mass. 1997) (holding that an automatic classification of a Level One sex offender, with no evidentiary hearing, violates procedural due process).

58. *Compare* Doe v. Sex Offender Registry Bd., 857 N.E.2d 473, 480-81 (Mass. 2006) (noting that the legislative purpose of the Sex Offender Registry Act "is to protect forthwith the vulnerable members of our communities from sexual offenders"), *with Humphries*, 554 F.3d at 1193 (noting that the state has a vital interest in maintaining a child abuse index to prevent child abuse).

59. *Humphries*, 554 F.3d at 1194 ("[T]he effectiveness of a system listing individuals that pose a danger to children becomes less effective if a larger and larger percentage of the population erroneously becomes listed due to unsubstantiated claims.").

60. Christina D. Rule, Comment, *A Better Approach to Juvenile Sex Offender Registration in California*, 42 U.S.F. L. REV. 497, 506 (2007).

61. *See* Nigrelli, *supra* note 1, at 360, 363 ("Crimes which by their nature pose no threat to minor children or other vulnerable people may not warrant registration."); *see also supra* note 31 and accompanying text.

includes sex offenders who do not present a risk to children.[62] A Level One offender is one whose risk of reoffense is determined to be low and has been determined not to pose a risk to the community; therefore, their information should not be made available to the public.[63] Information regarding a Level One offender is disseminated only to local police departments, the department of correction, the department of youth services, the department of social services, the parole board, the department of probation, and the Federal Bureau of Investigation ("FBI").[64] The lack of public interest implicated in a Level One classification is evidenced by the lack of public availability of Level One information.[65] Since the statute makes clear that no legitimate state purpose is served by notifying the public of Level One offenders,[66] the liberty interests implicated in the registration requirement outweigh any other alleged purpose for requiring low risk offenders to register.[67] A Level One offender's liberty interests outweigh the need for local law enforcement and the FBI to be concerned with an offender who does not pose a risk to the community.[68] This is an unnecessary use of already strained resources.[69]

One of the primary purposes behind registration is to enable the public to obtain information so that they can be aware of, and protect themselves and their families against sex offenders who pose a risk to their communities.[70] This purpose is defeated by a registration scheme that does not make this information available to the public or include offenders who have or are likely to target society's most vulnerable members.[71] The sex offender registration scheme in Massachusetts should be amended to

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62. *See* MASS. GEN. LAWS ch. 6, § 178J(c) (2008) (authorizing police to disseminate information to the person making the inquiry only if the search results in a sex offender who has been "finally classified by the board as a level [two] or level [three] offender").

63. MASS. GEN. LAWS ch. 6, § 178K(2)(a).

64. *Id.*

65. *See id.*

66. *See id.*

67. *See infra* notes 90-95 and accompanying text.

68. *See* MASS. GEN. LAWS ch. 6, § 178K(2)(a); *see generally infra* notes 90-95 and accompanying text (describing the liberty interests implicated through the requirement to register).

69. *See* Lara Geer Farley, Note, *The Adam Walsh Act: The Scarlet Letter of the Twenty-First Century*, 47 WASHBURN L.J. 471, 498-99 (2008) (arguing that law enforcement should only concern itself with those offenders who have been convicted of violent crimes (or a crime against a child) and have been determined to pose a high risk to the community).

70. Rule, *supra* note 60.

71. *See* Doe v. Sex Offender Registry Bd., 857 N.E.2d 473, 480-81 (Mass. 2006) (noting that the legislative purpose of the Sex Offender Registry Act "is to protect forthwith the vulnerable members of our communities from sexual offenders").

include only those offenders who pose a high or moderate risk of reoffense, specifically those who are classified as either a Level Two or Level Three sex offender.[72] Since information regarding these types of offenders is already made available to the public, the Level Two or Level Three designation is narrowly tailored to the legitimate state purpose of public protection, unlike its Level One counterpart.[73]

III. Application of Level One in Massachusetts

A. Low Risk of Reoffense

The concern society has with regard to the threat of "sex offenders lies more with the perceived threat they pose to children," rather than with concrete statistical studies.[74] Ninety-three percent of child sex abuse victims are molested by family members or other individuals whom they know and trust.[75] In general, sex offenders, when compared to other members of the criminal population, have much lower recidivism rates.[76] Recidivism rates differ depending on the type of sex offender.[77] The two types of sex offenders who have the highest recidivism rates are those who molest young boys and rape adult women.[78]

Sex offenders who molest and sexually abuse young boys have recidivism rates as high as fifty-two percent.[79] Therefore, in accordance with Massachusetts's law, sex offenders who molest young boys would likely be classified as either a Level Two or Level Three sex offender[80] as they have the highest likelihood of reoffense.[81]

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72. *See infra* Part VI.

73. *See* MASS. GEN. LAWS ch. 6, § 178K(2)(a).

74. Amanda C. Graeber, Note, McKune v. Lile *and the Construction of Constitutional Protections for Sexual Offenders*, 23 REV. LITIG. 137, 145 (2004).

75. Amy Baron-Evans, *Still Time to Rethink the Misguided Approach of the Sex Offender Registration and Notification Act*, 20 FED. SENT'G REP. 357, 359 (2008) ("The myth that 'stranger danger' is rampant and is somehow controlled by public sex offender registries is incorrect and gives parents a false sense of security.").

76. *Id.* ("Recidivism rates are much lower for sex offenders than for the general criminal population.").

77. *Id.* ("Recidivism rates vary markedly based on the type of sex offender.").

78. *See id.*; The Association for the Treatment of Sexual Abusers, Facts About Adult Sex Offenders, http://www.atsa.com/ppOffenderFacts.html (last visited Dec. 1, 2009) [hereinafter The Association].

79. The Association, *supra* note 78.

80. *See* MASS. GEN. LAWS ch. 6, § 178K(2)(b)-(c) (2008).

81. Baron-Evans, *supra* note 75; The Association, *supra* note 78.

In addition, rapists of adult women also have a high recidivism rate of up to thirty-nine percent.[82] Since they have high recidivism rates, those who molest young boys and rape adult women would not be classified as Level One sex offenders.[83] Therefore, the Level Two or Three designations further the legitimate state purpose of protecting society's most vulnerable members because they include the offenders who have targeted, and would likely retarget (if they reoffend) women and children.[84]

Recently, in Massachusetts and throughout the United States, there have been repeated incidents of "sexting."[85] "Sexting" involves sending nude or semi-nude pictures as a text message.[86] Under Massachusetts law, those convicted of transmitting these images through a text message could be found guilty of child pornography and would be required to register as a sex offender.[87] Even if this is an isolated event, and the factors indicate that the offender is not likely to reoffend, they will still have to register as a Level One sex offender.[88] Granted, "sexting" is highly inappropriate behavior, perhaps even deserving of punishment, but requiring someone to register as a Level One sex offender for an isolated incident of "sexting" unreasonably infringes on the individual's liberty interests.[89]

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82. The Association, *supra* note 78.

83. MASS. GEN. LAWS ch. 6, § 178K(1)(b)(ii) (noting that one of the factors taken into consideration when determining the risk of reoffense is whether the sex offense involved a weapon, violence, or infliction of a bodily injury); *see* MASS. GEN. LAWS ch. 6, § 178K(2)(a) ("Where the board determines that the risk of reoffense is low and the degree of dangerousness posed to the public is not such that a public safety interest is served by public availability, it shall give a level [one] designation to the sex offender."); *see also* MASS. GEN. LAWS ch. 6, § 178K(1)(a)(iii) (noting that one of the factors taken into consideration when determining the risk of reoffense is whether the sex offender in question was an adult who committed a sex offense against a child).

84. *See generally* MASS. GEN. LAWS ch. 6, § 178K(2)(a)-(c) (providing public notification of a Level Two or Level Three sex offender, but not of a Level One offender); Doe v. Sex Offender Registry Bd., 857 N.E.2d 473, 480 (Mass. 2006) (noting that the legislative purpose of the Sex Offender Registry Act "is to protect forthwith the vulnerable members of our communities from sexual offenders").

85. Posting of Altman & Altman to Boston Criminal Lawyer Blog, http://www.boston criminallawyerblog.com/2009/03/sexting_in_massachusetts_could.html (Mar. 24, 2009).

86. *Id.*

87. *Id.*

88. *See* MASS. GEN. LAWS ch. 6, § 178K(2)(a).

89. *See infra* Part III.B.

B. Liberty Interests Implicated in Registration

Registration alone implicates an offender's liberty interests.[90] "[T]he requirement that a citizen [must] regularly report to the police for an extended term of years . . . engages serious liberty interests, and presents an 'importantly distinct kind of constitutional danger.'"[91] The act of habitual registration is a "continuing, intrusive, and humiliating regulation of the person himself."[92]

In Massachusetts, the Level One classification implicates the liberty and privacy interests involved in registration.[93] Since registration alone implicates these interests,[94] and the Level One classification does not include those offenders who pose a risk to society's most vulnerable members, the Level One designation serves no legitimate state purpose.[95] To require low risk offenders to register infringes unnecessarily on their privacy and liberty interests.

C. Level One in Other States

Massachusetts is not the only state to codify a classification system for its sex offenders.[96] Nor is it the only state to prohibit disclosure of sex offender information under a Level One (or its equivalent) classification.[97]

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90. *See* Doe v. Att'y Gen., 715 N.E.2d 37, 43 (Mass. 1999).

91. *Id.* (quoting Doe v. Att'y Gen., 686 N.E.2d 1007, 1016 (Mass. 1997) (Fried, J., concurring)).

92. Doe v. Att'y Gen., 686 N.E.2d 1007, 1016 (Mass. 1997) (Fried, J., concurring).

93. *See Doe v. Att'y Gen.*, 715 N.E.2d at 42-43 (noting that there are "protected liberty and privacy interests implicated by the registration and attendant notification provisions of the act").

94. *See id.*

95. This Note assumes that Level One offenders do not include those who have committed a sex crime towards a child because those sex offenders have the highest risk of reoffense and therefore, would likely be categorized as a Level Two or Level Three offender. *See supra* notes 79-84 and accompanying text. If Level One offenders do include those who have been convicted of a sex crime towards a child, then the problem is even more egregious because information regarding those sex offenders who have harmed children should be made available to the public in order to promote the purpose of protecting society's most vulnerable members. *See infra* notes 129 and accompanying text.

96. *See* DEL. CODE ANN. tit. 11, § 4336 (2007); N.J. STAT. ANN. § 2C:7-8 (West 2005); N.D. CENT. CODE § 12.1-32-15 (1997 & Supp. 2009); WASH. REV. CODE ANN. § 72.09.345(5) (West 2004).

97. *See* DEL. CODE ANN. tit. 11, § 4336(h)(1) ("The release of Tier One offenders will require notification to all law enforcement agencies with jurisdiction over the area where the offender intends to reside . . . ."). But this does not provide public notification of Tier One registrant information. *See id.* Public dissemination of registrant information is provided for Tier Two and Tier Three sex offenders. *Id.* § 4336(h)(2)-(3). *See also* N.J. STAT. ANN. §

Delaware and New Jersey provide distinctions based on risk of reoffense[98] and do not permit public dissemination of sex offender registrant information if the offender is determined to present the lowest possible risk of reoffense.[99] Similar to Massachusetts, information regarding a moderate or high risk sex offender in either Delaware or New Jersey is made available to the public.[100] The remaining two jurisdictions, Washington and North Dakota, permit public dissemination of those who are determined to be a Level One (or its equivalent) offender.[101]

Public notification of Level One offenders, or at least provisions that permit public notification upon request, furthers some of the principles illustrated within the federal legislation that these state statutes are based upon.[102] Children and women are not protected against sex offenders if offenders' information cannot be released to the public.[103] However, sex offenders with the highest risks of recidivism, those who target children and women, will not be classified as Level One offenders (provided that the registration system and its requirements are functioning correctly), regardless of whether the statute provides for public availability of their personal information, because of the increased likelihood that they will

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2C:7-8(c)(1). If a sex offender is determined to be low risk, then only "law enforcement agencies likely to encounter the person registered shall be notified." *Id.* If the risk is moderate or high, public dissemination of registrant information is provided. *Id.* § 2C:7-8(c)(2)-(3).

98. *See* DEL. CODE ANN. tit. 11, § 4336(h) (noting that there are three tiers of sex offenders based on whether they are a low risk, moderate risk, or high risk offender); N.J. STAT. ANN. § 2C:7-8(c) (noting that there are three levels of notification based on risk of reoffense).

99. *See* DEL. CODE ANN. tit. 11, § 4336(h)(1); N.J. STAT. ANN. § 2C:7-8(c)(1).

100. *See* MASS. GEN. LAWS ch. 6, § 178K(2)(b)-(c); DEL. CODE ANN. tit. 11, § 4336(h)(2)-(3); N.J. STAT. ANN. § 2C:7-8(c)(2)-(3).

101. *See* WASH. REV. CODE ANN. § 4.24.550(3)(a) (West 2005) (noting that for those offenders classified as Risk Level I, "the agency shall share information with other appropriate law enforcement agencies and . . . [the agency] may disclose, upon request, relevant, necessary, and accurate information to any victim or witness to the offense and to any individual community member who lives near the residence where the offender resides, expects to reside, or is regularly found"); N.D. CENT. CODE § 12.1-32-15(13) (1997 & Supp. 2009) (noting that "[u]pon request, law enforcement agencies may release conviction and registration information regarding low-risk" offenders).

102. *See* Emily A. White, Note, *Prosecutions Under the Adam Walsh Act: Is America Keeping Its Promise?*, 65 WASH. & LEE L. REV. 1783, 1788 (2008).

103. *See generally id.* (noting that one of the provisions of Megan's Law permits the release of sex offender information in order to protect the public).

reoffend.[104] Therefore, regardless of whether public dissemination of information is available for a Level One offender—the Level One classification does not protect society's most vulnerable members since it includes offenders who are not likely to reoffend and therefore do not pose a risk to the community.[105]

The Level One designation has a purported state interest of protecting its most vulnerable members from sex crimes.[106] By definition, Level One offenders do not commit sex crimes against children or violent sex crimes.[107] Even if Level One offenders in Massachusetts include those who have been convicted of either a child sex crime, or a violent sex crime, society is not protected if this information is not made available to those whom it is implemented to protect; society's most vulnerable members.[108] Although this information is made available to local police departments and law enforcement agencies, the lack of public dissemination defeats the state's purpose in protecting such individuals.[109] Accordingly, the Level One designation does not achieve its intended purpose.[110]

IV. Level One Does Not Serve the Purposes Enumerated in Megan's Law and Other Consistent Federal Legislation.

Sex offenders are "particularly despicable to both the public and public officials."[111] This is due in large part to the psychological and physical violence incurred by their victims, which is unique when compared to other non-sex crimes.[112] Federal legislation, such as the Jacob Wetterling Crimes Against Children and Sexually Violent Registration Act

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104. *See* DEL. CODE ANN. tit. 11, § 4336(h)(1) (2007); MASS. GEN. LAWS ch. 6, § 178K(2)(c) (2008); N.J. STAT. ANN. § 2C:7-8(a) (West 2005); N.D. CENT. CODE § 12.1-32-15(12) (1997 & Supp. 2009); WASH. REV. CODE ANN. § 72.09.345(5) (West 2004).

105. *See* MASS. GEN. LAWS ch. 6, § 178K(2)(a); *see also supra* Part III.A (describing sex offenders with high recidivism rates).

106. *See* Artway v. Att'y Gen. of N.J., 81 F.3d 1235, 1267 (3d Cir. 1996).

107. MASS. GEN. LAWS ch. 6, § 178K(2)(a).

108. *See* DEL. CODE ANN. tit. 11, § 4336(h)(1); MASS. GEN. LAWS ch. 6, § 178K(2)(a); N.J. STAT. ANN. § 2C:7-8(c)(1); *see infra* Part IV (discussing the Adam Walsh Act and the requirement that states permit disclosure of Level One offender information if the offense involved a child).

109. *See* White, *supra* note 102, at 1814 (noting that the state legislature has a legitimate purpose of promoting public safety, which is furthered by alerting the public to the risk and existence of sex offenders in their communities).

110. *See* MASS. GEN. LAWS ch. 6, § 178K(2)(a) (2008); *see also* White, *supra* note 102, at 1814 (noting that Alaska's statute had the purpose of protecting the public from sex offenders).

111. Graeber, *supra* note 74, at 139.

112. *See id.*

("Jacob Wetterling Act"), Megan's Law, and the Adam Walsh Child Protection and Safety Act of 2006 ("Adam Walsh Act"), attempts to address this difference by isolating sex offenders—particularly those who have the propensity to endanger children and those who are considered violent sex offenders—and treats them differently from other criminal offenders through registration and public notification requirements.[113]

Megan's Law was enacted as an addition to the Jacob Wetterling Act, which required community notification of sex offenders.[114] The Jacob Wetterling Act, signed by President Bill Clinton in 1994, established a national registration scheme for sex offenders who have committed sex offenses against children or adults, or violent offenses against children.[115] Megan's Law amended the Jacob Wetterling Act by first, removing the requirement that states treat sex offender registry data as private information, and second, requiring state law enforcement agencies to "release sex offender registry information necessary to protect the public."[116] This second requirement was specifically aimed at the public dissemination of sex offender registry data of those required to register for offenses involving either minors or those convicted of violent sex offenses.[117] By focusing on these groups of sex offenders, Megan's Law and the Jacob Wetterling Act aim to protect society's most vulnerable members from those sex offenders who have the highest recidivism rates.[118]

In 2006, President George W. Bush, in an effort to further the objectives of the Jacob Wetterling Act and Megan's Law, signed the Adam Walsh Act into law.[119] The tragic story behind this piece of federal legislation took place in 1981 when Adam Walsh was abducted from a mall and found murdered two weeks later.[120] Adam's father, John Walsh, host of *America's Most Wanted*, lobbied Congress for federal legislation directed

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113. *See* Farley, *supra* note 69, at 490 ("Other than sex offenders, no offenders in the criminal justice system face national lifetime registries."); Graeber, *supra* note 74, at 139; White, *supra* note 102, at 1791.

114. Nancy G. Calley, *Juvenile Sex Offenders and Sex Offender Legislation: Unintended Consequences*, 72 FED. PROBATION 37, 37 (2008).

115. *Id.*

116. White, *supra* note 102.

117. *Id.*

118. *See* The Association, *supra* note 78 (noting that studies have found "that pedophiles who molest boys, and rapists of adult women, were the types of offenders most likely to recidivate at rates of [fifty-two percent] and [thirty-nine percent] respectively"); *see also* Graeber, *supra* note 111, at 138 (noting the "unusually high recidivism rates for violent sex offenders").

119. *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, § 111, 120 Stat. 587 (codified in scattered sections of 42 U.S.C. and 18 U.S.C.).

120. White, *supra* note 102, at 1791.

at tracking violent criminal offenders released from prison.[121] On July 27, 2006, the twenty-fifth anniversary of Adam's disappearance, President Bush signed into law the Adam Walsh Act.[122] Rather than employing a risk of reoffense analysis to differentiate between the classifications, the Adam Walsh Act provides for three tiers of sex offenders that are differentiated based on the crimes committed.[123] The Adam Walsh Act continues in the tradition of the Jacob Wetterling Act, which requires every state to compile a sex offense registry that "must be made available for viewing by the general public."[124] The Adam Walsh Act does provide one notable optional exception with regard to Tier I offenders[125]: any state may decline to disclose information regarding a Tier I sex offender "convicted of an offense *other than a specified offense against a minor*."[126]

The description of a Tier I offender is slightly ambiguous.[127] A Tier I offender is described as a sex offender "other than a [T]ier II or [T]ier III sex offender."[128] Despite the ambiguity, the optional exemption from public notification addresses the problem argued in this Note. In order to further the legitimate state purpose of public protection of its most vulnerable members, information regarding a Tier I (or Level One) sex offender should be made available to the public when the offense targeted a child.[129]

Unlike the classification system employed through the Adam Walsh Act, Massachusetts uses a risk of reoffense model to differentiate between the classifications and does not classify according to the crimes committed.[130] A system that differentiates based on the crime committed, rather than risk of reoffense, furthers the purported state interest in protecting society's most vulnerable members because it takes into account the crimes that have specifically targeted these members.[131]

States had until at least July 2009 to implement the requirements of the Adam Walsh Act or risk the loss of significant federal funding.[132] States

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121. *Id.*

122. *Id.*

123. 42 U.S.C. § 16911(2)–(4) (2006).

124. 42 U.S.C. § 16918(a) (requiring every jurisdiction to make registrant information available); Steven J. Costigliacci, *Protecting Our Children From Sex Offenders: Have We Gone Too Far?*, 46 FAM. CT. REV. 180, 181 (2008).

125. 42 U.S.C. § 16918(c)(1).

126. *Id.* (emphasis added).

127. *See id.* § 16911(2).

128. *Id.*

129. *See id.* § 16918(c)(1).

130. *Compare id.* § 16911, *with* MASS. GEN. LAWS ch. 6, § 178K (2008).

131. *See* 42 U.S.C. § 16911.

132. *See* White, *supra* note 102, at 1791.

were required to "substantially implement the law's requirements," but the ultimate deadline depend[ed] on a number of factors.[133] Although funding reductions and grant programs are implemented through the law to induce compliance, "some states may determine that the costs of compliance outweigh the benefits. In that case, the state's existing sex offender laws will continue to govern."[134]

Under this federal mandate, Massachusetts had the option of excluding from public notification information regarding Level One offenders, so long as the information does not pertain to a sex offender convicted of a sex crime involving a child.[135] As of April 2009, Massachusetts had decided to file an extension until it could determine whether the Adam Walsh Act runs afoul of State constitutional provisions.[136] This federal mandate promotes the purpose behind Megan's Law and would correct the ineffective Level One classification presently in effect in Massachusetts.[137] The Adam Walsh Act furthers the purposes enumerated in Megan's Law and the Jacob Wetterling Act by making information about sex offenders who have been convicted of a sex crime towards a child publicly available.[138]

V. An Equal Protection Challenge to the Level One Classification

Although equal protection arguments have repeatedly been struck down, if the group distinctions required to bring an equal protection argument were drawn differently, a persuasive equal protection argument could be made.[139] Equal protection arguments made along the lines enumerated in the Third Circuit's decision in *Artway* have failed.[140] In *Artway*, the court described the parameters of an equal protection challenge and why, when used against Megan's Law, it does not survive rational review.[141] The court noted that the Equal Protection Clause of the Fourteenth Amendment is "a direction that all persons similarly situated should be treated alike," and does not operate as a command that everyone

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133. Kyle O'Dowd, *The Scarlet Letter of the Law: The Adam Walsh Child Protection and Safety Act of 2006*, CHAMPION, Nov. 2006, at 59, 60.

134. *Id.*

135. *See* 42 U.S.C. § 16918(c)(1).

136. SEARCH Survey on State Compliance with the Sex Offender Registration and Notification Act (SORNA), April 2009, *available at* http://www.search.org/files/pdf/SORNA-StateComplianceSurvey2009.pdf.

137. *See* N.J. STAT. ANN. § 2C:7-1 (West 2005); *supra* note 130.

138. *See* 42 U.S.C. § 16918(c)(1); *supra* note 113 and accompanying text.

139. *See* Artway v. Att'y Gen. of N.J., 81 F.3d 1235, 1267-68 (3d Cir. 1996).

140. *Id.*

141. *Id.*

be treated similarly.[142] The level of scrutiny used to analyze an equal protection claim differs depending on the class involved.[143] When the classification involves a suspect class, heightened scrutiny is used.[144] Other classifications use a rational relationship test, where the classification must be rationally related to a legitimate state purpose.[145]

The court, in *Artway*, rejected the equal protection challenge presented in an attempt to discredit Megan's Law.[146] The plaintiff in *Artway* argued that Megan's Law's distinction between compulsive sex offenders and other sex offenders was "'arbitrary and discriminatory.'"[147] The court disagreed and held that the Equal Protection Clause "does not forbid all discrimination, and the distinctions made by Megan's Law are not arbitrary."[148] Since the challenged category of compulsive offenders was not a suspect class, rational basis scrutiny applied.[149] The court upheld the registration statute on the grounds that requiring sex offenders to register is rationally related to the legitimate state interest of protecting "vulnerable individuals from sexual offenses."[150]

An equal protection challenge would work if the two classes of people required to bring such an action were drawn with different lines. The Third Circuit noted that "[r]equiring registration of convicted sex offenders found to be 'repetitive and compulsive,' as opposed to other sex offenders or the rest of the population, is rationally related to that goal."[151] Suppose instead that the two classes in question were not between "compulsive and repetitive" sex offenders and all other sex offenders,[152] but rather were between all offenders released from probation or parole who have a low risk of reoffense, regardless of the crime they committed, and sex offenders who are released into society who have a low risk of reoffense (Level One offenders). The court, in *Artway*, suggested that the

142. *Id.* at 1267 (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985)).

143. *Id.*

144. *Id.*

145. *See Artway*, 81 F.3d at 1267.

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Artway*, 81 F.3d at 1267-68.

152. *Id.* at 1267 (distinguishing the two classes necessary to bring an equal protection challenge).

Legislature would have had a rational basis to determine that those sex offenders with a low risk of reoffense need not be required to register.[153]

This reclassification hypothetical meets the requirements necessary to establish an equal protection challenge: the classes of people in question are similarly situated as they are all reintegrated into society due to a finding of a low risk of reoffense. However, they are treated differently. One class, those convicted of a sex offense, are required to register[154] whereas those who do not have a sex offense conviction are not required to register (unless they are under parole; however, once the parole obligations are completed, these individuals can become active and contributing members of society without the burden of registration).[155] The question then becomes whether there is a rational relationship between the state's legitimate interest in protecting its most vulnerable citizens from sex offenses by requiring a low risk sex offender to register under the Level One classification.[156]

Since Level One sex offenders do not include offenders who have been convicted of sex crimes against children or violent sex crimes against

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153. *Id.* at 1268.

> The legislature could have rationally concluded that sex offenders who had completed all incarceration, probation and parole had a good chance of reintegrating into their communities and therefore posed a lower risk. Also, realizing that people who had rejoined society had the most to lose, the legislature could have rationally decided to require only "repetitive and compulsive" offenders in this category to register.

Id. Note that this action might be difficult to bring because of the explicit congressional permission authorizing states to treat sex offenders differently than other offenders. *See* Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. § 16911.

154. *See* MASS. GEN. LAWS ch. 6, § 178G (2008) (requiring sex offenders to register for at least twenty years, unless they were convicted of a sexually violent offense, in which case, there is a lifetime requirement to register); *see also* 803 MASS. CODE REGS. 1.38 (2008).

155. *See* MASS. PAROLE BD., ANNUAL STATISTICAL REPORT 3 (2007), http://www.mass.gov/Eeops/docs/pb/2007WebAnnual.pdf. "In Massachusetts, parole is the procedure whereby certain inmates are released prior to the expiration of their sentence permitting the remainder of their sentence to be served in the community under supervision and subject to specific rules and conditions of behavior." *Id.* "Our primary responsibility is to identify parole-eligible offenders for whom there is sufficient indication that confinement has served its purpose, setting appropriate conditions for parole and enhancing public safety through the responsible integration of these individuals to the community." *Id.* at 4.

156. *See* Doe v. Sex Offender Registry Bd., 857 N.E.2d 473, 480-81 (Mass. 2006) (noting that the legislative purpose of the Sex Offender Registry Act "is to protect forthwith the vulnerable members of our communities from sexual offenders"); Doe v. Att'y Gen., 715 N.E.2d 37, 44 (Mass. 1999) (noting the state's interest in protecting children from recidivist sex offenders); *see also Artway*, 81 F.3d at 1267 (describing the legitimate state purpose of protecting its citizens from sex offenses).

women—the vulnerable members the Act was intended to protect[157]—there is no rational relationship between the Level One classification and the legitimate state purpose. The Level One classification is not rationally related to the legitimate state purpose because it encompasses prior convictions based on conduct that does not constitute a threat towards vulnerable members of society.[158]

Although there is evidence that there are high recidivism rates for those convicted of sex offenses against children, not all sex offenders have high recidivism rates.[159] Under the SORB in Massachusetts, those who have a high risk of reoffense, presumably those who have been convicted of a sex offense against a child or a violent sex offense against a woman, would be classified under Level Two or Three where the risk of reoffense is determined to be either moderate or high.[160] Unfortunately, there is no concrete data to determine how many (if any) Level One offenders have been convicted of a child sex crime.[161]

VI. Noble in Theory, Noble in Practice

Massachusetts should enact a registration scheme that is more narrowly tailored to the legitimate state purpose of protecting society's most vulnerable members.[162] This can be done through eliminating the Level One designation entirely and limiting the registration requirements to those who pose a moderate or high risk of reoffense or by requiring public notification of sex offenders registered as Level One if the sex offense involved a child.[163] The appropriate balance between the liberty interests of

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157. *See Sex Offender Registry Bd.*, 857 N.E.2d at 480-81 (noting that the legislative purpose of the Sex Offender Registry Act "is to protect forthwith the vulnerable members of our communities from sexual offenders"); *Doe*, 715 N.E.2d at 44 (noting the state's interest in protecting children from recidivist sex offenders).

158. *See Doe*, 715 N.E.2d at 44.

> But the statute also encompasses acts such as sexual experimentation among underage peers and consensual sexual activity between teenagers (commonly referred to as statutory rape). In either of these latter circumstances, the State's interest in protecting children from recidivist sex offenders might not be sufficiently urgent to warrant subjecting to registration every person convicted of those acts.

Id. (citation omitted).

159. *See id.*

160. *See* 803 MASS. CODE REGS. 1.38 (2008).

161. *See* E-mail from Kristin McCarthy, Associate Director, New England School of Law Library, to Jenai Cormier, author (Feb. 26, 2009, 9:20:00 EST) (on file with author).

162. *See generally* Farley, *supra* note 69, at 499 (arguing that states would benefit if only high risk sex offenders were required to register).

163. *See supra* note 129 and accompanying text.

a convicted sex offender and community safety is struck when the registration scheme and attendant public notification requirements are limited to those who pose either a moderate or high risk to the community.[164]

Liberty interests are implicated in the mere requirement to register[165] and are unreasonably infringed upon when Level One offenders are required to register.[166] Level One offenders have a low risk of reoffense and do not pose a risk to the community; therefore, the legitimate state purpose of public protection is not outweighed by the liberty interests implicated by registration.[167] The state interest in community protection outweighs the liberty and privacy interests implicated in the registration and notification provisions of a Level Two or Level Three offender because they have a moderate to high risk of reoffense.[168]

Further, by limiting the registration scheme to those sex offenders who pose a moderate to high risk to the community, the probability of mistakes being made when imputing this data would be decreased.[169] Registration schemes are prone to mistakes, which can include wrong names and wrong addresses.[170] The probability that mistakes will be made is decreased in a system that is narrowly tailored to the legitimate state purpose of protecting society's most vulnerable members by only requiring

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164. *See generally* Alex B. Eyssen, Comment, *Does Community Notification for Sex Offenders Violate the Eighth Amendment's Prohibition Against Cruel and Unusual Punishment? A Focus on Vigilantism Resulting from "Megan's Law,"* 33 ST. MARY'S L.J. 101, 115 (2001).

> The proliferation of sex offender notification laws signifies Americans' clear preference for community protection at the expense of the liberty interest of sex offenders: the laws seek to preempt sex crimes by at once branding offenders and providing information to communities in the putative name of public safety through self-protection.

Id. (quoting Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1225 (1999)).

165. *See supra* note 94-95 and accompanying text.

166. *See* MASS. GEN. LAWS ch. 6, § 178K(2)(a) (2008) (stating that level one offenders have a low risk of reoffense).

167. *See id.*; *see also supra* note 94-95 and accompanying text.

168. *See* MASS. GEN. LAWS ch. 6, § 178K(2)(a); *see also* Artway v. Att'y Gen. of N.J., 81 F.3d 1235, 1267-68 (3d Cir. 1996).

169. *See* Eyssen, *supra* note 164, at 116-17 ("[A] random spot check of ten offenders' files on the Texas [sex offender] website in 1999 revealed that seven files contained errors, ranging from wrong addresses and inaccurate victim information to the reporting of wrong crimes altogether.").

170. *See id.* at 117.

moderate to high risk offenders to register.[171] This overall reduction in the number of registrants would prevent innocent people from becoming victims of clerical error.[172]

This risk assessment model permits law enforcement to focus on protecting the public from high risk offenders, rather than waste valuable resources on those who will likely never reoffend.[173] This purpose would be greater served in a narrowly tailored scheme where only those who are required to register, moderate to high risk sex offenders, warrant the attention of law enforcement.[174] There is no need to protect the public from Level One offenders as, by definition, they pose a very low risk to the community.[175] The current sex offender registration scheme in Massachusetts is more intrusive on a Level One offender's liberty interests than is necessary to promote the legitimate state purpose of public protection.[176]

CONCLUSION

Sex crimes are considered particularly atrocious because they damage an individual in a way that no other crime can or does.[177] The invasion of someone's personal being leaves a psychological impact that is often difficult and sometimes impossible to overcome.[178] The federal government has enacted legislation that allows states to address the uniqueness of sex crimes by establishing sex offender registration statutes with community notification provisions.[179] Sex offender registration schemes promote a very important and legitimate state purpose.[180]

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171. *See generally id.* at 116-17 (arguing that once notified of sex offender information, communities have sometimes responded with verbal harassment and life-threatening attacks). Since Level One information is not made publicly available, these offenders would not be prone to community condemnation. *Cf. id.* Also, by decreasing the overall amount of registrants by eliminating the Level One classification, the amount of clerical mistakes would be reduced. *Cf. id.*

172. *See id.* at 116.

173. *See* Farley, *supra* note 69, at 498 ("Law enforcement officials should focus only on those offenders who committed severe offenses and who are likely to recidivate.").

174. *See id.* at 498-500.

175. *See* MASS. GEN. LAWS ch. 6, § 178K(2)(a) (2008).

176. *See supra* note 158 and accompanying text.

177. *See* Graeber, *supra* note 74, at 139.

178. *Cf. id.* (discussing the psychological impact that results from sex crimes).

179. *See* 42 U.S.C. § 14071 (2006) (establishing the "Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program").

180. *See* Doe v. Sex Offender Registry Bd., 857 N.E.2d 473, 480-81 (Mass. 2006) (noting that the legislative purpose of the Sex Offender Registry Act "is to protect forthwith the vulnerable members of our communities from sexual offenders").

Protecting society's most vulnerable members from becoming victims of violent sex crimes is only furthered through narrowly tailored sex offender registration schemes.[181] Society's most vulnerable members are threatened by those considered Level Two or Level Three offenders under the Massachusetts statute.[182] Therefore, it follows that only those offenders who have been determined to have a moderate or high rate of reoffense—Level Two or Level Three—should be required to register.[183] The Level One classification, which is only afforded to sex offenders and not to other criminal offenders who have been released after serving time,[184] does not serve the legitimate state purpose of public safety,[185] and should be either eliminated or amended.[186] By retaining a Level One designation, Massachusetts does not have a sex offender registration scheme narrow enough in its design to enable law enforcement to protect society's most vulnerable members.[187]

181. *See* Farley, *supra* note 69, at 499-500.

182. *See* MASS. GEN. LAWS ch. 6, § 178K(2)(b)-(c) (2008).

183. *Cf.* Farley, *supra* note 69, at 499 (noting that law enforcement should focus on those offenders convicted of violent crimes).

184. *See id.* at 490.

185. *See Doe*, 857 N.E.2d at 480-81.

186. *Cf.* Farley, *supra* note 69, at 499.

187. *See generally id.* (arguing that states would benefit if only high risk sex offenders were required to register).

COPYRIGHT PROTECTION FOR THE FRUITS OF DIGITAL LABOR: FINDING ORIGINALITY IN DIGITAL WIRE-FRAMES

Michael Palumbo[*]

Abstract: Copyright encourages progress in the "useful arts" by securing certain exclusive rights to authors, thereby providing an economic incentive for intellectual endeavors. The United States is the world's largest exporter of copyrighted material. As such, it is crucial for U.S. copyright law to remain on the cutting edge of technological innovation so as to protect this vital economic interest. In order to ensure this objective is achieved, courts must remain constantly aware of the underlying policies for protecting intellectual property and resist the practice of applying ill-fitting paradigms to new problems presented by changing technology.

Digital imaging technology is prevalent in all forms of visual communication. The ways in which some digital images are created present a unique set of problems for copyright law. Specifically, the creation of three-dimensional images entails a multi-step process during which several potentially copyrightable works may be created.

Historically, courts have been slow to extend copyright protection to works created with the aid of new technology. As such, it is unclear whether courts will consistently extend copyright protection to expressions that arise at different stages of the digital imaging process.

This Note advocates that works of authorship created at various stages of digital imaging processes, and in particular, digital wire-frames, are entitled to copyright protection. Digital wire-frames can be conceptualized as the

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"skeletons" of three-dimensional digital images. They are created by digital "sculptors" who meticulously construct them from various shapes and lines.

The first section of this Note presents background material about several foundational concepts in copyright law and digital imaging technology. This Note then demonstrates that digital wire-frames should be afforded copyright protection, because such wire-frames satisfy the elements of the Copyright Act. What is likely to be the biggest obstacle to copyright protection of digital wire-frames is finding originality.

Originality is a term of art within copyright. The Supreme Court has held that originality is a constitutionally required element of copyright. The Supreme Court has also held that in order for a work to possess originality, it must satisfy two elements: (1) independent creation and (2) a "spark of creativity." These elements impose an extremely low burden. Independent creation merely means that a work is not copied. The "spark of creativity" requirement is less clearly defined. However, almost any artistic or aesthetic judgment will satisfy the "spark of creativity" requirement.

This Note posits that, almost by definition, wire-frames are *original* works of authorship fixed in a tangible medium of expression. As such, the protection of digital wire-frames is proper under the existing U.S. copyright law regime. Further, the underlying policy considerations that have historically driven copyright law in the United States present compelling reasons for protecting such works.

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INTRODUCTION

Copyright serves the vital function of encouraging progress in the "useful arts."[1] It does so by securing certain exclusive rights to authors, thereby providing an economic incentive for intellectual endeavors.[2] The United States is the world's largest exporter of copyrighted material.[3] It is crucial for U.S. copyright law to adapt to changes in technology to protect this vast economic interest and also to encourage development of the "useful arts."[4] In order to ensure these objectives are achieved, courts must remain constantly aware of the underlying policies for protecting intellectual property while resisting the practice of applying ill-fitting paradigms to new problems presented by changing technology.[5]

Digital imaging technology is increasingly prevalent in all forms of visual communication including film, television, print, and the Internet.[6]

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1. *See* Irah Donner, *The Copyright Clause of the U.S. Constitution: Why Did the Framers Include It with Unanimous Approval?*, 36 AM. J. LEGAL HIST. 361, 369 (1992).

2. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2544-45 (codified at 17 U.S.C. § 102 (2006)) [hereinafter cited to the relevant U.S.C. provision]; *see* Donner, *supra* note 1; Leslie A. Pettenati, *Moral Rights of Artists in an International Marketplace*, 12 PACE INT'L L. REV. 425, 428 (2000).

3. Sharon E. Foster, *Prelude to Compatibility Between Human Rights and Intellectual Property*, 9 CHI. J. INT'L L. 171, 192 (2008); Alan J. Hartnick, *The Revolt of the Students: Is Intellectual Property Dead?*, N.Y. L.J., Feb. 11, 2008 at 3 (2008); Stephanie Condon, *Bush Signs RIAA-Backed Intellectual-Property Law*, CNET NEWS, Oct. 13, 2008, http://news.cnet.com/8301-13578_3-10064527-38.html?tag=mncol; Nat'l Sci. Bd., Nat'l Sci. Found., Science & Engineering Indicators, Technology Development and Diffusion 6-6 (1996), http://www.nsf.gov/statistics/seind96/chap_6.pdf.

4. U.S. CONST. art. I, § 8, cl. 8; *see* Sheldon W. Halpern, *The Digital Threat to the Normative Role of Copyright Law*, 62 OHIO ST. L.J. 569, 572-73 (2001); Hartnick, *supra* note 3; Condon, *supra* note 3.

5. *See* Halpern, *supra* note 4, at 590-91.

6. *See id.* at 571.

The ways in which some digital images are created present a unique set of problems for copyright law.[7] Specifically, the creation of three-dimensional images entails a multi-step process during which several potentially copyrightable works are created.[8] However, courts have often been slow to extend copyright protection to new or different forms of expression.[9] Therefore, it is unclear whether courts will consistently extend copyright protection to expressions that arise at different stages of the digital imaging process.[10]

This Note advocates that works of authorship created at various stages of the digital imaging process, and in particular, digital wire-frames,[11] are entitled to copyright protection. The first section of this Note presents background material about several foundational concepts in copyright law and digital imaging technology. This Note then demonstrates that digital wire-frames should be afforded copyright protection because such wire-frames satisfy the elements of the Copyright Act;[12] almost by definition, digital wire-frames are *original* works of authorship fixed in a tangible medium of expression. As such, the protection of digital wire-frames is proper under the existing U.S. copyright law regime. Further, the underlying policy considerations that have historically driven copyright law in the United States present other compelling reasons for protecting such works.

I. Background

Prior to any investigation into how copyright law and digital imaging technology interact, it is necessary to first consider several fundamental copyright concepts. Specifically, it is necessary to understand the sources

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7. *See* John Gastineau, Note, *Bent Fish: Issues of Ownership and Infringement in Digitally Processed Images*, 67 IND. L.J. 95, 95-100 (1991); Halpern, *supra* note 4, at 578.

8. *See* Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc., 528 F.3d 1258, 1260-61 (10th Cir. 2008).

9. For example, photographs were initially not recognized as copyrightable expressions. *See* Christine Haight Farley, *The Lingering Effects of Copyright's Response to the Invention of Photography*, 65 U. PITT. L. REV. 385, 391 (2004). The same was true of software and other works in early computer cases. *See* Anthony L. Clapes et al., *Silicone Epics and Binary Bards: Determining the Proper Scope of Copyright Protection for Computer Programs*, 34 UCLA L. REV. 1493, 1495-96 (1987).

10. One recent case has considered this issue. *See Meshwerks*, 528 F.3d at 1263-66. This Note posits that in *Meshwerks*, the Tenth Circuit incorrectly held that digital wire-frames do not possess sufficient originality so as to be protected by copyright. *See infra* Part III.

11. Digital wire-frames are the skeletons of digital three-dimensional images. They are sometimes referred to as meshes. *See infra* Part I.E (describing wire-frames and the process by which they are created).

12. 17 U.S.C. § 102 (2006).

of copyright law, including the U.S. Constitution, the Copyright Act, case law, and international treaties. The Copyright Act of 1976, which is currently in force, has a number of terms that require explanation.[13] A brief consideration of the historical development of copyright law is also illuminating since it demonstrates that new technologies have often presented challenges to copyright law and that changes in copyright law must be motivated by the underlying policy, as well as practical considerations.[14]

A. Sources of Copyright Law

Copyright is a form of intellectual property protection.[15] In the United States, there are essentially three branches of intellectual property: patent, trademark, and copyright.[16] Patent, trademark, and copyright are limited as to *what* they protect and also *how* they protect it.[17] Copyright protects any original work of authorship fixed in a tangible medium of expression.[18] To understand precisely what is covered by the preceding phrase, one must consider the intricacies of U.S. copyright law, beginning with the sources of copyright protection.[19]

1. The Constitution

Among Congress's enumerated powers in Article I, Section 8 of the U.S. Constitution is the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[20] The Framers of the Constitution recognized the importance of providing

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13. *Id.* §§ 101-02.

14. *See* Farley, *supra* note 9.

15. *See* Donner, *supra* note 1.

16. *See id.*

17. For the purposes of this Note, it is sufficient to say that a patent protects new, useful, and non-obvious products and processes. 35 U.S.C. § 101 (2006). Patents are more difficult to obtain than copyrights and provide more rigorous protection for shorter periods of time. *See* Dotan Oliar & Christopher Sprigman, *There's No Free Laughs (Anymore): The Emergence of Intellectual Property Norms and the Transformation of Stand-Up Comedy*, 94 VA. L. REV. 1787, 1805-08 (2008). Trademark, on the other hand, allows a mark holder to prevent others from using a particular word, symbol, or device as a brand name for a product or service if the use of such word, symbol, or device would be confusing for potential customers. 15 U.S.C. § 1127 (2006); *see also* What Are Patents, Trademarks, Servicemarks, and Copyrights? http://www.uspto.gov/web/offices/pac/doc/general/whatis.htm (last visited Dec. 1, 2009).

18. 17 U.S.C. § 102 (2006).

19. *Id.*

20. U.S. CONST. art. I, § 8, cl. 8.

protection for intellectual property.[21] They believed that giving rights to those engaged in intellectual pursuits benefited the public since "individual effort was stimulated by higher expected returns."[22] Thus, the Framers sought to encourage the development and proliferation of science and the "useful arts" by providing an economic incentive to authors and inventors for their efforts.[23] By allowing authors and inventors to have exclusive rights to the fruits of their intellectual pursuits, the Constitution allows the holder of such exclusive rights to profit from their pursuits.[24]

2. The Copyright Act

Acting under its constitutional grant, Congress passed the first U.S. Copyright Act in 1790 [hereinafter the "1790 Act"].[25] The 1790 Act sought to encourage learning by "securing the copies of maps, charts, and books to the authors and proprietors of such copies" for fourteen years.[26] It closely resembled England's Statute of Anne.[27] In order to obtain copyright protection, an author or proprietor had to deposit a copy of the work at a district court.[28] Unless an author took this step, he or she would not be afforded protection under the statute.[29] However, if an author properly followed the procedure, he or she would have exclusive rights to his or her maps, charts, or books.[30]

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21. *See* Donner, *supra* note 1; B. ZORINA KHAN, THE DEMOCRATIZATION OF INVENTION: PATENTS AND COPYRIGHTS IN AMERICAN ECONOMIC DEVELOPMENT, 1790-1920, at 2 (2005).

22. KHAN, *supra* note 21, at 3.

23. *Id.*

24. *Id.*; Donner, *supra* note 1.

25. KHAN, *supra* note 21, at 235.

26. Copyright Act of 1790, ch. 15, 1 Stat. 124 (repealed 1831).

27. *See* KHAN, *supra* note 21, at 230. Many of the developments in English Common Law crossed the Atlantic and became part of U.S. copyright law. *See* Donner, *supra* note 1, at 369-74. The first copyright statute passed in England was the Statute of Anne in 1710. KHAN, *supra* note 21, at 230. The purpose of this statute was to democratize intellectual property by allowing anyone to obtain a copyright for his or her work. *Id.* The Statute of Anne limited the length of time for which one may hold exclusive rights to a work, after which the work would become part of the public domain. *Id.* The essential elements of the Statute of Anne remain at the heart of the Copyright Act currently in effect. *Id.* at 231. Copyright law today protects works for a limited, statutorily defined time for the benefit of the copyright holder. 17 U.S.C. § 302-304 (2006). When copyright protection expires, the work enters the public domain where it may be used freely by the public. *Id.*

28. KHAN, *supra* note 21, at 235.

29. Copyright Act of 1790, ch. 15, 1 Stat. 124 (repealed 1831).

30. *Id.*

The first major re-codification of the Copyright Act occurred in 1909 [hereinafter "1909 Act"].[31] The 1909 Act made many amendments to its predecessor.[32] Two of the most important modifications were (1) the expansion of copyright to encompass all "writings of [the] author"[33] and (2) an increase in the duration of copyright protection from fourteen to twenty-eight years, with the option to renew protection for an additional twenty-eight years.[34]

The significance of including all "writings of [the] author" under the statute was to provide protection to expressions embodied in new or increasingly popular mediums, such as lithographs.[35] This expansion shows that as new technology becomes available copyright law must evolve so as to further the underlying policy of protecting "useful arts."[36] Congress expressed the will of the people to protect works that are believed to have intellectual value.[37] The 1909 Act remains effective for works that were copyrighted under it.[38]

The Copyright Act of 1976 [hereinafter the "1976 Act" or the "Copyright Act"] was the second major re-codification of copyright law in the United States.[39] Congress sought to update U.S. copyright law while maintaining several previously established concepts that Congress determined to be vital to the Framers' original intent; primary among these was the standard of originality established by the courts.[40] The most notable changes to the 1909 Act were the expansion of the subject matter that is

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31. Copyright Act of 1909, ch. 320, 35 Stat. 1075 (repealed 1976).

32. *Id.*

33. *Id.* § 4.

34. *Id.* § 23. The 1909 Act also changed the mechanism for attaching copyright from deposit with a federal court to the time of publication. The term "publication" was the focus of much litigation under the 1909 Act. *See generally* Michael B. Landau, *"Publication," Musical Compositions, and the Copyright Act of 1909: Still Crazy After All These Years*, 2 VAND. J. ENT. L. & PRAC. 29 (2000) (examining whether the sale of recorded music constituted a publication under the 1909 Act).

35. Copyright Act of 1909 § 4.

36. *See* Stephanie Berg, *Remedying the Statutory Damages Remedy for Secondary Copyright Infringement Liability: Balancing Copyright and Innovation in the Digital Age*, 56 J. COPYRIGHT SOC'Y U.S.A. 265 (2009).

37. *See* Russ Versteeg, *Defining "Author" for Purposes of Copyright*, 45 AM. U. L. REV. 1323, 1360, 1362 (1996).

38. *See* Landau, *supra* note 34, at 42. Fewer and fewer works remain subject to this statute as the terms of works copyrighted under the 1909 Act expire. *Id.*

39. H.R. REP. NO. 94-1476 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 5659 [hereinafter HOUSE REPORT].

40. The phrase "original works of authorship" is intended to incorporate without change the standard of originality established by the courts under the 1909 copyright statute. *Id.* at 51.

protected and the point at which copyright protection attaches.[41] The 1976 Act expanded the scope of copyright protection to include *any* "original works of authorship fixed in *any* tangible medium of expression, now known *or later developed*."[42] Under the 1976 Act, copyright protection attaches immediately upon fixation.[43] The 1976 Act and the Sonny Bono Amendment also extended the initial length of copyright protection from twenty-eight years to the length of the author's life plus seventy years.[44]

The 1976 Act imposes certain limitations.[45] Copyright protection does not "extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."[46] Essentially, this provision prevents extending copyright protection to those things that are generally protected by patent or that should not, for public policy reasons, be protected by copyright.[47]

Once copyright protection attaches, the author is granted several exclusive rights.[48] An author is given the exclusive rights to, among others, "reproduce the copyrighted work in copies or phonorecords,"[49] and "distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending."[50] These exclusive rights provide tremendous potential for profit.[51] Furthermore, since copyright is a property interest, a copyright holder also has the right

41. 17 U.S.C. § 102 (2006).

42. *Id.* (emphasis added).

43. *See id.* § 410(a). Although copyright protection attaches immediately upon fixation in a tangible medium, the Act provides incentives to registering a work with the Copyright Office, such as establishing prima facie evidence of the validity of the copyright. *See id.* § 410(c).

44. Under the original 1976 Copyright Act, protection lasted for the life of the author plus fifty years. Copyright Act of 1976 § 302(a). This was amended in 1998, now protection last for seventy years after the author's death. *See* Sonny Bono Copyright Term Extension Act, Pub. L. No. 105-298, § 102(b), 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. § 302 (2006)).

45. Copyright Act of 1976 § 107.

46. *Id.* § 102(b); Material Not Subject to Copyright, 37 C.F.R. § 202.1 (2008).

47. *See* Robert Spoo, *Ezra Pound's Copyright Statute: Perpetual Rights and the Problem of Heirs*, 56 UCLA L. REV. 1775, 1789 (2009).

48. Copyright Act of 1976 § 106.

49. *Id.* § 106(1).

50. *Id.* § 106(3).

51. *See* Donner, *supra* note 1, at 368-70.

to defend his or her work against all others.[52] Copyright protection is both extensive and long lasting.[53]

Under the current Copyright Act, a work is entitled to copyright protection so long as it is an "*original* work[] of authorship *fixed* in [a] tangible medium of expression."[54] This phrase sets forth the guiding principle regarding what can be protected under copyright.[55] Tangible medium of expression pertains to fixation in a form that can be observed by others either naturally or with the aid of machines, such as a writing or recording.[56] The terms "fixed," "works of authorship," and "original" are vital to understanding what material is subject to copyright.[57] It is important to note that the terms "fixed" and "works of authorship" are defined in the statute, while "original" is not.[58] Furthermore, the crux of many copyright issues, including the one addressed in this Note, is the definition and application of "originality."[59] As such, this Note briefly discusses the first two terms and gives "originality" special attention in the following section.

a. Fixation

Under the Copyright Act, copyright protection attaches immediately upon fixation.[60] Fixation is the process by which an expression is placed in a tangible medium that can be perceived by others directly or with the aid of machines.[61] The Copyright Act provides that fixation "in a tangible medium of expression [occurs] when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently

52. *See* Copyright Act of 1976 § 106.

53. *See id.* §§ 102, 302.

54. *Id.* § 102(a) (emphasis added).

55. *See* VerSteeg, *supra* note 37, at 1343-49.

56. Copyright Act of 1976 § 102.

57. *See* VerSteeg, *supra* note 37.

58. *See* Copyright Act of 1976 §§ 101-02.

59. *See* sources cited *supra* note 9.

60. Fred Anthony Rowley, Jr., *Dynamic Copyright Law: Its Problems and a Possible Solution*, 11 HARV. J.L. & TECH. 481, 510-11 (1998). While no further action is required, there are additional steps a copyright holder may take to ensure protection. *See* Copyright Act of 1976 § 410. For example, a copyright holder may register his or her work with the Copyright Office for a small fee. *See id.* By doing so, the author secures certain statutory protections, such as a presumption of authorship in an infringement action and the option to recover statutory damages and attorney's fees if successful in such an action. *See id.* §§ 410-11.

61. *See id.* § 101.

permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[62]

The Copyright Act allows for fixation in any tangible medium, including those not yet in existence.[63] In early computer copyright litigation, there was much concern over whether data stored electronically on a computer could be "fixed."[64] Early litigation in this area demonstrated uncertainty by the courts as to the functioning of computers and points to the broader issue of delayed copyright protection of new technologies.[65] The argument against fixation in such cases relied on reasoning similar to that used in *White-Smith Music Publishing Co. v. Apollo Co.* ("*Piano Roll Case*").[66] In the *Piano Roll Case*, the Supreme Court held that a piano roll should not be afforded copyright protection since it could not be read by humans.[67] Such arguments were dispelled in the 1976 Act by the addition of the language, "copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."[68] However, this issue has been largely resolved.[69] Fixation is generally recognized in electronic and digital storage so long as such data can be perceived by the aid of a machine.[70]

b. Works of Authorship

The Copyright Act provides that "works of authorship" include, but are not limited to, the following categories: "(1) literary works; (2) musical

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62. *Id.* The definition of fixed further provides, "[a] work consisting of sounds, images, or both, that are being transmitted, is 'fixed' for purposes of this title if a fixation of the work is being made simultaneously with its transmission." *Id.* This provision was added to eliminate an ambiguity created by broadcasted images and sounds that were not recorded prior to transmission. HOUSE REPORT, *supra* note 39, at 51.

63. 17 U.S.C. § 102 (2006).

64. *See generally* Matthew Bender & Co. v. West Publ'g Co., 158 F.3d 693 (2d Cir. 1998); Data Cash Sys., Inc. v. JS&A Group, Inc., 480 F. Supp. 1063 (N.D. Ill. 1979).

65. *See* Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240, 1246-54 (3d Cir. 1983) (holding that even computer software stored only on temporary memory is subject to copyright protection); Firoozye v. Earthlink Network, 153 F. Supp. 2d 1115, 1124-26 (N.D. Cal. 2001) (holding that computer programs are covered by copyright).

66. *See* White-Smith Music Publ'g Co. v. Apollo Co., 209 U.S. 1, 18 (1908).

67. *See id.*

68. 17 U.S.C. § 102(a).

69. *See Bender*, 158 F.3d 693.

70. *See, e.g., id.*; Midway Mfg. Co. v. Artic Int'l, Inc., 704 F.2d 1009, 1011 (7th Cir. 1983). For example, information stored on a hard drive is sufficiently fixed so as to be afforded copyright protection.

works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works."[71] Literary works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; and sound recordings are defined within the statute, while the remaining categories are not.[72]

Of particular interest in this Note are the definitions of pictorial, graphic, and sculptural works. The definition provided in the Copyright Act is essentially an illustrative list of the types of works included in this category.[73] It includes "two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings."[74]

B. Originality

The Copyright Act does not define the term "original."[75] Therefore, the meaning of "original" must be determined through statutory interpretation and judicial decisions interpreting the Copyright Act.[76] Originality in copyright can be visualized as layers of a multi-layer cake. Each new layer of original authorship is entitled to copyright.[77] However, only the original elements (i.e., each new layer of cake) are eligible for protection; in copyright terms, each new layer of cake is an original work of authorship.[78]

1. The Two-Step Originality Test from *Feist Publications, Inc. v. Rural Telephone Service Co.*[79]

The leading case on originality is *Feist Publications, Inc. v. Rural Telephone Service Co.*[80] The facts of *Feist* are as follows: Rural was a telephone utility provider.[81] State regulation required Rural to produce a

71. Copyright Act of 1976 § 102(a).

72. *Id.* § 101.

73. *See id.*

74. *Id.*

75. *See id.*

76. *See* HOUSE REPORT, *supra* note 39, at 51.

77. *See* Russ VerSteeg, *Rethinking Originality*, 34 WM. & MARY L. REV. 801, 878 (1993) [hereinafter Versteeg, *Rethinking Originality*].

78. *See id.*

79. 499 U.S. 340 (1991).

80. *See id.*

81. *Id.* at 342.

telephone directory of its customers.[82] Feist was a phone book publisher who incorporated Rural's directory into its own and then sold the directory for a profit.[83] Rural brought suit, alleging Feist had infringed upon its exclusive rights under the Copyright Act as to the directory.[84] Feist defended by arguing that the directory was not an original work of authorship entitled to copyright protection.[85]

The Supreme Court held, in a unanimous decision, that "[t]he sine qua non of copyright is originality."[86] That is, originality is a threshold requirement for copyright.[87] The Court found that legislative history indicates that by not including a definition of originality, Congress intended to impute previously-developed definitions of the term into the Copyright Act.[88] The Court went on to recognize that "[o]riginal, as the term is used in copyright, means only that the work was independently created by the author . . . and that it possesses at least some minimal degree of creativity."[89] This rule imposes a two-step inquiry when determining originality.[90] Independent creation is a rather direct issue; it requires only that the work is not copied from a pre-existing work.[91] The second prong imposed by the Court in *Feist*, a spark of creativity, requires a significantly more complex analysis.[92]

Creativity is an ambiguous term, which was left undefined by the Court.[93] It did acknowledge, however, that the quality of creativity is not the subject of inquiry, but rather the mere presence of creativity.[94] It does

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82. *Id.*

83. *Id.* at 342-43.

84. *Id.* at 344.

85. *Feist*, 499 U.S. at 344.

86. *Id.* at 345.

87. *See id.* at 346.

88. *See* HOUSE REPORT, *supra* note 39, at 51.

89. *Feist*, 499 U.S. at 345. Prior to *Feist*, originality was not consistently required to have two elements (i.e., independent creation *and* a spark of creativity). However, following the Court's decision in *Feist*, it is widely recognized that originality must possess the two elements. *See* VerSteeg, *Rethinking Originality*, *supra* note 77, at 805-07; Russ VerSteeg, *Sparks in the Tinderbox:* Feist, *"Creativity," and the Legislative History of the 1976 Copyright Act*, 56 U. PITT. L. REV. 549, 550-51, 554 (1995) [hereinafter VerSteeg, *Sparks*].

90. *See Feist*, 499 U.S. at 345.

91. *Id.* at 346.

92. VerSteeg, *Rethinking Originality*, *supra* note 77, at 823-27. Some have argued that requiring anything more than a showing of independent creation for originality violates Congress's intent in intentionally excluding "creativity" from the statute. *Id.* at 877-79.

93. *Feist*, 499 U.S. at 348.

94. *Id.* at 345.

not matter "how crude, humble or obvious" an expression might be.[95] So long as it was independently created and possesses some degree of creativity, it is original under the Copyright Act.[96] Originality does not require novelty.[97] The Court acknowledged, "a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying."[98] This is a well-settled principle of copyright law; it is one of the primary distinguishing characteristics of copyright as compared to patent protection.[99]

2. Interpretations of Originality in Cases Prior to and After *Feist*

An early Supreme Court case interpreting originality was *Burrow-Giles Lithographic Co. v. Sarony*.[100] In that case, the Court held that a photograph may be afforded copyright protection so long as the photographer adds some degree of originality to the expression.[101] The Court held that the photographer's decision regarding the pose of the actor, lighting, composition of the scene, and choice of equipment were sufficient to make the photograph a copyrightable expression.[102]

In *Bleistein v. Donaldson Lithographing Co.*, the Supreme Court refused to require some degree of *artistic* expression to qualify for copyright.[103] Essentially, this decision recognized that it is not the role of the Court to distinguish between "good" or "bad" expressions.[104] The Court renounced the distinction between artistic and ordinary.[105] The Court found that a very modest expression of personality constitutes sufficient originality for copyright.[106]

Recent cases have continued to uphold the minimal degree of creativity required to find originality.[107] In *SHL Imaging, Inc. v. Artisan House, Inc.*, the court held that "[c]opyright covers . . . the incremental

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95. *Id.* (citing 1 M. NIMMER & D. NIMMER, COPYRIGHT §§ 2.01[A], [B] (1990)).

96. *Id.* at 348.

97. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249-50 (1903).

98. *Feist*, 499 U.S. at 345.

99. Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir. 1936).

100. 111 U.S. 53 (1884).

101. *See id.* at 58.

102. *Id.* at 59-60.

103. *See* 188 U.S. 239, 249-51 (1903).

104. *See id.* at 251.

105. *See id.*

106. *Id.* at 249-50.

107. *See, e.g.*, SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301, 309 (S.D.N.Y. 2000).

contribution and not the underlying information."[108] In that case, the issue was whether photographs of picture frames taken for use in a catalog were sufficiently original to warrant copyright protection.[109] The court held they were.[110] This decision was based largely on consideration of the factors laid out in *Burrow-Giles Lithographic Co. v. Sarony*.[111]

The Supreme Court recognized that while the "vast majority of works make the grade quite easily," there are instances where an expression may lack sufficient originality.[112] There are several commonly recognized limitations on what is original and therefore subject to copyright protection.[113] Facts and ideas cannot be copyrighted.[114] The Court recognized that "[n]o author may copyright his ideas or the facts he narrates."[115] This is because "facts do not owe their origin to an act of authorship. The distinction is one between creation and discovery: The first person to find and report a particular fact has not created the fact; he or she has merely discovered its existence."[116] Facts are un-copyrightable "because they bear no mark of variation that is beyond the trivial."[117] The legislative history of the Copyright Act of 1976 clearly shows that it was Congress's intention "to maintain the established standards of originality" that existed prior to the 1976 Act.[118]

Feist extinguished an issue that had split courts in previous copyright originality cases: the "sweat of the brow" theory of copyright.[119] In early copyright jurisprudence there were two competing theories regarding what should trigger copyright protection.[120] One theory, often referred to as the "sweat of the brow" theory, said that a work was entitled to copyright protection if some quantum of effort was expended in its creation.[121] The

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108. *Id.* at 311.

109. *Id.* at 303.

110. *See id.* at 310.

111. *Id.* at 309-11.

112. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991).

113. *See* Alberto-Culver Co. v. Andrea Dumon, Inc., 466 F.2d 705, 707-08 (7th Cir. 1972) (describing the test of copyright infringement).

114. *See* 17 U.S.C. § 102(b) (2006); *Alberto-Culver*, 466 F.2d 705 *passim* (finding slogans do not meet minimum originality standards); Newton v. Diamond, 204 F. Supp. 2d 1244, 1253 (C.D. Cal. 2002) (finding slight musical variations to be insufficiently original).

115. Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 556 (1985).

116. *Feist*, 499 U.S. at 347.

117. Russ VerSteeg, *Intent, Originality, Creativity and Joint Authorship*, 68 BROOK. L. REV. 123, 127 (2002) [hereinafter Versteeg, *Creativity and Joint Authorship*].

118. *See* HOUSE REPORT, *supra* note 39, at 51; *Feist*, 499 U.S. at 355.

119. *See Feist*, 499 U.S. at 353, 359-60.

120. *See id.* at 352.

121. *Id.* at 356.

"sweat of the brow" theory is derived from a natural law interpretation of intellectual property.[122] That is, the Lockean principle that anything produced by one's body is somehow imbued with a piece of the creator, and so becomes the possession of the creator.[123] In less philosophical terms, it was based on the principle that one should be entitled to the fruits of his or her labor.[124]

The competing theory, prevalent in U.S. copyright jurisprudence and affirmatively adopted by the Court in *Feist*, holds that the amount of work invested in an expression is irrelevant.[125] The only consideration is whether the resulting expression has some quality that should be protected.[126] The Court in *Feist* indicated that Congress emphasized opposition to "sweat of the brow" copyright protection with regard to compilations.[127] The purpose in doing so was to ensure that "courts would not repeat the mistake of the 'sweat of the brow' courts by concluding that fact-based works are treated differently and measured by some other standard."[128] The Court explained that it was Congress's goal to "make plain that the criteria of copyrightable subject matter stated in section 102 apply with full force to works . . . containing preexisting material."[129] "In summary, the 1976 revisions to the Copyright Act leave no doubt that originality, not 'sweat of the brow,' is the touchstone of copyright protection . . . ."[130]

While *Feist* resolved the longstanding tension caused by the "sweat of the brow" theory of copyright, it gave rise to an often-lamented definition of originality.[131] By requiring a finding of a "spark of creativity," the Court introduced a subjective inquiry into every copyright case.[132] The appropriateness of the Court's creativity requirement has been questioned.[133] Nevertheless, the "spark of creativity" requirement is

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122. *See infra* Part I.C.

123. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, CHAPTER 5: OF PROPERTY § 27 (C.B. Macphereson ed., Hackett Pub. Inc. 1980) (1690).

124. *See* Leslie A. Pettenati, *Moral Rights of Artists in an International Marketplace*, 12 PACE INT'L L. REV. 425, 429-30 (2000).

125. *See Feist*, 499 U.S. at 345.

126. *See id.* at 348.

127. *Id.* at 352-53.

128. *Id.* at 357.

129. *Id.* (quoting HOUSE REPORT, *supra* note 39, at 57).

130. *Id.* at 359-60.

131. VerSteeg, *Sparks*, *supra* note 89.

132. *Feist*, 499 U.S. at 345; *see* VerSteeg, *Sparks*, *supra* note 89, at 550-51.

133. VerSteeg, *Creativity and Joint Authorship*, *supra* note 117, at 134.

currently the second prong (the first being independent creation) required for a finding of originality.[134]

C. Alternative Approaches to Copyright: Moral Rights

Not all countries follow the U.S. copyright model.[135] Many civil law countries have a different conception of intellectual property protection and recognize moral rights.[136] In some countries, copyright protection is not something given to an author by the government, but rather it is a natural or moral right that exists as soon as an author creates an expression.[137] Such an interpretation of intellectual property is based on the Lockean principle that an individual has an interest in the product of his or her body.[138] An idea is as much a product of one's body as labor, and is therefore entitled to protection by natural law.[139]

Although these principles do not prevail in present-day Anglo-American copyright law, they enjoy prominence in other parts of the world.[140] Furthermore, such theories also suggest policy considerations of encouraging the "useful arts" for the betterment of society.[141] The Berne Convention, to which the United States is a signatory, adopts at least some natural rights principles with regard to copyright.[142] The Berne Convention protects copyrighted works of signatory countries without regard to formalities.[143] The protections afforded by the Berne Convention are similar to those provided by the U.S. Copyright Act,[144] however they also provide a number of "moral rights."[145] For example, the Berne Convention provides that an "author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other

134. *Feist*, 499 U.S. at 345.

135. *See generally* Pettenati, *supra* note 124.

136. *See id.* at 426-27, 442-44.

137. *See id.* at 429.

138. *See* LOCKE, *supra* note 123, at 128 ("Though the earth, and all inferior creatures be common to all men, yet every man has a property in his own person. This nobody has any right to but himself. The labour of his body, and the work of his hands . . . are properly his.").

139. *See id.*

140. *See* Pettenati, *supra* note 124, at 426-27.

141. *See generally id.*

142. *See* Berne Convention for the Protection of Literary and Artistic Works, art. 6*bis*, July 24, 1971, 24 U.S.T. 1749, *available at* http://www.law.cornell.edu/treaties/berne/overview.html [hereinafter Berne].

143. *See id.* art. 5(2).

144. *Compare* Copyright Act of 1976 § 106A (2006), *with* Berne, *supra* note 142, art. 6.

145. *See* Berne, *supra* note 142, art. 6.

derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."[146]

The Berne Convention Implementation Act of 1988 ("Berne Convention") shows the United States' reluctance to fully adopt all of the provisions of the Berne Convention.[147] The Berne Implementation Act is a watered-down adoption of the Berne Convention.[148] However, the Visual Artists Rights Act of 1990 brought the United States a step closer to the spirit of Berne, at least with respect to a narrowly defined category of works.[149] The Visual Artists Rights Act of 1990 created a special set of rights for visual artists that reflect provisions in the Berne Convention.[150] For example section 106A creates the right to "claim authorship of that work," "prevent the use of his or her name as the author of any work of visual art which he or she did not create," "prevent the use of his or her name as the author of the work of visual art in the event of a distortion, mutilation, or other modification of the work which would be prejudicial to his or her honor or reputation," and "to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right."[151] The United States adopted at least some aspects of the natural rights theories embodied in the Berne Convention.[152]

D. *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*: Demonstrating the Danger of Misinterpreting Originality

A recently decided case from the Tenth Circuit Court of Appeals, *Meshwerks*, held that digital wire-frames of Toyota car models were not sufficiently original so as to be protected by Copyright.[153] The court relied on *Feist* and its progeny to determine that the "wire-frames" created by Meshwerks, for use in an advertisement for Toyota, were not sufficiently

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146. *Id.* art. *6bis*.

147. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (codified as 17 U.S.C. §101).

148. *Compare id.*, *with* Berne, *supra* note 142.

149. Visual Artist Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (codified at 17 U.S.C. § 106(A)); *see* H.R. REP. NO. 101-735 (1990), *as reprinted in* 1990 U.S.C.C.A.N. 6935; Pettenati, *supra* note 124, at 431.

150. 17 U.S.C. § 106A; *see* Berne, *supra* note 142.

151. 17 U.S.C. § 106A.

152. *See* Pettenati, *supra* note 124, at 428-30.

153. Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc., 528 F.3d 1258, 1260 (10th Cir. 2008). Meshwerks, Inc. is a "cutting-edge 3D [d]igital [c]ontent [c]reation [s]tudio" that creates digital models or parts of digital models for television, film, and commercial purposes. Meshwerks: About Us, http://www.meshwerks.com (last visited Dec. 1, 2009).

original to be protected by copyright.[154] The court held so, even while recognizing that the creation of the "wire-frames" required significant amounts of work and creativity.[155] For example, after taking measurements of the Toyota cars, Meshwerks personnel manually "sculpted" each "wire–frame" by manipulating digital lines on the screen.[156] Meshwerks estimated that approximately ninety percent of the data points contained in the final models were manually sculpted.[157]

The Tenth Circuit relied on cases involving photographs[158] to determine that digital wire-frames of cars were not sufficiently original.[159] The court noted that photographers are entitled to copyright for their "incremental contribution."[160] That is, photographs are copyrightable only to the extent that "pose, positioning, background, lighting, shading, and the like" can be attributed to the photographer.[161] The Tenth Circuit held that to "the extent [works] do not involve any expression apart from the raw facts in the world," they are not copyrightable.[162]

Here, the key fact was that "Meshwerks' digital wire-frame computer models depict Toyota's vehicles without any individualizing features: they are untouched by a digital paintbrush; they are not depicted in front of a palm tree, whizzing down the open road, or climbing up a mountainside."[163] The court held, "Meshwerks' models depict nothing more than unadorned Toyota vehicles—the car *as* car."[164] The court reasoned that if the car was removed from Meshwerks' work, nothing copyrightable was left.[165] However, as discussed below, the court in *Meshwerks* improperly analyzed the "creative spark" required for originality.[166]

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154. *See Meshwerks*, 528 F.3d at 1267-68.

155. *Id.* at 1268.

156. *See id.* at 1261.

157. *Id.* at 1260.

158. *Id.* at 1263-67.

159. *Id.* at 1269.

160. *Meshwerks*, 528 F.3d at 1264 (citing SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301, 311 (S.D.N.Y. 2000)).

161. *Id.* (discussing Burrow-Giles Lithograph Co. v. Sarony, 111 U.S. 53, 279 (1884)).

162. *Id.* at 1265.

163. *Id.*

164. *Id.*

165. *Id.* at 1266.

166. *See infra* Part III. The very cases cited by the court in *Meshwerks* demonstrate that any kind of artistic judgment is sufficient to satisfy the "spark of creativity" requirement. *See, e.g.*, Rogers v. Koons, 960 F.2d 301, 308 (2d Cir. 1992) (emphasizing photographer's inventive efforts).

E. Digital Imaging

Digital technology presents numerous challenges to copyright law.[167] In the past several years, much legal scholarship and litigation has focused on the impact of digital technology on photography.[168] Prior to engaging in an analysis of how copyright law should interact with digital wire-frames, it is helpful to consider in greater detail the process by which digital images are created. The process of creating three-dimensional images is a complicated process requiring much skill.[169] It involves procedures that are akin to sculpting, painting, and other traditional art forms, transposed, however, into the digital world.[170] Generally, the process for creating life-like three-dimensional digital images involves three steps: capture, wire-framing, and skinning.[171]

Wire-framing refers to the process by which a three-dimensional digital object is given structure.[172] Wire-frame images are a way of viewing three-dimensional objects that represent shapes as intersections of lines in planes.[173] The structure works like a skeleton.[174] A digital artist must create each bone of the skeleton.[175] A finished wire-frame looks much like a finished digital image.[176] However, it does not have texture or "skin," that is, the appearance of texture or color.[177] Wire-frames are also necessary for animation.[178] Three-dimensional animation programs generally have "physics," which, much like in the natural world, impose certain rules upon moving bodies.[179]

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167. *See* Peter S. Menell, *Envisioning Copyright Law's Digital Future*, 46 N.Y.L. SCH. L. REV. 63, 199 (2003).

168. *See* Lisa Byrne Anastasio Potter, Note, *Alterated Realities: The Effect of Digital Imaging Technology on Libel and Right of Privacy*, 17 HASTINGS COMM. & ENT. L.J. 495, 502-05 (1995).

169. *See* Chris Wedge, *Foreword to* PETER WEISHAR, BLUE SKY: THE ART OF COMPUTER ANIMATION: FEATURING ICE AGE AND BUNNY (2002).

170. *See, e.g.*, How We Build a Rendered 3D Model, An Example from the Northwest Palace of Ahsur-nasir-pal II at Nimrud, Interactive Publication Prototype, http://www.learningsites.com/NWPalace/HowWeBuildaModel02/RenderProcess.htm (last visited Dec. 1, 2009) (demonstrating how to make a 3D image from a sculpture).

171. *See* WEISHAR, *supra* note 169, at 16-32, 44-45.

172. *See id.* at 16-32.

173. *See id.* at 44.

174. *Id.* at 26.

175. *See id.*

176. *See id.* at 26-29.

177. *See* WEISHAR, *supra* note 169, at 26.

178. *Id.*

179. *Id.*

II. Digital Wire-Frames Are Copyrightable Works of Authorship.

In all but the narrowest of circumstances, digital wire-frames that accurately depict real-life subjects satisfy the elements of originality set forth in *Feist*.[180] Therefore, the authors of such wire-frames should enjoy the exclusive rights provided by the Copyright Act.

A. Independent Creation

In order to be independently created, an expression must not be copied from a pre-existing expression.[181] Judge Learned Hand addressed the issue of independent creation in *Sheldon v. Metro-Goldwyn Pictures Corp.*[182] In that case, the plaintiffs, copyright holders to a play, alleged that defendants, Metro-Goldwyn Pictures Corporation, violated their exclusive rights by producing a film so similar to the play that it constituted copying.[183] Defendants argued that plaintiffs could not hold copyright to the themes and events in the play since they were very common in literature.[184] In rejecting this argument, Judge Hand stated:

> [Defendants erroneously believe that like] patent, a copyrighted work must be not only original, but new. That is not however the law as is obvious in the case of maps or compendia, where later works will necessarily be anticipated. . . . Borrowed the work must indeed not be . . . but if by some magic a man who had never known it[,] were to compose anew Keats's Ode on a Grecian Urn, he would be an "author," and, if he copyrighted it, others might not copy that poem . . . .[185]

In other words, a work can be original for the purposes of copyright, without being novel, new, or unique.[186] Therefore, digital wire-frames that are not copied from pre-existing works satisfy the first prong of the test for originality set forth in *Feist*.[187]

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180. *See supra* Part I.B.1 (describing the elements of originality as described in *Feist*).

181. *See* VerSteeg, *Rethinking Originality*, *supra* note 77, at 805-06; VerSteeg, *Sparks*, *supra* note 89, at 550-51.

182. 81 F.2d 49, 53 (S.D.N.Y. 1936).

183. *Id.* at 49.

184. *Id.*

185. *Id.* at 53-54.

186. *See id.*

187. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 344-45, 361 (1991).

B. Spark of Creativity

The "spark of creativity" requirement is also satisfied with regard to wire-frames since digital wire-frames require the skilled "sculpting" by digital artists.[188] There is almost necessarily some degree of creativity in wire-frames that are created by digital sculptors, since nearly every component of such wire-frames requires artistic or aesthetic judgment.[189] This principle was established in *Burrow-Giles* with regard to photography and is equally applicable in the case of wire-frames.[190] The personal judgment and artistic skill required in the wire-framing process is precisely what was recognized as crucial for establishing originality in *Burrow-Giles*[191] and its progeny.[192] The skillful manipulation of digital information that is used to create digital wire-frames is even more pervasive than that required to achieve a desired aesthetic result in the manipulation of a photograph, which is generally sufficient to satisfy the "spark of creativity" requirement.[193]

In *SHL Imaging*, the court recognized that the combination of elements that satisfy the "minimal 'spark of creativity'" requirement "necessarily var[ies] depending on . . . creative choices."[194] The principles applied in photography cases are illustrative for other pictorial works.[195] The factors that must be considered in finding creativity in digital wire-frames will, as the court acknowledged in *SHL Imaging*, "necessarily vary."[196] However, the operative fact is that just as a photograph is copyrightable so long as it is not a mechanical reproduction,[197] so too are

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188. *See supra* text accompanying notes 169-79.

189. *See* Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc., 528 F.3d 1258, 1260 (10th Cir. 2008); *see supra* text accompanying notes 169-79. The narrow circumstances that would prevent a wire-frame from being afforded copyright protection are those in which a wire-frame is purely the result of computerized processes (e.g., where a computer takes measurements and, based on the set of data points, creates a wire-frame image without any input from human sculptors). *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 55, 60 (1884).

190. *See Burrow-Giles Lithographic Co.*, 111 U.S. at 60.

191. *See id.* at 55 (emphasizing pose, selection and arrangement of costumes, draperies and other accessories, and lighting and shading).

192. *See* E. Am. Trio Prods., Inc. v. Tang Elec. Corp., 97 F. Supp. 2d 395, 417 (S.D.N.Y. 2000) (emphasizing layout, angles, lighting, and computer enhancements); Rogers v. Koons, 960 F.2d 301, 307 (2d Cir. 1992) (emphasizing photographer's inventive efforts); Gross v. Seligman, 212 F. 930, 931 (2d Cir. 1914) (emphasizing pose, background, light, and shade).

193. *See Meshwerks*, 528 F.3d at 1265.

194. 117 F. Supp. 2d 301, 310 (S.D.N.Y. 2000).

195. *See* VerSteeg, *Rethinking Originality*, *supra* note 77, at 837.

196. *SHL Imaging*, 117 F. Supp. 2d at 310.

197. *See id.* at 309.

wire-frames copyrightable so long as there is artistic input and not mere digital information capture.[198]

The court in *SHL Imaging* began its originality analysis by considering the photographer's creative process.[199] The court in that case held that "artistic judgment" was sufficient to satisfy the *Feist* standard of originality.[200] The *SHL Imaging* court also held that the intended purpose of the photographs (for commercial use) "ha[d] no bearing" on their ability to be protected.[201]

Furthermore, digital wire-frames do not fall into any of the narrow categories of works that the Supreme Court held were not sufficiently original in *Feist*.[202] The Court in *Feist* held that works that are merely "mechanical," "entirely typical," "garden-variety," "obvious," "basic information," "mere selection," "an age-old practice," "firmly rooted in tradition," "so commonplace [as] to be expected as a matter of course," "practically inevitable," or "time-honored tradition" are insufficient to warrant copyright protection.[203]

C. Legislative History Demonstrates the Minimal Degree of Creativity Necessary to Establish Originality.

Legislative history demonstrates Congress intended to exclude "creativity" from the Copyright Act. Congress deliberately left the term "originality" undefined in the Copyright Act of 1965 in order to retain the standard of originality established by judicial decisions under the 1909 Act.[204] What then was the definition of originality that Congress wished to perpetuate by intentionally leaving the term undefined in the Act? There were actually three definitions of originality that existed prior to the 1976 Act.[205] They were "(1) independently created; (2) independently created plus a distinguishable variation; and (3) independently created plus some

198. *Id.*

199. *Id.* at 310.

200. *Id.* at 311.

201. *Id.*

202. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 362-63 (1991).

203. *Id.*

204. *See* SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW: 1965 REVISION BILL, *reprinted in* 4 GEORGE S. GROSSMAN, OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 3 (2001) ("Our intention here is to maintain the established standard[s] of originality without implying any further requirements of aesthetic value, novelty, or ingenuity."); HOUSE REPORT, *supra* note 39, at 51; Dale P. Olson, *Copyright Originality*, 48 MO. L. REV. 29, 31 (1983).

205. VerSteeg, *Sparks*, *supra* note 89, at 579.

minimal degree of creativity."[206] In a 1963 proposed draft of the Copyright Act, Congress actually included a definition of originality.[207] The definition adopted by Congress in the proposed draft was the first definition—mere independent creation.[208] "This definition submits that 'originality' equals 'independent creation' and nothing more."[209]

However, even though Congress "ultimately passed the bill with the proposed definition of 'originality' deleted . . . [i]t is not clear that it was deleted because the drafters thought that the proposed definition itself was flawed."[210] Quite the contrary: The main objection to the proposed definition of originality in the 1963 bill was that its redundancy and potential to give rise to an elevated standard of creativity.[211] This legislative history demonstrates that the creative requirement (if any!) intended by the drafters of the Copyright Act was minimal.[212] As such, the extent of creativity exhibited by digital sculptors in creating wire-frames is sufficient to satisfy this requirement.[213]

III. *Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc.*:[214] An Example of Improper Application of Originality Standard

The *Meshwerks* case provides an excellent example of how the originality requirement can be misconstrued when considering wire-frames.[215] The court in *Meshwerks* erred most egregiously with regard to originality when it sought direct support from cases involving originality in photographs without considering the differences between photography and digital modeling.[216] The court also erred when it considered "the parties' purpose in creating them."[217]

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206. *Id.*

207. *Id.* at 572-73 (defining originality as an "independent creation of an author who did not copy it from another source").

208. *See* H.R. REP. NO. 89-4347, at 42-43 (1966), *reprinted in* 4 GEORGE S. GROSSMAN, OMNIBUS COPYRIGHT REVISION LEGISLATIVE HISTORY 3 (2001); VerSteeg, *Sparks*, *supra* note 89, at 579-80.

209. VerSteeg, *Sparks*, *supra* note 89, at 574.

210. *Id.* at 577.

211. *See id.*

212. *See id.* at 579.

213. *See supra* text accompanying notes 169-79.

214. 528 F.3d 1258 (10th Cir. 2008).

215. *See id.* at 1264.

216. *See id.*

217. *Id.*

The *Meshwerks* court held that the wire-frame models did not possess any "individualizing features."[218] The court found that since the models were "untouched by a digital paintbrush" and "not depicted in front of a palm tree" or some other scene, the "models depict[ed] nothing more than unadorned Toyota vehicles—the car *as* car."[219] Embellishment, however, is not the only means of creating an original expression.[220] By relying so much on the factors vital to photography cases, the *Meshwerks* court ignored some of the obvious distinguishing characteristics of digital images.[221] In particular, a digitally-sculpted image is not a mere mechanical reproduction, but rather (in most cases) a carefully crafted digital skeleton made with potentially millions of digital objects.[222] Meshwerks personnel manually sculpted each wire frame by manipulating digital lines on the screen.[223] Meshwerks estimated that roughly ninety percent of the data points contained in the final model were the result of manual sculpting by digital artists.[224] Such manual sculpting requires artistic and aesthetic judgment, precisely what has been identified as vital to originality in several photography cases.[225] In these cases, the process of creating the image was sufficient to establish originality so long as the artist's judgment was necessary to create the final work.[226]

Defendants in *Meshwerks* argued that wire-frames failed to meet this threshold requirement for originality.[227] Defendants claimed that in the case of three-dimensional images based on real-life objects, the digital artist is merely copying an already existing work into a new medium.[228] Proponents of this argument rely either on the theory of simple copying or on the theory of a derivative work with no new copyrightable expression.[229]

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218. *Id.* at 1265.

219. *Id.*

220. *See* Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068, 1074 (9th Cir. 2000); Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983).

221. *See Meshwerks*, 528 F.3d at 1270.

222. *See supra* Part I.E.

223. *See Meshwerks*, 528 F.3d at 1260.

224. *See id.*

225. *See* SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301, 306 (S.D.N.Y. 2000); *see* cases cited *supra* note 192.

226. *See* cases cited *supra* note 192.

227. *Meshwerks*, 528 F.3d at 1261.

228. *Id.* at 1268 (defendant arguing its cars are copyrightable expressions).

229. *See id.* at 1261; *Ets-Hokin*, 225 F.3d at 1077.

IV. Proposed Change to the Originality Analysis: Considering the Process of Fixation

In order to prevent future errors like those in *Meshwerks*, courts should inquire into *how* a work is created, rather than merely the appearance of the final product. This is not an attempt to bring back the "sweat of the brow" analysis.[230] This Note does not posit that a digital sculptor should be entitled to copyright protection merely because wire-frames require a large quantity of effort. Rather, this Note posits that in order to determine whether a work is original, courts must determine if there is a degree of creativity. Since creativity is that mysterious process by which a human injects *something* into a work, we must consider the process through which that *something* is expressed.[231] This is what courts have done in the line of photography cases,[232] and it is what is done in other cases considering originality in different contexts.[233] Digital images, generally, and wire-frames in particular, are not easily categorized within a single category of works recognized by the Copyright Act.[234] Rather, wire-frames combine attributes of several types of expression protected by copyright.[235] For example, like photographs, digital wire-frames may result in a realistic depiction of modeled objects.[236] However, unlike photographs these models will not appear realistic without extensive artistic input from a digital sculptor; in this regard, digital wire-frames are more akin to paintings or sculptures.[237] Therefore, the originality analysis for such works, including wire-frames, should not be rigidly confined to an ill-fitting paradigm. The reason they are distinguishable from the types of works just mentioned is the way or the process by which they are created.[238] As the court in *SHL Imaging* recognized, "the authorship of the photographic work is entirely different and separate from the authorship of the sculpture."[239] Therefore, courts should not seek exactly the same expressions of creativity in a case involving wire-frames as it would in a

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230. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 352-53 (1991) (describing the "sweat of the brow" doctrine and its flaws).

231. *See* VerSteeg, *Rethinking Originality*, *supra* note 77, at 825-43.

232. *See* cases cited *supra* note 192.

233. *See, e.g.*, United States v. Hamilton, 583 F.2d 448, 451-52 (9th Cir. 1978).

234. *See* 17 U.S.C. § 101 (2006).

235. *See supra* text accompanying notes 169-79.

236. Potter, *supra* note 168, at 498.

237. *See id.* at 499.

238. *See id.* at 498-99.

239. SHL Imaging, Inc. v. Artisan House, Inc., 117 F. Supp. 2d 301, 306 (S.D.N.Y. 2000).

case involving photography; rather courts should look for any sort of artistic or aesthetic expression, regardless of the type of work or medium in which it is fixed.[240]

Works of authorship are not judged on the quality of the creativity, rather merely on the presence of it.[241] However, depending on the medium of expression in which a work of authorship is fixed, creativity manifests itself in different ways.[242] For example, in cases involving maps, where all the information contained within the map is either part of the public domain or factual, originality is determined by whether the combination and arrangement of facts are independently created and possess a spark of creativity.[243] Ultimately, creativity can only be determined by the physical act through which an expression is fixed.[244] Each medium requires different actions to secure fixation, and the way one performs these actions is relevant in determining whether creativity exists.[245] For example, if a digital wire-frame were created entirely by an automatic process, there would be no opportunity for a digital artist to inject any degree of creativity, just as a photograph with no artistic judgment would not be subject to copyright protection.[246] However, where artists make judgments as to how to recreate a model using digital processes, some quantum of creativity is present.[247] So long as such models are not copied, they are original under *Feist*, its progeny, and the Copyright Act.

Wire-frames do not fall within the "narrow category of works" that lack sufficient originality.[248] In most instances wire-frames cannot be categorized as "mechanical," "entirely typical," "garden-variety," "obvious," "basic information," or "mere selection," since each is the product of significant creative input.[249] Nor is the creation of wire-frames

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240. *See generally* VerSteeg, *Rethinking Originality*, *supra* note 77, at 803 (noting that there is no clear definition of originality).

241. *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 59-60 (1884).

242. *See, e.g.*, Olson, *supra* note 204, at 36.

243. *See, e.g.*, United States v. Hamilton, 583 F.2d 448, 451-52 (9th Cir. 1978) (rejecting the argument that the map in question was not subject to copyright due to lack of originality).

244. *See* Olson, *supra* note 204, at 37-40 (reviewing early Supreme Court copyright jurisprudence).

245. *See id.* at 48-50.

246. *See Burrow-Giles Lithographic Co.*, 111 U.S. at 59-60.

247. *See id.* at 60.

248. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 359 (1991); *see also* VerSteeg, *Rethinking Originality*, *supra* note 77, at 821-23.

249. *See supra* text accompanying notes 169-79. The categories referred to are those identified by the Court in *Feist* that are generally not entitled to copyright protection. *Feist*, 499 U.S. at 362.

akin to the mere transposition of a work from one medium to another.[250] Rather, each wire-frame requires the skilled manipulation of visual elements and digital data.[251] Even if a digital sculptor were to use data derived from measurements taken by sensors as a starting point for the wire-frame, much manipulation is still required.[252] Therefore, the creation of digital wire-frames is unlike cases where a mere change in medium was held to be insufficient for finding originality.[253]

A closer look at the mechanics of the process, rather than merely the final output should be a part of a court's originality analysis. If an expression, though ultimately viewed as a two-dimensional image, is created through a process that more closely resembles the process of sculpture, courts should apply a hybrid analysis of originality that takes into consideration factors considered in determining originality in each type of works.[254] This argument is based on the fact that works of authorship that appear very similar may nevertheless receive different originality analyses as a result of the process by which such works are created.[255] For example, paintings often contain more copyrightable elements than photographs because a painting is fixed in tangible form purely by the efforts of the author, while a photograph may be created without originality.[256] The court in *Meshwerks* failed to recognize the distinction between digital wire-frames and photographs.[257] This case demonstrates the need for clarification on the requirements of originality in digital wire-frames.[258]

This is not to say that that judges should make a searching inquiry as to the quality of the creativity in an expression. Justice Holmes warned against this in *Bleistein v. Donaldson Lithographing Co.*, "[i]t would be a dangerous undertaking for persons trained only to the law to constitute

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250. *See* Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc., 528 F.3d 1258, 1265 (10th Cir. 2008).

251. *See supra* text accompanying notes 169-79.

252. *See supra* text accompanying notes 169-79.

253. *See* Gracen v. Bradford Exch., 698 F.2d 300, 305 (7th Cir. 1983); L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 492 (2d Cir. 1976); Alfred Bell & Co. v. Catalda Fine Arts, Inc., 191 F.2d 99, 105 (2d Cir. 1951); Doran v. Sunset House Distrib. Corp., 197 F. Supp. 940, 947-48 (S.D. Cal. 1961).

254. *See* Mary Campbell Wojcik, *The Antithesis of Originality:* Bridgeman, *Image Licensors, and the Public Domain*, 30 HASTINGS COMM. & ENT. L.J. 257, 266-67 (2008).

255. *Compare* Ets-Hokin v. Skyy Spirits, Inc., 225 F.3d 1068, 1073 (9th Cir. 2000), *with* Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983).

256. *See Ets-Hokin*, 225 F.3d at 1073.

257. Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc., 528 F.3d 1258, 1260 (10th Cir. 2008).

258. *See id.* at 1263.

themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."[259] Although, originality is a threshold issue in any copyright action,[260] the originality standard is minimal.[261] Arguments against finding originality in digital wire-frames fail to recognize the sophistication of expression inherent in digital wire-frames.[262] Wire-frames are not simply mechanically composited images, but rather they are created from observation and interpretation of the natural world.[263]

V. The Underlying Policy for Protecting Intellectual Property Requires Protecting Wire-Frames Under Copyright.

The purpose of copyright protection is to provide incentives to further the "useful arts."[264] Requiring that works of authorship possess originality helps to filter out those works that are entitled to copyright protection from those that are not.[265] The history of copyright law reveals a pattern of changes in technology followed, begrudgingly, by adaptation of the law to accommodate such innovation.[266] For example, in early photography cases, courts were reluctant to extend copyright protection because they were unsure whether photographs were works of an author and, if so, whether such works were original.[267] The same is true of early computer cases, where courts were unsure whether digital storage constituted fixation.[268] However, in each of these instances, copyright protection was eventually extended, either by statutory revision or through judicial interpretation.[269] Ultimately, the law must change to accommodate the needs of society.[270] As society relies more upon digital technology, we invest more time and

259. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 251 (1903).

260. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 352 (1991).

261. *See id.* at 358-59.

262. *See Meshwerks*, 528 F.3d at 1265.

263. *See* VerSteeg, *Rethinking Originality*, *supra* note 77.

264. *See* VerSteeg, *Sparks*, *supra* note 89, at 550-51; Donner, *supra* note 1.

265. *See* VerSteeg, *Sparks*, *supra* note 89, at 550-51. This does not require, however, that such works be unique or novel. *Id.* at 580.

266. *See, e.g.*, Farley, *supra* note 9, at 389.

267. *See id.* Photographs were not protected by copyright until the Act of March 3, 1865, 38th Cong., 2d Sess., 13 Stat. 540.

268. *See* Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983); Clapes, *supra* note 9.

269. *See* sources cited *supra* note 9.

270. *See* Berg, *supra* note 36, at 332.

energy into creating digital works.[271] Whereas not so long ago, an author pored over a typewriter, and artists sweat onto a canvas, today authors, artists, and musicians invest equally as much intellectual vigor into expressing themselves through digital technology.[272] In light of these practical considerations, it is necessary for copyright law to protect digital works to the utmost.[273] By denying copyright protection to digital wire-frames, the law denies skilled artists protection for the fruits of their labor.[274]

The "sweat of the brow" theory of copyright was extinguished in *Feist*.[275] However, this does not mean that we as a society believe that an artist should not be entitled to profit from her labor. Rather, hard work without something more will not be afforded copyright protection, but when hard work results in an original expression—as we define that term—it should be entitled to protection under the Copyright Act.[276]

After considering the process required to create digital wire-frames, it is apparent that a great amount of skill and artistic discretion is required.[277] The creative process involved results in an entirely new work of authorship in a new medium of expression.[278] The process is far less mechanical than the creation of a photograph.[279] There is a significant quantity of judgment and skill involved in the creation of wire-frames.[280] It is likely that no artist will construct a wire-frame exactly as another artist.[281]

So long as creativity is a requirement in finding originality, courts must take into consideration, to some degree, the mental process involved

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271. *See* Aaron A. Hurowitz, *Copyright in the New Millennium: Is the Case Against ReplayTV a New Betamax for the Digital Age?*, 11 COMMLAW CONSPECTUS 145, 145 (2003).

272. *See generally* sources cited *supra* note 3.

273. *Cf.* Hurowitz, *supra* note 271, at 148 (explaining that copyright law inhibits the introduction of new technologies).

274. *See supra* Part IV (discussing a proposal to extend the originality analysis to include digital wire-frames).

275. Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 354-60 (1991).

276. *Id.* at 346-47.

277. *See* Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc., 528 F.3d 1258, 1260 (10th Cir. 2008); *see also supra* Part I.E.

278. *See* WEISHAR, *supra* note 169, at 6.

279. *See generally id.* (describing the process of creating a 3D computer animated film using wire-frames).

280. *See generally id.*

281. Appellant's Reply Brief, Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc., 528 F.3d 1258 (10th Cir. 2008) (No. 2:06-CV-97TC) [hereinafter Appellant's Reply Brief].

in expression.[282] Creativity is an infamously elusive term that describes an equally elusive process.[283] Many have attempted to explain the creativity process through psychology, psychophysiology, and chemistry, though with limited success.[284] Indeed, the use of such a chimera in a legal test has caused much outcry amongst scholars in the field.[285] Nevertheless, so long as the law requires consideration of creativity, lawyers must continue to seek a tenable answer.

Without explicating the vast array of literature on the topic of creativity, this Note posits that the process of sculpting digital wire-frames involves a creative process equal to that of sculpting, painting, or photography. Digital sculpting requires the observation of an image, followed by the internalization of that image, and finally the expression of the internalized stimulus into a medium that can be observed by others.[286] Creativity exists between and during each of these stages.[287] There are nearly infinite ways to create wire-frames, even if two may ultimately appear very similar.[288] Even simple structures in the natural world require complex restructuring in the digital realm.[289] A great deal of creativity is required of an author creating even simple wire-frames.[290] Furthermore, for wire-frames that will be animated there is further creativity required in determining how the wire-frame will move, how it will be skinned, and scaled.[291]

CONCLUSION

Digital wire-frames should be afforded copyright protection. Not only do wire-frame images fall within the scope of the Copyright Act, they are, in most instances, sufficiently original so as to trigger copyright protection.[292] Regardless of how one conceptualizes originality within the

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282. *See* VerSteeg, *Rethinking Originality*, *supra* note 77, at 840. *See generally* David Nimmer, *Copyright in the Dead Sea Scrolls: Authorship and Originality*, 38 HOUS. L. REV. 1, 175-86 (2001).

283. *See* VerSteeg, *Rethinking Originality*, *supra* note 77, at 840.

284. *Id.* at 826-34.

285. *See id.* at 803-04.

286. *See generally* WEISHAR, *supra* note 169 (describing the process of digital imaging as it pertains to animation).

287. *See id.* at 6.

288. Appellant's Reply Brief, *supra* note 281.

289. *See supra* text accompanying notes 169-79.

290. *See* WEISHAR, *supra* note 169, at 6.

291. *See id.* at 60-67 (describing the animation process).

292. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 351-52 (1991); *supra* Part II.A-C.

confines of *Feist*, wire-frames that are independently created and that possess a spark of creativity must be protected by copyright.

In order to properly analyze the originality of digital wire-frame images, courts must consider not only the final appearance of wire-frames, but also the process by which they are created. The court in *Meshwerks* demonstrates the shortcomings of an over-simplified approach to determining the category of a work.[293] Since digital wire-frames require significant creative input by their creators, and are more than mere mechanical reproductions, they are entitled to protection for each element that was created independently and with a spark of creativity.[294] Generally, such protection will be great since all but the simplest wire-frame images require a significant amount of discretion and creative input by a digital sculptor.

Consideration of the policies underlying U.S. copyright law provide further support for the argument that wire-frame images should be afforded copyright protection. In particular, since digital imaging is a burgeoning industry, the copyright office should encourage digital artists to produce innovative works for many applications. One way of doing this is to provide copyright protection to digital artists so as to provide the economic incentive envisioned by the Framers.[295]

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293. *See* Meshwerks, Inc. v. Toyota Motor Sales U.S.A., Inc., 528 F.3d 1258 (10th Cir. 2008); *supra* Part III.

294. *See* Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 53-56 (1884); *supra* Part II.A.

295. *See* Donner, *supra* note 1.

* * * *

"THE MACHINE KNOWS!"*: WHAT LEGAL IMPLICATIONS ARISE FOR GPS DEVICE MANUFACTURERS WHEN DRIVERS FOLLOWING THEIR GPS DEVICE INSTRUCTIONS CAUSE AN ACCIDENT?

*Martin J. Saulen***

Abstract: As technology has advanced and evolved over the past decade, an increasing number of people are setting aside rational thought and putting all of their faith and trust into sophisticated machines. This Note explores the alarming dependence people have placed on their GPS devices and the resulting legal liability that may follow when the devices do not perform as intended. The resulting analysis in this Note reveals that the courts will face problematic questions; for example, does a GPS device manufacturer provide a product or service? If a GPS device is a product, should strict liability apply? The courts answering these questions must determine what tort law theories may apply to a GPS manufacturer for a user harmed while relying on the device's erroneous directions.

An examination of analogous case law provides the courts with the roadmap to approach the novel legal questions facing GPS device manufacturers. The courts should look to these cases for guidance, while recognizing what distinguishes them from GPS devices. Specifically, in determining the appropriate standard of legal liability to use, the courts should take special note of a driver's duty to use common sense on the road and the immense potential these devices have to benefit society.

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* *The Office: Traveling Salesman* (NBC television broadcast Jan. 11, 2007).

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> GPS [device]: Make a right turn.
>
> [Michael begins turning right.]
>
> Dwight: Wait, wait, wait! No, no, no! It means bear right, up there.
>
> Michael: No, it said right, it said take a right.
>
> Dwight: No, no, no, look, it means go up to the right, bear right, over the bridge and hook up with 307.
>
> Michael: Maybe it's a shortcut Dwight. It said go to the right. [turns right]

> Dwight: It can't mean that! There's a lake there!
>
> Michael: The machine knows where it is going!
>
> Dwight: This is the lake!
>
> Michael: The machine knows—stop yelling at me!
>
> Dwight: No, it's—there's no road here! [car drives into lake]
>
> . . .
>
> [Michael drives the car into the lake. Water starts pouring into the vehicle while the GPS device says "make a U-turn if possible."][1]

INTRODUCTION

Luckily, this hilarious exchange occurred on an episode of the fictional NBC television show "The Office," and no people were injured or property damaged.[2] While most reasonable people know it would be a costly and dangerous mistake to take that immediate right and drive into a lake, in today's age of highly sophisticated and evolving technological devices it has become commonplace for people to follow their Global Positioning System ("GPS") navigational device's instructions into dangerous situations.[3] As this Note will explore, an increasing number of

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1. *The Office: Traveling Salesman* (NBC television broadcast Jan. 11, 2007).

2. *Id.*

3. *See Man Using GPS Drives into Path of Train*, http://www.iol.co.za/general/news/newsprint.php?art_id= nw20080104065507338C895047&sf= (last visited Dec. 1, 2009) (discussing a man who, following GPS instructions, turned right onto train tracks, at which point his automobile became wedged on the tracks; the man exited the vehicle, which was then hit by a commuter train); Matt Glazebrook, *GPS Leads Driver to Cliff's Edge*, ASYLUM, Mar. 26, 2009, http://www.asylum.com/2009/03/26/gps-leads-driver-to-cliffs-edge/ (discussing a man who followed GPS directions to the edge of a cliff); Darren Murph, *Another Brit Puts Complete Faith in GPS System, Nearly Perishes*, http://www.engadget.com/2007/05/11/another-brit-puts-complete-faith-in-gps-system-nearly-perishes (last visited Dec. 1, 2009) (discussing a twenty-year-old driver who followed her GPS route onto an unmarked railroad crossing and narrowly escaped from her vehicle before it was struck by a train); Darren Murph, *Motorist Has Faith in GPS, Drives into Sandpile*, http://www.engadget.com/2006/10/10/motorist-has-faith-in-gps-drives-into-sandpile (last visited Dec. 1, 2009) (discussing a driver who blatantly ignored warning signs and drove directly into a sandpile); Marc Perton, *UK Drivers Trust GPS More Than Their Own Eyes*, http://www.engadget.com/2006/04/20/uk-drivers-trust-gps-more-than-their-own-eyes (last visited Dec. 1, 2009) (discussing drivers who disregarded warning signs that a bridge was out of service and followed their GPS instructions directly into a river).

drivers are setting aside common sense and placing their trust in these types of electronic devices.[4] As the fictional character, Michael Scott, succinctly remarked in the above exchange, "[t]he machine knows where it is going!"[5]

As technology has rapidly evolved over the past decade, an increasing number of Americans have become completely dependent on cell phones, GPS devices, personal computers, MP3 players, and personal digital assistants.[6] Considering that these devices are manufactured products, they occasionally fail to perform as intended.[7] Who is at fault if a driver following a GPS device's instructions causes an accident?[8] Typically, when a product harms a consumer, the consumer may sue the manufacturer under a theory of products liability.[9] If a GPS device is characterized as a product, the manufacturer could be held strictly liable for its defects.[10] If a GPS device is considered a service, the manufacturer would not be exposed to strict liability, but could still be held liable for negligence, misrepresentation, or breach of warranty for either defective design of the product or for failing to give adequate instructions or warnings.[11] The question thus arises: Under products liability law, are the navigational capabilities of a GPS device a product or a service?[12]

Accordingly, a driver would want to show that a GPS device is a physical product used by a consumer that ultimately leads the user to a destination, similar to a toaster oven that gives the user the choice of settings to reach a preferred end (burnt or lightly browned toast).[13] The essence of both the GPS device and toaster oven is that of a tangible good.[14] The manufacturer's argument would center on its interpretation of

4. *See* sources cited *supra* note 3 and accompanying text.

5. *The Office: Traveling Salesman* (NBC television broadcast Jan. 11, 2007).

6. Peter C. Neger, *A Map to the Legal Landscape of GPS Devices*, N.Y. L.J., Mar. 5, 2005.

7. *See id.*

8. *See* Eric J. Sinrod, *Perspective: Is GPS Liability Next?*, CNET NEWS, Jan. 16, 2008, http://news.cnet.com/Is-GPS-liability-next/2010-1033_3-6226346.html.

9. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (1997). "One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect." *Id.*

10. Neger, *supra* note 6.

11. *See id.*

12. *See id.*

13. *See id.*

14. *See id.*

the device as a service, providing the user with geographic information and directions, similar to what the online Web mapping service MapQuest[15] offers.[16]

This Note examines how the tort law theories of negligence and strict liability may apply to situations where inaccurate GPS device directions lead to user harm or property damage.[17] Part I discusses the development, features, and commercial applicability of GPS technology. In particular, Part I focuses on the outbreak of accidents blamed on GPS devices. Due to the recent emergence of GPS devices in the American marketplace[18] there appears to be a dearth of case law concerning GPS liability.[19] However, there are analogous authorities that could provide insight into how the court may approach this novel area.

Part II begins by exploring whether a GPS navigational device is a product or service. Part II then examines whether GPS navigational devices could be considered a service. Additionally, Part II focuses on how the strict products liability doctrine may apply to GPS device manufacturers by examining the "aeronautical chart" cases, where the courts contemplated whether aeronautical navigational charts were a product or service and which standard applied. Part II concludes by looking at what role the Restatement (Third) of Torts may play in determining GPS manufacturer liability and what the future may hold for GPS device manufacturers and the strict liability theory.

Part III examines the courts' reluctance to apply any liability upon the publishers of books and magazines that cause personal injury and whether that analysis could extend to GPS device manufacturers. Part IV considers the tort law concept of negligence as applied to navigational charts, and how this analysis may affect GPS device manufacturers. Lastly, Part V also explores a driver's duty of care in conjunction with the negligence and contributory negligence theories.

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15. MapQuest.com is an identifiable consumer website that provides users with maps and directions. *See* About MapQuest, http://company.mapquest.com/about-mapquest.html (last visited Dec. 1, 2009).

16. *See* Neger, *supra* note 6.

17. While numerous contract and warranty liability issues could also arise within the GPS framework, these issues are beyond the scope of this Note.

18. *See infra* note 20.

19. *See* Neger, *supra* note 6.

I. Background

A. GPS Device Overview

As a recent product,[20] the GPS navigational device has been flying off the shelves.[21] In fact, over 1.2 million GPS devices were purchased by consumers in the second quarter of 2005.[22] This number doubled in the second quarter of 2006 as consumers purchased an incredible 2.4 million GPS units.[23] According to a recent report, the number of GPS handsets with navigational capabilities expanded to 20 million in 2008.[24]

A large number of companies, relying on the Department of Defense's GPS satellites, are developing or using satellite navigation and positioning satellites.[25] The ability to use GPS-based technology to receive accurate real-time answers to "where am I on Earth?" questions has been a huge success in commercial industries such as navigation, agriculture, surveying, and precision machine control.[26] The benefit of using such a device has provided incredible commercial and personal utility to companies and individuals alike.[27] GPS-based devices allow companies to precisely answer the question, "where are my assets at all times?"[28] With this technology, a company can accurately dispatch vehicles, create the most efficient transportation routes, track fixed and mobile assets, and manage its inventory with pinpoint accuracy.[29] Likewise, the benefits of GPS devices to drivers include receiving live traffic reports; getting voice-

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20. After the first Gulf War ended in 1991 but before 2000, the first GPS systems were offered for commercial civilian use; however, the signals were degraded to prevent enemies of the U.S. from using the signals with the same accuracy. Gary M. Kaye, *Find Your Way Home: New GPS Devices*, FOX NEWS, Feb. 25, 2009, http://www.foxnews.com/story/0,2933,499464,00.html. In 2000, the U.S. Government changed course and allowed commercial access to the stronger signal, leading to the first in-car handheld navigation device to hit the market only months later. *See id.*

21. *See* Neger, *supra* note 6.

22. Mark Etinger, *The Present and Future of GPS Devices*, http://ezinearticles.com/?The-Present-and-Future-of-GPS-Devices&id=1858530 (last visited Dec. 1, 2009).

23. *Id.*

24. *By 2008, the Number of GPS Handsets with Navigation Functions Will Be Up to 20 Million*, REUTERS, Jan. 9, 2008, http://www.reuters.com/article/pressRelease/idUS114222+09-Jan-2008+BW20080109.

25. *See* Daniel R. Sovocool, *GPS: Charting New Terrain: Legal Issues Related to GPS-Based Navigation and Location Systems* (April/May 1999), *available at* http://library.findlaw.com/1999/Jul/2/130417.html.

26. *See id.*

27. *See id.*

28. *See id.*

29. *See id.*

activated turn-by-turn navigation; using touch-screen controls on bright, interactive maps; and initiating automated police contact if the car is stolen.[30]

1. Development of GPS

GPS was previously called NAVSTAR (Navigation Satellite Timing and Ranging) and was exclusively used and developed by the United States military starting in the 1970s.[31] The main goal of the system was to give military personnel "precise information for navigation, targeting, and troop coordination."[32]

The GPS device uses triangulation, satellite technology, and built-in digital maps to locate the position of the device, and if the user wants, to map out a course to a specific location.[33] To accomplish this, GPS-based navigation systems send and receive radio signals.[34] The GPS receiver accepts the signals and provides the user with the geographic information.[35]

The navigation system is made up of a collection of twenty-four satellites and their ground systems that are financed and operated by the U.S. Air Force.[36] GPS utilizes these "man-made stars" as reference points to accurately calculate positions.[37] Essentially, these satellites map every square foot on Earth with an exclusive address.[38]

2. Commercial GPS Navigational Devices

There are typically two types of GPS navigational devices the average consumer would be most familiar with: (1) automotive navigation systems that are built directly into a vehicle;[39] and (2) portable GPS devices.[40]

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30. Etinger, *supra* note 22.

31. *See* GARMIN: GPS BEGINNER'S GUIDE 4 (2008), http://www8.garmin.com/manuals/GPSGuide forBeginners_Manual.pdf [hereinafter GARMIN]; Jonathan Epstein, *Global Positioning System (GPS): Defining the Legal Issues of Its Expanding Civil Use*, 61 J. AIR L. & COM. 243, 248 (1995).

32. *See* Epstein, *supra* note 31.

33. *See* Neger, *supra* note 6.

34. *See* GARMIN, *supra* note 31.

35. *See id.*

36. *See* Trimble, What is GPS?, http://www.trimble.com/gps/whatgps.shtml (last visited Dec. 1, 2009); *see also* U.S. Air Force, Factsheets: Global Positioning System, http://www.af.mil/information/factsheets/factsheet.asp?id=119 (last visited Dec. 1, 2009).

37. *See* Trimble, *supra* note 36.

38. *See id.*

39. *See generally* Press Release, Microsoft, Microsoft Technology Hits the Road in BMW 7 Series: Microsoft Navigates the Automotive Industry, Enhances the Driver

Automotive navigation systems use a GPS navigation device to acquire position data in order to locate the user on a road in the unit's map database.[41] Utilizing the road database, the device can provide directions to other locations along roads also contained in its database.[42] Portable GPS navigation devices, which are not permanently affixed to the vehicle, come with a bracket to mount the device on the surface of the dashboard and are powered by the automobile's twelve-volt electrical receptacle.[43] Both types of commercial GPS devices typically have functions that include interactive street maps, points of interest, route information, and step-by-step directions.[44]

B. The "Irresponsible Driver Syndrome"[45]

From 2006 to 2009, a surprising number of drivers caused extensive property damage or were nearly killed after following erroneous GPS device instructions.[46] As GPS devices have flooded the market, authorities have had to deal with an increasing number of accidents caused by drivers who unquestioningly obeyed their GPS device's directions.[47]

The story of a California man driving in Bedford Falls, New York is an example of a driver completely disregarding his common sense. This man told police that as he drove over train tracks his GPS device told him to turn right.[48] He took the immediate right and turned onto the train tracks.[49] His vehicle became stuck, and he was almost killed when a northbound train crashed into his vehicle.[50]

The United Kingdom has also dealt with a nationwide problem of drivers crashing or nearly crashing their cars after following erroneous

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Experience (Mar. 4, 2002), *available at* http://www.microsoft.com/presspass/press/2002/mar02/03-04BMWpr.mspx.

40. *See generally* GARMIN, *supra* note 31.

41. *See generally* Microsoft, *supra* note 39.

42. *See generally* GARMIN, *supra* note 31, at 8.

43. *See generally id.*

44. *See, e.g., id.*

45. This Note uses the term "Irresponsible Driver Syndrome" to refer to the behavior exhibited by drivers who have put themselves at risk by unquestioningly following their GPS device into unsafe situations.

46. *See* sources cited *supra* note 3.

47. *See* Nicole Neroulias, *Life Takes a Wrong Turn as Logic Takes a Back Seat: Drivers Relying Too Much on GPS Navigation Systems Can Run into Trouble*, WESTCHESTER J. NEWS, Jan. 5, 2008, at A1.

48. *Id.*

49. *Id.*

50. *Id.*

directions provided to them by their GPS navigational devices.[51] An article published in the *Daily Mirror U.K.* in July 2008 reported that around 300,000 motorists had or were nearly involved in accidents stemming from GPS instructions.[52] The article explained that roughly "1.5 million drivers have suddenly veered dangerously or illegally [into] busy traffic while following [their GPS device's] directions."[53]

To highlight this problem, in March 2009, a GPS device user driving through the West Yorkshire village of Todmorden in the United Kingdom blindly followed the instructions of his GPS device as it directed him off the road and onto a narrow public walkway.[54] The GPS user continued to unquestioningly follow the device's commands until the bumper of his vehicle came into contact with a thin wire fence only inches away from a precipitous hundred-foot drop.[55] The driver stated that as the device consistently referred to the walkway as a road, "[he] just trusted it."[56]

In April 2006, the small British village of Luckington dealt with a rash of drivers who followed their GPS device-recommended routes directly into a nearby river.[57] The directions instructed the drivers to proceed over a bridge that had been closed for the past seven days.[58] Although warning signs were posted on both sides of the road and the river was visible directly in front of the drivers, local residents were forced to extricate approximately fourteen cars from the river.[59] A nearby village also reported that drivers were directed by their GPS navigation systems to the edge of a ravine with a hundred-foot drop.[60]

These cases demonstrate that there are many GPS navigational device users who needlessly put their lives at risk by obstinately following their GPS device instructions. Instead of understanding the GPS device's helpfulness as a navigational aid, these drivers are following the GPS

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51. *See* Tanith Carey, *SatNav Danger Revealed: Navigation Device Blamed for Causing 300,000 Crashes*, DAILY MIRROR U.K., July 21, 2008, http://www.mirror.co.uk/news/top-stories/2008/07/21/satnav-danger-revealed-navigation-device-blamed-for-causing-300-000-crashes-115875-20656554/.

52. *See id.*

53. *Id.*

54. *See* Matt Glazebrook, *GPS Leads Driver to Cliff's Edge*, ASYLUM, Mar. 26, 2009, http://www.asylum.com/2009/03/26/gps-leads-driver-to-cliffs-edge.

55. *Id.*

56. *Id.*

57. Marc Perton, *UK Drivers Trust GPS More Than Their Own Eyes*, ENGADGET, Apr. 20, 2006, http://www.engadget.com/2006/04/20/uk-drivers-trust-gps-more-than-their-own-eyes.

58. *See id.*

59. *See id.*

60. *See id.*

device instructions to the detriment of road safety. As navigational devices become increasingly affordable and more readily available,[61] these cases exemplify the core of the device's problem: people may follow their navigational device even when it is clearly wrong.

II. GPS and the Strict Products Liability Doctrine

In determining the appropriate standard of liability to attach to GPS device manufacturers, the GPS device must first be categorized as either a product or service.[62] Currently, there are no cases or secondary materials that outline whether a GPS device should be categorized as a product or service.[63] This distinction will have serious implications for GPS device manufacturers.[64] With no GPS device liability analysis, it is helpful to turn to the commentary regarding legal liability arising from the use and production of Geographic Information System ("GIS")[65] data.[66]

As GPS devices are different than any product or service on the market, determining the correct liability standard to apply is challenging.[67] There are no cases on point concerning whether and to what degree a GPS

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61. *See generally By 2008, the Number of GPS Handsets with Navigation Functions Will Be up to 20 Million . . .*, REUTERS, Jan. 9, 2008, http://www.reuters.com/article/pressRelease/idUS114222+09-Jan-2008+BW20080109.

62. *See* Neger, *supra* note 6.

63. *See id.*

64. Jeremy Speich, Comment, *The Legal Implications of Geographical Information Systems (GIS)*, 11 ALB. L.J. SCI. & TECH. 359, 386 (2001) (discussing legal issues concerning GIS and effect on major policy areas).

65. GIS is described as "any system of spatially referenced information or data," and a system "designed for the collection, storage and analysis of objects and phenomena where geographic location is an important characteristic or [is] critical to the analysis." Jennifer L. Phillips, Comment, *Information Liability: The Possible Chilling Effect of Tort Claims Against Producers of Geographic Information Systems Data*, 26 FLA. ST. U. L. REV. 743, 745 (1999). In other words, GIS is a system for "capturing, storing, checking, integrating, manipulating, analyzing and displaying data which are spatially referenced to the earth." *Id.* GIS is currently used in a variety of ways, "including navigation, market analysis, utilities management, transportation routing, environmental planning, and voter redistricting." *Id.* Please note that while Phillips focuses exclusively on the unique and highly specialized nature of GIS, her analysis concerning GIS producer liability could be illustrative in examining how the courts may approach liability for GPS device manufacturers. To understand the concept of GIS in relation to GPS, consider a company like United Parcel Service that monitors packages from their origination points to their destinations via GPS satellites, which is a function of GIS technology. Hereinafter, when the Author cites to the Phillips article, it is to use Phillips's analysis of potential GIS producer liability to extend that same analysis to GPS producer liability.

66. *See id.* at 744.

67. *See id.* at 760.

device manufacturer is liable towards a user who detrimentally relied on the data displayed on the GPS device.[68] In determining what liability is appropriate for the GPS manufacturer, the courts could turn to cases concerning the production of aeronautical navigational charts and to cases regarding the publishers of information contained in books.[69] These areas of law are the most developed and analogous to the issue at hand in determining the best avenue for attaching legal liability to a GPS device manufacturer.[70] These subjects focus on the tort law theories of strict liability and negligence.[71] This section analyzes how the concept of strict liability may apply to GPS device manufacturers within the context of the "aeronautical chart"[72] cases. This section also explores how GPS device manufacturers may avoid strict liability by showing that they provide a service and not a product, and how the Restatement (Third) of Torts approaches false information contained in maps and navigational charts. The last section concludes with a discussion on how strict liability may apply to GPS device manufacturers in the future.

The concept of strict liability was formulated in the Restatement (Second) of Torts.[73] The three main policy reasons supporting the strict liability doctrine include: (1) spreading the loss that results from a defective product because the manufacturers are in a better position to absorb the

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68. *See id.* at 761.

69. *See id.*; *see also* discussion *infra* Parts II.B, III.

70. *See* Phillips, *supra* note 65, at 761.

71. *See id.*; *see also* discussion *infra* Parts II.B, III.

72. Throughout this Note the Author will use the term "aeronautical chart" when referring to the aeronautical navigational chart cases.

73. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

> Special Liability of Seller of Product for Physical Harm to User or Consumer:
>
> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id.

loss;[74] (2) recognizing that consumers are forced to rely upon the manufacturer's representation of safety because of the inherent difficulty of discovering potential product flaws;[75] and (3) offering manufacturers a safety incentive to exercise greater caution in producing their goods.[76]

There are four requirements of strict products liability.[77] First, the sale must be of a product.[78] Second, the product must be unreasonably dangerous and in a defective condition.[79] Third, the defective product must be used in a manner reasonably foreseeable by the manufacturer.[80] Lastly, the product must have caused personal injury or property damage.[81]

A. Avoiding Strict Liability: Could a GPS Navigational Device Be Considered a Service?

It seems incongruous to label a GPS device a service because it appears to be a physical and obtainable product in the marketplace.[82] However, that analysis does not take into account what is actually provided by the GPS device: geographic data and directions.[83] In arguing that a GPS device's sole function is to provide its users with a navigational service or aid, the GPS device manufacturer could persuade the court that it was merely providing the user with geographic information that its computer programmers processed and ultimately displayed on "a tangible product."[84]

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74. *See id.* at cmt. c; W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 98, at 692-93 (5th ed. 1984).

75. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1965).

76. *See id.*; KEETON ET AL., *supra* note 74, § 98, at 693.

77. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

78. *Id.* § 402A cmt. d.

79. *Id.* § 402A cmt. g. "The rule stated in this Section applies only where the product is, at the time it leaves the seller's hands, in a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him." *Id.*

80. *Id.* § 402A cmt. h. "If the injury results from abnormal handling . . . the seller is not liable." *Id.*

81. KEETON ET AL., *supra* note 74, § 101, at 708.

> Where products do not have defects that endanger others, it can reasonably be argued that they cannot be so poor in quality as to be unworthy of sale if the price is right . . . . Historically, therefore, the only tort action available to a disappointed purchaser suffering intangible commercial loss has been the tort action of deceit for fraud and the only contract action has been for breach of a warranty, express or implied. This remains the generally accepted view.

Id. (citations omitted).

82. *See* Advent Sys. Ltd. v. Unisys Corp., 925 F.2d 670, 673-76 (3d Cir. 1991).

83. *See supra* text accompanying notes 29-30, 33-35.

84. *See* Phillips, *supra* note 65, at 763.

Logically, it seems unlikely that a GPS manufacturer could be considered to provide only a service. However, consider *SDK Medical Computer Services Corp. v. Professional Operating Management Group*,[85] where the Supreme Judicial Court of Massachusetts determined that a computer company that provided record keeping, billing services, and the physical production of computerized data reports supplied only a service and not a product.[86] The court reasoned that, "the analysis and processing of customers' records [were at] the heart of the matter, [and] the reports rendered to the customers [were] merely the embodiment of those services."[87] The court noted that while printed reports were produced, intangible services typically produced something tangible.[88]

In applying the holding of *SDK Corp.* to a similar suit against a GPS device manufacturer, the manufacturer faces a significant challenge in proving it provided a service rather than a product.[89] While acknowledging that a GPS navigational device is a "good" with respect to its software and the physical nature of the receiver, the manufacturer could focus its argument on the production of geographic information.[90] The manufacturer could maintain that the physical GPS receiver "merely . . . embodi[ed] . . . the service[]" in producing geographic information conveyed to the GPS user.[91] A GPS device manufacturer could argue that it provided a service when it converted the satellites' laser signals into graphic visual representations, which were then transmitted to the user via the tangible receiver.[92] If the manufacturer successfully established that it provided a service and not a product, then strict liability might not apply.[93]

However, when declining to apply the strict products liability doctrine to the providers of professional services, the courts have usually based their findings upon "'[t]here . . . no[t] [being a] mass production of goods or a large body of distant consumers.'"[94] When this concept extended to the "aeronautical chart" cases, the courts refused to find that the producers of

85. 354 N.E.2d 852 (Mass. 1976).

86. *Id.* at 853, 858.

87. *Id.* at 858.

88. *Id.*

89. *See* Phillips, *supra* note 65, at 763.

90. *See* Speich, *supra* note 64, at 387.

91. *See SDK Med. Computer Servs. Corp.*, 354 N.E.2d at 858; *see* Speich, *supra* note 64, at 386-87.

92. *See* Phillips, *supra* note 65, at 763.

93. *See, e.g.*, La Rossa v. Scientific Design Co., 402 F.2d 937, 942-43 (3d Cir. 1968) (declining to apply strict liability doctrine to a business involved in supplying and monitoring the installation of coated pellets); Gagne v. Bertran, 275 P.2d 15, 20-21 (Cal. 1954) (declining to extend strict liability to a test-hole driller).

94. Phillips, *supra* note 65, at 764 (quoting *La Rossa*, 402 F.2d at 942).

aeronautical charts were merely providing a service and instead found that the mass-production and marketing aspect of the aeronautical charts made them a product.[95]

As GPS manufacturers produce mass quantities of navigational devices to an extremely wide and distant body of consumers, it does not appear that the courts would conclude these manufacturers only provide a navigational service.[96] Therefore, it seems that the "aeronautical chart" cases provide persuasive case law for holding that GPS navigational devices are products; this conclusion would lead to manufacturers being found strictly liable for defective or erroneous information displayed on GPS devices that led to user harm or property damage.[97]

B. Applying Strict Liability: The Aeronautical Chart Cases

A majority of courts that have faced the question of whether navigational charts are products or services have held that charts containing erroneous information were products.[98] In these cases, the courts stressed that the navigational charts were examined for their physical traits and not the ideas contained in them.[99] The courts based their conclusions on the total reliance the pilots placed on the navigational charts, which directly connected the charts to the crashes.[100]

The following cases concern the manufacturers and publishers of mass-produced navigation charts that caused or contributed to a plaintiff's injuries or death and examine how strict liability applied.

1. *Brocklesby v. United States*

On September 8, 1973, an airplane collided with a mountain in the vicinity of Cold Bay, Alaska, killing all six crewmembers aboard.[101] The airplane and all of its contents were also destroyed.[102] The survivors of the six deceased crewmen filed suit against Jeppesen & Company, the producer

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95. *See, e.g.*, cases cited *infra* note 98.

96. *See* Phillips, *supra* note 65, at 764 (quoting *La Rossa*, 402 F.2d at 942).

97. *See id.*

98. *See, e.g.*, Brocklesby v. United States, 767 F.2d 1288, 1295 (9th Cir. 1985) (holding that defendant's navigational approach chart was a product); Saloomey v. Jeppesen & Co., 707 F.2d 671, 676 (2d Cir. 1983) (agreeing with the trial court's holding that navigational charts were products under Colorado law); Fluor Corp. v. Jeppesen & Co., 216 Cal. Rptr. 68, 71 (Cal. Ct. App. 1985) (holding that the airport instrument approach charts should be regarded as products in determining whether strict liability applies).

99. *See* Phillips, *supra* note 65, at 766-70.

100. *See id.*

101. *Brocklesby*, 767 F.2d at 1291.

102. *Id.*

of the aeronautical charts used by the pilots, and the United States, the supplier of the information used in the charts.[103]

The Jeppesen charts graphically displayed the instrument approach procedures created for airports, which were designed and issued by the FAA.[104] The procedures were highly detailed and encompassed all of the important aspects for the airplane's approach including directional headings, distances, minimum altitudes, turns, and radio frequencies.[105] These specifications were set by the FAA and promulgated in tabular form.[106] Jeppesen, in turn, processed the FAA form and displayed the data on a graphic approach chart.[107]

Jeppesen unsuccessfully appealed the jury's general verdict, which held it liable under theories of strict liability, breach of warranty, and negligence.[108] The Ninth Circuit Court of Appeals concluded that the chart was a "product" and the jury could properly find Jeppesen negligent for the production of a product that it knew or had reason to know was dangerous.[109] The court agreed with the jury that Jeppesen failed to use reasonable care in the design, production, testing, and inspection of the product.[110] "Jeppesen's chart was a 'product in a defective condition unreasonably dangerous to the user' within the meaning of section 402A(1) [of the Restatement of Torts]."[111] Additionally, "[s]ection 402A(2)(a) provides that strict liability is appropriate even though 'the seller has exercised all possible care in the preparation and sale of his product.'"[112] Consequently, the court held Jeppesen, as the seller of a defective product, strictly liable for the harm caused by the product, despite the fact that the flaw in Jeppesen's product could have been attributed "to a component part supplied by another."[113]

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103. *Id.* at 1291-92.

104. *Id.* at 1292.

105. *Id.* at 1294-95.

106. *Id.* at 1295.

107. *Brocklesby*, 767 F.2d at 1295.

108. *Id.* at 1291-92.

109. *Id.* at 1297.

110. *Id.*

111. *Id.* at 1296 (quoting RESTATEMENT (SECOND) OF TORTS § 402A (1965)).

112. *Id.*

113. *Brocklesby*, 767 F.2d at 1295. *See, e.g.*, Vandermark v. Ford Motor Co., 391 P.2d 168, 170 (Cal. 1964); *see also* KEETON ET AL., *supra* note 74, § 100, at 705.

2. *Saloomey v. Jeppesen & Co.*

In *Saloomey v. Jeppesen & Co.*,[114] the descendents of an airline pilot killed in a West Virginia airplane crash filed suit against Jeppesen, alleging that the crash was caused by erroneous maps manufactured by Jeppesen.[115] The theories presented by the plaintiffs included negligence, breach of warranty, and strict products liability.[116] Jeppesen was found liable under all three theories.[117]

On appeal, Jeppesen argued that the trial court incorrectly found that the navigational charts were products and not services.[118] The Second Circuit Court of Appeals disagreed and held that the trial court correctly ruled that the navigational charts were products.[119] The court concluded that the charts made by Jeppesen and provided to the airline pilot were not changed or differentiated in any way—"they were simply mass-produced."[120]

The court analyzed the Restatement (Second) of Torts section 402A and found that the comments contained within had contemplated the application of strict liability against the vendors of these types of goods.[121] As a result of disseminating and selling the maps, "Jeppesen undertook a special responsibility, as seller, to insure [sic] that consumers will not be injured by the use of the charts."[122]

The court concluded that to accept Jeppesen's position that the charts were only a service would disregard the mass-production characteristic of the charts.[123] "Though a 'product' may not include mere provision of architectural design plans or any similar form of data supplied under individually-tailored service arrangements, . . . the mass production and marketing of these charts requires Jeppesen to bear the costs of accidents that are proximately caused by defects in the charts."[124]

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114. 707 F.2d 671 (2d Cir. 1983).

115. *Id.* at 673.

116. *Id.*

117. *Id.* at 673-74.

118. *Id.* at 676.

119. *Id.*

120. *Saloomey*, 707 F.2d at 676.

121. *Id.*

122. *Id.* at 676-77.

123. *Id.* at 677.

124. *Id.* (citation omitted); *see also* RESTATEMENT (SECOND) OF TORTS § 402A cmt. c, f (1965).

3. *Fluor Corp. v. Jeppesen & Co.*

Fluor Corp. v. Jeppesen & Co.[125] concerned a multi-theory action against the maker and distributor of navigational approach charts for the loss of property when an airplane crashed into a hillside.[126] The plaintiff successfully proved that the trial court erred when it refused to instruct the jury on the theory of strict liability with respect to the navigational charts made and sold by Jeppesen.[127] The plaintiff argued that Jeppesen's failure to account for a hill, which was the highest point in the surrounding area, while showing a smaller hill on its chart, could be a design defect and sustain a cause of action.[128] The California Court of Appeals held that the navigational approach chart was a product and not a service, and the lower court's refusal to instruct on the theory of strict liability was a reversible error.[129]

C. How Do the "Aeronautical Charts" Cases Apply to GPS Device Manufacturers?

The "aeronautical chart" cases are significant for GPS device manufacturers for a variety of reasons. First, these cases provide persuasive reasoning to conclude that a GPS device is a product.[130] As the strict liability doctrine does not apply to services, courts seeking to protect victims of defective GPS devices could conclude that a GPS navigational device is a product that provides a navigational function similar to that of the aeronautical chart.[131] The courts could determine that the mass-production and marketing aspects of the GPS navigational devices put the burden on the manufacturer to bear the costs of any accidents proximately caused by the defects in the device.[132]

It is also notable that the courts were willing to look to the Restatement (Second) of Torts for additional guidance concerning this previously undeveloped area of law.[133] The Restatement provides the courts with persuasive authority that liability should attach to any person who

125. 216 Cal. Rptr. 68 (Cal. Ct. App. 1985).

126. *Id.* at 70.

127. *See id.*

128. *Id.*

129. *Id.* at 73.

130. *See supra* Part II.B.

131. *See, e.g.*, *Fluor Corp.*, 216 Cal. Rptr. 68 (holding that a navigational chart was a product and not a service, thus making the manufacturer strictly liable).

132. *See generally* Saloomey v. Jeppesen & Co., 707 F.2d 671, 677 (2d Cir. 1983).

133. *See id.* at 676-77; Brocklesby v. United States, 767 F.2d 1288, 1295 (9th Cir. 1985).

sells a defective product that is unreasonably dangerous—even if "the seller has exercised all possible care in the preparation and sale of his product."[134]

In examining this principle, the *Brockelsby* court affirmed a jury instruction that permitted liability to be attributed to Jeppesen for a defect found in Jeppesen's product that could be "traced to a component part supplied by another."[135] It also illustrates that strict liability could be applicable even where the product displayed precise content but proved defective for some other reason.[136] Simply put, this principle can be viewed as the "single most significant legal consequence of a finding that a chart or other aid to navigation is a product."[137]

This analysis is pertinent to GPS device manufacturers because they rely on the United States Government to provide the detailed satellite information, which is processed and uploaded onto the navigational devices.[138] The affirmative defense that the manufacturer accurately displayed the information supplied by the government would not permit the manufacturer to avoid liability if the plaintiff could prove that the device's design, i.e., data, graphics, or map, misinformed the GPS device user.[139]

While the rationale of the "aeronautical chart" cases has the potential to have huge implications for GPS devices, these holdings raise several questions.[140] For example, how would a court decide whether a GPS device product was unreasonably dangerous?[141] Would the court need to analyze all GPS geographical information and representations to determine if they were unreasonably dangerous?[142] This kind of examination could be time consuming, expensive, and burdensome, but necessary.[143]

D. Restatement (Third) of Torts: Products Liability

The Restatement (Third) of Torts also provides the courts with additional secondary authority to consult when examining what standard of liability should apply to GPS device manufacturers. The Restatement

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134. RESTATEMENT (SECOND) OF TORTS § 402A(2)(a) (1965).

135. *Brocklesby*, 767 F.2d at 1295.

136. *See* Edward J. Obloy & John E. Perruzzi, *The Electronic Chart Display and Information System (ECDIS): Is It the "Legal Equivalent of a Paper Chart" and What Potential Liabilities Does Its Use Introduce?*, 26 J. MAR. L. & COM. 215, 222-23 (1995).

137. *See id.* at 223.

138. *See* discussion *supra* Part II.C.

139. *See* Obloy & Perruzzi, *supra* note 136, at 223.

140. *See* Phillips, *supra* note 65, at 761.

141. *See id.*

142. *See id.*

143. *See id.*

contains relatively straightforward language that could attach liability to GPS navigation device manufacturers for erroneous information provided to GPS users.[144] Under the Restatement (Third), a product is defined as "tangible personal property distributed commercially for use or consumption."[145] The comments elaborate further that "[c]omponent parts are products, whether sold or distributed separately or assembled with other component parts."[146]

The comments also indicate that maps and navigational charts are considered tangible personal property that fall under the Restatement's purview.[147] If the courts chose to adopt the Restatement (Third) approach, the GPS device manufacturer would likely be liable for false or erroneous geographic representations that were displayed on GPS devices, which led to some kind of user harm or property damage.[148] Therefore, when examining the Restatement's comment in the context of GPS device manufacturers, it appears that GPS device manufacturers would be exposed to actions under the strict products liability doctrine for misrepresentations that users relied on to their detriment.[149]

E. The Future of GPS Devices and Strict Liability

In summary, the "aeronautical chart" cases provide persuasive analysis that GPS manufacturers would be held strictly liable to a driver that is harmed or injured due to defective information transmitted via their product. However, the cases indicate that the users must show that their total reliance on the charts directly resulted in their injuries or damages.[150]

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144. *See id.*

145. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 19(a) (1998).

146. *Id.* § 19 cmt. b.

147. *Id.* § 19 cmt. d.

148. *Id.*

> One area in which some courts have imposed strict products liability involves false information contained in maps and navigational charts. In that context the falsity of the factual information is unambiguous and more akin to a classic product defect. However, the better view is that false information in such documents constitutes a misrepresentation that the user may properly rely upon.

Id.; *see* Phillips, *supra* note 65, at 765.

149. *Compare* Phillips, *supra* note 65, at 765 (stating that pursuant to comment d, a GIS producer "will likely face the potential for strict products liability"), *with* Joel R. Wolfson, *Express Warranties and Published Information Content Under Article 2B: Does the Shoe Fit?*, 16 J. MARSHALL J. COMPUTER & INFO. L. 337, 371-72 (1997) (contending that the Restatement Third's draft language limited the reach of strict liability to the specific example concerning aeronautical charts).

150. *See, e.g.*, cases cited *supra* note 98.

A GPS manufacturer could attempt to distinguish the "aeronautical chart" cases by arguing that the user could not have completely relied on the GPS device instructions, because all devices come with an explicit disclaimer that the device is for navigation only.[151] Therefore, if the user misused the product no strict liability should attach.

The GPS device user would want to hold the manufacturer strictly liable under the Restatement (Second) of Torts and by the framework provided in the "aeronautical chart" cases. The user would argue that the mass-production and marketing of the devices required the GPS device manufacturer to bear the costs of accidents that were proximately caused by the device's defects.[152] Essentially, the driver would argue that because he paid for this device, he could rely on the accuracy of the directions, and therefore he could hold the GPS device manufacturer responsible when the device does not work correctly.[153]

The user could also argue under *Brocklesby* that even if the GPS device manufacturer merely relayed erroneous or defective information it received from the satellites operated by the U.S. Air Force, the manufacturer should still be held strictly liable.[154] Restatement (Second) of Torts section 402A states that the seller of a defective product could be held strictly liable for the harm caused by a defect from a part made by an outside party.[155]

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151. A typical warning from a GPS device manufacturer says the following:

> When navigating, carefully compare information displayed on the unit to all available navigation sources, including information from street signs, visual sightings, and maps. For safety, always resolve any discrepancies or questions before continuing navigation and defer to posted road signs.
>
> . . . .
>
> The unit is designed to provide route suggestions. It is not designed to replace the need for driver attentiveness regarding road closures or road conditions, traffic congestion, weather conditions, or other factors that may affect safety while driving.

See Garmin, Set up and Go!, Nuvi 200 Series, Important Safety and Product Information 11, http://www8.garmin.com/manuals/1512_SetupandGo!.pdf (last visited Dec. 1, 2009).

152. *See* Saloomey v. Jeppesen & Co., 707 F.2d 671, 677 (2d Cir. 1983); RESTATEMENT (SECOND) OF TORTS § 402A cmt. c, f (1965).

153. Sinrod, *supra* note 8.

154. *See* sources cited *supra* note 113.

155. RESTATEMENT (SECOND) OF TORTS § 402A cmt. a (1965); *see also* sources cited *supra* note 113.

Nevertheless, while there would seem to be a strong argument under both the Restatement (Second) of Torts Section 402A and the "aeronautical chart" cases that strict liability should attach to GPS device manufacturers for transmitting erroneous information, it would be sound policy to refrain from imposing the strict liability doctrine on GPS device manufacturers.[156] GPS is a burgeoning technology that has only recently arrived onto the market, and the legal profession should be allowed time to thoroughly develop the legal standards that should be applied before allowing strict liability to attach.[157] The capacity for this technology to benefit society is immeasurable.[158] From its use in search-and-rescue missions or recovery of stolen automobiles, to its overall potential to transform the world's transportation infrastructure, GPS is a technology not to be taken lightly.[159]

Holding GPS manufacturers strictly liable for defective geographic information could result in a slippery slope that could have a significant detrimental effect on an entire fledgling industry.[160] It is clear that the strict products liability doctrine is an effective way to hold the manufacturers of goods responsible for defective products that harm consumers. However, it would seem inequitable to hold a manufacturer strictly liable for a driver harmed when they unquestioningly follow erroneous GPS directions. To do so, would in effect reward a driver's lack of common sense by shifting the blame onto the manufacturer, which could lead to an avalanche of litigation.[161]

III. The "Book Cases":[162] When Information Causes Personal Injury

Products liability is an expansive body of law that holds manufacturers of goods legally liable for defective products that harm consumers.[163] However, there is no body of law in the United States that

156. *See* Phillips, *supra* note 65, at 766 (stating that when incorrect or incomplete data is applied the negligence theory of tort liability has the strongest arguments for application).

157. *Id.*

158. *See* Epstein, *supra* note 31, at 245.

159. *See* Jonathan M. Epstein, *The Role of the Global Positioning System in the Environment*, 6 N.Y.U. ENVTL. L.J. 72, 72 (1997).

160. *See* Phillips, *supra* note 65, at 766.

161. *See id.*

162. This author will refer to the publisher of information cases as the "book cases." These cases include: Winter v. G.P. Putnam's Sons, 938 F.2d 1033 (9th Cir. 1991); Birmingham v. Fodor's Travel Publ'ns, Inc., 833 P.2d 70 (Haw. 1992); Alm v. Van Nostrand Reinhold Co., 480 N.E.2d 1263 (Ill. App. Ct. 1985).

163. *See* RAYMOND T. NIMMER, THE LAW OF COMPUTER TECHNOLOGY ¶ 15.20[3] (3d ed. 1997) (stating that when a primary function of a publisher's product is to distribute information and ideas, these publishers are not typically held liable for harm, because of the "desire to maintain a free and open marketplace of ideas for public discourse").

imposes liability upon publishers of information for injuries sustained by people relying on information contained in mass-market publications.[164]

A. *Winter v. G.P. Putnam's Sons*

In *Winter v. G.P. Putnam's Sons*,[165] the Ninth Circuit Court of Appeals held the publisher of the book, '*The Encyclopedia of Mushrooms*,' not liable for the serious injuries sustained by a family who ate wild mushrooms in reliance on the information contained in the book.[166] The court concluded that a book publisher had no legal obligation to examine the correctness of information in its books and that publishers had no duty to independently ensure that the information could be relied on by purchasers.[167] Essentially, the court refused to impose a legal duty on a publisher to inspect the truthfulness of the books it published.[168]

The court noted the significant divergence in how the law handles information related to products and goods sold in the market.[169] The Ninth Circuit flatly rejected the notion that a book should be held to a products liability standard.[170] While the court understood that society was willing to restrict inventiveness in certain circumstances in order to shield the public from harm, it did not want to extend the same restrictions to information products.[171] The court "accept[ed] [instead] the risk that words and ideas have wings [they] cannot clip and which carry them [they] know not where. The threat of liability without fault . . . could seriously inhibit those who wish to share thoughts and theories."[172]

Winter protects publishers against deficiencies in the content of the book that existed at the time of publication.[173] Consequently, *Winter* stands

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164. *See, e.g.*, *Winter*, 938 F.2d 1033 (concluding that mushroom aficionados could not recover under a products liability theory against a book publisher); *Alm*, 480 N.E.2d 1263 (concluding that the harmed party had no cause of action against the publisher of a tool-making book); Cardozo v. True, 342 So. 2d 1053 (Fla. Dist. Ct. App. 1977) (concluding that liability of a book dealer could not rest upon a warranty theory where a purchaser was injured as a result of an alleged failure to warn); *see also* NIMMER, *supra* note 163.

165. 938 F.2d 1033 (9th Cir. 1991).

166. *Id.* at 1033.

167. *Id.* at 1037.

168. *Id.*

169. *See id.* at 1035.

170. *Id.* at 1038.

171. *Winter*, 938 F.2d at 1035.

172. *Id.*

173. *See id.* at 1037; *see also* NIMMER, *supra* note 163.

for the proposition that a publisher of information has no obligation to inspect the information it publishes.[174]

B. *Birmingham v. Fodor's Travel Publications, Inc.*

In *Birmingham v. Fodor's Travel Publications, Inc.*,[175] the Supreme Court of Hawaii declined to apply a products liability-based "duty to warn" upon a book publisher for the harm sustained by plaintiffs surfing at a beach highlighted in one of the defendant's travel guides.[176] The court faced an issue of first impression: Could a publisher that did not write or assure the correctness of the accounts contained in its publication be legally responsible for physical injuries suffered in reliance on the information enclosed in the publication?[177]

To answer this question, the court started with the essential premise that for a negligence claim to be successful, a plaintiff must prove there was a duty owed to the plaintiff by the defendant.[178] The court concluded that, "no jurisdiction has held a publisher liable in negligence for personal injury suffered in reliance upon information contained in the publication, unless the publisher authored or guaranteed the information."[179] Therefore, the court held that the publisher of a work generally distributed, in which the publisher does not author or specifically assure the contents in its publication, "has no duty to warn the reading public of the accuracy of the contents of its publication."[180]

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174. *See Winter*, 938 F.2d at 1035.

175. 833 P.2d 70 (Haw. 1992).

176. *Id.* at 75-76.

177. *Id.* at 74.

178. *Id.*

179. *Id.* at 75; *see also* Jones v. J.B. Lippincott Co., 694 F. Supp. 1216, 1216-17 (D. Md. 1988) (holding that a publisher who issued an author's work had no duty of care to the purchasers of the publication regarding its contents and made no warranty with respect to the contents); Pittman v. Dow Jones & Co., 662 F. Supp. 921, 922 (D. La. 1987) ("[A] newspaper has no duty, whether by way of tort or contract, to investigate the accuracy of advertisements placed with it which are directed to the general public, unless the newspaper undertakes to guarantee the soundness of the products advertised."), *aff'd*, 834 F.2d 1171 (5th Cir. 1987); Lewin v. McCreight, 655 F. Supp. 282, 283 (D. Mich. 1987) ("Every case in other jurisdictions that would support a products liability cause of action against a publisher . . . involves a situation in which the publisher actually created, rather than merely printed, the content."); Hanberry v. Hearst Corp., 81 Cal. Rptr. 519, 521 (Cal. Ct. App. 1969) (holding a publishing company liable for flawed merchandise as it had pronounced that the product had the "Good Housekeeping's Consumers' Guaranty Seal," upon which the publisher reviewed the product and issued an express, limited warranty).

180. *Birmingham*, 833 P.2d at 76.

The court in *Birmingham* also addressed the plaintiff's argument that the defendant was strictly liable because the published guide could be considered a "product."[181] The plaintiffs relied on three cases[182] as authority for the allegation that the data in a publication is a "product."[183] The court disagreed with this assertion by distinguishing the "aeronautical chart" cases the plaintiffs cited from typical publications like the one at issue.[184] The court noted that the Ninth Circuit in *Brocklesby* determined that charts were "distinct products" because the charts contained "more than just a republication of text," as they transformed the "text into graphic form and represent[ed] that the chart[s] contain[ed] all necessary information."[185]

Next, the court examined the findings of the Ninth Circuit in *Winter*,[186] where the court declined to expand its holding in *Brocklesby*[187] to a specialty book focused on different types of mushrooms.[188] *Winter* relied on the Ninth Circuit's finding that the "aeronautical chart" cases were an anomaly.[189] In *Winter*, the Ninth Circuit concluded that because

> [a]eronautical charts [were] highly technical tools . . . [t]he best analogy to an aeronautical chart [was] a compass . . . . 'The Encyclopedia of Mushrooms' is like a book on how to use a compass or an aeronautical chart. The chart itself is like a physical "product" while the "How to Use" book is pure thought and expression.[190]

The court found the Ninth Circuit's rationale in *Winter* convincing and concluded that the guide was not a "product" and strict products liability did not apply to Fodor's, the publisher in the *Birmingham* case.[191]

C. How the "Book Cases" May Apply to GPS Device Manufacturers

GPS device manufacturers face a significant challenge in arguing that the holdings of the "book cases" were applicable in determining its liability

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181. *Id.* at 77.

182. *See* cases cited *supra* note 98.

183. *Birmingham*, 833 P.2d at 77; *see* discussion *supra* Part II.B.

184. *Birmingham*, 833 P.2d at 78.

185. *Id.* (quoting Brocklesby v. United States, 767 F.2d 1288, 1298 (9th Cir. 1985)).

186. *Id.* at 76.

187. Winter v. G.P. Putnam's Sons, 938 F.2d 1033, 1035-36 (9th Cir. 1991).

188. *Birmingham*, 833 P.2d at 78.

189. *Id.*

190. *Id.* (quoting *Winter*, 938 F.2d at 1036 (footnotes omitted)).

191. *Id.* at 79.

for harm caused by defective GPS information. First, the "book cases" centered on the First Amendment guarantee of the free flow of ideas and information, on which a publisher could freely distribute.[192] The courts found this guarantee applicable in shielding the publishers of information from liability.[193]

In going through this analysis, the court sought to prevent any risk that ideas and theories could be stifled by imposing liability without fault.[194] The GPS device manufacturer produces a navigational aid, which helps users map out a desired route between two geographic points.[195] This does not appear to be the dissemination of the thoughts or ideas the court sought to protect.[196] Additionally, a thorough examination of the holding of *Birmingham*, which distinguished a typical guide from an aeronautical chart, seems to effectively separate the GPS device from the publishers of the information realm.[197] The *Winter* court noted the highly technical aspect of the aeronautical charts and analogized them to a compass, which is a product for strict liability purposes.[198] Extending this holding to GPS device manufacturers would likely result in a finding that GPS devices were not exempted from the products liability regime by producing a "pure thought and expression" product.[199] The courts could simply conclude that GPS devices are highly technical tools that aid in automobile navigation, and as such, the devices are "distinct products" that contained "'more than just a republication of [geographic data]' inasmuch as they converted '[geographic data] into [visual] form and represent[ed] that the [display screen] contain[ed] all necessary information.'"[200]

IV. Negligence, Navigational Charts, and GPS Devices

This section examines the tort law concept of negligence and how it may lend itself to the GPS device framework by focusing on its application

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192. *See* Alm v. Van Nostrand Reinhold Co., 480 N.E.2d 1263, 1267 (Ill. App. Ct. 1985) (stating that "the adverse effect of such liability upon the public's free access to ideas would be too high a price to pay").

193. *See id.*

194. *Winter*, 938 F.2d at 1035.

195. *See* Neger, *supra* note 6.

196. *See generally* Birmingham v. Fodor's Travel Publ'ns, Inc., 833 P.2d 70, 78 (Haw. 1992) (discussing the importance of protecting the special attributes of ideas and expressions).

197. *See id.*

198. *Id.* (citing *Winter*, 938 F.2d at 1036).

199. *See id.* (footnotes omitted) (quoting *Winter*, 938 F.2d at 1036) (discussing why aeronautical charts should be treated as "distinct products")).

200. *See id.* (internal quotations omitted) (quoting Brocklesby v. United States, 767 F.2d 1288, 1298 (9th Cir. 1985)).

to aeronautical charts. Examining the negligence theory of liability in the context of aeronautical charts producers, it appears likely that the courts would attach negligence liability to a manufacturer whose GPS device provided erroneous information leading to physical harm or property damage.[201]

Federal administrative agencies are in charge of the production and circulation of aeronautical navigational aids.[202] These agencies strive to ensure that the published charts effectuate the safe and proficient operation of aircraft in flight.[203] The charts are required to display precise information.[204] The chart manufacturer must use due care to ensure the chart "accurately depict[s] what [it] purport[s] to show."[205] If latent or patent flaws are present on an aeronautical chart, the chart manufacturer could be held responsible for any damage or injury that occurs from its use.[206]

In *Southern Natural Gas Co. v. Pontchartrain Materials, Inc.*,[207] the Fifth Circuit Court of Appeals found the government negligent when it erroneously omitted underground gas pipelines from its charts that resulted in a chart user's dredge striking one of the underground pipelines.[208] The government's chart showed one of the pipelines, but failed to account for two other pipelines located in the same zone.[209]

Similarly, if information presented on a navigational chart is in the wrong location, negligence could also attach to the chart manufacturer.[210] In *Reminga v. United States*,[211] the Sixth Circuit Court of Appeals found the government negligent when it published an aeronautical chart that depicted a TV tower in the wrong location.[212] The court concluded that because the government, on its own accord, published navigational charts that were to be used in aviation, it had a duty to exercise due care and verify that the chart accurately displayed everything that appeared on it.[213]

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201. *See Birmingham*, 833 P.2d at 78 n.10.

202. *See* 49 U.S.C. § 44721(a)(1), (c) (2006); *see, e.g.*, Phillips, *supra* note 65, at 766.

203. *See* Phillips, *supra* note 65, at 766.

204. *See id.*

205. *Id.* (quoting Reminga v. United States, 631 F.2d 449, 452 (6th Cir. 1980)).

206. *See* Brocklesby v. United States, 767 F.2d 1288, 1297 (9th Cir. 1985); *see also* Phillips, *supra* note 65, at 766-67.

207. 711 F.2d 1251 (5th Cir. 1983).

208. *See id.* at 1259.

209. *Id.*

210. Phillips, *supra* note 65, at 767.

211. 631 F.2d 449 (6th Cir. 1980).

212. *See id.* at 458.

213. *Id.* at 452.

These cases show that latent or patent defects in geographic information or directions displayed on a GPS device could expose a manufacturer to liability for harm or damage caused by the user relying on the defective information.[214] Applying this framework to GPS device manufacturers, courts could find that manufacturers have a duty to exercise reasonable care in ensuring the complete accuracy of GPS device information and directions.[215] However, applying these holdings to the manufacturers of GPS devices would require courts to determine whether the manufacturers accounted for every conceivable type of object or terrain that the GPS user may have encountered in the area where the harm occurred.[216] This may prove to be a complex, time consuming, and unwieldy analysis to undertake.[217]

Alternatively, if a manufacturer could successfully prove that the GPS user utilized the device inappropriately, a court may decline to find the manufacturer negligent.[218] Consider *De Bardeleben Marine Corp. v. United States*,[219] which involved sailors on a barge that sank and who were without a revised "Notice to Mariners" survey chart that was widely distributed and readily available to them.[220] The Fifth Circuit Court of Appeals held that the government issued these charts with the knowledge that the charts would reach the ships and crews and with the expectation that these charts would be relied upon.[221] The court found that the mariners' failure to obtain an updated chart constituted misuse and placed the fault for the barge's sinking squarely upon the mariners.[222] The court absolved the government of negligence liability.[223]

Similarly, in *Hahn v. United States*,[224] the court did not find the government negligent for an airplane crash when the pilot negligently struck an unmarked transmission line.[225] The court determined that the pilot failed to take into account the available aeronautical charts and did not

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214. *See* Phillips, *supra* note 65, at 767.

215. *See Reminga*, 631 F.2d at 452.

216. *See* Phillips, *supra* note 65, at 770 (discussing that chart producers "may be held liable for any resulting injury or damage").

217. *See id.*

218. *See id.* at 768 (discussing how chart producers avoided liability "when the chart user did not use the chart appropriately").

219. 451 F.2d 140 (5th Cir. 1971).

220. *Id.* at 141.

221. *Id.* at 148.

222. *Id.* at 148-49.

223. *Id.* at 149.

224. 535 F. Supp. 132 (D.S.D. 1982).

225. *Id.* at 137.

maintain the requisite altitude that would have placed him above the unmarked transmission line.[226] Also, the court referenced the pilot's inability to adequately observe his surroundings on his flight earlier that day when he failed to see or detect the same transmission line.[227] The court concluded that these contributing factors absolved the government of negligence for the omission of the transmission tower on the aeronautical chart.[228]

In the absence of consumer misuse of GPS devices, these cases demonstrate that it is likely GPS device manufacturers will face liability for negligently providing false or inaccurate information to GPS device users.[229] The judicially created duty of care imposed upon the analogous aeronautical chart manufacturers requires the aeronautical charts and maps they produce to "accurately depict what they purport to show."[230] This duty of care seems to readily lend itself to GPS device manufacturers to ensure that the devices that they mass-produce and distribute also "accurately depict what they purport to show."[231]

However, in the GPS device context, there are no statutes or case law to guide manufacturers in how they should cultivate and display GPS produced information.[232] Analyzing the above cases reveals that GPS device manufacturers will likely have a duty to provide and administer extremely accurate and continuously updated geographic information.[233] Ultimately, this could be particularly difficult for GPS device manufacturers to do, as there are a multitude of factors that go into the production of real time GPS data that ends up on the display screen of a GPS device.[234] It is inarguable that GPS device manufacturers have a duty

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226. *Id.* at 135.

227. *Id.* at 137.

228. *See id.*

229. *See* Phillips, *supra* note 65, at 768 (discussing cases where chart users inappropriately used the charts, resulting in chart companies avoiding liability).

230. Reminga v. United States, 631 F.2d 449, 452 (6th Cir. 1980).

231. *See id.*; Phillips, *supra* note 65, at 768 (discussing the application of aeronautical chart cases to GIS cases).

232. *See* Phillips, *supra* note 65, at 768.

233. *Id.* at 769. *See generally* S. Natural Gas Co. v. Pontchartrain Materials, Inc., 711 F.2d 1251 (5th Cir. 1983); *Reminga*, 631 F.2d 449.

234. *See* United States Coast Guard Navigation Center, GPS Frequently Asked Questions, http://www.navcen.uscg.gov/ faq/gpsfaq.htm (last visited Dec. 1, 2009).

> The GPS concept of operation is based upon satellite ranging. Users figure their position on the earth by measuring their distance from the group of satellites in space. The satellites act as precise reference points.
>
> Each GPS satellite transmits an accurate position and time signal. The user's receiver measures the time delay for the signal to reach the

to exercise reasonable care and verify that most of the displayed geographic information is accurate.[235] However, while not addressed in the above cases, the courts should take special note of the problems inherent in dealing with such a high degree of complexity that goes into the production of geographic data, and carefully contemplate whether it would be unfair for negligence liability to attach to the manufacturer for all erroneously displayed information.[236]

Consider that within the United States there are likely thousands of ongoing construction projects that lead to ever-changing road conditions, road closures, route re-routing, and bridge closings.[237] This illustrates that there are an unlimited amount of variables that could lead to the production of erroneous geographic information being conveyed to the GPS device user.[238]

Lastly, the above cases demonstrate that manufacturers should not be liable for negligently displaying inaccurate information when consumers misuse the geographically displayed data and directions.[239] The manufacturers could argue that when the device user ignored visual signals, like railroad tracks, in blindly following the instructions, he misused the product and therefore, any claim of negligence should be defeated.[240] To illustrate, consider the hypothetical situation of someone driving on a freeway.[241] If the GPS device inexplicably tells the driver that he has reached his destination, should the GPS manufacturer be held negligent if the driver stops in the middle of the expressway causing a fifty-car pile up?[242] It would seem incongruous for this driver to be absolved of his own negligence when he failed to observe the explicit warning that the GPS device is not a substitute for his own judgment.[243]

> receiver, which is the direct measure of the apparent range to the satellite. Measurements collected simultaneously from four satellites are processed to solve for the three dimensions of position, velocity and time.

Id.

235. *See Reminga*, 631 F.2d at 452 (holding the government liable for not using due care in accurately depicting the location of a tower in an aeronautical navigation chart).

236. *See* Phillips, *supra* note 65, at 769 (discussing the problems facing GIS producers if liability attaches to all inaccurately displayed information).

237. *See generally* Neger, *supra* note 6.

238. *See generally id.*

239. *See* Phillips, *supra* note 65, at 769.

240. *See generally* Neger, *supra* note 6.

241. *See generally* Sinrod, *supra* note 8.

242. *See generally id.*

243. *See supra* note 151 and accompanying text.

V. Automobile Driver's Duty of Care, Contributory Negligence and GPS Device Manufacturers

This section explores the duties of automobile drivers within the context of negligence and contributory negligence theories.[244] Typically, negligence actions arise in motor vehicle accidents where a driver fails to use reasonable care to avoid harming others.[245] Many jurisdictions impose an obligation upon the automobile operator to exercise reasonable care, which is the degree of care that an ordinary or reasonable person would use in a similar situation.[246] The kind of ordinary or reasonable care required of drivers differs and depends on the location, circumstances, and conditions the driver faces.[247]

Also, when it comes to the operation of a motor vehicle, what would be considered reasonable care in some situations could be negligence in other circumstances.[248] To illustrate, Louisiana common law requires a driver to exercise additional caution in extremely poor driving conditions.[249] Next, in addition to the common law obligation to use reasonable care under the circumstances, there are statutes in all jurisdictions that impress a variety of obligations upon the operator of an automobile.[250] The obligations extend across a wide range of duties including: driving on the right side of the road; avoiding following other cars too closely; obeying speed limits; maintaining control of the vehicle at all times; and turning, signaling, stopping, standing, and parking.[251]

In thinking about the problem posed by a driver who obstinately follows his GPS directions and causes an accident, it is important to remember that a motor vehicle operator has an ongoing obligation to use reasonable care when driving on public roads to avoid accidents and harm

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244. This Note does not focus on any specific jurisdiction's duty of care imposed on automobile drivers, as the duty of care varies slightly from state to state.

245. *See* Foulke v. Beogher, 850 N.E.2d 1269, 1273 (Ohio Ct. App. 2006); 8 AM. JUR. 2D *Automobiles and Highway Traffic* § 420 (2007).

246. *See* Hodder v. United States, 328 F. Supp. 2d 335, 341 (E.D.N.Y. 2004) (applying New York law); St. Louis v. Dail, 178 F. Supp. 2d 520, 523 (D. Md. 2001) (applying Maryland law); Nelson v. State, 922 So. 2d 447, 450 (Fla. Dist. Ct. App. 2006) (applying Florida law); McKissick v. Giroux, 612 S.E.2d 827, 829 (Ga. Ct. App. 2005) (applying Georgia law); State v. Carter, 781 A.2d 376, 382 (Conn. App. Ct. 2001) (applying Connecticut law); 8 AM. JUR. 2D *Automobiles and Highway Traffic* § 420 (2007).

247. *See Hodder*, 328 F. Supp. 2d at 341; *Foulke*, 850 N.E.2d at 1273; 8 AM. JUR. 2D *Automobiles and Highway Traffic* § 420 (2007).

248. *See, e.g.*, F E C News Co. v. Pearce, 58 So. 2d 843, 844 (Fla. 1952).

249. *See* Hebert v. Lafayette Consol. Gov't, 930 So. 2d 281, 285 (La. Ct. App. 2006).

250. 4 MODERN TORT LAW: LIABILITY AND LITIGATION § 34.18 (2d ed. 2008).

251. *Id.*

to themselves and others.[252] A motorist's duty to drive with reasonable care is not waived when a GPS device tells a motorist he should turn left, which would lead him onto train tracks or into oncoming traffic.[253]

For the driver of an automobile seeking to hold a GPS navigational device manufacturer liable for providing erroneous instructions that led to his harm or injury, the courts would need to scrutinize the driver's actions in determining whether he exercised the reasonable care that an ordinary person would have used under the same circumstances.[254] Application of this principle would likely lead to the dismissal of many suits against the manufacturers of GPS devices for drivers who put aside their common sense and followed the device's directions into clearly dangerous situations. A manufacturer could argue that a driver was contributorily negligent in causing an accident if they failed to act reasonably in relation to the erroneously displayed information.[255] While negligence law imposes a duty on a defendant to not expose a plaintiff to "an unreasonable risk of harm," the doctrine of comparative negligence "imposes on the plaintiff who has been harmed a duty to the defendant to protect herself and minimize the harm she suffers."[256]

Conversely, if drivers harmed by their reliance on GPS device directions could show they exercised reasonable care and acted as an ordinary person would have acted under the same circumstances, then negligence liability should attach to a GPS device manufacturer. It is easy to contemplate a driver navigating in an unfamiliar area in less than ideal conditions, relying on the explicit directions given by the GPS device.[257] In following these directions the driver may only have a split second to make

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252. *See* Bellere v. Madsen, 114 So. 2d 619, 621 (Fla. 1959) (concluding that motorists have an obligation to exercise reasonable care on the roadways commensurate with the road and surroundings); Nelson v. Ziegler, 89 So. 2d 780, 783 (Fla. 1956) (stating that a driver has a duty to use reasonable care when driving on a public roadway).

253. *See generally* Hesse v. McClintic, 176 P.3d 759, 762 (Colo. 2008) (holding that a driver is under a duty to drive with reasonable care).

254. *See supra* sources accompanying note 246.

255. RESTATEMENT (SECOND) OF TORTS § 466 (1965). The plaintiff's contributory negligence may be either:

> (a) an intentional and unreasonable exposure of himself to danger created by the defendant's negligence, of which danger the plaintiff knows or has reason to know, or
>
> (b) conduct which, in respects other than those stated in Clause (a), falls short of the standard to which the reasonable man should conform in order to protect himself from harm.

Id.

256. *Hesse*, 176 P.3d at 762 n.3; *see* RICHARD A. EPSTEIN, TORTS § 8.2.1, at 189, (1999).

257. *See generally* Sinrod, *supra* note 8.

a choice.[258] The court may look at that situation and decide it would not have been unreasonable for the driver to rely on the GPS instructions.[259]

In conclusion, it is clear that this country heavily depends on our automobiles to get us from point A to point B. When you contemplate this reliance in conjunction with the increased population density of U.S. cities and the vital significance of highway safety, it becomes clear that there is a high duty of care imposed on all citizens to help make our roads safer.[260] It is critically important for the courts to use a system of comparative negligence to ensure that drivers, who have disregarded their duty to exercise reasonable care by heedlessly following erroneous GPS device instructions, be taken into consideration when examining who is responsible for a specific injury.[261]

CONCLUSION

In any action in tort against a GPS device manufacturer, the court must first determine whether the navigational capabilities of a GPS device are a product or a service.[262] As GPS device manufacturers produce mass quantities of navigational devices for an extremely wide and distant body of consumers, it would seem unlikely for the courts to conclude these manufacturers were only providing a navigational service.[263] Furthermore, the framework of the "aeronautical chart" cases provides persuasive case law for finding that GPS navigational devices are products, which could lead to the GPS manufacturers being held strictly liable for defective or erroneous information that leads to accidents.[264]

However, the "aeronautical chart" cases required users to prove that their total reliance on the charts directly resulted in their injuries or damages.[265] This could allow a GPS navigation device manufacturer to distinguish the "aeronautical chart" cases by arguing that its explicit warnings eliminated any user reliance because the warnings indicate that the GPS device is to be used as a navigational aid only and not a substitute

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258. *See generally id.*

259. *See generally id.*

260. *See* 6 THOMAS D. SAWAYA, WEST'S FLORIDA PRACTICE SERIES: FLORIDA PERSONAL INJURY LAW AND PRACTICE WITH WRONGFUL DEATH ACTIONS § 4:10 (2008).

261. *See, e.g., id.* (discussing how Florida uses a system of comparative negligence to ensure that all who may have acted negligently will be considered in determining liability in automobile accidents).

262. Neger, *supra* note 6.

263. *See* Phillips, *supra* note 65, at 764 (discussing how GIS producers provide a service, but they can also be viewed as providing a product).

264. *See id.*

265. *See, e.g.*, cases cited *supra* note 98.

for the driver's perception of road conditions.[266] Therefore, if the driver misused the product then no strict liability should attach.

Nevertheless, there appears to be a strong argument under both the Restatement of Torts (Second) section 402A and the "aeronautical chart" cases that strict liability should attach to GPS device manufacturers for transmitting erroneous information that leads to user harm.[267] However, it would be sound policy to refrain from imposing the strict liability doctrine on GPS device manufacturers.[268] GPS is an emerging technology that has only recently come into the marketplace, and the legal profession should be allowed time to thoroughly develop the applicable legal standards before allowing strict liability to attach.[269] This technology has enormous potential.[270] Applying the strict liability doctrine to a GPS device manufacturer for a user who acted unreasonably by unquestioningly following inaccurate GPS directions would reward the driver's lack of common sense, which could cripple an entire industry and lead to an enormous increase of claims filed against GPS manufacturers.[271]

When analyzing the "book cases," it appears that GPS device manufacturers would face an uphill battle in proving these holdings were applicable in determining their liability for harm caused by erroneous or defective GPS device information. GPS devices do not appear to be a "pure thought and expression" product. The courts could find that as GPS devices are complicated navigational aids, they are unique products and not subject to the "book cases" analysis.

Lastly, with respect to the theory of negligence in the GPS device context, there are no statutes or case law to guide manufacturers on how they should gather and display GPS produced information.[272] The negligence cases examined in Part IV provide strong evidence that manufacturers could have a duty to administer completely accurate and continuously updated geographic data. This may ultimately be impossible for manufacturers to do as there are a multitude of factors and high costs that go into the production of real-time GPS data that ends up on the display screen of the device.[273] While acknowledging that GPS device manufacturers have a duty to exercise reasonable care in ensuring that geographic information is accurately displayed, the courts should take

266. *See supra* note 151 and accompanying text.

267. *See* Phillips, *supra* note 65, at 766.

268. *See id.*

269. *See id.*

270. *See* Epstein, *supra* note 31, at 245.

271. *See id.*

272. *See* Phillips, *supra* note 65, at 768.

273. *See supra* text accompanying note 234.

special note of the problems inherent in dealing with such a vast degree of complexity that encompass the production of geographic information.[274]

Additionally, in any negligence analysis, the courts should strongly scrutinize whether the driver misused the device.[275] If it can be shown that the driver misused the product by disregarding visual cues and blindly following the GPS instructions into danger, then the claim of negligence should be defeated.[276] The courts should also take special note of the duty of reasonable care imposed on every driver who uses public roads.[277] By incorporating a system of comparative negligence, the courts could ensure that they properly account for drivers who disregard their duty of care by obstinately following erroneous directions. [278]

274. *See* Phillips, *supra* note 65, at 769.

275. *See id.*

276. *See generally* Neger, *supra* note 6.

277. *See generally id.*

278. *See generally id.*

COMMENTS:

PREGNANCY AS A RESULT OF UNLAWFUL BUT NON-FORCIBLE SEXUAL CONDUCT IS NOT A FORM OF GREAT BODILY INJURY*

*Sabrina Bonanno***

Abstract: Pregnancy resulting from unlawful but non-forcible sexual conduct is treated differently depending on the jurisdiction where the offense takes place. In *People v. Cross*, the Supreme Court of California affirmed the defendant's conviction by holding that a pregnancy can be considered a form of great bodily injury (hereinafter "GBI"). In contrast to California, Wisconsin and Nebraska list pregnancy and GBI as specific elements of the sexual assault statute. Thus, the Wisconsin and Nebraska statutes outline a clear distinction between the two elements.

The application of GBI should be reserved for the most severe physical injuries. To define pregnancy as GBI is to reduce the significance of the term as it is applied to physical attacks that leave a victim on the verge of being maimed or deformed for life. Also, in light of societal views of pregnancy, where pregnancy is generally celebrated, it is inconsistent to define a pregnancy as GBI. Further, in the civil context, liability for an unwanted, but healthy child generally does not exist, while in the criminal context, a sentencing enhancement for GBI can result from an unwanted pregnancy. Instead pregnancy should be listed as a specific element of the sexual assault

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* Hereinafter the terms "great bodily harm," "serious bodily harm," and "serious bodily injury" will be referred to as "great bodily injury" since that is the term defined in the California statutes and used by the Supreme Court of California in *People v. Cross*, 190 P.3d 706 (Cal. 2008).

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statute and should not be encompassed within the definition of GBI. While pregnancy resulting from unlawful but non-forcible sexual conduct should still be a factor in determining the reprehensibility of the offense, by making pregnancy an element of the offense, it eliminates the need to classify pregnancy as GBI for the purpose of increasing a defendant's sentence.

Thus, pregnancy resulting from unlawful but non-forcible sexual conduct should not fall under the category of GBI. GBI should be reserved for severe physical injuries that are prolonged or permanent. As a result, sexual assault statutes should list pregnancy as a separate element of the offense which could be satisfied in order to secure a conviction.

INTRODUCTION

Jurisdictions treat pregnancy resulting from rape or unlawful but non-forcible sexual conduct[1] differently. In California, a pregnancy resulting from such conduct can be considered great bodily injury (hereinafter "GBI").[2] More specifically, in *People v. Cross*,[3] the defendant engaged in unlawful but non-forcible sexual conduct with his step-daughter resulting in a pregnancy and subsequent abortion.[4] The Supreme Court of California held that the step-daughter's pregnancy could be considered a form of GBI.[5] Conversely, Wisconsin and Nebraska list pregnancy as a specific element in the sexual assault statute that, if satisfied, secures a conviction.[6]

The legal definition of GBI depends on the jurisdiction.[7] In California, GBI means a "significant or substantial physical injury."[8] Whether a pregnancy resulting from unlawful but non-forcible sexual

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1. An example of unlawful but non-forcible sexual conduct is when an adult engages in sexual conduct with a minor but does not use force. *See People v. Cross*, 190 P.3d 706, 708-09 (Cal. 2008).

2. *Id.* at 708, 712 (holding that the jury had enough facts to determine that a pregnancy resulting from unlawful but non-forcible sexual conduct with the defendant was enough for a finding of GBI).

3. 190 P.3d 706 (Cal. 2008).

4. *Id.* at 708-09.

5. *Id.* at 708. The abortion could not be considered GBI because the defendant did not perform the abortion. *Id.* at 713.

6. *See, e.g.*, State v. Grunke, 752 N.W.2d 769, 773 n.7 (Wis. 2008) ("First degree sexual assault. Whoever does any of the following is guilty of a Class B felony: (a) Has sexual contact or sexual intercourse with another person without consent of that person and causes pregnancy *or* great bodily harm to that person.") (emphasis added) (citing WIS. STAT. ANN. § 940.225(1) (West 2005)); NEB. REV. STAT. § 28-318(4) (2008).

7. *See, e.g.*, CAL. PENAL CODE § 12022.7(f) (West 2009); NEB. REV. STAT. § 28-318(4); WIS. STAT. ANN § 939.22(14).

8. CAL. PENAL CODE § 12022.7(f).

conduct falls under this broad definition is a question of fact for a jury.[9] However, pregnancy should not be a form of GBI. Rather, pregnancy should be listed as a specific element of the sexual assault statute that could be satisfied as was codified by the Wisconsin and Nebraska Legislatures.[10] To define pregnancy as GBI is to reduce the significance of the term as it applies to physical attacks that leave a victim on the verge of being maimed or deformed for life.[11] Even though pregnancy resulting from such unlawful conduct should not be considered GBI, it should still be a factor in determining the reprehensibility of the offense. As such, sexual assault statutes should list pregnancy as a separate element of the offense which could be satisfied to maintain the charge.

Part I of this Comment will examine the different definitions of GBI, how California has defined pregnancy under this definition, and the alternatives to listing pregnancy as a form of GBI. Part II of this Comment will outline the *Cross* holding. Part III of this Comment will be broken into three parts. Part III.A will demonstrate why *Cross* should have been distinguished from both *People v. Escobar* and *People v. Sargent.*[12] Part III.B will analyze the disconnect between pregnancy in the criminal context where it can constitute a form of GBI and pregnancy in the civil context where liability for an unwanted child generally does not exist. Part III.C will examine examples of different statutes that list pregnancy as an element of the sexual assault statute of which the California Legislature should use as a model to amend their current statutes.

I. History of GBI and the Resulting Classification of Pregnancy

The breadth of a GBI statute depends on the jurisdiction.[13] California, Nebraska, and Wisconsin each have a different definition.[14] In California, the statute is much broader than both the Nebraska and Wisconsin statutes.[15] This section will examine the different definitions of GBI, how

9. *See, e.g.*, People v. Cross, 190 P.3d 706, 710 (Cal. 2008).

10. *See* NEB. REV. STAT. § 28-318(4); WIS. STAT. ANN. § 940.225(1)(a).

11. *See generally* State v. Canady, 641 N.W.2d 43, 54 (Neb. 2002) (stating that a child who suffered full thickness burns resulting in skin grafts, mobility problems, and growth retardation was maimed or deformed for life).

12. *Escobar* and *Sargent* both addressed GBI as a result of forcible rape. People v. Escobar, 837 P.2d 1100, 1106 (Cal. 1992); People v. Sargent, 150 Cal. Rptr. 113, 115 (Cal. Ct. App. 1978).

13. *See, e.g.*, NEB. REV. STAT. § 28-109(20) (2008); WIS. STAT. ANN. § 939.22(14) (West 2005); People v. Escobar, 837 P.2d at 1103.

14. *Compare* CAL. PENAL CODE §§ 12022.7, 12022.8 (West 2009), *and* NEB. REV. STAT. § 28-109(20), *and* WIS. STAT. ANN. § 939.22(14).

15. *Compare* CAL. PENAL CODE §§ 12022.7, 12022.8, *with* NEB. REV. STAT. § 28-109(20), *and* WIS. STAT. ANN. § 939.22(14).

California has defined pregnancy under the statute, and the alternative statutes that list pregnancy as an element of a sexual assault offense.

A. Definitions of GBI in California, Wisconsin, and Nebraska

1. California's Definition of GBI

In California, GBI is a separate offense that results in a sentencing enhancement.[16] It is defined as a "significant or substantial physical injury."[17] However, the courts still have difficulty distinguishing a "significant or substantial bodily injury . . . from [a] trivial or insignificant injury or [from] moderate harm."[18] The broad statutory definition allows injuries with varying degrees of seriousness to constitute a form of GBI in California.[19] Two cases cited within *People v. Cross*[20] were *People v. Escobar*[21] and *People v. Sargent*.[22] In *Escobar*, the common law of California maintained that in order for GBI to be significant or substantial, the injury need not be so grave as to cause the victim "permanent, prolonged, or protracted" bodily injury.[23] In *Sargent*, GBI existed when a pregnancy resulted from forcible rape since the pregnancy was not incidental to forcible rape.[24]

2. Wisconsin's Definition of GBI

In Wisconsin, the definition of GBI is much narrower and is defined as "bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury."[25] Bodily harm "means physical pain

16. People v. Cross, 190 P.3d 706, 708 (Cal. 2008).

17. CAL. PENAL CODE § 12022.7.

18. People v. Miller, 558 P.2d 552, 559 (Cal. 1977) (affirming a jury verdict where a defendant was found guilty when the victim was shot twice in the commission of a robbery).

19. *Compare* People v. Harvey, 9 Cal. Rptr. 2d 17, 19 (Cal. Ct. App. 1992) (second degree burns required a month of treatment), *and* People v. Beltran, 258 Cal. Rptr. 884, 892 (Cal. Ct. App. 1989) (multiple surgeries required), *with* People v. Jaramillo, 159 Cal. Rptr. 771, 774 (Cal. Ct. App. 1979) (there were bruises and swelling).

20. 190 P.3d 706 (Cal. 2008).

21. 837 P.2d 1100 (Cal. 1992).

22. 150 Cal. Rptr. 113 (Cal. Ct. App. 1978).

23. *Escobar*, 837 P.2d at 1106. *Escobar*'s GBI definition that significant or substantial injury need not be permanent was applied to a forcible rape case where Escobar inflicted physical injury through beatings, not as a result of pregnancy. *Id.* at 1101-02.

24. *Sargent*, 150 Cal. Rptr. at 116.

25. WIS. STAT. ANN. § 939.22(14) (West 2005).

or injury, illness, or any impairment of physical condition."[26] This definition is more specific than California's because it limits the types of bodily harm that can constitute GBI.[27] Most instances of GBI in Wisconsin require hospitalization and immediate medical treatment.[28]

3. Nebraska's Definition of GBI

Nebraska's definition of GBI mirrors Wisconsin's definition.[29] Nebraska's statute lists GBI and pregnancy as specific elements within the statute.[30] This shows the intent of the Nebraska Legislature to keep pregnancy as a distinct separate element.[31] "[Great] bodily injury shall mean bodily injury which involves a substantial risk of death, or which involves substantial risk of serious permanent disfigurement, or protracted loss or impairment of the function of any part or organ of the body."[32] Within the previous definition, bodily injury "shall mean physical pain, illness, or any impairment of physical condition."[33] GBI is serious by nature.[34] The previous definition tracks the Wisconsin definition precisely except that the Wisconsin definition includes "or other serious bodily injury."[35] This allows the Wisconsin statute to be viewed more broadly than the Nebraska statute since the Wisconsin statute allows other serious bodily injuries to fall within the statute's purview despite the injuries not being able to fit into the more narrow categories outlined in the statute.[36]

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26. *Id.* § 939.22(4).

27. *Compare* WIS. STAT. ANN. § 939.22(14), *with* CAL. PENAL CODE § 12022.7(f) (West 2009).

28. *See, e.g.*, La Barge v. State, 246 N.W.2d 794, 795 (Wis. 1976) (multiple cuts and stab wounds requiring sutures and hospitalization); Irby v. State, 182 N.W.2d 251, 254 (Wis. 1971) (victim suffered a chest wound resulting in massive blood loss and hospitalization).

29. *Compare* NEB. REV. STAT. § 28-109(20) (2008), *with* WIS. STAT. ANN. § 939.22(14).

30. NEB. REV. STAT. § 28-318(4).

31. *See id.*

32. *Id.* § 28-109(20).

33. *Id.* § 28-109(4).

34. *See, e.g.*, State v. Canady, 641 N.W.2d 43, 54 (Neb. 2002) (severe burns); State v. Oldenburg, 628 N.W.2d 278, 282 (Neb. Ct. App. 2001) (gunshot wound to the left side of a person's neck left the victim disabled).

35. *Compare* NEB. REV. STAT. § 28-109(20), *with* WIS. STAT. ANN. § 939.22(14) (West 2005).

36. *Compare* NEB. REV. STAT. § 28-109(20), *with* WIS. STAT. ANN. § 939.22(14).

B. California's Application of GBI to Pregnancy

In California, a charge of GBI can be maintained if a pregnancy results from unlawful but non-forcible sexual conduct.[37] However, the act itself is not enough to constitute such injury.[38] Rape and sodomy alone do not constitute GBI because neither one is a significant nor substantial injury.[39] According to the Supreme Court of California, GBI may be found when victims of unlawful sexual conduct experience pain beyond that "routinely associated" with the offense.[40] As such, pregnancy is considered to be beyond the ordinary experience for victims of unlawful but non-forcible sexual conduct since it satisfies the definition of GBI under California law.[41]

C. Pregnancy as a Separate Element of the Offense

Wisconsin and Nebraska have codified sexual offense statutes to list pregnancy as a separate element of the offense that could be satisfied in order to maintain the sexual assault charge.[42] The Wisconsin and Nebraska statutes are more narrowly tailored since they list pregnancy as a separate element of the offense rather than encompassing pregnancy within the definition of GBI.[43]

1. Wisconsin

The Wisconsin statute lists pregnancy as a possible element of a sexual assault that could be established in order to find a defendant guilty of that particular offense.[44] In Wisconsin, first degree sexual assault occurs when a defendant "[h]as sexual contact or sexual intercourse with another person without consent of that person and causes pregnancy *or* great bodily harm."[45] Under the statute, a person found guilty of first degree sexual assault either has to impregnate the victim or cause the victim to suffer

37. People v. Cross, 190 P.3d 706, 718-19 (Cal. 2008).

38. People v. Caudillo, 580 P.2d 274, 289 (Cal. 1978).

39. *Id.*

40. People v. Escobar, 837 P.2d 1100, 1106 (Cal. 1992).

41. *See, e.g.*, *Cross*, 190 P.3d at 712 (noting that the jury was urged to use its "common experiences" to decide whether the pregnancy equated to GBI).

42. NEB. REV. STAT. § 28-318(4) (2008); WIS. STAT. ANN. § 940.225(1)(a) (West 2005).

43. *See* NEB. REV. STAT. § 28-318(4); WIS. STAT. ANN. § 940.225(1)(a).

44. WIS. STAT. ANN. § 940.225(1)(a).

45. *Id.* (emphasis added).

GBI.[46] Thus, "first degree sexual assault can occur on the basis of pregnancy as an alternative element to great bodily harm."[47]

2. Nebraska

According to the Nebraska statute, "[s]erious personal injury means great bodily injury or disfigurement, extreme mental anguish or mental trauma, *pregnancy*, disease, or loss or impairment of a sexual or reproductive organ."[48] The construction of this statute shows that the Nebraska Legislature intended for pregnancy and GBI to be considered separate offenses.[49] While both appear under the heading of "serious personal injury," they are listed separately.[50]

II. The Supreme Court of California in *People v. Cross*

Gary Cross (hereinafter "the defendant") became the stepfather of the victim, Kate, when he married her mother in 1995.[51] Kate's mother worked the evening shift while the defendant's shift often changed.[52] In June 2002, when Kate was thirteen, and while her mother was at work, the defendant woke Kate up to bring her into the master bedroom where he engaged in sexual intercourse with her.[53] Kate did not object because she was afraid the defendant would prevent her from going out with her friends or that he would take away her cell phone.[54] The defendant also prevented Kate from telling her mother by threatening Kate with the possibility of being removed from the home.[55]

Between June 2002 and August 2002, the defendant and Kate routinely engaged in sexual intercourse.[56] Sometime in August 2002, Kate informed the defendant that there was a possibility she might be pregnant.[57] The defendant brought Kate to a clinic where her pregnancy was confirmed

46. *Id.*

47. Hagenkord v. State, 302 N.W.2d 421, 437 n.8 (Wis. 1981).

48. NEB. REV. STAT. § 28-318(4) (emphasis added).

49. *Id.*

50. *Id.*

51. People v. Cross, 190 P.3d 706, 708 (Cal. 2008). The abbreviation "K." was used for the name of the victim in *Cross* to protect her identity. For the purposes of this Comment, the fictitious name "Kate" will be substituted for the initial "K."

52. *Id.*

53. *Id.* at 708-09.

54. *Id.* at 709.

55. *Id.*

56. *Id.*

57. *Cross*, 190 P.3d at 709.

on September 25, 2002.[58] The defendant brought Kate back to the same clinic during December 2002 for an abortion when she was five and a half months pregnant.[59] Kate was referred to San Francisco General Hospital, without her mother's knowledge, for the two day abortion procedure since her pregnancy was too far along for an abortion at the clinic.[60] When Kate filled out the medical forms, she listed the defendant as her father.[61] After the abortion, the defendant continued to have sexual intercourse with Kate until July 2003 when her mother found the abortion records and Kate finally informed her mother that the defendant had been engaging in sexual intercourse with her.[62]

DNA evidence used from the fetus eventually confirmed to a 99.99% probability that the defendant was the father.[63] The defendant was arrested and charged with several offenses including "committing a lewd and lascivious act on a child under the age of [fourteen] by force, violence, duress, menace, or fear, with an allegation that he inflicted great bodily injury on the victim."[64] The prosecutor told the jury that either the pregnancy or the abortion could meet the requirement of GBI.[65] The defendant was found guilty of a lesser crime that included "committing a lewd act on a child under the age of [fourteen]," and the defendant was found guilty of personally inflicting GBI on Kate.[66] Such a finding along with a specific type of sexual offense results in an automatic prison sentence of fifteen years to life under the "One Strike Law."[67] The California Court of Appeals affirmed the guilty verdicts, and the Supreme Court of California granted the defendant's petition for review.[68]

The Supreme Court of California looked to the statutory definition of GBI and examined previous cases that applied it to offenses involving

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58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Cross*, 190 P.3d at 709.

64. *Id.* (citation omitted). The other charges are not being mentioned since the GBI sentencing enhancement does not apply to them.

65. *Id.* at 709-10.

66. *Id.* at 710.

67. *Id.* at 708. This sentence was to be served consecutively with a six-year sentence given to the defendant as a result of being found guilty of non-forcible oral copulation. *Id.* at 710. Under the "One Strike Law," if a defendant is convicted of a specific type of sexual offense, as in this case, the trial court must sentence the defendant to anywhere from fifteen years to life in prison. *Id.* at 708.

68. *Id.* at 710.

sexual assaults resulting in pregnancy.[69] Accordingly, in California, GBI is defined as "a significant or substantial physical injury."[70] It can be proved through evidence showing the seriousness of the physical injury, the pain resulting from the injury, and any medical care that is required to treat the injury.[71] According to the Supreme Court of California, GBI may be found when victims of unlawful sexual conduct experience pain beyond that "routinely associated" with the offense.[72]

In reviewing the jury's determination that enough facts supported such a finding, the court applied the standard from *People v. Escobar* where "to be significant or substantial the injury need not be so grave as to cause the victim 'permanent, prolonged, or protracted' bodily damage."[73] The court also cited *People v. Sargent* to support the jury's factual determination that Kate's pregnancy was a form of GBI.[74] The court further noted that GBI resulting from physical harm was a factual determination to be made by the jury and was not a question of law.[75] A jury determines where the "fine line can divide an injury from being significant or substantial from an injury that does not quite meet the description."[76]

The court concluded that there were enough facts in the record to affirm the jury's verdict that the unlawful but non-forcible sexual conduct resulting in Kate's pregnancy constituted GBI.[77] The court was careful to

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69. *Cross*, 190 P.3d at 710.

70. *Id.* (citation omitted).

71. *Id.* at 712.

72. People v. Escobar, 837 P.2d 1100, 1106 (Cal. 1992); *see Cross*, 190 P.3d at 712 (stating that the jury was urged to use its "common experiences" to decide whether the pregnancy was beyond what is routinely associated with unlawful sexual conduct).

73. *Cross*, 190 P.3d at 711 (citing *Escobar*, 837 P.2d at 1106). *Escobar*'s definition that significant or substantial injury need not be permanent was applied to a forcible rape case where the defendant inflicted physical injury through beatings, not as a result of pregnancy. *Escobar*, 837 P.2d at 1101-02. The victim made repeated attempts to escape and was dragged by her hair and physically restrained, sustaining extensive bruises and abrasions. *Id.*

74. *Cross*, 190 P.3d at 711 (citing People v. Sargent, 150 Cal. Rptr. 113 (Cal. Ct. App. 1978)). *Sargent* involved a victim that was forcibly raped at knifepoint. *Sargent*, 150 Cal. Rptr. at 115. As a result, the victim became pregnant; she also sustained scratch marks and vaginal excoriation. *Id.*

75. *Cross*, 190 P.3d at 710.

76. *Id.* (internal citation omitted) (internal quotations omitted).

77. *Id.* at 712. The defendant argued that reversible error existed if he was found guilty of committing GBI based on procuring the abortion for Kate. *Id.* The trial judge instructed the jury that an abortion can constitute GBI. *Id.* However, the court held that an abortion cannot constitute GBI when someone other than the defendant performs the abortion. *Id.* Despite the erroneous jury instruction, the court found that since the instruction was irrelevant and inapplicable, the error was harmless. *Id.* Had the jury based its guilty verdict

note that not every case where non-forcible sexual conduct results in pregnancy will constitute GBI.[78] However, the Supreme Court of California held that unlawful but non-forcible sexual conduct resulting in pregnancy *could* amount to GBI.[79]

III. Pregnancy Resulting from Unlawful but Non-Forcible Sexual Conduct Is Not GBI.

A. The *Cross* Court Incorrectly Used Precedential Authority.

In *Cross*, the court used the fact patterns and definitions of GBI from *People v. Escobar*[80] and from *People v. Sargent*[81] in analogizing the case. The definition used in those cases stated that the injury must be a "significant or substantial bodily injury" not a "trivial or insignificant injury."[82] These definitions appropriately described the physical injuries and trauma that the rape victims suffered in *Escobar* and *Sargent*.[83] However, the application of the term to the factual circumstances in *Cross* should have been distinguished from those present in *Escobar* and *Sargent*.

1. *People v. Escobar*

Escobar should have been distinguished from *Cross* because the injuries the victim sustained in *Escobar* were physically severe.[84] The facts in *Escobar* are distinguishable from *Cross* on two grounds: (1) *Escobar* involved forcible rape, and (2) *Escobar* involved significant and substantial physical injuries where no pregnancy resulted.[85] In *Escobar*, the victim was taken at gunpoint by the defendant.[86] She was repeatedly dragged by her hair, thrown to the ground, and slapped.[87] The victim suffered injuries to her neck.[88] She also suffered from bruises, scrapes, and abrasions.[89] The

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of GBI on the abortion instead of the pregnancy, reversible error would have existed. *See id.* at 713.

78. *Id.* (holding that a jury could reasonably believe a thirteen-year-old girl who was twenty-two weeks pregnant at the time she had an abortion suffered GBI).

79. *Id.* at 708.

80. 837 P.2d 1100 (Cal. 1992).

81. 150 Cal. Rptr. 113 (Cal. Ct. App. 1978).

82. *Escobar*, 837 P.2d at 1109 (citations omitted); *Sargent*, 150 Cal. Rptr. at 115.

83. *See Escobar*, 837 P.2d at 1101-02; *Sargent*, 150 Cal. Rptr. at 115.

84. *See Escobar*, 837 P.2d at 1101-02.

85. *Compare id.* at 1106, *with* People v. Cross, 190 P.3d 706, 709 (Cal. 2008).

86. *Escobar*, 837 P.2d at 1101.

87. *Id.*

88. *Id.* at 1102.

89. *Id.*

victim screamed and struggled with the defendant the entire time.[90] She was unable to walk without assistance for days after the attack.[91] The defendant was found to have inflicted GBI on the victim as a result of the physical attack.[92]

The degree of brutality and violence in *Escobar* went beyond the types of injuries "routinely associated with rape."[93] *Escobar*'s finding of GBI focused on the brutal physical attack of the victim.[94] By contrast, in *Cross*, there was no physical force used.[95] The victim in *Cross* consented to the sexual intercourse because she was afraid she would not be allowed to go out with her friends, not because of physical force.[96] No pregnancy resulted from the forcible rape in *Escobar*,[97] making the comparison between a finding of GBI as a result of physical force and as a result of pregnancy distinguishable.

2. *People v. Sargent*

Sargent should have been distinguished from *Cross* because the injuries the victim sustained in *Sargent* were also physically severe and more traumatic.[98] While this case is similar to *Cross* in that the victim became pregnant, there are still two major distinctions: (1) the victim in *Sargent* was forcibly raped at knifepoint, and (2) there were physical injuries beyond the pregnancy that could have constituted GBI.[99] In *Sargent*, the defendant broke into the victim's home.[100] She was only seventeen years old.[101] She was forcibly raped at knifepoint.[102] She had scratch marks on her neck.[103] There was also major excoriation[104] and inflammation of the vaginal area.[105] The victim became pregnant as a result

90. *Id.* at 1101-02.

91. *Id.* at 1102.

92. *Escobar*, 837 P.2d at 1106.

93. *Id.*

94. *See id.*

95. *See* People v. Cross, 190 P.3d 706, 709 (Cal. 2008).

96. *Id.*

97. *See Escobar*, 837 P.2d at 1101-02.

98. *See* People v. Sargent, 150 Cal. Rptr. 113, 115 (Cal. Ct. App. 1978).

99. *See id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. Excoriate is defined as "[t]o tear or wear off the skin of." THE AMERICAN HERITAGE COLLEGE DICTIONARY 487 (4th ed. 2001).

105. *See Sargent*, 150 Cal. Rptr. at 115.

of the forcible rape and underwent an abortion.[106] According to the court, forcible rape in and of itself is not GBI.[107] Pregnancy resulting from forcible rape is GBI because the injuries are "significantly and substantially beyond that necessarily present in the commission of rape."[108] By contrast, *Cross* involved unlawful but non-forcible sexual conduct, not forcible rape.[109] The victim in *Cross* also did not suffer any physical injuries as a result of the unlawful sexual conduct.[110] On this basis, *Cross* should have been distinguished from *Sargent*, not analogized to it.

B. Pregnancy in the Criminal Context Versus Pregnancy in the Civil Context

A disconnect exists between the civil and criminal law pertaining to pregnancy. In the criminal context, an unwanted pregnancy as a result of unlawful but non-forcible sexual conduct may be found to constitute GBI.[111] In the civil context, in California and other jurisdictions, an unwanted pregnancy that results in the birth of a healthy child does not give rise to any form of liability.[112] As a matter of public policy, the birth of a healthy child, even if unwanted, does not constitute injury to the child's parents.[113] Holding an individual responsible for the birth of "one of life's greatest gifts" is incompatible with views on pregnancy and the birth of happy and healthy children.[114] Misrepresentations resulting in pregnancy also do not give rise to liability.[115]

Not only does the birth of a normal, healthy child not give rise to liability in a civil context, but the term "bodily injury" should be given its plain and ordinary meaning.[116] Pregnancy does not fall within the plain and

106. *Id.*

107. *Id.*

108. *Id.* at 116.

109. People v. Cross, 190 P.3d 706, 708 (Cal. 2008).

110. *See id.* at 709.

111. *Id.* at 708.

112. *See, e.g.*, Stephen K. v. Roni L., 164 Cal. Rptr. 618, 619 (Cal. Ct. App. 1980); Andrews v. Keltz, 838 N.Y.S.2d 363, 368 (N.Y. 2007).

113. *Keltz*, 838 N.Y.S.2d at 368 (noting that a medical malpractice suit cannot be maintained when the birth of an "unwanted but otherwise healthy" child results from negligence in performing a vasectomy).

114. People v. Cathey, 681 N.W.2d 661, 668 (Mich. Ct. App. 2004) (Murphy, J., dissenting); *see Keltz*, 838 N.Y.S.2d at 368.

115. *Roni L.*, 164 Cal. Rptr. at 619 (holding that a man had no cause of action against his girlfriend even though she misrepresented her inability to conceive a child).

116. *Cathey*, 681 N.W.2d at 669 (Murphy, J., dissenting).

ordinary meaning of the term "bodily injury."[117] When the term is not appropriately defined by the legislature, a dictionary can be consulted.[118] Bodily injury means "physical damage to a person's body."[119] Pregnancy cannot be considered harmful or damaging to the body since it is "one of life's greatest gifts."[120] Only the legislature should decide if pregnancy resulting from unlawful sexual conduct is GBI.[121] Thus, the legislature should list pregnancy as an element of the offense or write into the statute that pregnancy is GBI.[122]

C. California's Sexual Assault Statute Should Be Modeled After the Sexual Assault Statute in Wisconsin and Nebraska.

1. Wisconsin's Sexual Assault Statute

Wisconsin lists pregnancy as one possible element of a sexual assault charge that must be established to find a defendant guilty of that particular offense.[123] "First degree sexual assault. Whoever does any of the following is guilty of a Class B felony: (a) Has sexual contact or sexual intercourse with another person without consent of that person and causes pregnancy *or* great bodily harm."[124] This statute specifically states that a sexual offense resulting in pregnancy is a Class B felony.[125] GBI is also a Class B felony under the statute.[126] By keeping these two concepts separate, the Wisconsin Legislature implied that they are not to be considered the same for the purposes of statutory construction.[127] "[F]irst-degree sexual assault can occur on the basis of pregnancy as an alternative element to great

117. *See id.* Although *Cathey* is a Michigan case, the Michigan Court of Appeals followed the Supreme Court of California's definition that pregnancy resulting from unlawful but non-forcible sexual conduct can constitute GBI. *Id.* at 664 (majority opinion) (citing People v. Sargent, 150 Cal. Rptr. 113, 115 (Cal. Ct. App. 1978)).

118. *Id.* at 668 (Murphy, J., dissenting).

119. *Id.*

120. *Id.* "[T]he creation of a new life, innocent of any wrongdoing, cannot . . . be relegated to the designation of 'damage' unless the Legislature has clearly expressed such an intent." *Id.*

121. *Id.*

122. *See Cathey*, 681 N.W.2d at 669 (Murphy, J., dissenting).

123. WIS. STAT. ANN. § 940.225(1)(a) (West 2005).

124. *Id.* (emphasis added).

125. *Id.*

126. *Id.*

127. *See id.*

bodily harm."[128] Thus, a pregnancy resulting from unlawful sexual conduct is its own offense.[129]

2. Nebraska's Sexual Assault Statute

According to Nebraska's sexual assault statute, "[s]erious personal injury means *great bodily injury* or disfigurement, extreme mental anguish or mental trauma, *pregnancy*, disease, or loss or impairment of a sexual or reproductive organ."[130] By placing pregnancy and GBI under the heading of "serious personal injury," the plain reading of this statute illustrates that the Nebraska Legislature intended for these elements to be considered separate offenses.[131] In order for a charge of second degree sexual assault, there should either be a pregnancy resulting from the sexual assault or GBI resulting from the sexual assault.[132]

CONCLUSION

Pregnancy resulting from unlawful but non-forcible sexual conduct should not be considered GBI. The term should be reserved for the most severe physical injuries that are on the verge of being permanent or that result in a deformity.[133] A disconnect in the law exists when an unwanted pregnancy due to unlawful but non-forcible sexual conduct may result in a prison sentence of fifteen years to life while there is no civil liability for an unwanted pregnancy due to medical malpractice or misrepresentations made by an individual. Pregnancy cannot be "one of life's greatest gifts" in the civil context, but then found to be GBI in the criminal context. Even though the pregnancy itself should not be considered GBI, the pregnancy should still be considered an element of the sexual assault statute. Instead of defining GBI to include pregnancy, California should change its sexual assault statutes to list pregnancy as a separate element of the offense. As such, the disconnect between the definition of GBI when compared with societal views of pregnancy will be eliminated.

128. Hagenkord v. State, 302 N.W.2d 421, 437 n.8 (Wis. 1981).

129. *See id.*

130. NEB. REV. STAT. § 28-318(4) (2008) (emphasis added).

131. *See id.*

132. *See* State v. Freeman, 677 N.W.2d 164, 176 (Neb. 2004).

133. *See generally* State v. Canady, 641 N.W.2d 43, 54 (Neb. 2002).

NO HELPING HAND FOR DRUG ADDICTS: *A HELPING HAND L.L.C. V. BALTIMORE COUNTY, MARYLAND*, THE ADA, AND THE CASE FOR DISABLED DRUG ADDICTS

Kevin Voyvodich[*]

Abstract: Methadone is a narcotic medication that is used to treat opiate addiction. It has been an accepted type of treatment for over thirty years, and methadone maintenance programs are heavily regulated. Despite this, there is a large stigma attached to those who undergo the treatment. The programs have been stigmatized by a society that sees drug addiction as a weakness, even when those addicted seek treatment. Title II of the Americans with Disabilities Act ("ADA") has been one place that these programs have looked to for protection.

Disability under the ADA is defined as an individual who is impaired and unable to participate in a "major life activity." Drug abusers in treatment are considered "impaired" under the ADA, but there is some dispute over whether they can participate in major life activities. In *A Helping Hand, L.L.C. v. Baltimore County, Maryland*, the Fourth Circuit held that drug abusers were considered impaired but could not, as a matter of law, be considered unable to participate in "major life activities." This Comment will take a detailed look at the Fourth Circuit's decision in *A Helping Hand*. It will argue, based on the intent of the ADA, that the proper holding would have been that those in methadone treatment are disabled as a matter of law.

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INTRODUCTION

Methadone is a narcotic medication that is used in treatment for addiction and withdrawal from opiates.[1] It has been in use for over thirty years.[2] The methadone treatment programs that are offered are among the most regulated medical programs in the country.[3] Despite the fact that Methadone Maintenance Treatment ("MMT") is a sanctioned medical treatment for opiate addiction, there is still a large stigma attached to those receiving the treatment.[4] Within the realm of public opinion, these MMT "program[s] [have] been stigmatized by the belief that methadone treatment merely substitutes one drug [addiction] for another."[5] The stigma of MMT has resulted in excessive regulation and policies that could be considered counterproductive in the treatment of drug addicts.[6] MMT Clinics have looked to Title II of the Americans with Disabilities Act ("ADA") for protection.[7]

Title II of the ADA states that its purpose is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[8] In order to be disabled under the ADA, a person must be impaired and unable to participate in a "major life activity."[9] Drug abusers are considered "impaired" under the ADA, but there is a dispute over the question of whether they can participate in major life activities.[10]

In *A Helping Hand, L.L.C. v. Baltimore County, Maryland*, the Fourth Circuit held that drug abusers were considered impaired but could not, as a matter of law, be considered unable to participate in "major life activities."[11] In this case, the County of Baltimore ("the County") allegedly

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1. ERIN STEINER BROEKHUYSEN, ONDCP DRUG POLICY INFORMATION CLEARINGHOUSE FACT SHEET: METHADONE (2000), http://www.whitehousedrugpolicy.gov/publications/pdf/ncj175678.pdf.

2. *Id.*

3. *Id.*

4. Herman Joseph et al., *Methadone Maintenance Treatment (MMT): A Review of Historical and Clinical Issues*, 67 MOUNT SINAI J. MED. 347, 358 (2000).

5. *Id.* The stigma of methadone users has also led to their "social ostracism" and a constant fear of job loss if the fact that they are receiving treatment is discovered. *Id.*

6. *Id.*

7. *See* Ellen M. Weber, *Bridging the Barriers: Public Health Strategies for Expanding Drug Treatment in Communities*, 57 RUTGERS L. REV. 631, 657-58 (2005).

8. 42 U.S.C. § 12101(b)(1) (2006).

9. A Helping Hand, L.L.C. v. Balt. County, Md., 515 F.3d 356, 366-67 (4th Cir. 2008).

10. *Id.* at 367.

11. *Id.* at 368 (stating that in certain instances, those in MMT could be perceived by the community as able to participate in the major life activity of employment despite any possible criminal tendencies).

changed city zoning restrictions so that a methadone clinic that had already fulfilled all zoning requirements could not open.[12] A Helping Hand methadone clinic ("the Clinic") brought suit against the County claiming that the zoning changes violated Title II of the ADA.[13] The district court held that since the County perceived the Clinic's clients as impaired in major life activities, they were disabled under the ADA as a matter of law.[14] On appeal, the Fourth Circuit rejected this holding.[15] The Fourth Circuit reasoned that the ADA's question of whether the Clinic's clients had a disability was a question of fact for the jury.[16]

The holding of the Fourth Circuit is not in line with the intent of the ADA[17] or the reality of the stigma attached to those in methadone treatment.[18] The appeals court should have agreed with the district court's opinion and held that the Clinic's clients were impaired in a major life activity as a matter of law.[19] The Fourth Circuit recognized that there was an argument to be made that drug abusers were disabled due to the County's bias towards the clients, but left it for a jury to decide whether that was the case.[20]

Part I of this Comment will provide an overview of ADA law related to those in drug treatment and the progression of ADA case law leading up to the decision in *A Helping Hand.* Part II of this Comment will take a detailed look at the Fourth Circuit's decision in *A Helping Hand.* Part III will argue that the Fourth Circuit should have held that people undergoing MMT were disabled as a matter of law. There are three reasons the current holding is problematic: first, it does not allow for the clear cut guidelines of disability that the ADA envisions;[21] second, it overruled the overwhelming amount of evidence that the County had done everything in its power to keep the Clinic from opening,[22] and it additionally ignored another

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12. *Id.* at 358-59.

13. *Id.* at 361. There was also a due process claim that will not be examined in this Comment. *Id.*

14. *Id.* at 365; *see infra* Part I.A (discussing what constitutes a disability under the ADA).

15. *A Helping Hand*, 515 F.3d at 368.

16. *See id.*

17. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(1), 122 Stat. 3553 (stating that the purpose of the ADA was to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities").

18. *See* Joseph et al., *supra* note 4 (discussing the stigma of those in MMT programs).

19. *See A Helping Hand*, 515 F.3d at 365.

20. *Id.* at 368.

21. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(1), 122 Stat. 3553. "This Act may be cited as the 'ADA Amendments Act of 2008.'" *Id.* § 1.

22. *See* Joseph et al., *supra* note 4.

Circuit's decision that held that a MMT's clients were disabled under the ADA;[23] and third, it put to the jury the question of whether the clients of the Clinic were disabled, a question that Congress has stated "should not demand extensive analysis" in an ADA claim.[24]

I. Background of Relevant Law

A. The ADA Before the 2008 Amendments Act

Title II of the ADA is the controlling law for issues of discrimination against persons with disabilities by public entities.[25] Title II of the ADA prohibits all public entities[26] from discriminating against those with disabilities.[27] The ADA defines a "disability" as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment."[28] The phrase "being regarded as having such an impairment" is defined in the Code of Federal Regulations ("C.F.R.") stating that a person who is regarded as disabled either:

> (i)[h]as a physical or mental impairment that does not substantially limit major life activities but that is treated by a public entity as constituting such a limitation; (ii) [h]as a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or (iii) [h]as none of the impairments defined in paragraph (1) of this definition but is treated by a public entity as having such an impairment.[29]

This language has been interpreted to mean that a person need not be actually physically impaired; it must only be *perceived* by others that the person has a disability.[30] In the case of public entities it has been established "that community views may be attributed to government bodies

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23. *See* MX Group, Inc. v. City of Covington, 293 F.3d 326, 342 (6th Cir. 2002) (holding that a city's attempts to prevent an MMT clinic from opening "were based on stereotypes and fear and violated the ADA").

24. ADA Amendments Act of 2008 § 2(b)(5).

25. *See* 42 U.S.C. § 12101 (2006).

26. 28 C.F.R. § 35.104 (2008) (defining public entities as any state or local government for the purposes of the ADA).

27. Weber, *supra* note 7 (discussing what legal protections drug treatment clinics are given).

28. 42 U.S.C. § 12102(2) (2006).

29. 28 C.F.R. § 35.104.

30. *See* A Helping Hand, L.L.C. v. Balt. County, Md., 515 F.3d 356, 367 (4th Cir. 2008).

when the government acts in response to these views."[31] The C.F.R. has recognized drug addiction as an impairment under the ADA.[32] Precedent interpreting the ADA has also held that drug addiction constitutes an "impairment" under the ADA.[33] Illustratively, the Sixth Circuit has held that methadone users are disabled.[34]

B. Defining "Substantially Limited in a Major Life Activity"

Having an impairment is only one part of the test to see if an individual is disabled under the ADA.[35] People being treated for drug addiction must also demonstrate that they are "substantially limited" in a "major life activity" because of other person's attitudes toward their addiction.[36] In *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, the Supreme Court stated that these terms need to be interpreted narrowly in order to create a demanding standard for disabilities.[37] The Supreme Court in *Toyota* declined to define a person with carpal tunnel syndrome as disabled under the ADA.[38] The Court stated that Congress intended to create a narrow definition of major life activities.[39] Another Supreme Court case, *Sutton v. United Air Lines, Inc.*,[40] also narrowed the "broad" scope of the ADA.[41] In *Sutton*, the Supreme Court held that in a Title II action the plaintiffs had to be impaired in their ability to work in a variety of jobs to be considered unable to participate in a major life activity.[42] The ADA does

31. *Id.* at 366.

32. 28 C.F.R. § 35.104.

33. *See* Dovenmuehler v. Saint Cloud Hosp., 509 F.3d 435, 439 (8th Cir. 2007) (citing Thompson v. Davis, 295 F.3d 890, 896 (9th Cir. 2002)); Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown, 294 F.3d 35, 46 (2d Cir. 2002); United States v. S. Mgmt. Corp., 955 F.2d 914, 919 & n.3 (4th Cir. 1992); H.R. REP. NO. 101-485, pt. 2, at 51 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 333 ("[P]hysical or mental impairment" includes "drug addiction[ ] and alcoholism.").

34. *See* MX Group, Inc. v. City of Covington, 293 F.3d 326, 342 (6th Cir. 2002). The facts in *MX Group* also involved an attempt to keep a methadone clinic from opening. *Id.* at 328-31.

35. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 195 (2002).

36. *See* 28 C.F.R. § 35.104.

37. *See* 534 U.S. at 195-96; *see infra* Part I.C (discussing how this holding has recently been reversed by Congress).

38. *Toyota*, 534 U.S. at 187.

39. *See id.* at 197.

40. 527 U.S. 471, 493 (1999) (holding that petitioners with severe vision problems were not disabled under the ADA).

41. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(4), 122 Stat. 3553.

42. *Sutton*, 527 U.S. at 493 (stating that the plaintiffs, employees of an airline, had to demonstrate the inability to function in a broad array of jobs rather than just the one in which they were currently working).

not specifically define the term "major life activity," but the C.F.R. does offer some guidance.[43] The C.F.R. states that "[t]he phrase *major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[44] The Supreme Court has interpreted this to mean that major life activities are those which are "of central importance to daily life."[45] This interpretation of what constitutes a major life activity was further clarified by the Fourth Circuit's holding in *Cline v. Wal-Mart Stores, Inc.*, which stated that individuals could be considered disabled based on the public's perception that they are disabled.[46] Further, the Sixth Circuit held in *MX Group, Inc. v. City of Covington* that this standard would apply to people in MMT treatment.[47]

C. The 2008 ADA Amendments Act

In September of 2008, the President signed into law an amendment to the ADA ("the Amendment").[48] This Amendment sought to clarify the intent and scope of the ADA.[49] In the Amendment, Congress intended for the focus of ADA cases to shift from the question of whether an individual had an impairment constituting a disability, to an examination of whether the public entity discriminated against the party with the impairment.[50] Within the Amendment, Congress specifically pointed to the *Toyota* and *Sutton* cases as mistakenly creating too strict a standard for what constituted a disability.[51] The Amendment stated that an examination of whether an impairment was a disability under the ADA "should not demand extensive analysis."[52] This Amendment defined the phrase "being regarded as having such an impairment" to mean that even if an impairment failed to limit and was not perceived to limit a major life

43. 28 C.F.R. § 35.104 (2008).

44. *Id.* The ADA Amendments Act of 2008 has adopted this definition. *See* ADA Amendments Act of 2008 § 4(a).

45. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 197 (2002).

46. 144 F.3d 294, 302 (4th Cir. 1998) (meaning that a plaintiff in an ADA case did not have to demonstrate any actual physical or mental disability).

47. 293 F.3d 326, 340 (6th Cir. 2002). The facts in *MX Group* also involved an attempt to keep a methadone clinic from opening. *Id.* at 328-31.

48. The U.S. Equal Employment Opportunity Commission, Notice Concerning the Americans with Disabilities Act (ADA) Amendments Act of 2008, http://www.eeoc.gov/ada/amendments_notice.html (last visited Dec. 1, 2009).

49. ADA Amendments Act of 2008 § 2(b)(1).

50. *Id.* § 4(a).

51. *Id.* § 2(a)(4)-(6).

52. *Id.* § 2(b)(5).

activity, one could still bring a valid claim under the ADA if a public entity subjects a person to an "action prohibited under this Act."[53]

II. *A Helping Hand, L.L.C. v. Baltimore County, Maryland*

In *A Helping Hand*, the Fourth Circuit examined under what circumstances those in drug treatment were considered "disabled" by the ADA.[54] The County appealed the district court's ruling arguing that the court erred in holding that the Clinic's clients were "regarded as" disabled under the ADA.[55] The district court held that on the facts of the case the clients of the Clinic were disabled as a matter of law.[56] The district court then went on to hold that the Clinic's clients had been discriminated against by the new zoning restrictions and that the County's zoning changes violated the ADA.[57] The Fourth Circuit reversed and remanded on the issue of disability stating that it was for the jury to decide whether the clients of the Clinic were disabled under the ADA.[58]

A. The Facts

In September of 2001, Joe Prell explored the options of opening a methadone clinic in Baltimore County, Maryland.[59] Prell identified a building that had been previously used as a medical office as a possible location for the Clinic.[60] Prell then contacted the County Department of Permits and Development Management about obtaining any necessary permits for opening the Clinic at that location.[61] The County then notified Prell in writing that the methadone treatment center would constitute a "permitted by right" use under the zoning rules for that location but Prell may need to obtain a "change of occupancy permit."[62] Prell followed up with the County about the change of occupancy permit and was informed

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53. *Id.* § 4(a) (defining the term "regarded as having such an impairment"). This can be taken to mean that the focus of analysis in an ADA case is on the actions of the public entity, and not the perception of disability. *See id.*

54. 515 F.3d 356, 367 (4th Cir. 2008).

55. *Id.* at 365.

56. *See id.* at 367. A judgment as a matter of law is granted when a jury "would not have a legally sufficient evidentiary basis to find for the party on that issue." FED. R. CIV. P. 50(a)(1).

57. *A Helping Hand*, 515 F.3d at 367. The text of the district court's decision is unavailable at this time.

58. *See id.* at 373 (questioning specifically whether the clients of the Clinic were impaired in a major life activity under the ADA).

59. *Id.* at 358.

60. *Id.*

61. *Id.*

62. *Id.*

that because the office was currently a medical office, no further paperwork would be needed.[63] After receiving this information, Prell entered into a lease for the location, incorporated the Clinic, and applied for all the relevant federal and state certifications and permits.[64] At this point, the community around the planned Clinic learned of it and began to protest its creation.[65] The protests included public demonstrations, letter writing campaigns, flyer distributions, and meetings in an attempt to prevent the Clinic from opening.[66] The protests became quite dramatic.[67] In one instance, the police were summoned to deal with protesters during an open house at the Clinic.[68]

During this time, a city councilman took up the cause of the protesters.[69] Councilman Kevin Kamenetz worked with the protesters in developing a strategy to keep the Clinic from opening.[70] This collaboration culminated in a County Council Bill ("the Bill") that created new zoning requirements for "state-licensed medical clinics."[71] This new Bill would require these "state-licensed medical clinics" to participate in a public hearing process, obtain a special permit before being allowed to open, and be 750 feet from the nearest residence.[72]

The County previously tried to keep another methadone clinic from opening by creating a new zoning ordinance.[73] In that case, a federal court held that the new zoning ordinance violated the ADA.[74] Because Kamenetz was aware that there was a potential ADA challenge to the Bill, its language was changed to use the general term "state-licensed medical clinics" to avoid specifically identifying methadone clinics.[75] During the time that the Bill was being crafted, Prell received all the necessary approvals from federal agencies including the Drug Enforcement Administration, the Substance Abuse and Mental Health Services

63. *A Helping Hand*, 515 F.3d at 358.

64. *Id.* at 358-59.

65. *Id.* at 359.

66. *Id.*

67. *Id.*

68. *Id.*

69. *A Helping Hand*, 515 F.3d at 359.

70. *Id.*

71. *Id.*

72. *Id.*

73. Smith Berch, Inc. v. Balt. County, 115 F. Supp. 2d 520, 522 (D. Md. 2000) (vacated on other grounds).

74. *Id.* at 523 (vacated on other grounds). This case held that Baltimore County violated the ADA by requiring a methadone clinic to participate in a special zoning hearing. *See id.*

75. *A Helping Hand*, 515 F.3d at 359.

Administration, and the Council on Accreditation.[76] The State of Maryland informed Prell that state officials declared that the Clinic was "in compliance, and... should be receiving [its necessary state] license shortly," but after a week, the State contacted Prell and told him that due to several unfulfilled requirements, the County had not yet approved the Clinic's occupancy permit.[77] When Prell contacted the County, they informed him that he needed to submit a site plan and a parking plan before he would be approved for an occupancy permit.[78] Prell also noted that during this period of time "he overheard a conversation in which a County official assured the head of a local community association that the Clinic would never be allowed to open."[79] Prell obtained a site plan and a parking plan and submitted them to the County.[80] The County came back with new requirements, which Prell promptly fulfilled.[81] By April 15, 2002, the Clinic had obtained everything necessary before opening, including a valid County permit.[82]

The Bill passed on April 15, 2002 and was signed into law the following morning.[83] One significant aspect of the Bill was that it provided a six-month grace period for clinics that had been established shortly before the date that the Bill became effective. In a last minute change to the language of the Bill, the exception was changed to make it so only those clinics that were *operating* prior to the date that the Bill would take effect would fit into that exception.[84] The Clinic argued that it had opened on April 15th before the Bill became effective, but the County rejected this argument and began to assess fines against the Clinic in the amount of $200 for every day that it remained in operation.[85] At the same time that the County was assessing fines against the Clinic, the County granted a kidney dialysis center a variance and allowed it to open without fulfilling the requirements of the Bill.[86]

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76. *Id.* at 359-60.

77. *Id.* at 360.

78. *Id.*

79. *Id.*

80. *Id.*

81. *A Helping Hand*, 515 F.3d at 360. Prell was told by the County that he now needed "to submit a plan depicting the utilities, including the plumbing and electrical operation of the building." *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 360-61.

86. *Id.* at 361.

B. Procedural History

On August 2, 2002 the Clinic filed suit in federal district court claiming intentional discrimination, disparate impact, and a violation of due process.[87] The first two claims were based on Title II of the ADA.[88] The case was tried before a jury for ten days.[89] After the close of evidence, the district court granted judgment as a matter of law on the disparate impact claims and on one of the intentional discrimination claims.[90] The jury found for the Clinic and provided injunctive relief on their successful ADA claims.[91] The County appealed the decision on those ADA claims.[92]

C. The Fourth Circuit's Reversal

On appeal, the Fourth Circuit reviewed the County's claim that the Clinic's clients were not disabled under the definition of the ADA.[93] The court recognized that drug addiction constituted an impairment under the ADA.[94] It then pointed out that "[a]n ADA claimant must also demonstrate that drug addiction was regarded as 'substantially limit[ing]' one or more 'major life activities' or that drug addiction actually substantially limited one or more 'major life activities' because of the attitudes of others towards the addiction."[95] The court reasoned that the Clinic's clients were stigmatized and "regarded as criminals and generally undesirable neighbors and, further, that this perception accords with the stigma that often attaches to recovering drug addicts," but this did not mean that they were "significantly impaired in their ability to work, learn, care for themselves, or interact with others."[96]

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87. *A Helping Hand*, 515 F.3d at 361. For the purposes of this Comment, the due process claim will not be examined.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* Concerning the intentional impact claim, the jury also found on behalf of the Clinic's clients. *Id.*

92. *Id.*

93. *See A Helping Hand*, 515 F.3d at 367.

94. *Id.* (citing Dovenmuehler v. Saint Cloud Hosp., 509 F.3d 435, 439 (8th Cir. 2007) (citing Thompson v. Davis, 295 F.3d 890, 896 (9th Cir. 2002)); Reg'l Econ. Cmty. Action Program, Inc. v. City of Middletown, 294 F.3d 35, 46 (2d Cir. 2002); United States v. S. Mgmt. Corp., 955 F.2d 914, 919 & n.3 (4th Cir. 1992); H.R. REP. NO. 101-485, pt. 2, at 51 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 333 ("'physical or mental impairment' includes 'drug addiction[ ] and alcoholism'")).

95. *A Helping Hand*, 515 F.3d at 367 (citing 28 C.F.R. § 35.104 (2008)).

96. *Id.* at 367-68.

The court then recognized that being regarded as a "criminal" and "undesirable" might hurt one's ability to gain employment based on other person's perception of that impairment, but it was an open question that the jury should have decided.[97] In holding on this issue, the court stated that even if the public regarded drug addicts as criminals, it was an open question whether they were impaired in "major life activities," such as gaining employment.[98] By allowing the jury to decide if the Clinic's clients were impaired in a major life activity, the court allowed the jurors to make the initial decision of whether the clients of the Clinic were disabled.[99] This decision meant that the case would be remanded for further proceedings on whether the clients were perceived to be impaired in major life activities by members of the County's community.[100]

The County argued that even if the clients were impaired under the ADA, their interactions with others were not a "major life activity."[101] However, the court never had to reach a decision in that matter because "a reasonable jury could have found that the community regarded the Clinic's clients as significantly impaired in one or more major life activities, [but] we cannot conclude that this is the only outcome a reasonable jury could have reached."[102]

III. The Wrong Interpretation of the ADA

A. Congress Has Clarified the Intent and Scope of the ADA in a Way Favorable to the Clinic.

On September 25, 2008, the ADA Amendments Act was signed into law.[103] This Amendment clarifies the congressional intent of the ADA and should prompt the Fourth Circuit to reexamine its holding in *A Helping Hand*.[104] The Fourth Circuit focused on determining whether the Clinic's clients were perceived to be impaired by the community.[105] The recent addition to the ADA shifts the court's focus to the actions of the discriminating public entity, rather than to the community's perception of

97. *Id.* at 368.

98. *Id.*

99. *See id.*

100. *Id.*

101. *A Helping Hand*, 515 F.3d at 367. The court expressed "skepticism" that "interacting with others" is a "major life activity" under the ADA. *Id.*

102. *Id.* at 368.

103. The U.S. Equal Employment Opportunity Commission, *supra* note 48.

104. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(3), 122 Stat. 3553.

105. *A Helping Hand*, 515 F.3d at 368.

the clients.[106] By reversing the district court's decision on the community's perception of the clients in *A Helping Hand*, the court focused on the wrong issue.[107]

The Amendment puts the focus of ADA cases on whether the public entity was violating ADA rules, rather than having an in-depth examination of whether the person is disabled.[108] This seems to favor the Clinic because the County, due to intense public pressure, did everything in its power to make sure the Clinic did not open.[109] This Amendment should force the Fourth Circuit's decision to be reconsidered in light of the fact that the focus should have been on the conduct of the County.[110]

B. The District Court Was Correct.

In its argument to the Fourth Circuit, the Clinic provided a large amount of evidence to prove the County had discriminated against the clients and that the community regarded the clients as undesirable.[111] The Clinic stated that the district court relied on two arguments in making its decision:[112] first, the clients were disabled due to the perception of the community, and second, the County had discriminated against the Clinic's clients through the zoning law changes.[113] The district court concluded that the clients were disabled and held that the clients had been discriminated against by the restrictive zoning regulations put in place by the County.[114] The Clinic, on appeal, pointed to the district court's reasoning, which cited *Cline v. Wal-Mart Stores, Inc.* and *MX Group, Inc. v. City of Covington* to support the assertion that the clients were impaired in a major life

106. *See* ADA Amendments Act of 2008 § 4(a) (stating that individuals have met the "requirement of 'being regarded as having such an impairment' if [they] establish[] that [they have] been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment *whether . . . the impairment limits or is perceived to limit a major life activity*") (emphasis added). Baltimore County is considered a "public entity" for the purposes of an ADA claim. *A Helping Hand*, 515 F.3d at 361.

107. *See* ADA Amendments Act of 2008 § 2(a)(5).

108. *Id.*

109. *See A Helping Hand*, 515 F.3d at 359.

110. *See* ADA Amendments Act of 2008 § 2(a)(5).

111. Brief of Appellee at 26-27, Balt. County, Md. v. A Helping Hand, L.L.C., No. 06-2026 (4th Cir. May 30, 2007). This evidence included: community protests, unruly demonstrations, newspaper articles, and extensive communication between community leaders and the public regarding the public's outcry over the opening of the clinic. *Id.*

112. *Id.* at 28.

113. *Id.*

114. *Id.*

activity.[115] The district court applied this precedent to the Clinic's situation holding that the clients fell under ADA protection and were discriminated against by the County.[116]

The district court's ruling was based on evidence that demonstrated public outcry from the community around the opening of the Clinic and the County's actions in response.[117] Following the district court's reasoning, the Fourth Circuit lacked any basis for requiring further examination of whether the community perceived the Clinic's clients as disabled.[118] The district court had correctly interpreted precedent by focusing on the actions of the County.[119]

C. The Focus for a Jury Should Be the Actions of the "Public Entity."

Under the ADA, the focus of a claim is whether there was discrimination, not, in the eyes of a jury, whether the public perceives those in MMT as disabled.[120] Congress has stated in the recent Amendment to the ADA that "whether an individual's impairment is a disability under the ADA should not demand extensive analysis."[121] The district court appropriately examined whether the County had engaged in discriminatory acts against the Clinic after concluding that there was a large amount of evidence that demonstrated the clients were disabled under the ADA.[122] The Fourth Circuit should have accepted the holding of the district court and defined the Clinic's clients as disabled.[123]

The initial finding of fact for the jurors should have been, and was before the reversal, the evidence of discrimination by the County, and not whether there were some in the County who did not consider the clients disabled.[124] By making this issue the central focus on appeal, the Fourth Circuit would have fulfilled the intent of Congress to minimize the analysis of whether the person bringing the action has an impairment that

115. *Id.* (citing Cline v. Wal-Mart Stores, Inc., 144 F.3d 294, 302 (4th Cir. 1998) and MX Group, Inc. v. City of Covington, 293 F.3d 326, 326 (6th Cir. 2002)).

116. *Id.*

117. Brief of Appellee, *supra* note 111, at 28.

118. *But see* A Helping Hand, L.L.C. v. Balt. County, Md., 515 F.3d 356, 368 (4th Cir. 2008).

119. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)(5), 122 Stat. 3553.

120. *See id.* § 2(b)(5).

121. *Id.* ("[T]he Supreme Court in the case of Toyota . . . has created an inappropriately high level of limitation necessary to obtain coverage under the ADA . . . .").

122. *See* Brief of Appellee, *supra* note 111, at 26-28.

123. *See supra* Part II.B.

124. *See* ADA Amendments Act of 2008 § 2(b)(5).

constitutes a disability.[125] If the Fourth Circuit had made this decision, there likely would have been no other issue to reverse because the County had clearly made all the zoning changes to restrict the creation of the Clinic.[126]

CONCLUSION

In *A Helping Hand*, the Fourth Circuit was not convinced that the Clinic's clients were disabled as a matter of law.[127] The recent Amendment to the ADA states that the focus in ADA cases should be on the actions of the public entity accused of discrimination, not on whether a person is really disabled, or perceived to be disabled. There is a clear requirement for what constitutes a disability under the ADA.[128] The district court held that these requirements were fulfilled.[129] Therefore, the County's actions of changing the zoning and the community's strong protests about the Clinic should have been the focus of any jury decision of fact related to the case.[130] The intention of the ADA is to protect those with disabilities from discrimination by public entities.[131] The stigma[132] of those who are seeking treatment for their opiate addiction through MMT is one which can clearly be elevated to a disability.[133] It is important that there are clear standards that focus on the facts of the alleged discrimination, rather than haggling over which type of impairment constitutes a disability.[134]

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125. *See supra* Part I.C.

126. *See* A Helping Hand, L.L.C. v. Balt. County, Md., 515 F.3d 356, 368 (4th Cir. 2008). The court had also affirmed that the clients of the Clinic had standing to bring the ADA claim. *Id.*

127. *Id.*

128. *See* ADA Amendments Act of 2008 § 4(a).

129. Brief of Appellee, *supra* note 111, at 26-27.

130. *See id.* at 28.

131. ADA Amendments Act of 2008 § 2(a)(1).

132. Joseph et al., *supra* note 4.

133. MX Group, Inc. v. City of Covington, 293 F.3d 326, 342 (6th Cir. 2002) (holding that methadone users were disabled under the ADA).

134. *See* Weber, *supra* note 7, at 745 ("[T]he adoption of legislative and regulatory standards based on federal nondiscrimination standards . . . will, in the long run, be more effective in establishing treatment . . . .").

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ARTICLES

FIVE AGAINST THE ENVIRONMENT

PETER MANUS*

Abstract: The Supreme Court issued five high-profile environmental opinions during its 2008-2009 Term. All were losses for the environmental interests. This Article discusses the five cases, noting commonalities and distinctions among them. While stopping short of concluding that the Supreme Court's conservative majority has waged a campaign against environmental values through the 2008-2009 Term, this Article concludes that each of the five cases contains indications of prejudice against environmental values among the conservative Justices.

INTRODUCTION

The five 2008-2009 Supreme Court environmental cases create a trajectory of a sort through the Term, with the early majority opinions treading relatively well-worn decisional paths and those following displaying increasingly overt anti-environmental activism as the majority bloc seemed to stretch and flex in the confidence borne of its newfound solidarity.[1] The first case, *Winter v. Natural Resources Defense Council,*

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1. The five cases are *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365 (2008) (lifting a preliminary injunction requiring the U.S. Navy to adhere to mitigation measures designed to protect marine mammals while the Navy continued to conduct sonar training exercises pending a judicial determination of whether the Navy had sufficiently studied the environmental impacts of such tests as required under the National Environmental Policy Act); *Summers v. Earth Island Institute*, 129 S. Ct. 1142 (2009) (finding that plaintiff environmentalists lacked the specificity required to meet constitutional standing requirements where a new U.S. Forest Service policy allowed salvage timber sales to proceed without public input in national forests where the plaintiffs engaged in outdoor activities); *Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498 (2009) (finding that the Clean Water Act allows the use of cost-benefit analysis in setting performance-based standards for discharges from existing cooling water intake structures); *Burlington Northern & Santa Fe Railway Co. v. United States*, 129 S. Ct. 1870 (2009) (finding that arranger

Inc., was an easy case for the majority, as the Navy's training program was readily framed as a matter of national security, rendering the environmental interests seemingly frivolous and anti-American.[2] On the heels of *Winter* came *Summers v. Earth Island Institute*, another relatively safe opinion in which Justice Scalia traced the template of his prior environmental standing opinions.[3] Riding on the momentum of these victories, the conservative majority appeared to revel in three additional opportunities to undermine the broad principles of several environmental statutes, offering crabbed and at times confusing readings of the provisions under dispute in *Entergy Corp. v. Riverkeeper, Inc.*, *Burlington Northern & Santa Fe Railway Co. v. United States*, and *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, all while purporting to bow in deference before various principles of statutory and regulatory construction.[4]

This Article considers each case both as a separate decision and for its contribution to this trajectory. Unsurprisingly, both individually and collectively the cases demonstrate that the Court's ideologically conservative bloc has regrouped in the wake of *Massachusetts v. EPA*, the landmark environmental victory of 2007, to utilize a familiar arsenal of legal doctrines as a means of drumming environmentalists out of the courts.[5] This Article concludes that, at least for the 2008-2009 Term, anti-environmentalism is as reliable a predictor as any on the issue of how the conservative members of the Court reached decisions.[6]

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liability under the Comprehensive Environmental Response, Compensation, and Liability Act requires that the defendant intended to dispose of hazardous substances); and *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458 (2009) (finding that the Clean Water Act authorizes discharges of fill into waters of the United States without triggering performance standards requiring a permit for new discharges of pollutants).

2. *See* discussion *infra* notes 7-21 and accompanying text.

3. *See* discussion *infra* notes 22-39 and accompanying text.

4. *See* discussions *infra* notes 40-67, 68-84, 85-107 and accompanying text.

5. In *Massachusetts v. EPA*, the Court found that Massachusetts had standing to sue the EPA for its decision against regulating greenhouse gas emissions under the Clean Air Act, 42 U.S.C. §§ 7401-7671q (2006). 549 U.S. 497, 526 (2007). Justice Stevens wrote the majority opinion, joined by Justices Kennedy, Souter, Breyer, and Ginsburg. *Id.* at 504. Chief Justice Roberts dissented on the issue of standing, joined by Justices Scalia, Thomas, and Alito. *Id.* at 535 (Roberts, C.J., dissenting). Justice Scalia dissented on the issue of standing and on the question of whether the Clean Air Act authorizes the EPA to regulate mobile source emissions due to their contribution to global warming. *Id.* at 549, 555 (Scalia, J., dissenting).

6. *See Winter*, 129 S. Ct. at 369 (Roberts, C.J., joined by Scalia, Kennedy, Thomas, and Alito, JJ. delivered the opinion of the Court); *Summers*, 129 S. Ct. at 1146 (Scalia, J., joined by Roberts, C.J., and Kennedy, Thomas, and Alito, JJ., delivered the opinion of the Court, and Kennedy, J., concurring); *Entergy*, 129 S. Ct. at 1501 (Scalia, J., joined by Roberts, C.J., and Kennedy, Thomas, and Alito, JJ., delivered the opinion of the Court);

I. The 2008-2009 Supreme Court Environmental Decisions

This section offers brief analyses of the five environmental decisions issued by the Supreme Court during the 2008-2009 Term. Readers familiar with Supreme Court environmental cases emerging over the past several decades will recognize themes that the more conservative Justices rely on to render decisions unfavorable to environmental litigants, such as equitable discretion, constitutional standing, and judicial deference.

A. *Winter v. Natural Resources Defense Council, Inc.*

Winter came before the Supreme Court when the U.S. Navy appealed a preliminary injunction mandating that the Navy implement a series of mitigation measures during certain sonar training exercises pending the Navy's completion of an Environmental Impact Statement ("EIS") as required under the National Environmental Policy Act ("NEPA").[7] The Supreme Court overturned the Ninth Circuit decision upholding the district court-crafted mitigation measures.[8] Chief Justice Roberts wrote the opinion for a majority consisting of himself and Justices Scalia, Thomas, Kennedy and Alito.[9] After criticizing some of the lower courts' statements on the standard for evaluating whether a claimed threat of injury warrants injunctive relief, the Court ultimately determined that any error that may have been committed on this issue was harmless, as the crux of the matter was a particular element of a preliminary injunction determination under which courts compare the relative gravitas of the public interests championed by the parties seeking and resisting injunctive relief.[10]

Burlington N., 129 S. Ct. at 1873-74 (Stevens, J., joined by Roberts, C.J., and Scalia, Kennedy, Souter, Thomas, Breyer, and Alito, JJ., delivered the opinion of the Court); and *Coeur Alaska*, 129 S. Ct. at 2462 (Kennedy, J., joined by Roberts, C.J., and Thomas, Breyer, and Alito, JJ., delivered the opinion of the Court, which Scalia, J., joined in part); *see supra* note 1.

7. More precisely, the Navy appealed the Ninth Circuit Court of Appeals' affirmation of the district court's denial of the Navy's motion to vacate the district court's injunction. *Winter*, 129 S. Ct. at 374. The Navy argued that a Council on Environmental Quality ("CEQ") determination that the Navy faced emergency circumstances allowing it to implement alternative arrangements to fulfill NEPA compliance effectively overrode the mitigation measures imposed under the district court's injunction. *See id.* at 373-74; *id.* at 388-89 (Ginsburg, J., dissenting).

8. *Id.* at 382 (majority opinion) (concluding that the district court had abused its discretion).

9. *Id.* at 369.

10. For the Court's discussion of the preliminary injunction review standards, see *id.* at 375-76 (criticizing the district court and Ninth Circuit's use of the term "possibility" in connection with the threat of irreparable harm that a plaintiff seeking preliminary equitable relief must establish and insisting that a court must find a likelihood of irreparable harm

Defining the two public interests at stake broadly, the Court had an easy time concluding that national security outranked marine mammal protection as a matter of public interest.[11] Indeed, the Court considered the outcome of this comparison so obvious that it offered little in the way of analysis in its opinion.[12] Thus, the Supreme Court's decision to obliterate all mitigation measures designed to protect marine mammals and allow the Navy to continue its training unobstructed, even as it moved forward on its belated EIS, rested primarily on the majority's finding that Navy sonar testing is of greater public importance than protecting aquatic life from death and injury.[13] The decision to allow the Navy to bypass NEPA, in short, was a product of the unarticulated personal value system shared by five Supreme Court Justices under which preparedness for war with unidentified foreign nations outranks environmental stewardship to the extent that war preparation exercises may not be postponed or otherwise hampered by a federal law requiring reflection on environmental interests.[14]

Justice Breyer, joined by Justice Stevens, concurred in the judgment, but argued that the four mitigation measures deemed acceptable by the Navy should have been left intact while the lower court reconsidered its injunction.[15] This would have been a more logical outcome, not only

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before granting preliminary relief). For the Court's discussion of the public interest element, see *id.* at 376-78 ("[E]ven if plaintiffs have shown irreparable injury from the Navy's training exercises, any such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors. A proper consideration of these factors alone requires denial of the requested injunctive relief.").

11. *Id.* at 378 (finding that the public interest factor "tip[s] strongly in favor of the Navy").

12. The Court professed to find that the case involved "'complex, subtle, and professional decisions,'" but all complexities were those involved in the Navy's development of its training program, and the *Winter* majority discussed neither these nor any complexities that might be discernible in the public's effort to protect and preserve marine species. *Winter*, 129 S. Ct. at 377 (quoting Gilligan v. Morgan, 413 U.S. 1, 10 (1973)).

13. *Id.* at 378 ("The public interest in conducting training exercises with active sonar under realistic conditions plainly outweighs the interests advanced by the plaintiffs. . . . [T]he proper determination of where the public interest lies does not strike us as a close question.").

14. The majority stressed that NEPA requires nothing more than for the government to consider the environmental consequences of its actions, and not to alter its actions on the basis of that consideration, as if that fact lessens the environmental interests at play even further: "Given that the ultimate legal claim is that the Navy must prepare an EIS, not that it must cease sonar training, there is no basis for enjoining such training in a manner credibly alleged to pose a serious threat to national security." *See id.* at 381. This statement appears to presume that the Navy would never alter its training program on the basis of its EIS, or that the EIS is nothing more than a matter of paperwork. *See id.*

15. *Id.* at 382, 387 (Breyer, J., concurring) (favoring a decision leaving intact the four

because the Navy had agreed that it could conduct its training exercises under these mandated conditions, but also because one of the majority's criticisms of the district court was that no analysis had been conducted on the diminished threat of harm presented to the marine mammals with the four undisputed mitigation measures in place.[16] In other words, the Court first scolded the Ninth Circuit for upholding an injunction mandating six mitigation measures by arguing that the Navy had agreed to four of them and the relative threat of injury presented by the Navy's refusal to implement the remaining two did not justify an injunction. Following this, the Court relieved the Navy of all six mitigation measures, without itself doing any sort of analysis on the relativity of competing public interests to determine whether leaving the four undisputed mitigation measures intact somehow would have subsumed the dominant public interest in having a prepared Navy beneath the lesser public interest in environmental stewardship.[17] By pointing out the flaw in this logic, Justice Breyer's concurrence underscored the draconian nature of the majority opinion and the fact that it rested on an all-or-nothing comparison of two dissimilar and only cursorily analyzed public interests.[18]

Justice Ginsburg, joined by Justice Souter, dissented, bringing up a number of elements of the case history that had been ignored by the majority as a means of establishing that the Navy had operated to systematically subvert the purposes of NEPA.[19] From its inadequate assessment of whether its training program triggered the EIS requirement to its appeal to the Council on Environmental Quality to override the district court's imposition of the six mitigation measures, Justice Ginsburg

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mitigation measures that the Navy had conceded did not materially impede its training program).

16. *Id.* at 376 (majority opinion) ("[B]y the time of the District Court's final decision, the Navy challenged only two of six restrictions imposed by the court. The District Court did not reconsider the likelihood of irreparable harm in light of the four restrictions not challenged by the Navy. This failure is significant . . . .") (internal citations omitted).

17. The Court justified its decision to sweep the entire injunction aside in a footnote, concluding that "[u]nexamined conditions imposed by the stay order [under which the conditions had been imposed on the Navy] are certainly no basis for what would be in effect [with] the entry of a new preliminary injunction by this Court." *Id.* at 381 n.5.

18. Indeed, the Court even acknowledged that the Navy's own protests focused on "the two challenged restrictions imposed by the District Court." *Id.* at 377. When summing up the naval officers' assertions, however, the Court ignored the Navy's focus, concluding in broader terms that "[w]e accept these officers' assertions that the use of [mid-frequency active] sonar under realistic conditions . . . is of the utmost importance to the Navy and the Nation." *Id.*

19. *Id.* at 387-90 (Ginsburg, J., dissenting) (observing a number of times through the analysis that the Navy's EIS was scheduled for completion after the conclusion of the sonar training exercises it would address).

pointed out, the Navy had gone to extraordinary lengths to avoid its NEPA duties and sidestep the authority of the courts.[20] That the Navy, at long last, was engaged in the EIS process, Justice Ginsburg concluded, was of little comfort when the training exercises to which the NEPA analysis applied would be completed prior to the completion of the EIS.[21]

B. *Summers v. Earth Island Institute*

Summers arose out of a dispute over the validity of certain newly-promulgated U.S. Forest Service regulations that excluded smaller salvage timber sales from the administrative processes typically applicable to salvage timber sales and other proposed Forest Service activities arising under certain federal land management statutes.[22] The Forest Service's rationale for the exclusion was that the agency's administrative review process need not apply to activities that had been categorically excluded from NEPA's environmental impact review process, as such categorical exclusion indicated that the federal government had determined that these

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20. The CEQ is an advisory body located within the Executive Office of the Presidency. The Council on Environmental Quality, http://www.whitehouse.gov/administration/eop/ceq/about (last visited Feb. 1, 2010). At the Navy's request, the CEQ attempted to relieve the Navy of its NEPA obligations in connection with the training exercises under dispute. This maneuver was all but ignored by the majority. *See Winter*, 129 S. Ct. at 373-75 (noting without comment that the plaintiffs contended that the CEQ's involvement violated the separation of powers). Only the dissent recognized the Navy's actions as "an extraordinary course." *Id.* at 389 (Ginsburg, J., dissenting).

21. *See, e.g.*, *Winter*, 129 S. Ct. at 390 ("The Navy's publication of its EIS in this case, scheduled to occur *after* the [fourteen] exercises are completed, defeats NEPA's informational and participatory purposes.").

22. *See* Summers v. Earth Island Inst., 129 S. Ct. 1142, 1147 (2009) (noting that the Forest Service Decisionmaking and Appeals Reform Act, Pub. L. No. 102-381, tit. III, § 322, 106 Stat. 1419 (1992), note following 16 U.S.C. § 1612, requires the Forest Service to "establish a notice, comment, and appeal process for 'proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans developed under the Forest and Rangeland Renewable Resources Planning Act of 1974'") (citations omitted). The regulations allowing that certain Forest Service activities may be categorically excluded from the public process are codified at 36 C.F.R. § 215.4(a), 215.12(f) (2004). The new regulations under dispute identifying particular fire-rehabilitation and salvage-timber sale activities as categorically excused from public process are set forth at National Environmental Policy Act Documentation Needed for Fire Management Activities; Categorical Exclusions, 68 Fed. Reg. 33,814, 33,824 (June 5, 2003) (Forest Service Handbook 1909.15, ch. 30, § 31.2(11); and National Environmental Policy Act Documentation Needed for Limited Timber Harvest, 68 Fed. Reg. 44,598, 44,607 (July 29, 2003) (Forest Service Handbook 1909.15, ch. 30, § 31.2(13)).

activities would never impact the environment to a degree warranting individualized review.[23]

The Earth Island Institute's original challenge to the new Forest Service regulations included a claim by a hiker-member against the agency in connection with a salvage timber sale dubbed the Burnt Ridge Project, which was subject to the new exclusion from the public participation that would typically be available during the Forest Service's planning process.[24] When the parties settled the claims brought by this particular hiker in connection with the Burnt Ridge Project, Earth Island Institute continued with its suit against the Forest Service, as the settlement did not address the validity of the new regulations in general.[25] Realizing that it had lost one of its member-plaintiffs, and thus was vulnerable to a standing challenge, Earth Island Institute attempted to introduce additional member affidavits to supplement the one affidavit that remained before the court.[26] The Forest Service objected, and the Supreme Court accepted the case to hear the standing challenge.[27]

Justice Scalia penned the majority opinion denying standing, writing for the same bloc of Justices as had joined the *Winter* majority.[28] According to the Court, Earth Island Institute could not proceed with its claims once the associated injury alleged by its representative member had been

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23. *Summers*, 129 S. Ct. at 1147.

24. *Id.* at 1147-49.

> Affidavits submitted to the District Court alleged that organization member Ara Marderosian had repeatedly visited the Burnt Ridge site, that he had imminent plans to do so again, and that his interests in viewing the flora and fauna of the area would be harmed if the Burnt Ridge Project went forward without incorporation of the ideas he would have suggested if the Forest Service had provided him an opportunity to comment.

Id.

25. *Id.* at 1148 (noting that the parties settled their dispute, leading the district court to conclude that "'the Burnt Ridge timber sale is not at issue in this case.'" (citation omitted)).

26. *Id.* at 1150 n.1 (noting that the plaintiffs submitted additional affidavits to the district court and rejecting these as submitted too late because they were submitted after the district court had entered judgment and the Forest Service had filed its notice of appeal).

27. Summers v. Earth Island Inst., 490 F.3d 687 (9th Cir. 2007), *cert. granted*, 128 S. Ct. 1118 (2008).

28. *Compare Summers*, 129 S. Ct. at 1146 (Justice Scalia was joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito), *with* Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 369 (2008) (Chief Justice Roberts was joined by Justices Scalia, Kennedy, Thomas, and Alito). Justice Kennedy also filed a two-paragraph concurring opinion, not breaking from the bloc in any way, but simply reiterating the majority's already-stated view that procedural injuries do not meet constitutional muster. *Summers*, 129 S. Ct. at 1153 (Kennedy, J., concurring).

alleviated through settlement.[29] New affidavits were inadmissible, the majority concluded, because the Federal Rules of Civil Procedure allowing supplemental pleadings and joinder of parties are barred from application once judgment has been entered by the lower court and notice of appeal filed.[30]

In its analysis of the remaining individual member's affidavit that had been submitted with the original claim, the Court determined that it failed to satisfy standing due to its lack of precision about the affiant's plans to revisit, for recreational purposes, specific federal land areas that were slated for salvage timber sales and subject to the retraction in regulatory process.[31] The majority also rejected the idea that the procedural injury suffered—the plaintiffs' lost opportunity to participate in environmental review of individual salvage timber sales that were already occurring—qualified as an injury for standing purposes without an associated non-procedural injury, such as a date-specific plan to hike a particular tract of federal land currently slated to serve as the location of a salvage timber sale exempted from notice and comment under the Forest Service regulations.[32]

Joined by Justices Stevens, Souter, and Ginsburg, Justice Breyer wrote the *Summers* dissent, in which he argued that standing should be recognized.[33] After protesting the majority's fixation on the imminence element of standing as a requirement that injury be impending—Justice Breyer explained that the proper focus of an imminence analysis in the standing context was whether injury was conjectural—the dissent argued

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29. *Summers*, 129 S. Ct. at 1149-50 (majority opinion).

> We know of no precedent for the proposition that when a plaintiff has sued to challenge the lawfulness of certain action or threatened action but has settled that suit, he retains standing to challenge the basis for that action (here, the regulation in the abstract), apart from any concrete application that threatens imminent harm to his interests.

Id. at 1150.

30. *Id.* at 1153 (citing FED. R. CIV. P. 15(d), 21).

31. *Id.* at 1150-51 (criticizing the affidavit for its lack of specificity about where the affiant planned to hike in the future, where the Forest Service would be conducting salvage timber sales without notice and comment, and when the affiant planned to hike in forests subject to the challenged regulations).

32. *Id.* at 1151 (adding that a procedural right accorded by Congress relaxes only the redressability element of a standing inquiry, so that the plaintiff need not establish that the foregone notice and comment procedures would have resulted in greater protection of the forest areas subject to salvage timber sales, but that no procedural injury can assist a plaintiff to establish the injury-in-fact element of standing). *See* cases cited *supra* note 6.

33. *Id.* at 1153-54 (Breyer, J., dissenting). This was the only 2008-2009 Supreme Court environmental opinion in which four Justices joined together to dissent.

that standing should be recognized where an organization establishes that its membership has engaged, and will continue to engage, in recreational activities in locations subject to an announced agency policy that promises to diminish environmental protection of those areas and thus will inevitably impact the recreational activities of organization members.[34]

Justice Scalia's majority opinion rejected the "inevitability" argument as speculative and therefore not "concrete" enough to constitute a case or controversy as required by the Constitution.[35] As members of the judiciary, his opinion declared, judges are not in a position to gauge probabilities in the context of meeting their solemn duty to uphold the separation of powers.[36] Indeed, Justice Scalia connected his well-worn invocations of concepts like concreteness, particularization and imminence—concepts that inevitably translate into arguments over the picayune details of a particular nature-lover's stated travel plans—with the very fabric of the United States' democratic society.[37] Interestingly, Justice Scalia indicated that the affidavit of the environmental organization member who was no longer a plaintiff in the case might have been sufficient to satisfy constitutional standing.[38] The difference between the two individual affidavits considered was the fact that the remaining hiker-member's affidavit failed to identify a particular site as one where he planned to hike in the near future out of the twenty in the Allegheny National Forest where he hiked and where the Forest Service planned salvage timber sales.[39] Thus, it is this omission that caused the Court to dismiss the environmentalist organizations' case on separation-of-powers grounds.

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34. *See id.* at 1155-56 (arguing that the primary focus of a standing inquiry should be whether the threat of future harm is realistic, and that the plaintiffs had established that).

35. *Summers*, 129 S. Ct. at 1151-53 (majority opinion) (referencing *Sierra Club v. Morton*, 405 U.S. 727 (1972) and *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) to substantiate that the Court has a long history of requiring organizations to use member affidavits alleging specific and personal injuries as a means of establishing standing).

36. *See id.* at 1152 (scorning the prospect that "statistical probabilities" might suffice to establish standing, in part due to the courts' "independent obligation" to assure that standing exists).

37. *See id.*; *see also id.* at 1148-49 (discussing the importance of standing as a means of preserving the proper role for the judiciary in a democratic society).

38. *Id.* at 1149 (noting that the government accepted the affidavit that professed imminent plans to visit the Burnt Ridge site, where the Burnt Ridge Project was planned, as sufficient for standing purposes).

39. *Id.* at 1149-50 (comparing the two affidavits); *see also id.* at 1158 (Breyer, J., dissenting) (arguing that the surviving individual affidavits, including the one criticized by the majority, satisfied standing, even under the exacting test required by the majority).

C. *Entergy Corp. v. Riverkeeper, Inc.*

The *Entergy* case arose when the Environmental Protection Agency ("EPA") set regulatory performance standards for cooling water intake structures at electric power plants.[40] The Federal Clean Water Act ("CWA") requires such standards to reflect "the best technology available for minimizing adverse environmental impact" ("BTA").[41] The performance standards under dispute, dubbed "Phase II" standards, applied to existing electric power facilities utilizing more than fifty-million gallons of water daily, and identified goals such as reducing the destruction of fish and shellfish through incorporation of a variety of technologies designed to lessen the detrimental impacts of facility operations on the aquatic environment.[42] In its implementing regulations, the EPA set BTA standards and also allowed for the issuance of site-specific variances from the national performance standards where a plant could establish that the cost of compliance would greatly exceed the benefits.[43] The variance regulation required that any variance be subject to remedial measures aimed at bringing the power plant "as close as practicable" to the performance standard from which it was granted a variance.[44] In so doing, the BTA standard utilized language normally reserved for the lowest, least environmentally protective standard found in the CWA and in other environmental statutes.[45] Whether this was more than a linguistic slip was the essence of the question put before the federal courts.

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40. Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498, 1502-04 (2009) (detailing the history of the regulations).

41. Clean Water Act § 316(b), 33 U.S.C. § 1326(b) (2006) ("Any standard established pursuant to section 1311 of this title [the CWA section mandating that all effluent discharges comply with the Act] or section 1316 of this title [the CWA section addressing thermal discharges] and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.").

42. *Entergy*, 129 S. Ct. at 1503-04. Phase I standards applied to new cooling water intake structures with more than a designated capacity, and Phase III standards will apply to facilities not subject to Phase I or II standards. *Id.* at 1503, 1503 n.3.

43. *Id.* at 1504-05 (citing 40 C.F.R. § 125.94(a)(5)(i), (ii) (2007)).

44. *Id.* at 1505. For a discussion of the significance of the term "practicable" as used in the CWA, see *id.* at 1512-14 (Breyer, J., concurring in part and dissenting in part) (pointing out that Congress used the term "practicable" in drafting the CWA as a signal that cost-benefit analysis was required in setting standards).

45. *See id.* at 1513. Justice Breyer discussed the legislative history of the CWA, in which Senator Edward Muskie made clear that the BPT standard required a balancing test between total cost and effluent reduction benefits, while another standard under consideration which, like BTA, had at its core the term "available," would not require a balancing test, but would instead include an evaluation of how pollution discharge could be eliminated without regard to cost. *Id.* (citing 118 CONG. REC. 33,693 (1972)); *see also*

Riverkeeper's suit claimed that the EPA's Phase II regulations incorporated cost-benefit analysis and that this was contrary to the CWA, which allows cost-benefit analysis under the "best practicable technology" ("BPT") standard only.[46] Congress created the BPT standard for discharging facilities already in existence at the time that the CWA was originally introduced, reasoning that these facilities could not absorb the substantial financial burden associated with the more ambitious technologies required for new facilities.[47] A three-judge panel of the Second Circuit Court of Appeals agreed with Riverkeeper that the site-specific variance provisions in the EPA's regulations breached the CWA by incorporating cost-benefit analysis in a BTA analysis.[48] On the question of whether the EPA had relied on cost-benefit analysis in setting the generally applicable Phase II national performance standards, the Second Circuit remanded the case to the EPA, instructing the agency to explain how its reliance on cost constituted a cost-effectiveness analysis rather than the inappropriate cost-benefit analysis.[49] The EPA petitioned the Supreme Court on the question of whether the CWA prohibited the EPA from using cost-benefit analysis when setting BTA standards.[50]

In a decision authored by Justice Scalia and joined by Chief Justice Roberts and Justices Thomas, Kennedy, and Alito, the Supreme Court sided with the EPA, thus overturning the Second Circuit decision on the law and also rendering it unnecessary for the EPA to comply with the court of appeals' request for an explanation of how the EPA's Phase II BTA

Entergy, 129 S. Ct. at 1519 (Stevens, J., dissenting). Justice Stevens discussed how the use of the term "practicable" in the BPT standard was meant to signal that the standard was meant to "ease industry's transition to the new technology-based regime" by being temporary and by relying on cost-benefit analysis. *Id.* For a discussion of the Clean Air Act's reliance on a similar scheme with parallel reliance on terms like "practicable" and "available," see *Whitman v. American Trucking Ass'ns*, 531 U.S. 457 (2001) (concluding that where Congress intended EPA to rely on cost-benefit analysis in promulgating standards, it included the term "practicable" in the standard).

46. *Entergy*, 129 S. Ct. at 1505 (referencing Riverkeeper's argument that Congress authorizes cost-benefit analysis only where a standard contains the word "practicable").

47. *Id.* at 1519 (Stevens, J., dissenting) (discussing the reasoning behind the BPT standard and that the CWA's scheme imposes a system under which standards move away from this "temporary and exceptional" standard).

48. *Id.* at 1505 (majority opinion) (pointing out that the Second Circuit decision allowed for the consideration of costs under the BTA standard to gauge the economic impact on industry of the new standards and also to gauge the cost-effectiveness of the various technologies available to help industry to meet BTA, but that cost could not be used as a means of determining the level of environmental protection that must be achieved under BTA).

49. *Id.*

50. *Id.* (framing the question as one of law).

standards avoid constituting a cost-benefit analysis.[51] Framing the Court's analysis as an application of *Chevron* deference, the majority determined that the CWA nowhere expressly bars the EPA from utilizing a cost-benefit approach in determining BTA standards, and that therefore the Court was bound to defer to the EPA on the issue of whether a cost-benefit approach was suitable.[52]

Although the nature of the cost-benefit analysis is core to the decision, Justice Scalia never actually defined "cost-benefit analysis," and his opinion also used the actual phrase sparingly. Instead, Justice Scalia presented the concept of "cost" as considered in association with "benefit" in various iterations, as if suggesting that any sensitivity to spending in an agency's calculus could render a statutory standard a product of cost-benefit analysis.[53] This linguistic maneuver allowed the majority to deny that a pattern may be discerned in the CWA on the issue of where cost-benefit analysis is and is not authorized.[54] Thus, the majority was able to point to various CWA provisions mandating national standards that expressly allow cost considerations into the calculus of developing those standards and on this basis conclude that the silence in the BTA provision could only indicate that Congress had expressed no intent at all on whether a cost-benefit analysis may be utilized in developing the BTA standard.[55] In short, by obscuring the true meaning and import of cost-benefit analysis in the environmental setting, Justice Scalia could profess bafflement at the idea that the CWA presents a clear long-range scheme through which the emphasis on cost in developing performance standards must diminish over time, and that therefore the fact that the provision creating BTA does not

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51. *Id.* at 1510 (concluding that the cost-benefit approach was permissible under BTA both for setting national performance standards and for allowing variances from the standards).

52. *Entergy*, 129 S. Ct. at 1505 n.4 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984), although admitting that the majority opinion accordions the two step process into one).

53. *See id.* at 1509-10 (reviewing various settings in which the EPA includes costs in its calculus and considers the benefits derived from technologies bearing various costs, ultimately concluding that Riverkeeper acknowledging in its brief that the CWA would not require billions of dollars to be spent to save one fish is tantamount to Riverkeeper conceding that the CWA authorizes cost-benefit analysis generally).

54. *See id.* at 1506-08 (reviewing standards and denying that they reveal a pattern).

55. *See id.* (discussing the "best practicable control technology" standard applicable to facilities existing at the time of the statute's promulgation that discharge directly into waters of the United States (33 U.S.C. § 1311(b)(1)(A) (2006)); the "best available technology economically achievable" standard applicable to discharges of toxic and other pollutants defined as nonconventional (33 U.S.C. § 1311(b)(2)(A)); and the "best conventional pollutant control technology" standard applicable to pollutants not considered toxic or nonconventional (33 U.S.C. § 1311(b)(2)(E))).

contain the language customarily used to indicate that a standard is to be set through cost-benefit analysis signals Congress's intent that the EPA refrain from using cost as a controlling factor in setting BTA.[56]

Justice Breyer wrote an opinion partially concurring with the majority view and partially dissenting from it.[57] Focusing on the CWA's legislative history, Justice Breyer agreed with the majority that consideration of cost fit within Congress's vision for BTA analysis, but balked at the level of discretion that Justice Scalia gave the EPA in determining how central cost can be in setting various standards.[58] According to Justice Breyer, the clear indication from the CWA's legislative history is that Congress intended that the use of the cost-benefit approach be "restricted" except where it was expressly made the basis of standard-setting, as it is under the BPT standard.[59] Thus, it appeared that Justice Breyer joined the majority in refusing to recognize the significance of cost-benefit analysis in setting environmental standards, but nevertheless discerned a pattern in the CWA of moving from standards relying on cost toward standards that either make cost a secondary consideration or remove cost from the calculus altogether.

Justice Stevens, joined by Justices Souter and Ginsburg, wrote the dissent.[60] Justice Stevens argued that a straightforward reading of the BTA provision recognizes it as a directive to the EPA to make the minimization of adverse environmental impacts its primary goal in developing the BTA standard, so that only where the costs of the best technology known to achieve this goal are prohibitive may the agency conclude that such technology is not available.[61] Without openly disputing Justice Scalia's loose use of the cost-benefit label as one that applies to any standard-

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56. *See id.* at 1508 (concluding, possibly facetiously, that if the silence in the BTA provision is to be interpreted as a prohibition against the EPA using cost-benefit analysis, then the provision's failure to express other means through which BTA standards are to be developed must mean that no factors may be used to implement the standards).

57. *Id.* at 1512 (Breyer, J., concurring in part and dissenting in part) (concurring on the issue of whether BTA allows consideration of costs and benefits, but disagreeing with the majority on the issue of whether the CWA should be read to allow the unrestricted use of cost-benefit analysis).

58. *Entergy*, 129 S. Ct. at 1514 (relying on legislative history to conclude that Congress intended for the EPA to develop "best available" standards that move "as closely as is technologically possible to[ward] the elimination of pollution").

59. *See id.* at 1513-14 (admitting that the term "best available" as used in the CWA does not expressly require or forbid a comparison of costs and benefits, but explaining that the legislative history indicates Congress's intent that the EPA balance costs and benefits as a means of developing standards sparingly where the standard is other than "best practicable").

60. *Id.* at 1516 (Stevens, J., dissenting joined by Justices Souter and Ginsburg).

61. *Id.*

setting that allows a level of sensitivity to cost, Justice Stevens pointed out well-known truths about the dangers of environmental harms or benefits being distorted or even ignored where, in the course of a true cost-benefit analysis, all values must be monetized to be considered in a calculus of technologies and environmental impacts.[62] Thus, Justice Stevens concluded, silence on the use of cost-benefit analysis in an environmental statute cannot logically be read as an invitation for the implementing agency to exercise its discretion on the issue of its application.[63] Quoting from an earlier opinion by Justice Scalia on the issue of whether cost considerations may be imported into an environmental statutory provision directing the EPA to set a national standard, Justice Stevens analogized the lodging of such a drastic level of discretion in a statutory silence to hiding an elephant in a mousehole.[64]

By acknowledging the significant impact that cost-benefit standard setting has in the environmental field, Justice Stevens could conclude that Congress would only authorize its use expressly, making the BTA provision facially clear in its silence as to whether costs may play a central role in developing BTA standards.[65] This reading comported with Justice Stevens's reading of the CWA as a whole, as he concluded that the statute allowed cost-benefit analysis only where the EPA was setting the initial, lowest standards—the BPT standard that existing dischargers needed to meet when the CWA was first promulgated—thereby not forcing existing facilities to undergo expensive retrofitting to reduce their environmental impacts.[66] Because the statute is clear in both its overall intent and in where it allows cost-benefit analysis, Justice Stevens concluded, the Court should never have reached the second step of its *Chevron* analysis, under which it deferred to the EPA.[67]

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62. *Id.* (finishing with the observation that "cost-benefit analysis often, if not always, yields a result that does not maximize environmental protection").

63. *Id.* at 1517.

64. *Entergy*, 129 S. Ct. at 1517 (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 467-68 (2001), in which the Court rejected the argument that Congress intended cost to be a consideration in setting national ambient air quality standards under the Clean Air Act § 109, 42 U.S.C. § 7409(a) (2000)).

65. *Id.* (concluding that "we should not treat a provision's silence as an implicit source of cost-benefit authority, particularly when such authority is elsewhere expressly granted and it has the potential to fundamentally alter an agency's approach to regulation").

66. *Id.* at 1517-22. Various CWA standards were examined and the Court concluded that cost-benefit is reserved for standards that are "temporary and exceptional." *Id.* at 1519.

67. *See id.* at 1521-22 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984)).

D. *Burlington Northern and Santa Fe Railway Co. v. United States*

The *Burlington Northern* dispute arose out of a business relationship through which the Shell Oil Company ("Shell") sold chemical products to Brown & Bryant, a chemical distribution business that sprayed herbicides and pesticides at farms in California.[68] Shell sold chemical products to Brown & Bryant from some time in the 1950s through the early 1980s.[69] Starting in the mid-1960s, Shell required Brown & Bryant to accept delivery of its pesticides in trucks, from which Brown & Bryant would transfer the chemical product to bulk storage tanks.[70] Shell itself had engineered the shift from fifty-five-gallon drum storage to bulk storage as a means of increasing profits.[71] Spills inevitably occurred during every transfer; Shell knew about these spills and took steps to minimize them.[72]

When the EPA required remediation, Burlington Northern and the various other railroad companies that owned the site where the transfers had taken place incurred substantial costs. Eventually several lawsuits were consolidated, with the result that the EPA and a California agency were involved in a cost-recovery action against Shell and the owners of the transfer site.[73] Along with other claims, Shell disputed its liability status, which was based on section 107 of the Comprehensive Environmental Response, Cleanup, and Liability Act ("CERCLA").[74] That section imposes joint and several cleanup liability on various parties, including site owners, site operators, transporters of hazardous substances to the site, and parties who arranged for the disposal of hazardous substances at the site.[75]

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68. Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1874-75 (2009).

69. *Id.* (outlining business relationship lasting over two decades during which Shell delivered herbicides and pesticides to Brown & Bryant).

70. *Id.* at 1875 (discussing delivery of the pesticide D-D).

71. *See id.*; *see also id.* at 1885 (Ginsburg, J., dissenting) (emphasizing that the switch was required by Shell and was to Shell's economic advantage).

72. *Id.* at 1875 (majority opinion) (detailing Brown & Bryant's sloppy practices and Shell's efforts to minimize spills, which included the distribution of safety manuals, the instigation of financial incentives to encourage careful handling, and the institution of an inspection program requiring compliance with all applicable laws and regulations).

73. *Id.* at 1876 (detailing the thirteen-year span between the California Department of Toxic Substances Control's ("DTSC") initial investigation of Brown & Bryant and the consolidation of a 1992 cost recovery suit launched by the railroads against Brown & Bryant and two recovery actions initiated by the DTSC and EPA against Shell and the railroads).

74. At both the district and appellate court levels, Shell was deemed liable as a party that had arranged for the disposal of hazardous substances due to its delivery of the pesticide D-D to the site where the spill-plagued transfers occurred. *Burlington N.*, 129 S. Ct. at 1876. "[S]pills occurred every time deliver[y] [was] made." *Id.* at 1885 (Ginsburg, J., dissenting).

75. *See* CERCLA § 107(a)(3), 42 U.S.C. § 9607(a)(3) (2006) (imposing liability on "any [party] who by contract, agreement, or otherwise arranged for disposal . . . of

The district court and Ninth Circuit Court of Appeals agreed that Shell's knowledge of the releases occurring during the transfer operation that it had engineered between itself and Brown & Bryant was enough to maintain arranger liability in Shell.[76] In overturning the court of appeals, the Supreme Court applied what Justice Stevens termed an "ordinary meaning" reading to the term "arranged for disposal" as used in CERCLA, concluding that a defendant must intend that at least some of its hazardous substances be discarded before it can be found liable as an arranger under section 107.[77] Joined by all the Justices with the exception of Justice Ginsburg, Justice Stevens's opinion rested on his reasoning that because Shell would have preferred to have had no spills occur, the spillage occurring during transfers constituted instances of inadvertent product losses and could not logically be considered to constitute an arrangement for the purpose of disposing a hazardous substance.[78] The majority expressly rejected the argument that Shell's knowledge that the spills were inevitable, coupled with its control over the transfer operation through which the spills occurred, summed up to an arranged disposal, regardless of the fact that CERCLA expressly defines disposal to include spills.[79]

In her solo dissent, Justice Ginsburg admitted that she considered the question of Shell's liability a close one.[80] Drawing back from the supposed ordinary meaning of the term "arrange" to consider the purpose and operation of CERCLA as a whole, Justice Ginsburg concluded that the statute aims to spread liability among those parties that profit from and operate in the hazardous substance industry.[81] Thus, she reasoned, Shell's control over and economic incentive to devise the bulk transfer operation

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hazardous substances owned or possessed by such person . . . at any facility . . . owned or operated by another party or entity and containing such hazardous substance").

76. *Burlington N.*, 129 S. Ct. at 1876-77 (pointing out that the court of appeals acknowledged that Shell did not fall within the "traditional" concept of an arranger but was an arranger nevertheless because disposal was a foreseeable byproduct of Shell's arrangements at the site).

77. *Id.* at 1879-80 (introducing the "ordinary meaning" approach and then concluding that to qualify as an arranger Shell needed to have entered the transaction with Brown & Bryant with the intent that the pesticide be discarded during transfer).

78. *Id.* at 1880 (calling the spills "a peripheral result of the legitimate sale of an unused, useful product").

79. *Id.* (placing emphasis on the fact that Shell took steps to reduce the likelihood of spills). The definition of "disposal" in CERCLA includes several passive or unintended discharges, including "spilling." *See* 42 U.S.C. § 6903(3) (2006).

80. *Id.* at 1884 (Ginsburg, J., dissenting).

81. *Id.* at 1885 (identifying CERCLA's primary objective as "to place the cost of remediation on persons whose activities contributed to the contamination rather than on the taxpaying public").

during which the spills occurred placed it within the scope of CERCLA's arranger liability.[82] This reading of the liability provision also brought it into harmony with the definition of "disposal," which includes several incidental and unintentional events such as "spilling" and "leaking."[83] The majority opinion, in contrast, dismissed the issue of whether these passive terms indicate the statute's intent to encompass within its liability scheme those parties whose intentional arrangements involving hazardous substances result in unintended but foreseeable spills of a number or dimension that warrant remediation.[84]

E. *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*

The *Coeur Alaska* dispute arose when the U.S. Army Corps of Engineers issued a fill permit allowing mining company Coeur Alaska to dump slurry wastes from the froth-flotation process used in its gold ore mining operation into a twenty-three acre lake in Alaska.[85] Section 404 of the CWA addresses the placement of fill material into U.S. waterways and water bodies.[86] The program is administered primarily by the Army Corps, with the EPA serving as the program's ultimate overseer through both its issuance of section 404 guidelines and its authority to reject an Army Corps' section 404 permit decision.[87] The EPA also administers the CWA National Pollution Discharge Elimination System ("NPDES"), under which the Act requires a permit for all pollution discharges channeled directly to

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82. *Burlington N.*, 129 S. Ct. at 1885 (pointing out that Shell found it "economically advantageous, in lieu of shipping in drums, to require" bulk shipments and storage, and also that Shell's "control rein" over the delivery and transfer process rightly cast Shell as an arranger).

83. *Id.* at 1885 n.1 (Justice Ginsburg allows the definition to speak for itself.).

84. *Id.* at 1879-80 (majority opinion) (acknowledging the government's argument on the "disposal" definition but insisting nevertheless that an arranger must have "the intention" to dispose of hazardous substances).

85. Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 129 S. Ct. 2458, 2463-64 (2009). The opinion explained that the lake in question, Lower Slate Lake, is twenty-three acres in size, and thus small, but constitutes a navigable water and thus falls under CWA jurisdiction, and that Coeur Alaska plans to dump 4.5 million tons of debris into the lake, raising its bed to its current surface level, with the result that the surface of the lake will spread to sixty acres, requiring a dam at its downstream shore that will render it an isolated water body. *Id.* at 2464.

86. Clean Water Act, 33 U.S.C. § 1344(a) (2006).

87. *See id.* § 1344(b) (requiring the Army Corps to apply EPA guidelines); 40 C.F.R § 230.10 (2009) (requiring, among other considerations, that the Army Corps ensure that fill be introduced to waters of the United States in the least environmentally damaging manner practicable); 33 U.S.C. § 1344(c) (vesting in the EPA the authority to prohibit fill plans that would have an unacceptable adverse effect on water supplies, fish and shellfish habitats, wildlife, or recreational areas).

waters of the United States.[88] In conjunction with this core CWA program, section 306(b) of the Act authorizes the EPA to develop uniform performance standards applicable to all new sources of discharges to navigable waters.[89]

Acting under this authority, in 1982 the EPA promulgated regulatory performance standards applicable to various categories of potential dischargers; these regulations allow "no discharge of process wastewater" from new froth-flotation gold mines.[90] Thus, when the Army Corps issued a fill permit to Coeur Alaska a coalition of environmentalist organizations objected, arguing that Coeur Alaska's disposal plans required a discharge permit from the EPA under CWA section 402 because the slurry constituted a new source of pollutants being discharged to a water of the United States, and arguing further that the discharge was illegal under the section 306 regulation's absolute ban.[91]

All parties agreed that the Army Corps and EPA did not exercise coterminous authority over discharges falling within the definition of fill where those discharges also fell within pollution control provisions, and that therefore a decision needed to be reached on the question of which program dominated.[92] On this issue, the district court agreed with the government that section 404 governs such discharges even in instances where the fill adds identified pollutants to waters of the United States.[93] The Ninth Circuit Court of Appeals reversed, concluding that the fact that a discharge fell within the regulatory definition of fill did not insulate it from the new source performance standards promulgated under section 306, with

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88. *See* 33 U.S.C. § 1342 (barring all discharges of pollutants to waters of the United States except where the EPA has issued a discharge permit).

89. *Id.* § 1316 (authorizing the EPA to regulate new sources of pollution discharge by category). The Act states elsewhere that "no exemption[s] may be granted from the requirements of section 1316." *Id.* § 1323(a).

90. 40 C.F.R. § 440.104(b)(1) (2009).

91. Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 129 S. Ct. 2458, 2466 (2009) (detailing the objections brought by the Southeast Alaska Conservation Council, the Sierra Club, and the Lynn Canal Conservation (collectively, "SEACC"), which included the claim that Coeur Alaska should have sought a section 402 permit from the EPA for the slurry discharge, and that EPA's issuance of such a permit was prohibited by the section 306 regulations). SEACC also claimed that a section 402 discharge permit that the EPA had issued allowing discharges of water from the slurry-filled lake to a downstream creek violated the EPA's section 306 performance standard for froth-flotation gold mines. *Id.*

92. All the Justices agreed with this reading. *See id.* at 2467-68 ("The question of which agency has authority to consider whether to permit the slurry discharge is our . . . inquiry."); *id.* at 2480 (Ginsburg, J., dissenting) ("Discharges properly within the Corps' permitting authority, it is undisputed, are not subject to EPA performance standards.").

93. *See id.* at 2466 (majority opinion) (pointing out that the district court granted summary judgment in favor of the government).

the result that the regulatory ban on wastewater discharges from froth-filtration mining operations barred Coeur Alaska from receiving a section 404 fill permit.[94]

The Supreme Court rejected the Ninth Circuit's reading of the statute.[95] Joined in judgment by five of his fellow Justices, Justice Kennedy concluded that the Army Corps and EPA were justified in characterizing the slurry wastes as subject to section 404 and thus insulated from the NPDES discharge permit program.[96] Stressing the fact that the EPA plays a role in the section 404 process through its guidelines and its ultimate veto power, Justice Kennedy appeared to perceive as a legitimate consideration the question of whether the Act may be interpreted to vest each agency with a respectable amount of authority compared to the other.[97] He also appeared to derive great comfort from the fact that the government-favored reading conforms to its past practices and at least one EPA memorandum.[98] Complementing Justice Kennedy's attention to the preferred balance of authority between the two agencies was his approval of the fact that the majority's reading promotes industry convenience and profitability.[99] Justice Kennedy's opinion, in short, is a highly deferential one that made its priority the endorsement of industry and of agency business-as-usual.[100]

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94. *Id.* at 2466-67 (concluding that under a plain meaning reading of the CWA, the absolute ban under section 306 trumped the fact that the section 404 regulations define fill as slurry discharges that raise a water body's bottom elevation).

95. *Id.* at 2467 (concluding that the court of appeals had "reallocated the division of responsibility that the Corps and the EPA had been following").

96. *See id.* ("The Act is best understood to provide that if the Corps has authority to issue a permit for a discharge under [section] 404, then the EPA lacks authority to do so under [section] 402.").

97. *Coeur Alaska*, 129 S. Ct. at 2467 ("The EPA's function is different, in regulating fill, from its function in regulating other pollutants, but the agency does exercise some authority."); *id.* at 2469 (pointing out that the EPA section 404 guidelines "do not strip the Corps of power to issue permits for fill in cases where the fill is also subject to an EPA new source performance standard"); *id.* at 2473 (applauding the EPA memorandum because it "preserves a role for the EPA's performance standard" while denying that it applies to situations like that in *Coeur Alaska*).

98. *See id.* at 2468 (relying on the EPA's statements to the Court as to the agency's reading of an arguably ambiguous EPA regulation interpreting the interplay between CWA sections 404 and 402); *id.* at 2473-77 (relying heavily on a 2004 internal EPA memorandum to conclude that section 404 trumps section 306).

99. *Id.* at 2463-64 (characterizing Coeur Alaska's goals sympathetically as "seek[ing] to make [a long-closed mine] profitable once more"); *id.* at 2469 (worrying about the difficulties that the SEACC reading of section 404 would create for the regulated industry, which the opinion characterizes as a "difficult problem" and applauding the agency reading as "workable").

100. *Id.* at 2477 (concluding, overall, that the Court "accord[s] deference to the agencies'

Justice Breyer wrote a concurring opinion in an apparent attempt to offer some solace to the three dissenters, who complained that the majority's endorsement of the EPA's hands-off approach to fill permitting perpetuated a loophole the agency had allowed in the pollution discharge permit program for dischargers able to characterize their waste as fill.[101] After worrying over the fact that an overly literal reading of CWA sections 402 and 306 could undermine the intended objectives of section 404, Justice Breyer opined that the EPA's ultimate veto power over Army Corps fill permits constituted an adequate safeguard against abuse of the pollution discharge program.[102]

Justice Ginsburg, joined by Justices Souter and Stevens, was not consoled.[103] Similar to her approach in her *Burlington Northern* dissent, Justice Ginsburg stepped back from the parsing of statutory language to review the primary intent of the CWA, which is to drastically reduce water pollution by subjecting all polluting discharges to the NPDES permit program.[104] Finding significance in the facts that the CWA includes solids as pollutants and that the statute regulates new discharge sources with particular attention, Justice Ginsburg could not accept that the Act would tacitly include a regulatory "escape hatch" for solid waste dischargers who happen to dump enough volume into a water body to allow their wastes to qualify as fill.[105] Parsing the language of the seemingly conflicting provisions from this perspective, Justice Ginsburg concluded that the most compatible reading of the two that utilized all language and ignored none made the discharge prohibitions dominant and the fill permit process subject to the prohibitions.[106] Justice Ginsburg's dissent concluded with the

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reasonable decision to continue their prior practice").

101. *Id.* at 2483 (Ginsburg, J., dissenting) (stating that dischargers can simply characterize pollutant as waste to avert being subject to regulations under the majority's holding).

102. *Id.* at 2478 (Breyer, J., concurring) (characterizing the EPA's section 404 veto power as "an important role in the permitting process").

103. *Coeur Alaska*, 129 S. Ct. at 2480, 2483 n.5 (Ginsburg, J., dissenting) (characterizing the veto authority as "ad hoc" and pointing out that the EPA has exercised the power "only a dozen times over [thirty-six] years encompassing more than one million permit applications").

104. *Id.* at 2480-82 (stressing that the CWA's "text, structure, and purpose" all point to the conclusion that the pollution reduction provisions are to be read as dominant).

105. *See id.* at 2483 (worrying that the Court's reading allows discharges to sidestep the section 306 ban by containing "sufficient solid matter to raise the bottom of a water body," and pointing out that because the CWA specifically identifies solids as pollutants, a reading that provides "an escape hatch" for such discharges is "particularly perverse").

106. *Id.* at 2482-83 (concluding that the CWA "can be home to both provisions, with no words added or omitted" if discharges allowed under the section 404 program are understood to require adherence to the section 306 regulations).

second reference in one of the 2008-2009 Term's environmental dissents to Justice Scalia's own assurance that Congress should not be presumed to have compromised a primary statutory goal in a vague or indirect manner, as such a practice would be analogous to "hid[ing] elephants in mouseholes."[107]

II. Commonalities Among the Environmental Losses of 2008-2009

It is difficult to dismiss the riff of environmental losses occurring at the Supreme Court level as something other than a concerted effort by the Court's conservative members to retaliate against the environmental cause by demonstrating that pro-environment lower court decisions will be readily overturned, one way or another, by a well-coordinated Court majority. Optimists may point to the exceptional qualities of each case as a means of denying that they represent any such pattern. After all, *Winter* was a national security case, *Summers* invoked the always-precarious standing doctrine, *Entergy* involved the darling of conservative decisionmaking strategies, and *Burlington Northern* centered on a liability provision much criticized for its fundamental unfairness.[108] As for *Coeur Alaska*, well, even Court defenders might accept that decision as revealing traces of anti-environmentalism, but if all the others may be shrugged off, then no pattern exists.

In fairness, it should be noted that it is necessary to consider factors other than the five decisions themselves to reach an informed conclusion on whether the environmental losses of 2008-2009 represent more or less than a bacchanalia of anti-environmental case-baiting on the part of the Court.[109] Nevertheless, as a means of aiding Court-followers to at least consider what the opinions themselves suggest about the environmental values of the Justices, this section identifies several commonalities and a few notable distinctions among the five decisions' opinions.

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107. *Id.* at 2484 (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).

108. Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 377 (2008); Summers v. Earth Island Inst., 129 S. Ct. 1142, 1148-49 (2009); Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498, 1505 (2009) (deferring to agency interpretation of statutes if reasonable); Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1878-79 (2009) (noting that the issue is whether Shell was liable under CERCLA for "arrangements").

109. *But see*, Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 389 (2004) ("[T]he Court's muscular authority over case selection in the modern era now gives it the unchallenged perogative in almost every instance to choose whether to resolve or to bypass important controversies that are brought before it in particular cases."); *id.* at 398 (discussing the system of certiorari as providing the Justices with "virtually unfettered discretion in shaping the content of the Court's docket").

A. Trees Without Forests—The Fixation on Words with No Context

A common theme among the opinions emerging from the 2008-2009 Supreme Court Term is the majority's refusal to step back and acknowledge the objectives of a statutory scheme or doctrine. In *Winter*, for example, the Court failed to even comment on the fact that the Navy's EIS was to be completed subsequent to its completion of the training exercises to which the EIS applied.[110] The opinion betrays no recognition of the fact that the EIS might have provided guidance to the Navy in its planning and conducting of its training exercises. Indeed, the majority came close to belittling the Navy's failure to complete an EIS as a consideration in its balancing-of-equities analysis by pointing out that NEPA requires only the creation of an EIS, but does not mandate the adherence to its conclusions about the environmental impact of the government project it examines, and that therefore the importance of the Navy's adherence to NEPA could never outweigh the Navy's interest in continuing its training exercises without hindrance.[111] To the majority, it appears, NEPA represents nothing more than paperwork.[112] It was left to the dissent to draw back and point out the intent of an EIS and the general purpose of NEPA, and how those were thwarted by both the Navy's resistance and the Court's complicity in that resistance.[113] NEPA's role as a means through which the government may provide itself with guidance on how to avoid environmentally detrimental consequences in its pursuits is barely new information, and so the majority's brush-off of the statute suggests an almost taunting commentary on its purpose.

Similarly, in *Entergy* the majority professed bafflement at the scheme set by Congress in the CWA under which discharge prevention standards move from a set of initial, cost-sensitive requirements toward standards that consider cost less centrally.[114] The majority instead professed to see the

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110. It is left to the dissent to point this out. *Winter*, 129 S. Ct. at 390 (Ginsburg, J., dissenting) (pointing out that the Navy's publication of its EIS after its exercises are complete "defeats NEPA's informational and participatory purposes").

111. *See id.* at 381 (majority opinion) (noting that NEPA requires the preparation of an EIS but nothing more).

112. *See id.* To be fair, it is worth noting that the majority stressed that the reason an EIS would do little good in this instance is that the type of Navy training triggering the EIS requirement "has been going on for [forty] years with no documented episode of harm to a marine mammal." *Id.* This argument is undermined, however, by the majority's insistence that the Navy's current training program is urgent because it involves a new form of sonar. *Id.* at 370 (discussing "mid-frequency active" sonar).

113. *Id.* at 389 (Ginsburg, J., dissenting) (recognizing that NEPA constitutes an effort to focus the federal government's attention on the environmental impacts of all its actions and that the EIS is the centerpiece of this effort).

114. *See* Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498, 1506-09 (2009) (launching

various CWA standards as a jumbled array made up of imprecise bits of phraseology, many of which suggest no particular priorities with regard to stringency, cost, or diminishment of pollution.[115] In this case both the concurrence and dissent discerned the dynamic movement that starts with cost-based standards and moves away from them, the concurrence through examination of the CWA's legislative history and the dissent in the language of the Act itself.[116] Given a second chance to recognize the overall thrust of the CWA in *Coeur Alaska*, the majority again ignored the primacy of pollution discharge diminishment evidenced in the statute's language and history.[117]

Consistent with this approach, the *Burlington Northern* majority neglected to step back and accept the overall thrust of CERCLA, leaving it to the dissent to identify this as the intent to include as liable all parties engaged in the profitable handling of hazardous substances.[118] In *Burlington Northern*, the majority went further, however, by refusing to allow the language in closely related statutory provisions to impact its chosen reading of the key language under scrutiny; the term "arranged" is analyzed in near-total isolation.[119] In similar fashion, the *Coeur Alaska* majority ignored language that did not comport with its preferred reading of the statute.[120] Unobstructed authority was read into one provision, while a clear statement of universal applicability was ignored in another.

In *Summers*, although the Court was not engaged in a statute-based analysis, the majority took a similar myopic approach in its reasoning by refusing to step back and consider how the purposes of the standing

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its consideration of the theory that the various CWA standards demonstrate a pattern, presented by Riverkeeper, with a parenthetical sigh over the complexity of the argument).

115. *See id.* at 1507 (claiming that it is not apparent that any of the three standards considered preclude cost-benefit analysis).

116. *Id.* at 1512 (Breyer, J., concurring in part and dissenting in part) (concluding that Congress intended the CWA's text "to be read as restricting, though not forbidding, the use of cost-benefit comparisons"); *id.* at 1518-19 (Stevens, J., dissenting) (recognizing tiers of technology standards in the Act).

117. *See* Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 129 S. Ct. 2458, 2467 (2009) (declaring that the applicability of the fill program to a discharger exempts that discharger from application of the pollution discharge prevention program).

118. Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1885 (2009) (Ginsburg, J., dissenting).

119. *See id.* at 1880 (majority opinion) (acknowledging and then putting aside the fact that the definition of "disposal" includes the word "spilling," which is exactly what the party protesting its liability allowed to occur).

120. It is left to the dissent to point out that CWA section 306 states a universal proscription, while section 404 simply creates authority to issue fill permits. *Coeur Alaska*, 129 S. Ct. at 2482-83 (Ginsburg, J., dissenting).

doctrine may best be served.[121] According to the Court, a plaintiff fails to establish standing if a majority of the Justices can claim an inability to discern a concrete plan on the part of the plaintiff to engage in some activity that will be detrimentally impacted by a particular concrete plan of the defendant.[122] The Court seemed to enjoy the game of semantics it has developed, and bristled at the idea that it instead gauge standing on a realistic assessment of when and where individual members of a national organization will encounter individual exercises of a nationwide federal program that inevitably will impact the interests of the organization members.[123] A broad view, even when more practical and realistic than a close inspection of linguistics, offended the majority.[124]

B. Voices in the Wilderness—The Disdain for Public Process

Another theme notable in more than one of the 2008-2009 environmental opinions is the disdain for process through which environmental impacts may be discussed and perhaps minimized. In *Winter*, for example, the Court appeared to discern no value in the EIS process, as if it presents nothing more than an administrative burden that will postpone, but under no circumstances influence, the Navy's planned training exercises.[125] Similarly, in *Summers*, even while dismissing the plaintiffs' case on the grounds that the affidavits did not state an injury in fact meeting the Court's requirements of specificity and imminence, the Court managed to convey its skepticism over whether the public process cancelled by the Forest Service would have influenced the agency's decisionmaking even if it had been left intact.[126] In *Coeur Alaska*, the Court's presumption that the primary function of process is as an administrative burden that hampers productivity was even more overt. The majority in that case worried that saddling an industrial discharger with a duty to adhere to the CWA pollution discharge program before it may

121. Summers v. Earth Island Inst., 129 S. Ct. 1142, 1152 (2009) (defending the practice of requiring individuals to claim highly particularized injuries that are immediately and directly threatened by pending agency actions).

122. *Id.* at 1150-51 (engaging in a close critique of an individual's affidavit and finding it imprecise and vague).

123. *See id.* at 1151-52 (rejecting the idea that the Court recognize "organizational standing").

124. *See id.* at 1151 (accusing the dissent of attempting to "make a mockery of our prior cases").

125. *See supra* notes 110-11 and accompanying text.

126. *Summers*, 129 S. Ct. at 1151 (noting "the possibility that Earth Island's allegedly guaranteed right to comment would not be successful in persuading the Forest Service to avoid impairment of Earth Island's concrete interests").

apply for an Army Corps' fill permit would represent an undue burden on the private sector.[127]

The *Summers* Court addressed a related issue as well when it took time to reject the idea that the loss of an opportunity for procedure could qualify as an injury for standing purposes.[128] To suffice for standing purposes, the Court declared, a procedural injury must bear a close relationship with a concrete personal injury claimed by the plaintiff.[129] With this requirement, the procedural injury is virtually useless to a standing argument.

C. Silences and Standards—Opportunities to Undermine Environmental Values

A third theme discernible in a number of the cases is that of the Court's seizing on a subjective or malleable standard and delivering a verdict on how that standard plays out in a case without much analysis and without acknowledging that the Court's decision turned on the ideological views of its majority. In *Winter*, for example, the opinion rested on the majority's prioritization of public interests without ever defining or discussing the concept.[130] In *Entergy*, the concept of cost-benefit analysis was central to the decision, but it was left to the dissent to define the term and explain its problematic application in the environmental field.[131]

That the majority opinions were result-oriented is also indicated by the inconsistency in the majority's approach on the issue of statutory silences. For example, in *Entergy* the Court refused to acknowledge that a statutory silence on a particular approach that an agency might consider in setting standards could well indicate that Congress intended for the agency to refrain from using that approach, rather than that Congress intended to allow the agency to exercise discretion on the matter.[132] Contrasting this

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127. *See* Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 129 S. Ct. 2458, 2469 (2009) (worrying about the difficulties presented for the discharger if it must adhere to EPA performance standards as a means of determining whether it is eligible for a fill permit).

128. *Summers*, 129 S. Ct. at 1151 (noting that a claim involving the deprivation of a procedural right without also involving some concrete interest impacted by the procedural right fails to create standing).

129. *Id.*; *see also id.* at 1153 (Kennedy, J., concurring) (concurring for the sole purpose of repeating this point).

130. *See* Winter v. Natural Res. Def. Council, Inc., 129 S. Ct. 365, 376 (2008) (observing that the decision rests on "the public interest and the Navy's interest in effective, realistic training of its sailors").

131. Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498, 1516-17 (2009) (Stevens, J., dissenting) (explaining the controversial nature of cost-benefit analysis in the environmental field).

132. *See id.* at 1508 (majority opinion) (concluding that the silence in a CWA standard

refusal to "read into" a statutory silence, the *Coeur Alaska* majority concluded that a statutory silence on the issue of whether a private party acting under an approval obtained under one statutory program was vulnerable to lawsuit for breaching another should be read as an indication that Congress never envisioned that the two statutory programs could apply simultaneously to a regulated party.[133] Thus, the majority appeared to perceive nothing in a statutory silence when the indication is that it requires less pollution, while it imputed a great deal into a silence where the silence could be read as a signal that discharges of polluting materials are to be insulated from sanction.

CONCLUSION

It is easy to accuse judges of result-oriented or politically grounded decisionmaking.[134] Some of the Supreme Court's decisions that are recognized as its most historically important have weathered these accusations, and certainly environmental decisions are among these.[135] The fact that the Supreme Court produced five environmental decisions in a single term, with all five holdings decidedly against the environmental interests involved, makes the Court vulnerable to such an accusation. The fact that the Term follows one in which the Court rendered a historically important pro-environment decision on a social issue of global importance and with a constitutional issue at its core adds to the suspicion that the 2008-2009 Term was one in which the majority of the Court was looking to

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"is meant to convey nothing more than a refusal to tie the agency's hands").

133. *See* Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 129 S. Ct. 2458, 2471-72 (2009) (concluding that the silences in the CWA about how two statutory programs work together indicates that Congress and the EPA never envisioned that the pollution discharge standards would apply to discharges falling under the fill permit program).

134. *See, e.g.*, Lawrence Baum, *Case Selection and Decisionmaking in the U.S. Supreme Court*, 27 LAW & SOC'Y REV. 443, 443 (1993).

> [T]he predominant view is that the Court's decisions on the merits result chiefly and most directly from its members' preferences for some public policies over others. But this view always has attracted critics, who argue that it gives too little weight to the impact of law on Supreme Court decisions.

Id.

135. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555, 566-68 (1992) (rejecting without explanation a claim of injury offered by an animal lover at the prospect that a federal policy change would further endanger several identified species threatened with extinction); Roe v. Wade, 410 U.S. 113, 153 (1973) (determining that the U.S. Constitution protects a woman's right to an abortion); Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (declaring the existence of a penumbra in relation to some of the Amendments of the U.S. Constitution, in which may be discerned a privacy right).

reassert that environmental law occupies an always-tenuous position in the judicial branch.[136] The fact that the five opinions contain at least some level of contradictory analysis and precarious logic may settle, for some, the question of whether these decisions are result-oriented.

Still, it is worth noting that the current members of the Supreme Court have decided upwards of eighteen cases that may be termed "environmental," and that at least eight of those opinions have been declared, at least by some, to constitute environmental victories.[137] Another fact that aids to blunt the accusation that the conservative members of the current Court have formed some sort of loose alliance in an effort to undermine the environmental movement is that in *Burlington Northern* eight of the Justices signed the majority opinion while the ninth admitted that the case was a close one.[138] In fairness, then, at least *Burlington Northern* needs to be removed from the mix when environmentalists count cases as part of a claim that the Supreme Court hates environmentalism.

In the end, all that may be stated with conviction is that the 2008-2009 Term was one in which the Supreme Court was stinting in its reading of environmental laws, and that a majority of the Justices refused to interpret environmental laws as presumptively supportive of environmental values. We may hesitate before accusing five of our current Justices of result-oriented anti-environmentalism, but we may look toward 2009-2010 with confidence that we will not be accusing them of result-oriented pro-environment decisionmaking.

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136. *See* Massachusetts v. EPA, 549 U.S. 497, 519-21 (2007) (finding that the Commonwealth of Massachusetts had standing in a challenge to the EPA's decision against regulating greenhouse gases under Clean Air Act section 202, 42 U.S.C. § 7521).

137. *See* Jonathan H. Adler, *Business, the Environment, and the Roberts Court: A Preliminary Assessment*, 49 SANTA CLARA L. REV. 943 app. (2009) (setting forth a table of environmental cases heard by the Supreme Court between 2006 and early 2009).

138. Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1884 (2009) (Ginsburg, J., dissenting) (launching the solo dissent with the observation that the decision was a close one).

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COMING FULL CERCLA: WHY *BURLINGTON NORTHERN* IS NOT THE SWORD OF DAMOCLES FOR JOINT AND SEVERAL LIABILITY

MARTHA L. JUDY*

Abstract: The Supreme Court's decision in *Burlington Northern & Santa Fe Railway Co. v. United States* is a case study of the intersection of common law concepts of divisibility of harm with Superfund statutory pronouncements designed to charge the cost of cleanup to the parties associated with contamination or to those who benefit from the property's cleanup. It is also a study in the deference owed to reasonable, factually supported district court decisions concerning questions of fact. *Burlington Northern* is not a sea change in the law of apportionment of harm among otherwise jointly and severally liable parties under CERCLA.

The Court made clear that apportionment of harm to void joint and several liability is not the same as the analysis required for the more equitably oriented CERCLA contribution claim. Similarly, understood in the context of the unique facts presented by the Burlington Northern contamination, the Court acknowledged district court authority to reasonably apportion harm when the facts support such an analysis, as in *Burlington Northern*'s reasonably simple division between two owners of separate properties,

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where there were no other liable parties and contribution would not balance the equities because of the insolvency of the most culpable party. The Supreme Court emphasized that the burden of proving divisibility is upon the parties seeking it while overlooking this problem in *Burlington Northern* in order to rein in an overly restrictive appellate review of the district court's divisibility analysis and consequential apportionment.

The Article is divided into three parts. Part I provides an overview of CERCLA and its application to the contamination at the Railroads' and B&B's properties. Part II examines the first and second installments of the Supreme Court's "CERCLA trilogy": *Cooper Industries v. Aviall Services, Inc.* and *United States v. Atlantic Research Corp.* and why those decisions frame the conclusions to be drawn about the *Burlington Northern* ruling. Part III reflects on the common law and how the facts unique to *Burlington Northern* and the nature of the Supreme Court's evidentiary review of the district court's decision combine to confirm that *Burlington Northern* only brings us "full CERCLA." The decision reaffirms twenty-seven-year-old CERCLA common law on the divisibility of harm. The ruling follows in the wake of other CERCLA decisions that were once haled as the end of joint and several liability in CERCLA.

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> "We sometimes call it contribution, we sometimes call it bananas—what we call it is unimportant. . . . Whatever we call it, what we have seen is the emergence of a strong tendency to split the burden of accident costs."[2]

> The concept that a passive owner of a contiguous parcel, not representing more than [nineteen percent] in area of a CERCLA site, operated less than [forty-four percent] of the time, where substantially smaller volumes of hazardous substance releases occurred, should be strictly liable for the entire site remediation, because no other responsible party is judgment-worthy, takes strict liability beyond any rational limit.[3]

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2. Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law: 1995 Monsanto Lecture*, 30 VAL. U. L. REV. 859, 868 (1996).

3. United States v. Atchison, No. CV-F-92-5068 OWW, 2003 U.S. Dist. LEXIS

> But hard cases, it has often been said, almost always make bad law; and hence it is, in the end, far better that the established rules of law should be strictly applied, even though in particular instances serious loss may be thereby inflicted on some individuals, than that by subtle distinctions, invented and resorted to solely to escape such consequences, long-settled and firmly fixed doctrines should be shaken, questioned, confused, or doubted.[4]

INTRODUCTION

The 2008-2009 U.S. Supreme Court Term poses many challenges to environmentalists and the government as they seek to advance environmental claims in the courts. One statute, the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"),[5] or Superfund as it is more commonly known, was the subject of three Supreme Court decisions in the last five years. The third of the trilogy was among the Supreme Court decisions during the 2008-2009 Term that many commentators post to the "losing" column for the environment. That decision, *Burlington Northern & Santa Fe Railway Co. v. United States*,[6] addressed two questions:

> Whether the court of appeals correctly affirmed the district court's determination that petitioner Shell Oil Company is liable under [s]ection 107(a)(3), 42 U.S.C. [§] 9607(a)(3), of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. [§] 9601 *et seq.*, as an entity that "arranged for disposal" of hazardous substances [; and][7]
>
> Whether joint and several liability may be imposed upon several potentially responsible parties under CERCLA, 42 U.S.C. § 9607(a), even where a district court finds an objectively reasonable basis for divisibility that would suffice at common law.[8]

23130, at *250 (E.D. Cal. July 14, 2003).

4. Demuth v. Old Town Bank, 37 A. 266, 266 (Md. 1897) (citation omitted).

5. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (2006)).

6. 129 S. Ct. 1870 (2009).

7. Brief for Respondent-Appellee at I, Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870 (2009) (Nos. 07-1601, 07-1607) (Dec. 17, 2008), 2008 WL 5266416.

8. Question Presented for 07-1607 Shell Oil Co. v. United States, http://www.supremecourtus.gov/qp/07-01607qp.pdf (last visited Feb. 1, 2010).

In answering the first question, the Court referenced Shell's effort to prevent spills and to encourage good delivery methods and management practices of the bulk storage tanks where their product, a pesticide, was stored prior to use.[9] The site where these pesticides were stored became the subject of a Superfund cleanup instituted by the State of California and the U.S. Environmental Protection Agency ("EPA").[10] The district court ruled that Shell's sale and transfer of the pesticides placed Shell within the statute's arranger liability provisions and this conclusion was affirmed by the Ninth Circuit.[11] Justice Stevens, writing for the majority in *Burlington Northern*, found that Shell's efforts to prevent the very spills that supported these courts' findings of arranger liability were sufficient to show Shell had not "arranged for disposal":

> To the contrary, the evidence revealed that Shell took numerous steps to encourage its distributors to *reduce* the likelihood of such spills, providing them with detailed safety manuals, requiring them to maintain adequate storage facilities, and providing discounts for those that took safety precautions. Although Shell's efforts were less than wholly successful, given these facts, Shell's mere knowledge that spills and leaks continued to occur is insufficient grounds for concluding that Shell "arranged for" the disposal of D-D within the meaning of § 9607(a)(3).[12]

This conclusion was the result of a fact-intensive inquiry that gave significant weight to Shell's efforts to prevent the spills and with which the Court contrasted the effects of a "'[s]loppy' [o]perator."[13] Some commentators anticipate that arranger liability will be significantly curtailed by this holding.[14] Given the Court's careful reflection on Shell's efforts to prevent spills of a useful product that it was selling to the operator,[15] the reverberations from this aspect of the *Burlington Northern* decision will likely serve only to reward other careful sellers and producers of products which, if handled incorrectly, could contaminate the environment. Less conscientious efforts to prevent spills may well continue to invoke arranger liability, especially for entities engaged in transactions other than the sale and delivery of a useful product.

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9. *Burlington N.*, 129 S. Ct. at 1880.

10. *Id.* at 1875.

11. *Id.* at 1876-77.

12. *Id.* at 1880.

13. *Id.* at 1875, 1880.

14. John M. Barkett, Burlington Northern: *The Super Quake and Its Aftershocks*, CHEMICAL WASTE LITIG. REP. 5, 12 (2009).

15. *See Burlington N.*, 129 S. Ct. at 1880.

The Supreme Court's answer to the second question also raises eyebrows and expectations among Superfund scholars and advocates and is the focus of this Article. Here again we have the "sloppy operator," also known as Brown & Bryant, Inc. ("B&B").[16] This time the analysis focuses on the operator's role as an owner of the property where the majority of the spills occurred and the operator's lease of a smaller contiguous property from joint owners of the neighboring parcel, the Atchison, Topeka & Santa Fe Railway Company and the Southern Pacific Transportation Company (now the Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company) ("Railroads").[17] The basis for the Court's decision may again be rooted in the contrast between B&B's significant role in the contamination—the owner-operator lessee—with the comparatively minor role of the railroad-owner landlord, whose contribution to the hazard is its lease of the small neighboring parcel to B&B and a modest, though seemingly undocumented, amount of hazardous substances.[18] Add to that the insolvency of B&B and the apparent lack of other responsible parties and this decision might have been a case study for critics of joint and several liability. Instead, the *Burlington Northern* decision is a case study of the intersection of common law concepts of divisibility of harm with statutory pronouncements designed to charge the cost of cleanup to the parties associated with contamination or to those who benefit from the property's cleanup. Commentators are startled by the apparent ease with which the Court affirms the district court's finding of divisibility and thus shields the Railroads from the "sword" of joint and several liability. One attorney refers to the Supreme Court's decision as a "Super Quake."[19]

But one must remember that before the Court sheathed the "sword" in this case, it conceded joint and several liability's central role in CERCLA. The Court placed the last cornerstone for the law of CERCLA liability, one that the Court was long overdue in setting, especially in light of the long federal court reliance on the principle of joint and several liability in CERCLA cases. Notwithstanding the apportionment issues, the Supreme Court is, at most, warning the United States and other parties eager to unsheathe the "sword" of joint and several liability and wield it indiscriminately. This "sword" has long been part of state, federal and tribal government's CERCLA arsenal to enlist cooperation and cost recovery in the clean up of hazardous sites. Now, due to the Court's conclusions about joint and several liability's application to CERCLA in

16. *See id.* at 1875.

17. *Id.* at 1874.

18. *See id.* at 1882-83.

19. Barkett, *supra* note 14, at 5.

Burlington Northern, and in combination with the first and second installments of what I refer to herein as the Supreme Court's "CERCLA trilogy," this "sword" is available to private parties and any others that engage in cleanup consistent with the requirements of the National Contingency Plan.[20] Whether the United States was engaged in an inappropriate use of the sword on the *Burlington Northern* facts is difficult to know since the United States never had a chance to rebut the district court's apportionment analysis, as none of the parties had proposed such an apportionment at trial.

I explain below that the Court's purpose was not to throw away joint and several liability by sanctioning a loose analysis of divisibility. Understood in the context of the preceding Supreme Court decisions on CERCLA liability that address private party claims for contribution[21] and cost recovery,[22] the Court is reminding the federal courts that joint and several liability is not without limit. Similarly, understood in the context of the unique facts presented by the contamination, the Court is acknowledging district court authority to reasonably apportion harm when the facts support such an analysis. This conclusion is supported by a close reading of the facts of the *Burlington Northern* decision. This Article will identify significant factors to guide future determinations of whether to apportion CERCLA liability.

The analysis is divided into three parts. Part I provides an overview of CERCLA and its application to the contamination at the Railroads' and B&B's properties. Part II examines the two U.S. Supreme Court decisions preceding the *Burlington Northern* decision and why those decisions frame the conclusions to be drawn about the *Burlington Northern* ruling. Part III reflects on the common law and how the facts unique to *Burlington Northern* and the nature of the Supreme Court's evidentiary review of the district court's decision combine to confirm that *Burlington Northern* follows in the wake of other CERCLA decisions that were once haled as the end of joint and several liability in CERCLA.

I. CERCLA Principles Applied to *Burlington Northern* Facts

CERCLA was passed in December 1980 to address contamination beyond the purview of the other environmental statutes enacted earlier, including the Clean Air Act, the Federal Water Pollution Control Act and the Solid Waste Disposal Act. CERCLA focused on remediation rather than regulation. CERCLA's regulations largely detail the procedures for

20. 40 C.F.R. § 300 (2008).

21. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157 (2004).

22. United States v. Atl. Research Corp., 551 U.S. 128 (2007).

identifying, prioritizing, qualifying for long-term federal funding and cleaning up contamination. In recent years, regulations also clarified some of the narrow defenses provided in CERCLA, such as the recent "All Appropriate Inquiry" regulations. No permits are issued. No prohibitions are proscribed.

CERCLA authorizes government and private party cleanup, funding for cleanup through taxes (until they expired in 1995),[23] government appropriations, and most significantly, a liability regime that for nearly thirty years resulted in private parties committing to clean up sites and to pay past costs from government cleanup. Federal government appropriations total $33.4 billion;[24] recovered government costs for past and future cleanup total $7.3 billion;[25] and cost estimates for private party work at federally listed sites exceed $22.5 billion through FY 2007.[26] What follows is an overview of CERCLA's liability structure as illustrated by the facts in *Burlington Northern*.

A. The Arvin Site

This is a story of two parcels joined through a lease and as a consequence of which the landlord-railroads faced significant CERCLA liability. I refer to these combined parcels as the "Arvin" site.[27] The Arvin site contamination stems, at least in part, from B&B's operation as a formulator for fertilizers, herbicides, pesticides and other agricultural chemicals. B&B began operation in 1960[28] and for the next fifteen years B&B operated on a 3.8-acre site.[29] Early on, B&B installed a sump in the center of its parcel, into which as much as 2000 to 4000 gallons of water

23. U.S. GAO, SUPERFUND: FUNDING AND REPORTED COSTS OF ENFORCEMENT AND ADMINISTRATION ACTIVITIES, GAO-08-841R, at 2 (2008) [hereinafter GAO-08-841R].

24. Martha L. Judy & Katherine N. Probst, *Superfund at 30*, 11 VT. J. ENVTL. L. 191, 199 (2009).

25. GAO-08-841R, *supra* note 23, at 15 tbl.2.

26. U.S. GAO, SUPERFUND: LITIGATION HAS DECREASED AND EPA NEEDS BETTER INFORMATION ON SITE CLEANUP AND COST ISSUES TO ESTIMATE FUTURE PROGRAM FUNDING REQUIREMENTS, GAO-09-656, at 30 (2009) [hereinafter GAO-09-656].

27. The opinions in many of the decisions related to this site refer to the combined Railroad and B&B parcels as the Arvin site or facility. *E.g.*, United States v. Burlington N. & Santa Fe Ry. Co., 520 F.3d 918, 930 n.3 (9th Cir. 2008).

28. Brief of Appellant-Petitioner at 7, Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870 (2009) (Nos. 07-1601, 07-1607), 2008 WL 493356. *But cf.* Atchison, Topeka & Santa Fe Ry. v. Brown & Bryant, No. CV-F-92-5068 OWW DLB, 1995 U.S. Dist. LEXIS 20627, at *4 (E.D. Cal. Nov. 15, 1995) (stating that B&B started in 1950).

29. *Burlington N.*, 129 S. Ct. at 1874.

from rinsing drums, cleaning up spills, and washing tools and vehicles used in product delivery and application were dumped each month.[30]

In 1975, the Railroads leased to B&B a neighboring .9-acre parcel for $410 per year.[31] The Railroads' parcel drained onto B&B's parcel through a small drainage pipe.[32] In addition, the Railroad parcel sloped toward B&B's parcel, which was graded down-slope to a drainage pond.[33] A pipe also connected the sump in the middle of the parcel to the pond.[34] Both the sump and the pond were unlined until 1979.[35]

Both before and after leasing the railroad site, B&B received deliveries of D-D and Nemegon, two soil fumigants from Shell.[36] Dow Chemical Company's "dinoseb," a herbicide, was also used by B&B.[37] The delivery and use of these chemicals was a messy process.

> [T]he chemical was transferred to bobtail trucks, nurse tanks, and pull rigs. During each of these transfers leaks and spills could—and often did—occur. Although the common carrier and B&B used buckets to catch spills from hoses and gaskets connecting the tanker trucks to its bulk storage tank, the buckets sometimes overflowed or were knocked over, causing D-D to spill onto the ground during the transfer process.[38]

In 1978 after a windstorm destroyed the bulk-storage tank that stored the D-D pesticide, B&B began using refurbished stainless steel milk trailers to store the bulk D-D on both the main parcel and the railroad parcel.[39] D-D corrodes steel to cause leaks in only a few years.[40] Leaks and spills of these and other pesticides occurred throughout the history of the site. The pond also overflowed due to storms on at least two occasions.[41]

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30. Brief of Appellant-Petitioner, *supra* note 28, at 9-10.

31. *Id.* at 9.

32. *Id.*

33. *Burlington N.*, 520 F.3d at 930.

34. Brief of Appellant-Petitioner, *supra* note 28, at 9.

35. Petition for Writ of Certiorari at 7, Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870 (2008) (No. 07-1601).

36. *Burlington N.*, 520 F.3d at 930-31.

37. *Id.* at 931.

38. Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1875 (2009).

39. *Burlington N.*, 520 F.3d at 931.

40. *Id.*

41. U.S. EPA, Site Overviews by State: Brown & Bryant (Arvin Plant), http://yosemite.epa.gov/R9/SFUND/R9SFDOCW.NSF/7508188dd3c99a2a8825742600743735/8d1fd78ed1c83e9688257007005e9437!OpenDocument (last visited Feb. 1, 2010).

B. CERCLA Definitions and Pre-Requisites for Liability

CERCLA liability extends to any facility where hazardous substances release or threaten release into the environment.[42] The statute defines facility to include a list of structures, e.g., "a pit, pond, lagoon, impoundment" *or* "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed or otherwise come to be located."[43] This definition is broad enough to encompass most places where hazardous substances may be found, but it excludes "any consumer product in consumer use."[44] One might think that the pesticides meet this exemption, but this is the formulation of pesticides, not their consumer use. Hazardous substances are those chemicals listed pursuant to several federal pollution control acts.[45] The ingredients of the pesticides fall within CERCLA's definition of "hazardous substance," so both the railroads and the B&B properties met the definition of a "facility." The EPA has broad discretion to designate one facility even where property boundaries divide it into two or more parcels as occurred at the Arvin site.[46] The definition of "release" includes "any spilling, leaking, . . . emptying, . . . escaping, leaching, dumping, or disposing into the environment (including the abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance)."[47] Excluded from this definition is "the normal application of fertilizer."[48] The exemption did not apply because leaking containers, rinseates or residues from floods as occurred at the Arvin facility were not the normal application of fertilizer.[49] Releases are only actionable if they occur or threaten to occur in the environment. CERCLA, the first multi-media pollution control statute, defines "environment" to include "surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States."[50]

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42. *See* 42 U.S.C. §§ 9604, 9606-9608 (2006).

43. *Id.* § 9601(9).

44. *Id.*

45. *See id.* § 9601(14).

46. Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1876 (2009).

47. 42 U.S.C. § 9601(22).

48. *Id.* § 9601(22)(D).

49. United States v. Burlington N. & Santa Fe Ry. Co., 520 F.3d 918, 931 (9th Cir. 2008).

50. 42 U.S.C. § 9601(8)(B).

Once evidence supports the above site-specific facts, CERCLA jurisdiction may be asserted over potentially responsible parties (or "PRPs" as they are often abbreviated).[51] CERCLA delineates liability for the following parties:

- current owners of the facility;[52]
- current operators of the facility;[53]
- past owners or operators "at the time of disposal of any hazardous substance of the facility" at which the hazardous substances were disposed;[54]
- those that arrange for disposal at the facility,[55] referred to as "arrangers" or "generators"; and
- transporters that select the facility to which they bring the hazardous substances.[56]

At the Arvin site, B&B fit the definitions of both an owner and an operator of the site. The Railroads' liability was based on their ownership of a piece of the contaminated property.[57] Shell was tagged with "arranger" liability[58] (though the Supreme Court ultimately disagreed with this conclusion).[59]

C. State and Federal Response Actions

The site involved in the *Burlington Northern* case was the recipient of several state response actions as well as EPA enforcement actions to mandate cleanup and seek recovery of costs. The State of California began enforcement actions against B&B, as the owner and operator of the facility, for failure to comply with Resource Conservation and Recovery Act ("RCRA") storage, transportation and disposal requirements in 1983.[60] By

51. *Burlington N.*, 520 F.3d at 933.

52. 42 U.S.C. § 9607(a)(1).

53. *Id.* § 9607(a)(1).

54. *Id.* § 9607(a)(2).

55. *Id.* § 9607(a)(3).

56. *Id.* § 9607(a)(4).

57. Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1876 (2009).

58. *Id.* at 1877.

59. *Id.* at 1880.

60. EPA SUPERFUND SITE RECORD OF DECISION, BROWN & BRYANT, INC. (ARVIN PLANT) 3 (Nov. 1993) [hereinafter BROWN & BRYANT, RECORD OF DECISION], *available at* http://www.epa.gov/superfund/sites/rods/fulltext/r0994108.pdf ("In 1981, the facility was licensed under RCRA as a hazardous waste transporter. In 1983, the State of California required Brown & Bryant to conduct a site investigation and dispose of contaminated soil.").

the late eighties, B&B had completed some cleanup, including excavating the sump and filling it with soil. Its insurance companies negotiated an agreement with the state to transfer all company assets "in exchange for an agreement absolving B&B, its president, and their insurance companies of further liability."[61] In 1989 B&B became insolvent and sought bankruptcy protection.[62] Settlement negotiations with the EPA "ceased in 1991, when the civil complaint filed by [B&B] against its insurers in state court was dismissed for failure to prosecute."[63]

1. National Priorities List ("NPL") Listing

Up to this point, the site had been addressed primarily under RCRA authority, but in 1989 the EPA transferred this and twenty-two other RCRA facilities on to the National Priorities List.[64] The NPL is the list of sites eligible for federal funding of long-term cleanup under CERCLA.[65] During this period, and for a number of years thereafter, the EPA and California engaged in various site evaluation and cleanup activities as authorized by CERCLA section 104.[66] The EPA "immediately conducted an emergency response assessment and identified two areas needing immediate attention, a dinoseb[67] spill area and the groundwater which appeared to pose an imminent and substantial endangerment to the municipal drinking water. The EPA treated the dinoseb-contaminated soil in the winter of 1991 under its emergency response authorities."[68]

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61. U.S. EPA, NPL Site Narrative for Brown & Bryant, Inc. (Arvin Plant), http://www.epa.gov/superfund/sites/npl/nar1109.htm (last visited Feb. 1, 2010).

62. *Burlington N.*, 129 S. Ct. at 1876.

63. BROWN & BRYANT, RECORD OF DECISION, *supra* note 60.

64. *See* National Priorities List for Uncontrolled Hazardous Waste Sites - Final Rule Convering [sic] Sites Subject to the Subtitle C Corrective Action Authorities of the Resource Conservation and Recovery Act, 54 Fed. Reg. 41,000-015 (Oct. 4, 1989) (to be codified at 40 C.F.R. pt. 300), *available at* http://www.epa.gov/superfund/sites/npl/f891004.htm#41000.

65. *See* 40 C.F.R. § 300.425 (2009). Unlisted sites are subject to Superfund liability and enforcement, but federal funding of cleanup actions (not enforcement actions) is restricted to "removal actions" (defined in 42 U.S.C. § 9601(23) (2006)) and usually limited to short term and Superfund Trust Fund costs capped at $2 million. 42 U.S.C. § 9604(c)(1). *Cf.* United States v. W.R. Grace & Co., 429 F.3d 1224, 1227-28, 1237 (9th Cir. 2005) (observing that removal actions are usually "time sensitive" but then concluding that EPA's several-year cleanup of an unlisted, Libby, MT asbestos mine and processing site for asbestos-containing vermiculite qualified as a removal action).

66. *Burlington N.*, 129 S. Ct. at 1876.

67. An herbicide produced by Dow Chemical. United States v. Burlington N. & Santa Fe Ry. Co., 520 F.3d 918, 931 (9th Cir. 2008).

68. BROWN & BRYANT, RECORD OF DECISION, *supra* note 60.

2. State and Federal CERCLA Cleanup Authority

The EPA and California used trust fund monies to conduct site investigation, emergency cleanup, and other actions pursuant to CERCLA section 104.[69] CERCLA also grants the EPA authority to order or otherwise require private parties to investigate or cleanup either voluntarily or involuntarily. The EPA may only issue mandatory administrative or judicial orders when the site poses an "imminent and substantial endangerment."[70] Parties that fail to comply with these orders without sufficient cause risk treble damages—the cost to conduct the ordered action plus three times that amount.[71] The EPA may also enter into agreements with parties that agree to do work that the EPA would otherwise perform pursuant to section 104.[72] In 1991, the EPA issued administrative orders to the Railroads to install groundwater monitoring wells and take other measures to address the contamination on the Arvin site.[73] "None of the contamination requiring immediate remediation was on the Railroad parcel."[74]

D. Cost Recovery and Contribution

CERCLA provides a variety of mechanisms to spread costs between parties and the government. Governments are able to recover "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan."[75] As described in detail below, the standard of liability under section 107 has been interpreted to be strict, joint and several. This means that the EPA and the State of California could seek recovery of the costs they incurred responding to the contamination of the Arvin site. They could seek one-hundred percent of those costs from parties such as B&B (due to its owner and operator liability) and likewise from the Railroads due to their owner liability. Strict liability means that the Railroads are liable because of their ownership status and no further "fault" is required for the governments to recover. Invoking section 107(a)(4)(A), the EPA and the state filed suit to recover over $8 million in cleanup costs from the

69. *See id.* § 9604.

70. *Id.* § 9606(a).

71. 42 U.S.C. § 9606(c)(3) (2006).

72. *Id.* § 9622(a).

73. Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1876 (2009).

74. United States v. Burlington N. & Santa Fe Ry. Co., 520 F.3d 918, 931 (9th Cir. 2008).

75. 42 U.S.C. § 9607(a)(4)(A).

Railroads and Shell.[76] B&B was not the subject of the cost recovery action because it had become defunct.[77]

PRPs—like the Railroads—that have incurred costs subject to a section 106 order or a section 107 cost recovery claim may spread costs that exceed their "fair share" through a claim for contribution. Explicit authority for contribution claims was added to the statute in 1986 as a part of the Superfund Amendments and Reauthorization Act ("SARA").[78] The Railroads incurred costs in excess of $3 million during their execution of EPA's cleanup order.[79]

In 1992 the Railroads filed suit in the United States District Court for the Eastern District of California.[80] The Railroads sought to apportion their costs such that they would only be responsible for contamination on the railroad parcel and asked the court to order B&B and other parties to pay for the contamination on B&B's portion of the property.[81] Judge Oliver W. Wanger granted the Railroads' motions for summary judgment "that they [were] not liable for response costs for releases from the [B&B] property."[82] He also ruled as follows with regard to the opposing parties' motions for summary judgment: "The [B&B] parties' motion for summary judgment that the Railroads are CERCLA-liable parties with respect to the Arvin Site is GRANTED, with respect to releases from the Railroads' leased property, and DENIED, with respect to releases from Brown & Bryant's property . . . ."[83]

Four years later, the EPA and California brought their own claims for cost recovery, and the district court consolidated the government's claims with the private party's claims in 1996.[84] In 1999, after a six-week bench trial,[85] Judge Wanger issued a lengthy opinion that found Shell and the Railroads liable to the governments.[86] Once again, he apportioned the costs between the parties, hence voiding the government's ability to recover all

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76. *Burlington N.*, 129 S. Ct. at 1876.

77. *Id.*

78. Superfund Amendments and Reauthorization Act of 1986, Pub. L. No. 99-499, 100 Stat. 1613 (codified as amended at 42 U.S.C. § 9613(f)(1), (3)(B)).

79. *Burlington N.*, 129 S. Ct. at 1876.

80. *Id.*

81. Atchison, Topeka & Santa Fe Ry. Co. v. Brown & Bryant, Inc., No. CV-F-92-5068 OWW DLB, 1995 U.S. Dist. LEXIS 20627, at *2 (E.D. Cal. Nov. 13, 1995).

82. *Id.* at *27.

83. *Id.*

84. *Burlington N.*, 129 S. Ct. at 1876.

85. *See* United States v. Burlington N. & Santa Fe Ry. Co., 520 F.3d 918, 932 (9th Cir. 2008) (describing a "twenty-seven day bench trial").

86. *Burlington N.*, 129 S. Ct. at 1876.

of their costs under a theory of joint and several liability.[87] His method for apportioning liability seemed to contemplate issues relating to claims for contribution where courts may consider any factors in allocating costs between liable parties.[88] He calculated the Railroads' portion of the harm as a function of the following factors:

- the percentage of the time B&B leased property from the Railroads as compared to the total time B&B operated;
- the percentage of the Arvin site that the Railroads' owned;
- the percentage of hazardous substances subject to remediation that were found on the Railroads' and B&B properties; and
- an "error factor" of fifty percent.[89]

The result allotted the Railroads with nine percent of the remediation and investigation costs needed to respond to the Arvin contamination.[90] Shell's share was calculated at six percent of total response costs.[91] The judgment-proof B&B was held responsible for one-hundred percent of response costs.[92]

The United States and the State of California appealed the district court's ruling.[93] Judge Marsha S. Berzon, writing for the Ninth Circuit, succinctly captured the problem posed to the government by the district court's decision: "[t]he agencies were thus left holding the bag for a great deal of money."[94] She criticized the lack of information in support of the district court's apportionment. She called the district court's calculation:

> a "meat-axe" approach to the divisibility issue, premised on percentages of land ownership, as a means of adjusting for the difficulties of proving divisibility with precision when PRP status is based on land ownership alone. Such an approach would be tantamount to a disagreement with the imposition of no-fault land ownership liability. Congress, however, created precisely such liability, placing the responsibility to pay for environmental

87. *See id.*

88. *See* 42 U.S.C. § 9613(f)(1), (3)(B) (2006) ("In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.").

89. *Burlington N.*, 129 S. Ct. at 1882.

90. *Id.*

91. *Id.* at 1877.

92. United States v. Burlington N. & Santa Fe Ry. Co., 520 F.3d 918, 932 n.11 (9th Cir. 2008).

93. *Id.* at 932.

94. *Id.* at 930.

> cleanup on parties, such as the Railroads, that profited from the circumstances giving rise to the contamination so that the taxpayers are not left holding the tab.[95]

The Ninth Circuit concluded: "Apportionment is the exception, available only in those circumstances in which adequate records *were* kept and the harm *is* meaningfully divisible."[96] The Railroads' (and Shell's) petitions for certiorari were granted and consolidated on October 1, 2008.[97]

II. Coming Full CERCLA: The Supreme Court's CERCLA Trilogy

Before I discuss the details of the Supreme Court's decision affirming the district court's apportionment analysis, it is important to understand the first and second installments of the Supreme Court's "CERCLA trilogy." The two prior decisions, *Cooper Industries, Inc. v. Aviall Services, Inc.*[98] ("*Aviall*") and *United States v. Atlantic Research Corp.*[99] ("*Atlantic*") are not alone among the Supreme Court's forays into the world of CERCLA. Earlier Supreme Court decisions addressed narrower questions, such as: "Who is liable?"[100] and "whether recovery extends beyond cleanup costs?"[101] Unlike the earlier decisions, the impact of *Aviall* and *Atlantic* extends to the foundations of CERCLA liability for all liable parties. Both of these decisions serve as the backdrop for the joint and several liability aspects of *Burlington Northern*.

A. Book I: *Cooper Industries, Inc. v. Aviall Services, Inc.*

Aviall dramatically changed the calculus and practicalities of cleaning up hazardous-substance contamination under CERCLA.[102] The decision

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95. *Id.* at 944-45.

96. *Id.* at 945-46.

97. United States v. Burlington N. & Santa Fe Ry. Co., 520 F.3d 918 (9th Cir. 2008), cert. granted, 77 U.S.L.W. 3195 (U.S. Oct. 1, 2008) (Nos. 07-1601, 07-1607).

98. 543 U.S. 157 (2004).

99. 551 U.S. 128 (2007).

100. *See* Pennsylvania v. Union Gas Co., 491 U.S. 1, 12-13 (1989) (defining the bounds of state liability), *overruled by* Seminole Tribe v. Florida, 517 U.S. 44, 72 (1996) (stating that, in situations where states are unable to legislate, neither Congress nor anyone else may obtain money damages from the states); United States v. Bestfoods, 524 U.S. 51, 66-68 (1998) (interpreting the meaning of operator liability and the extent of parent corporation liability for the actions of its subsidiary).

101. Key Tronic Corp. v. United States, 511 U.S. 809, 819-21 (1994) (clarifying the conditions for recovery of attorney's fees under CERCLA).

102. Martha L. Judy & Thomas Armstrong, Jr., U.S. v. Atlantic Research: *The Supreme Court Re-Opens the Road to CERCLA Cost Recovery*, SUPERFUND AND NAT. RESOURCE LIT. COMMITTEE DAMAGES NEWSL. (Am. Bar Ass'n, Chi., Ill.), July 2008, at 11, 12-13; *see*

turned upside-down the norms common in nine circuits[103] where private parties long relied on CERCLA section 113(f)(1) to recover costs incurred for various forms of voluntary—or at least not involuntary—cleanup, such as those involved in brownfields redevelopment, the transfer and sale of contaminated properties, and state directed response actions.[104] These section 113 claims had proceeded in addition to more typical claims for contribution brought under the same authority.

1. "Voluntary Cleanup"

Aviall involved a cleanup under a state voluntary cleanup program. Aviall Services had purchased properties used for aircraft maintenance

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Ronald G. Aronovsky, *Federalism and CERCLA: Rethinking the Role of Federal Law in Private Cleanup Cost Disputes*, 33 ECOLOGY L.Q. 1, 50-58 (2006); C.R. "Chip" Bowles, Jr., *Please Sue Me:* Cooper Industries, Inc. v. Aviall Services, Inc., 24 AM. BANKR. INST. L. REV. 28 (2005); Ron Cardwell, *Voluntary Cleanups: Down for the Count or Just on the Ropes?*, 16 S.C. L. REV. 14, 52 (2005); Richard O. Faulk & Cynthia J. Bishop, *There and Back Again: The Progression and Regression of Contribution Actions Under CERCLA*, 18 TUL. ENVTL. L.J. 323, 334-37 (2005); Stanley A. Millan, *Contemporary CERCLA: Reversals of Fortune and Black Holes*, 16 FORDHAM ENVTL. L. REV. 183, 213-15 (2005).

103. Dico, Inc. v. Amoco Oil Co., 340 F.3d 525, 527 (8th Cir. 2003) (dismissing the plaintiff's direct cost recovery action); Bedford Affiliates v. Sills, 156 F.3d 416, 423-24 (2d Cir. 1998) (limiting recovery by PRPs to section 113(f) contribution claims); Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 350 (6th Cir. 1998) ("Claims by PRPs, however, seeking costs from other PRPs are necessarily actions for contribution, and are therefore governed by the mechanisms set forth in section 113(f)."); Pneumo Abex Corp. v. High Point Thomasville & Denton R.R. Co., 142 F.3d 769, 776 (4th Cir. 1998) ("As the case before the court involves entirely potentially responsible parties, such parties must seek contribution under [section 113]."); Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1301 (9th Cir. 1997) ("Because all PRPs are liable under the statute, a claim by one PRP against another PRP necessarily is for contribution."); New Castle County v. Halliburton NUS Corp., 111 F.3d 1116, 1122 (3d Cir. 1997) ("Thus, section 113 does not in itself create any new liabilities; rather, it confirms the right of a [PRP] under section 107 to obtain contribution from other [PRPs]."); Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1496 n.7 (11th Cir. 1996) (distinguishing between section 113(f) contribution claims and section 107(a) cost recovery actions); United States v. Colo. & E. R.R. Co., 50 F.3d 1530, 1539 (10th Cir. 1995) ("[C]laims between PRPs to apportion costs between themselves are contribution claims pursuant to section 113 regardless of how they are pled."); United Techs. Corp. v. Browning-Ferris Indus., 33 F.3d 96, 103 (1st Cir. 1994) (prohibiting recovery under section 107 but allowing recovery by and between PRPs for contribution under section 113); *cf.* Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 764 (7th Cir. 1994) (characterizing a section 113(f) claim as a "quintessential claim for contribution," but leaving open the possibility of section 107 recovery under certain circumstances).

104. *See* Judy & Armstrong, *supra* note 102; *see also* Karl S. Bourdeau & W. Parker Moore, *Options for Potentially Responsible Parties in the Wake of the* Aviall *Decision*, 38 ENV'T REP. 440, 461 (2007); Faulk & Bishop, *supra* note 102, at 337.

from Cooper Industries in 1981.[105] Later, in 1996 a potential purchaser of Aviall's property conducted a phase II environmental assessment to identify possible CERCLA liability prior to purchase. Chlorinated solvents were found in the groundwater.[106] Aviall cleaned up the property as a part of the Texas Voluntary Cleanup Program[107] and thereafter sold the property, albeit Aviall retained the obligation to complete the remediation.[108]

2. Prior Decisions

No other suits under CERCLA were filed or settled prior to Aviall's seeking recovery of a portion of its costs under the contribution provisions of the statute, section 113(f)(1), from Cooper Industries.[109] The district court ruled in favor of Cooper Industries' motion to dismiss the suit for failure to have the prerequisite section 107 or section 106 civil action prior to seeking recovery under section 113. A divided panel of the Fifth Circuit affirmed and then later on rehearing *en banc*, reversed its decision in a divided vote.[110] The conclusion of this combination of hearings was that Aviall could recover its costs under section 113's contribution provisions whether or not it had been sued under section 106 or section 107.[111] The Third Circuit later ruled, similarly to the initial district court decision,[112] to provide the split in what had otherwise been the unanimous view of the courts: that among liable parties, section 113(f)(1) was the appropriate claim. On January 9, 2004, the Supreme Court granted Cooper Industries' petition for writ of certiorari.[113]

3. The Supreme Court's Textual Analysis

Justice Thomas wrote the opinion for the majority. He was joined by Chief Justice Rehnquist, and Justices O'Connor, Scalia, Kennedy, Souter,

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105. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 163 (2004).

106. Aviall Servs., Inc. v. Cooper Indus., LLC, No. 3:97-CV-1226-D, 2009 U.S. Dist. LEXIS 15524, at *6 (N.D. Tex. Feb. 27, 2009).

107. *Id.* at *7.

108. *Aviall*, 543 U.S. at 164.

109. *See id.* Initially Aviall filed claims under both section 107 and section 113 but later amended its complaint to seek recovery only under section 113. *Id.*

110. Aviall Servs., Inc. v. Cooper Indus., Inc., 263 F.3d 134 (5th Cir. 2001), *rev'd en banc*, 312 F.3d 677, 678 (5th Cir. 2002).

111. *See Aviall*, 312 F.3d at 686.

112. *See* E.I. DuPont de Nemours & Co. v. United States, 297 F. Supp. 2d 740, 750-52, 758 (D. N.J. 2003) (ruling that contribution under section 113 was only available to parties currently or previously subject to a civil action under sections 106 or 107).

113. Cooper Indus., Inc. v. Aviall Servs., Inc., 312 F.3d 677 (5th Cir. 2002), *cert. granted*, 71 U.S.L.W. 3552 (U.S. Jan. 9, 2004) (No. 02-1192).

and Breyer.[114] Justice Ginsburg, joined by Justice Stevens, filed a dissenting opinion.[115] In this short opinion, the focus was on section 113(f)(1). The majority's three-pronged, textual analysis of section 113 pivoted on the meaning of "may," the savings clause, and the role of provisions providing for contribution after settlement.[116] Justice Thomas quoted the text of section 113 and emphasized the words that guided his analysis: "Any person *may* seek contribution . . . *during or following* any civil action under section [106] of this title or under section [107] of this title."[117] The Court observed, "[t]he natural meaning of this sentence is that contribution may only be sought subject to the specified conditions, namely, 'during or following' a specified civil action."[118] Under the Court's analysis, "may" means "may only."[119] The framework of the enabling clause is that "it authorizes certain contribution actions—ones that satisfy the subsequent specified condition—and no others."[120] Otherwise, Congress would not have stated "the explicit 'during or following' condition."[121] The Court disagreed with Aviall's permissive interpretation of "may" and its corresponding flexibility in the timing of contribution actions: "Aviall's reading would render part of the statute entirely superfluous, something we are loath to do."[122] Likewise, the Court reasoned that language that authorizes contribution actions after settlement, section 113(f)(3)(B), would be unnecessary if contribution actions could be brought at any time.[123]

The third prong of this textual analysis focused on the "saving" clause as Justice Thomas called it.[124] The last sentence of section 113(f)(1) states: "Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section [106] of this title or section [107] of this title."[125] "The sole function of the sentence," explained Justice Thomas, "is to clarify that [section] 113(f)(1) does nothing to 'diminish' any cause(s) of action for contribution that may

114. *Aviall*, 543 U.S. at 159.
115. *Id.* at 171 (Ginsburg, J., dissenting).
116. *See id.* at 166-67 (majority opinion).
117. *Id.* at 166 (quoting 42 U.S.C. § 9613(f)(1) (2000)).
118. *Id.*
119. *See id.*
120. *Aviall*, 543 U.S. at 166.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* (quoting 42 U.S.C. § 9613(f)(1)).

exist independently of [section] 113(f)(1)."[126] Without saying what those causes of action are, if any, the sentence preserves other avenues for contribution besides those provided in section 113(f)(1), but the savings clause does not create a cause of action in and of itself, nor does it expand 113(f)(1) beyond the narrow interpretation of the Court.[127]

In one sentence, the Court dispatched arguments about the legislative history that might have provided another explanation of the savings clause: "[e]ach side insists that the purpose of CERCLA bolsters its reading of [section] 113(f)(1). Given the clear meaning of the text, there is no need to resolve this dispute or to consult the purpose of CERCLA at all."[128]

Quite simply, after the ruling, Aviall had no section 113(f)(1) claim.[129] Aviall had not been subject to a civil action under section 106 or 107.[130] It had never resolved its liability in a settlement.[131] However, this was not the end of the *Aviall* saga. Aviall sought relief under section 107(a)(4)(B).[132] Justices Ginsburg and Stevens in their dissent considered Aviall's claim.[133] Justice Ginsburg argued that the plaintiff in *Key Tronic* recovered costs under an implied cause of action for contribution or, at the very least, one for cost recovery brought by a liable party under section 107.[134]

The dissenting Justices reasoned that Aviall, as a comparable liable party, should be able to seek recovery in light of the majority's decision foreclosing its recovery under section 113.[135] The majority declined to address the issue.[136] It acknowledged the importance of resolving the role of responsible parties in the context of CERCLA's cost-recovery provisions but concluded that the issue was not ripe for review.[137]

4. Holding

The Supreme Court ruled in *Aviall* that contribution claims brought under section 113(f)(1) may only proceed during or following a civil action

126. *Aviall*, 543 U.S. at 166.
127. *Id.* at 167.
128. *Id.*
129. *Id.* at 168.
130. *Id.*
131. *Id.* at 167-68.
132. *Aviall*, 543 U.S. at 168.
133. *See id.* at 171, 174 (Ginsburg, J., dissenting).
134. *See id.* at 172.
135. *Id.* at 171-72.
136. *Id.* at 170 (majority opinion).
137. *Id.*

under section 106 or 107.[138] The decision was contrary to the precedent in nearly every circuit that considered the issue, most of which had directed private parties, even those who had incurred costs voluntarily, to recover their costs only under section 113's contribution provisions rather than under section 107's cost-recovery provisions.[139] Pending contribution claims under section 113(f)(1) brought without the necessary concurrent or prerequisite civil action were dismissed.[140]

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138. *Aviall*, 543 U.S. at 166.

139. *See, e.g.*, Bedford Affiliates v. Sills, 156 F.3d 416, 423-24 (2d Cir. 1998) (limiting a landowner who had entered into a consent order with a state agency prior to suing for contribution and cost recovery to contribution under section 113); Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 346, 349-56 (6th Cir. 1998) (announcing when a party sought recovery of costs incurred as a consequence of an administrative order under section 106, that "[c]laims by PRPs, however, seeking costs from other PRPs are necessarily actions for contribution, and are therefore governed by the mechanisms set forth in [section] 113(f)"); Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R., 142 F.3d 769, 776 (4th Cir. 1998) ("As the case before the court involves entirely potentially responsible parties, such parties must seek contribution under section [113]."); Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1301, 1305-06 (9th Cir. 1997) (finding that, when a PRP incurs costs without a section 106 or 107 civil action or settlement, "[b]ecause all PRPs are liable under the statute, a claim by one PRP against another PRP necessarily is for contribution"); New Castle v. Halliburton NUS Corp., 111 F.3d 1116, 1119, 1122, 1124 (3d Cir. 1997) (limiting recovery to contribution under section 113 when a party to a consent decree under RCRA seeks recovery of costs from a cleanup contractor); Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1496 & n.7 (11th Cir. 1996) (restricting a party's claims to contribution when it had entered into an administrative settlement with the EPA and received a hundred percent allocation after a claim for contribution and subsequently sought to shift the allocation through a section 107 action but as a non-innocent party); United States v. Colo. & E. R.R., 50 F.3d 1530, 1533-34, 1539 (10th Cir. 1995) (holding that "claims between PRPs to apportion costs between themselves are contribution claims pursuant to [section] 113 regardless of how they are pled" when a party incurred costs beyond those defined in a settlement and sought recovery from other parties to the settlement under section 107); United Techs. Corp. v. Browning-Ferris Indus., 33 F.3d 96, 101, 103 (1st Cir. 1994) (limiting recovery by and between PRPs to contribution under section 113, where a party that was subject to a civil action sought recovery under section 107); *c.f.* Akzo Coatings, Inc. v. Aigner Corp., 30 F.3d 761, 762, 764 (7th Cir. 1994) (Party subjected to a section 106 order sought recovery under section 107; the court characterized the claim as a "quintessential claim for contribution," but left open the possibility of a section 107 recovery under certain circumstances.).

140. *See, e.g.*, Major v. Astrazeneca, Inc., Nos. 5:01-CV-618, 5:00-CV-1736, 2006 U.S. Dist. LEXIS 65225, at *51 (N.D.N.Y. Sept. 13, 2006) ("[A] party may only seek contribution pursuant to [section] 113(f) during or following a civil action brought pursuant to [section 106] or [section 107]."); Kaladish v. Uniroyal Holding, Inc., No. 3:00-CV-854(CFD), 2005 U.S. Dist. LEXIS 17272, at *8 (D. Conn. Aug. 9, 2005) (prohibiting a section 113(f) contribution claim unless that party has been sued under section 106 or section 107); CadleRock Props. Joint Venture v. Schilberg, No. 3:01-CV-896, 2005 U.S.

5. *Aviall*'s Legacy

The interval between *Aviall* and Book II of the Supreme Court's CERCLA Trilogy, the *Atlantic Research* decision, was marked by confusion among CERCLA practitioners and changed private party expectations about their ability to recover costs for cleanup undertaken in reliance on long-time precedent, and hence without the prior resolution of their CERCLA liabilities in a settlement, or without being the subject of an enforcement action under sections 106 or 107.[141] Some courts[142] and commentators[143] thought that Congress should resolve the problems presented by this abrupt change of direction. Pending contribution claims under section 113(f)(1) brought without the necessary concurrent or prerequisite civil action were dismissed.[144]

The U.S. government gained control over private parties and sub-contractors implicated along with the federal government at contaminated federal facilities. Federal agencies are potentially liable for some of the worst hazardous waste sites in the country.[145] *Aviall* removed one incentive

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Dist. LEXIS 14701, at *34 (D. Conn. July 18, 2005) (dismissing contribution action for lack of an underlying federal legal claim); Champion Labs., Inc. v. Metex Corp., No. 02-5284, 2005 U.S. Dist. LEXIS 37068, at *12 (D.N.J. July 8, 2005) (dismissing contribution action for lack of an underlying federal legal claim).

141. *See, e.g.*, Bourdeau & Moore, *surpa* note 104, at 467; Bowles, *supra* note 102.

142. *See, e.g.*, E.I. DuPont de Nemours & Co. v. United States, 460 F.3d 515, 543 (3d Cir. 2006) ("[T]he debate over whether our national environmental cleanup laws should favor prompt and effective cleanups in any manner (including *sua sponte* voluntary cleanups by PRPs), or should favor settlements and other enforcement actions to ensure that wrongdoers admit their fault and fix the problem under the aegis of Government oversight, is a matter for Congress, not our Court."), *cert. granted and vacated*, 551 U.S. 1129 (U.S. Nov. 21, 2006) (No. 06-726), *abrogated by* United States v. Atlantic Research Corp., 551 U.S. 128 (2007), *remanded to* E.I. Dupont De Nemours & Co. v. United States, 508 F.3d 126 (3d Cir. 2007).

143. *See, e.g.*, Brian D. Langa, *Taken to the Cleaners: Potentially Responsible Parties That Sign CERCLA Consent Decrees May Face Unexpected Claims from Non-PRPs*, 28 L.A. LAW., June 2005, at 30, 34 ("The simplest solution to this problem would be to amend CERCLA to confirm that Section 113(f)(2) applies to Section 107(a) claims.").

144. *See, e.g.*, cases cited *supra* note 140.

145. *See* 42 U.S.C. § 9620(a)(1) (2006) (waiving sovereign immunity under CERCLA); United States v. Colorado, 990 F.2d 1565, 1569 (10th Cir. 1993) (citing Daigle v. Shell Oil Co., 972 F.2d 1527, 1531 (10th Cir. 1992)); Robert L. Glicksman, *Pollution on the Federal Lands III: Regulation of Solid and Hazardous Waste Management*, 13 STAN. ENVTL. L.J. 3, 12 (1994) ("The most severe hazardous waste contamination on federal lands typically occurs at sites owned or previously owned by the Departments of Defense (DOD) or Energy (DOE). These facilities generate a combined total of about twenty million tons of hazardous and

for the U.S. government to settle with private parties that had cleaned up sites with federal contamination. Private parties were at a loss to state a claim in contribution without first having been sued. Only the federal government has authority to bring actions under section 106.[146] While states and tribes could still file section 107 actions in addition to any section 107 actions brought by the federal government, these actions were unlikely and, on balance, unattractive. No contribution seemed possible for the volunteer without the federal government's intervention.[147] The federal government, in effect, could decide whether or not to bring the section 106 or 107 action, and when the cleanup included significant potential cross-claims for contribution against the United States, these requisite actions were not pursued. The federal government has alternate authorities to assure private party response actions at federal facilities without invoking CERCLA.[148] Without a claim for contribution and with little precedent supporting alternate theories of federal liability, the polluting side of the federal government was the big winner after *Aviall.* The federal government's dual role as both a CERCLA enforcer and a PRP accentuates the importance of alternate authorities to address sites with contamination due, at least in part, to the federal government.[149]

6. *Aviall*'s Signposts for *Burlington Northern*

Aviall pointed the way for *Burlington Northern* by underscoring the Court's reliance on the plain meaning of CERCLA and distaste for legislative history. The Court was willing to read the statute in a manner that disregarded legislative history, circuit court rulings and even private-party reliance on those precedents. In doing so, the Supreme Court categorically established that CERCLA provides an explicit right to contribution; one that is separate and distinct from the statute's other liability provisions.

Another signpost for the future was what the Court did not do. The Supreme Court did not clearly answer whether CERCLA authorizes joint and several liability. In fact, it did not expressly overrule much of the conflicting precedent in many of the circuit courts. Instead, it directed many questions to the federal courts:

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radioactive waste annually.").

146. *See* 42 U.S.C. § 9606(a).

147. *See id.* § 9613(f)(1).

148. *See, e.g.*, Resources Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k (2006).

149. See *Colorado*, 990 F.2d at 1583 (holding that the State of Colorado could bring state and federal claims against the United States to regulate hazardous waste at a federal facility), for an example of one authority that survived the *Aviall* decision but is of little value to private parties.

1. Were the courts of appeals correct in their rulings that section 107(a)(4)(B) does not provide a cause of action for joint and several liability by a private party that is itself a PRP?[150]

2. Does a section 107 cost recovery action allow for "a form of liability other than joint and several"?[151]

3. What is the relationship between sections 107 and 113?[152]

The Court remanded the section 107(a)(4)(B) claim for further consideration without deciding how to characterize the section 107 claim, i.e., whether it provides an implied right to contribution or an action for cost recovery and, if the latter, whether some form of liability other than joint and several is available.[153]

What the Justices did and what they left for another time are important considerations for understanding both *Burlington Northern* and *United States v. Atlantic Research Corp.*, "Book II," which answers some of the questions posed in *Aviall.*

B. Book II: *United States v. Atlantic Research Corp.*

As in any good trilogy, a theme connects the books. In this trilogy, the connection throughout is CERCLA liability, how far it extends, and who may wield its sword. In Book II, *Atlantic Research*, we learn the answer to a portion of question one: "Were the courts of appeals correct in their rulings that section 107(a)(4)(B) does not provide a cause of action for joint and several liability by a private party that is itself a PRP?" We start to understand the contours of the answer to question three, concerning the relationship between sections 107 and 113. The answer to question two is left for *Burlington Northern* to address.

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150. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 169 (2004) (citing by way of example to Bedford Affiliates v. Sills, 156 F.3d 416, 423-24 (2d Cir. 1998); Centerior Serv. Co. v. Acme Scrap Iron & Metal Corp., 153 F.3d 344, 349-56 (6th Cir. 1998); Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R., 142 F.3d 769, 776 (4th Cir. 1998); Pinal Creek Group v. Newmont Mining Corp., 118 F.3d 1298, 1301-06 (9th Cir. 1997); New Castle v. Halliburton NUS Corp., 111 F.3d 1116, 1120-24 (3d Cir. 1997); Redwing Carriers, Inc. v. Saraland Apartments, 94 F.3d 1489, 1496 n.7 (11th Cir. 1996); United States v. Colo. & E. R.R., 50 F.3d 1530, 1534-36 (10th Cir. 1995); United Techs. Corp. v. Browning-Ferris Indus., 33 F.3d 96, 98-103 (1st Cir. 1994)).

151. *Aviall*, 543 U.S. at 169-70.

152. *Id.* at 169.

153. *Id.* at 170-71.

1. Prior Decisions

Fortunately, for the cleanup of contaminated federal facilities and for other private parties hamstrung by the *Aviall* decision, the time between Books I and II was a relatively short three years. The facts in *Atlantic* demonstrated some of the problems described above with federal facilities and the possibility that the federal government would use *Aviall* to avoid contribution suits under CERCLA.[154] Atlantic Research Corporation ("ARC") sought contribution from the federal government for costs ARC incurred cleaning up the Shumaker Naval Ammunition Depot, which was operated by the U.S. Department of Defense ("DOD"). ARC was in the midst of final negotiations to settle its section 113 CERCLA suit with the DOD when the Supreme Court decided *Aviall*.[155] Settlement negotiations folded.[156] ARC then amended its complaint to seek recovery pursuant to section 107(a).[157] The United States filed a motion to dismiss.[158] Judge Barnes, while sympathetic to ARC's plight after *Aviall*, nonetheless granted the motion to dismiss after calling the *Aviall* decision a "sea change" for this case.[159] ARC appealed.[160]

Judge Rosenbaum for the Eighth Circuit heard ARC's appeal. He traced the lineage of circuit court decisions directing private parties whom were also PRPs to file under section 113[161] even though, prior to SARA's addition of the contribution provisions to the statute, private parties had successfully sought contribution, cost recovery, or both pursuant to section 107.[162] After careful consideration of the precedent in the Eighth Circuit on this issue,[163] he distinguished *Dico, Inc. v. Amoco Oil Co.* and followed the analysis provided by the Second Circuit's decision in *Consolidated Edison Co. v. UGI Utilities*;[164] Judge Rosenbaum ruled as follows:

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154. United States v. Atl. Research Corp., 459 F.3d 827, 829 (8th Cir. 2006).

155. *Id.*

156. *Id.*

157. *Id.*

158. United States v. Atl. Research Corp., 551 U.S. 128, 133 (2007).

159. Atl. Research Corp. v. United States, No. 02-CV-1199, 2005 U.S. Dist. LEXIS 20484, at *2, *10 (W.D. Ark. June 1, 2005).

160. *Atl. Research Corp.*, 459 F.3d at 830.

161. *Id.* at 832-33; *see, e.g.*, cases cited *supra* note 103.

162. *Atl. Research Corp.*, 459 F.3d at 830-33.

163. Dico, Inc. v. Amoco Oil Co., 340 F.3d 525, 529-31 (8th Cir. 2003) (showing the last of the line of circuit court decisions directing a responsible party to seek cost recovery only under section 113, and barring the potentially broader authority provided under section 107(a)(4)(B)).

164. 423 F.3d 90, 99 (2d Cir. 2005).

> We agree with our sister Circuit, and hold that it no longer makes sense to view [section] 113 as a liable party's exclusive remedy. This distinction may have made sense for parties such as Dico, which was allowed to seek contribution under [section] 113. But here, Atlantic is foreclosed from using [section] 113. This path is barred because Atlantic—like Aviall—commenced suit before, rather than "during or following," a CERCLA enforcement action. Atlantic has opted to rely upon [section] 107 to try to recover its cleanup costs exceeding its own equitable share. We conclude it may do so.[165]

The Eighth Circuit proceeded to weigh the issue of whether section 107 provided an implied right to contribution as was identified, but not resolved, by Justice Stevens[166] and disputed by Justice Scalia in his dissent to *Key Tronic Corp. v. United States*.[167] Both debates were recalled in Justice Ginsburg's dissent to *Aviall*.[168] The appeals court concluded, "we are satisfied that a right to contribution may be fairly implied from the text of [section] 107(a)(4)(B). Unlike some other statutes, CERCLA reflects Congress's unmistakable intent to create a private right of contribution."[169]

The United States' petition for certiorari was granted on January 19, 2007[170] to resolve the circuit split created by the Third Circuit's contrary ruling declining to allow recovery under section 107 to all private parties who were not "innocent."[171]

2. The Supreme Court's Textual Analysis and Holding

The Supreme Court returned to its favored means of resolving disputes involving statutes: the plain meaning of the statute.[172] The

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165. *Atl. Research Corp.*, 459 F.3d at 834-35.

166. Key Tronic Corp. v. United States, 511 U.S. 809, 818 n.11 (1994).

167. *Id.* at 822 (Scalia, J., dissenting in part) (arguing that section 107 provides an express right to cost recovery).

168. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 172 (2004) (Ginsburg, J., dissenting).

169. *Atl. Research Corp.*, 459 F.3d at 835.

170. United States v. Atl. Research Corp., 549 U.S. 1177 (2007).

171. *See* E.I. DuPont de Nemours & Co. v. United States, 460 F.3d 515, 542 n.32 (3d Cir. 2006), *cert. granted and vacated*, 551 U.S. 1129 (U.S. Nov. 21, 2006) (No. 06-726), *abrogated by* United States v. Atlantic Research Corp., 551 U.S. 128 (2007), *remanded to* E.I. DuPont de Nemours & Co. v. United States, 508 F.3d 126 (3d Cir. 2007).

172. *Aviall*, 543 U.S. at 167 ("[W]e must, if possible, construe a statute to give every word some operative effect. . . . [I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.") (citations omitted).

language in question involved the relationship between the two clauses in section 107 providing a right of recovery of cleanup costs. The first, section 107(a)(4)(A) provides governments with the following authority to recover from the afore listed "covered persons" or PRPs[173]: "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan."[174] Similarly, subsection (B) directly thereafter provides recovery of: "any other necessary costs of response incurred by any other person consistent with the national contingency plan."[175]

The Court considered and rejected the government's narrow interpretation of subsection (B), which the United States argued applied only to innocent parties not to any of the PRPs listed in section 107.[176] The Court rejected this argument because the breadth of parties that may be held responsible under CERCLA would essentially render subsection (B) meaningless. Even "innocent" landowners, such as those whose land was contaminated by another, can be held responsible, the Court observed, under the broad meaning of the statute.[177] And the fact that CERCLA is a strict liability statute made the point even clearer:

> But even parties not responsible for contamination may fall within the broad definitions of PRPs in [sections] 107(a)(1)-(4). . . . The Government's reading of the text logically precludes all PRPs, innocent or not, from recovering cleanup costs. Accordingly, accepting the Government's interpretation would reduce the number of potential plaintiffs to almost zero, rendering [section] 107(a)(4)(B) a dead letter. [178]

Applying the maxim, "[s]tatutes must be 'read as a whole,'"[179] Justice Thomas detailed the textual links between the two provisions:

> Each concerns certain costs that have been incurred by certain entities and that bear a specified relationship to the national contingency plan. Bolstering the structural link, the text also denotes a relationship between the two provisions. By using the

173. 42 U.S.C. § 9607(a)(1)-(4) (2006) (enumerating liability for current owners and operators, owners and operators at the time of disposal, certain "arrangers," and transporters that selected the site for disposal).

174. *Id.* § 9607(a)(4)(A).

175. *Id.* § 9607(a)(4)(B).

176. United States v. Atl. Research Corp., 551 U.S. 128, 134-35 (2007).

177. *Id.* at 136.

178. *Id.* at 136-37 (citing 42 U.S.C. § 9607(a)(1)).

179. *Id.* at 135 (citation omitted).

> phrase "other necessary costs," subparagraph (B) refers to and differentiates the relevant costs from those listed in subparagraph (A).[180]

His analysis for the unanimous Court concluded that the interpretation of the two provisions are complementary, in that subsection (B) only precludes the parties eligible to recover under subsection (A) and thus allows liable parties and others to recover costs within the scope of subsection (B).[181]

The Court affirmed the Eighth Circuit's judgment that ARC may use section 107(a)(4)(B) to recover costs from other PRPs even though ARC was itself also a PRP.[182] The Court did not take up the issue of implied rights of contribution under the same section.[183]

3. *Atlantic*'s Legacy

Atlantic restores private parties to "much the same place they were before the *Aviall* decision upset CERCLA contribution and cost recovery norms."[184] And more. After *Atlantic*, CERCLA clearly provides at least three ways for private parties, including liable parties, to recover costs, depending on the circumstances that resulted in payment of those costs:

> Cost Recovery: to recover necessary costs incurred voluntarily to prepare for or directly clean up contamination in line with the requirements of the national contingency plan.[185] The Court confirmed that such claims invoke strict liability against the "covered persons"—potentially liable parties—described in section 107(a)(1)-(4).[186]
>
> Contribution:
>
> a. Costs—those costs paid to reimburse others who incurred direct costs addressing contamination and who sought recovery of their costs under section 106 or 107 from the party seeking contribution—may be reallocated among other liable parties when the costs reimbursed exceed the "fair share"

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180. *Id.*

181. *Id.* at 135-36.

182. *Atl. Research Corp.*, 551 U.S. at 141.

183. *See id.* at 141 n.8.

184. Judy & Armstrong, *supra* note 102, at 16.

185. 42 U.S.C. § 9607(a)(4)(B) (2006).

186. *Atl. Research Corp.*, 551 U.S. at 136 ("CERCLA [section] [107] is a strict liability statute.") (citations omitted).

that the pleading party may properly be responsible for.[187]

b. Costs paid following resolution of "liability to the United States or a State . . . in an administrative or judicially approved settlement" may also be reallocated among other liable parties when the settlement exceeds the "fair share" that the pleading party may properly be responsible for.[188]

Many parties whose claims were summarily dismissed after *Aviall* reconstituted their claims as section 107(a)(4)(B) "cost recovery" claims.[189]

4. *Atlantic*'s Signposts for *Burlington Northern*

Atlantic answered some of the questions posed in *Aviall.* Some questions were answered in part, others not at all. Enough questions remain to carry the saga of Superfund liability to the next book; the issues to consider for the *Burlington Northern* analysis include the following points from *Atlantic*:

a. Contribution Is Defined and Rooted in the Common Law.

Justice Thomas presaged the joint-and-several-liability portions of *Burlington Northern* by instructing the government on the finer distinctions between "contribution" and "apportionment":

> The Government, however, uses the word "contribution" as if it were synonymous with any apportionment of expenses among PRPs. ("Contribution is merely a form of cost recovery, not a wholly independent type of relief") . . . . This imprecise usage confuses the complementary yet distinct nature of the rights established in [sections] 107(a) and 113(f).[190]

The Court proceeded to define contribution and to root CERCLA in the common law:

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187. *Id.* at 138-39 (discussing the conditions necessary for a claim in contribution subject to section 113(f)).

188. *Id.* at 138 n.5 (quoting 42 U.S.C. § 9613(f)(3)(B)).

189. In *Aviall*, the Court held that section 113(f) does not allow a person responsible for clean up, but not a party to the original litigation, to receive contribution. Cooper Indus., Inc. v. Aviall, 543 U.S. 157, 165-66 (2004). Therefore, others began to seek recovery under section 107(a) from PRPs for costs incurred in voluntary clean up. *Atl. Research Corp.*, 551 U.S. at 134-35.

190. *Atl. Research Corp.*, 551 U.S. at 138 (citations omitted).

> Contribution is defined as the "tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault." Nothing in [section] 113(f) suggests that Congress used the term "contribution" in anything other than this traditional sense.[191]

The Court reminded the government that while contribution as described by section 113 (both (f)(1) and (f)(3)(B)[192]) "permits suit before or after the establishment of common liability[,] [i]n either case, a PRP's right to contribution under [section] 113(f)(1) is contingent upon an inequitable distribution of common liability among liable parties."[193]

b. Section 107 Liability Is Distinct from Contribution.

The link between contribution and sections 106 and 107 is that these two sections describe the common liability that may be inequitably divided.[194] As the Court clarified, "[section] 107(a) permits cost recovery (as distinct from contribution) by a private party that has itself incurred cleanup costs."[195] Section 107 recoverable costs relate to different PRP actions, e.g., cleanup, study, or other site-specific work, as distinguished from actions, e.g., reimbursing costs paid by other parties or paying money as a consequence of a settlement or court judgment, which bring PRPs within the purview of section 113.[196] "[B]y reimbursing response costs paid by other parties, the PRP has not incurred its own costs of response and therefore cannot recover under [section] 107(a)."[197] In other words, reimbursed costs are recoverable in claims for contribution under section 113.

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191. *Id.* at 138 (quoting BLACK'S LAW DICTIONARY 353 (9th ed. 2009)). The reference to "proportionate shares" and "percentages of fault" in the context of section 113 would be noteworthy in itself were it not for the fact that the Court later cited favorably to the "equitable apportionment" authority given to district courts under section 113(f)(1). *Id.* at 138-40 ("In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.") (quoting 42 U.S.C. § 9613(f)(1) (2006)).

192. *Id.* at 138 n.5.

193. *Id.* at 138-39.

194. "Section 113(f)(1) authorizes a contribution action to PRPs with common liability stemming from an action instituted under [section] 106 or [section] 107(a)." *Id.* at 139.

195. *Id.*

196. *See Atl. Research Corp.*, 551 U.S. at 139.

197. *Id.*

c. But Sections 107 and 113 May Overlap.

Footnote six of the decision, however, limits the distinctions between these two provisions in relation to private party voluntary cleanup pursuant to section 107 and in relation to reimbursement pursuant to a legal judgment or settlement pursuant to section 113:

> We do not suggest that [sections] 107(a)(4)(B) and 113(f) have no overlap at all. For instance, we recognize that a PRP may sustain expenses pursuant to a consent decree following a suit under [section] 106 or [section] 107(a). In such a case, the PRP does not incur costs voluntarily but does not reimburse the costs of another party. We do not decide whether these compelled costs of response are recoverable under [section] 113(f), [section] 107(a), or both. For our purposes, it suffices to demonstrate that costs incurred voluntarily are recoverable only by way of [section] 107(a)(4)(B), and costs of reimbursement to another person pursuant to a legal judgment or settlement are recoverable only under [section] 113(f). Thus, at a minimum, neither remedy swallows the other, contrary to the Government's argument.[198]

Further, the Court did not use the distinctions described in subsection (2) above to rule that section 107 does not provide an implied right to contribution. The Court declined to address the issue, although in doing so, Justice Thomas cited cases disapproving of such implied rights.[199]

d. The Court Declined to Rule on Whether CERCLA Authorizes Joint and Several Liability.

The *Atlantic* opinion both clarifies and confuses. The Court wrestled with contribution and placed it within the common law context. It acknowledged its application when one party is made to pay more than its fair share, all without saying that CERCLA authorizes joint and several liability. *Atlantic* clarified that contribution is all that section 113 authorizes. The Court read section 107 to provide a cause of action to PRPs in certain "procedural circumstances."[200] It defined section 107 as authorizing recovery for direct cleanup-related costs and, now the ambiguous parts, perhaps other types of, as of yet, not clearly defined costs.

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198. *Id.* at 139-40 n.6 (citations omitted).

199. *Id.* at 141 n.8.

200. *See id.* at 139 ("[T]he remedies available in [sections] 107(a) and 113(f) complement each other by providing causes of action 'to persons in different procedural circumstances.'") (quoting Consol. Edison v. UGI Utils., 423 F.3d 90, 99 (2d Cir. 2005)).

Most ambiguous of all, however, and the siren call for *Burlington Northern*, is buried in footnote seven: "We assume without deciding that [section] 107(a) provides for joint and several liability."[201]

The sword of strict liability is handed to private parties but the breadth of its powers remains sheathed in mystery. We do not learn from *Atlantic* the answer to Justice Thomas's question in *Aviall* of whether section 107 provides for a "form of liability other than joint and several."[202] Strict liability was acknowledged, even though such acknowledgement was not necessary to the fundamental issues addressed by the Court.[203] On the joint-and-several-liability issue Justice Thomas said, "assume."[204] This assumption leaves us with only partial answers to the other questions posed in *Aviall*.[205] Concerning whether the courts of appeals were correct in their rulings that section 107(a)(4)(B) does not provide a cause of action for private parties, we learn the courts of appeals were incorrect, although the Court did not explicitly overrule their decisions. The complete question, though, queried whether these courts were correct in regard to private parties not having access to joint and several liability under section 107. *Atlantic* did not answer this question. *Atlantic* begins to reveal the relationship between sections 107 and 113, the third question posed by *Aviall*. Three threads remain for *Burlington Northern* to weave into the third installment of the CERCLA trilogy.

C. Book III: *Burlington Northern & Santa Fe Railway Co. v. United States*

As described above, the *Burlington Northern* facts present the railroad-landowner that leased its property to a neighboring agricultural chemical distributor. The distributor, B&B, had already contaminated its own property at the time of the lease and similar spills and drum storage thereafter took place on the railroad-landlord's property. The district court ruled that the harm was capable of division and held the Railroad responsible for only nine percent of the costs. The Ninth Circuit reversed. The appeals court concluded: "Apportionment is the exception, available only in those circumstances in which adequate records *were* kept and the harm *is* meaningfully divisible."[206] Judge Berzon's emphasis on keeping

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201. *Id.* at 140 n.7.

202. Cooper Indus., Inc. v. Aviall Servs., Inc., 543 U.S. 157, 170 (2004).

203. That the Supreme Court acknowledged CERCLA's application of strict liability is an important milestone in its own right, however.

204. *Atl. Research Corp.*, 551 U.S. at 140 n.7.

205. *See* discussion *supra* notes 150-56.

206. United States v. Burlington N. & Santa Fe Ry. Co., 520 F.3d 918, 945-46 (9th Cir. 2008).

detailed records as a condition precedent for finding a reasonable basis for apportionment diverges from traditional analyses of divisibility wherein probability, not certainty, is required for a defendant to sustain its burden of proving a reasonable basis for dividing the harm and hence avoiding joint and several liability. The Railroads' (and Shell's) appeal laid bare the sword of liability for the Supreme Court to divine.

1. The Supreme Court's Common Law Analysis

Unlike its decisions in Books I and II, the Supreme Court did not rely on the "plain meaning" of the statute to resolve the joint-and-several-liability issues before the Court. The Court recognized the dual nature of CERCLA, a statute that sets forth explicit rights and responsibilities and also left open certain key questions for the courts and the common law to resolve.[207] With respect to questions invoking joint and several liability, CERCLA is a "common law statute." William Eskridge describes the iterative approach typical of decisions related to common law statutes as follows:

> [W]hen Congress has declared an important public policy in general, sweeping terms, and has essentially left the courts free to mold the contours of that policy, courts should engage in essentially a common law process of creating specific rules, and of rescinding those rules that over time prove unworkable or inconsistent with general policy. Just as administrative agencies that are delegated lawmaking responsibilities to fill statutory gaps are routinely allowed to change their interpretations of the statute, courts to which Congress has implicitly given the responsibilities for filling in the details of common law statutes should also be given the leeway to experiment and overrule prior interpretations in a common law fashion.[208]

The shifting emphasis given to negligence and strict liability in the history of torts illustrates the "evolving" nature of the common law.[209]

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207. Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1880 (2009) ("Rather, Congress intended the scope of liability to 'be determined from traditional and evolving principles of common law[.]'" (quoting United States v. Chem-Dyne Corp., 572 F. Supp. 802, 808 (S.D. Ohio 1983))).

208. *See* William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1377-78 (1988).

209. *See* George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 539 (1972) (questioning the theory that "[s]trict liability is said to have prevailed in early tort history, fault supposedly held sway in the late nineteenth century, with strict liability now gaining ground" and thereafter exploring another theory to explain why the common law changes over time).

Much of this "evolution" is recorded in the various Restatements of Torts, the Second version of which Justice Stevens turned to for much of his analysis of joint and several liability:

> [W]hen two or more persons acting independently caus[e] a distinct or single harm for which there is a reasonable basis for division according to the contribution of each, each is subject to liability only for the portion of the total harm that he has himself caused. . . . But where two or more persons cause a single and indivisible harm, each is subject to liability for the entire harm.[210]

Characteristic of the ebb and flow of the common law and why restatements of law are merely advisory, Justice Stevens analyzed the facts using the Restatement (Second) of Torts even though the Restatement (Third) of Torts was published in 2000.[211] The Court turned to "[t]he seminal opinion on the subject of apportionment in CERCLA actions,"[212] *United States v. Chem-Dyne Corp.*,[213] for guidance on both the legislative history of the joint-and-several-liability provisions of the statute and the use of the Restatement (Second) to apportion common liabilities. On the legislative front, it is clear why the joint-and-several-liability provisions make CERCLA a common law statute: "After reviewing CERCLA's history, Chief Judge Rubin concluded that although the Act imposed a 'strict liability standard,' it did not mandate 'joint and several' liability in every case. Rather, Congress intended the scope of liability to 'be determined from traditional and evolving principles of common law.'"[214]

Nearly every case to address the issue of apportionment of harm in the CERCLA context refers to *Chem-Dyne* and in turn to the Restatement (Second) of Torts sections 433A and 881 on which *Chem-Dyne* relies. Following *Chem-Dyne*, Justice Stevens recognized:

> Not all harms are capable of apportionment, . . . and CERCLA defendants seeking to avoid joint and several liability bear the burden of proving that a reasonable basis for apportionment exists. . . . When two or more causes produce a single, indivisible harm, "courts have refused to make an arbitrary apportionment

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210. *Burlington N.*, 129 S. Ct. at 1881 (citations omitted) (quoting *Chem-Dyne Corp.*, 572 F. Supp. at 809 (citing Restatement (Second) of Torts, §§ 433A, 875, 881 (1976))).

211. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY (2000).

212. *Burlington N.*, 129 S. Ct. at 1880.

213. 572 F. Supp. 802 (S.D. Ohio 1983).

214. *Burlington N.*, 129 S. Ct. at 1880-81 (quoting *Chem-Dyne Corp.*, 572 F. Supp. at 800, 805).

> for its own sake, and each of the causes is charged with responsibility for the entire harm."[215]

Although to this point in the opinion, Justice Stevens is treading a well-worn path on the application of the principles of apportionment to CERCLA, the Court would have done well to examine the 160 cases to cite *Chem-Dyne* at the time of the decision. Contrary to the district court's characterization of the *Burlington Northern* facts, there are no "classic" [216] CERCLA cases finding divisibility in terms of degree, whether measured in terms of time, the contribution of hazardous substances to the site, or anything else for that matter. At the time of the Supreme Court's decision, only four cases of the 160 federal court opinions citing *Chem-Dyne* found that the defendants had met their burden of proving divisibility or of proving a reasonable basis therefore.[217] Four cases in nearly thirty years of CERCLA jurisprudence is hardly sufficient to describe any of these apportionment theories as "classic."

Justice Stevens accepted the district court's "classic" label and looked no further into the basis for it. This inquiry would show that the apportionment issue is confused with contribution in some of the *Chem-*

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215. *Id.* at 1881 (citing *Chem-Dyne Corp.*, 572 F. Supp. at 810 (quoting Restatement (Second) of Torts § 433A, cmt. I (1964))).

216. *Id.* at 1882 ("[T]he District Court ultimately concluded that this was 'a classic "divisible in terms of degree" case, both as to the time period in which defendants' conduct occurred, and ownership existed, and as to the estimated maximum contribution of each party's activities that released hazardous substances that caused Site contamination.'").

217. *See generally In re* Bell Petroleum Servs., Inc., 3 F.3d 889, 897, 903 (5th Cir. 1993) ("Even though it is not possible to determine with absolute certainty the exact amount of chromium each defendant introduced into the groundwater, there is sufficient evidence from which a reasonable and rational approximation of each defendant's individual contribution to the contamination can be made."); United States v. Vertac Chem. Corp., 364 F. Supp. 2d 941, 956, 965 (E.D. Ark. 2005) (finding a generator not liable for cleanup at a landfill at which they did not dispose waste—not exactly an apportionment decision but more of an evading liability altogether because the elements of liability were not met for that site—but the court framed its conclusions in terms of apportionment); Dent v. Beazer Materials & Servs., Inc., 993 F. Supp. 923, 945-46 (D.S.C. 1995) (holding that owner liability is divisible from successor-generator/operator's liability without any analysis as to why); United States v. Broderick Inv. Co., 862 F. Supp. 272, 276-77 (D. Colo. 1994) (finding Burlington Northern not liable as an owner for the costs of response for a groundwater plume containing the same chemical as the plume for which they were liable: "Since neither BN nor its predecessor ever had an ownership interest in the land on which the processing plant stood, and that plume has neither merged with the pond plume nor migrated onto the Parcel, BN is not responsible or liable for the plume emanating from the processing plant area").

Dyne-citing cases. Some of these cases had used *Chem-Dyne* to justify an implied right of contribution under section 107 when parties sought to shift costs between liable parties themselves.[218] As described above in the *Atlantic* discussion, contribution is a different analysis from apportionment, so those cases do not reflect what the Court did in *Burlington Northern* and should not be considered in evaluating the merits of an apportionment of liability analysis. Many more cases gave parties the chance to prove divisibility in order to avoid joint and several liability, but in almost every case the effort failed. Even when a magistrate judge found a basis for divisibility, on review, these findings were always rejected.

Justice Stevens narrowed the question before the Court after determining that the parties did not disagree on the law as laid down by *Chem-Dyne*, nor on the possibility that the harm in *Burlington Northern* was "theoretically capable of apportionment."[219] He focused the question before the Court to whether or not the district court's decision finding divisibility on the evidence presented in *Burlington Northern* was *reasonable*: "The question then is whether the record provided a reasonable basis for the District Court's conclusion that the Railroads were liable for only [nine percent] of the harm caused by contamination at the Arvin facility."[220]

2. Holding

The Court concluded that "the facts contained in the record reasonably supported the apportionment of liability."[221] The Court found that the size of the leased parcel and the duration of the lease was a reasonable starting point for the divisibility analysis given two facts in the district court's findings. First, the findings delineated the most significant contamination at the Arvin facility at the unlined sump and pond, both of which were most distant from the Railroads' parcel. Second, "the Railroad parcel contributed to no more than [ten percent] of the total site contamination, some of which did not require remediation."[222]

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218. *Chem-Dyne* predated Congress's SARA amendments, which provided an explicit right to contribution. *Compare* 42 U.S.C. § 9607(a) (2006), *with* United States v. Chem-Dyne Corp., 572 F. Supp. 802 (S.D. Ohio 1983).

219. *Burlington N.*, 129 S. Ct. at 1881 ("Neither the parties nor the lower courts dispute the principles that govern apportionment in CERCLA cases, and both the District Court and Court of Appeals agreed that the harm created by the contamination of the Arvin site, although singular, was theoretically capable of apportionment.").

220. *Id.*

221. *Id.* at 1882-83.

222. *Id.* at 1883 (citation omitted).

While the Court considered this finding "reasonable," it concerned the Court because of the lack of detailed evidence about the Railroad parcel's contribution to the B&B contamination. The Court acknowledged the usual problem in multi-chemical sites that the quantity of pollutants deposited in one or another portion of a facility does not equate with each owner's share of the harm caused by the contamination. The evidence did not show the exact amount of hazardous substances that migrated to the B&B parcel from the Railroad parcel and the "exact percentage of harm caused by each chemical."[223] That said, however, the Court recognized that the evidence supported a finding that "fewer spills occurred on the Railroad parcel and that of those spills that occurred, not all were carried across the Railroad parcel to the B&B sump and pond from which most of the contamination originated."[224] Moreover, the District Court's conclusion that the Railroad parcel contributed only Nemagon and Dinoseb in quantities requiring remediation was strengthened by the fact that "no D-D spills on the Railroad parcel required remediation."[225]

Even so, the Court was troubled that the record was unclear in regard to whether Nemagon and Dinoseb contributed only two-thirds of the contamination driving remediation.[226] The Court rationalized away this concern by using the district court's "error factor" to compensate for the possibility that the two chemicals were the entire reason for the remediation. The Court found that the result was the same if the error-factor was included in the calculation:

> Had the district court limited its apportionment calculations to the amount of time the Railroad parcel was in use and the percentage of the facility located on that parcel, it would have assigned the Railroads [nine percent] of the response cost. By including a two-thirds reduction in liability for the Nemagon and dinoseb with a [fifty percent] "margin of error," the District Court reached the same result.[227]

In effect, Justice Stevens's decision for the eight-justice majority concluded that the district court's opinion supported the apportionment based on the percentage of the costs appropriately attributable to the railroad, although for different reasons.[228] Justice Ginsburg dissented on the

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223. *Id.*

224. *Id.*

225. *Burlington N.*, 129 S. Ct. at 1882-83.

226. *Id.* at 1883.

227. *Id.*

228. *Id.* ("Because the District Court's ultimate allocation of liability is supported by the evidence and comports with the apportionment principles outlined above, we reverse the Court of Appeals' conclusion that the Railroads are

basis that the parties had not pled apportionment and thus the government had no chance to rebut the district court's conclusions at trial. She argued that the Court should remand the case to the district court—but did so after acknowledging the district court's work as a "heroic labor."[229] On the deferential reasonable basis review, Judge Wanger's labor paid off for Burlington Northern.

III. Why *Burlington Northern* Is Not the Sword of Damocles for Joint and Several Liability

A. Coming Full CERCLA: How *Burlington Northern* Answered the Remaining Questions in the CERCLA Trilogy

The questions left to be answered by *Burlington Northern* centered on the role of joint and several liability in CERCLA. The answer is now clear: CERCLA section 107 allows for the common law application of joint and several liability, at least in suits between the government and private parties, i.e., under section 107(a)(4)(A). *Burlington Northern* does not explicitly answer the question whether or not such claims may be brought by private parties in a cost recovery claim pursuant to section 107(a)(4)(B). The inference, however, is that joint and several liability is a consequence of facts not of words, and as such joint and several liability is authorized under either subsection of section 107.[230] On the relationship between section 107 and 113 we learn more but not as much more as some private parties would like. At root, this decision is about the standard of review that appellate courts may use when reviewing district court decisions apportioning harm among jointly and severally liable parties. Justice Stevens assumed that there was a reasonable basis for apportioning the harm and only looked to whether the district court's decision was reasonably supported by the record.[231]

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subject to joint and several liability for all response costs arising out of the contamination of the Arvin facility.").

229. *Id.* at 1885-86 (Ginsburg, J., dissenting).

230. One could argue based on the "plain language" that the provision authorizing governments and tribes to recover "all" costs of response not inconsistent with the National Contingency Plan under section 107(a)(4)(A) may somehow authorize joint and several liability. The "any other" costs of response wording in section 107(a)(4)(B), in contrast, might be argued to authorize something else. Textual arguments such as these, however, were not endorsed by a court usually friendly to such arguments so it seems unlikely they will be read to mean some difference in the application of joint and several liability to claims made by private parties.

231. *Burlington N.*, 129 S. Ct. at 1883.

B. The Apportionment Holding in *Burlington Northern* Is Nothing New.

As the Supreme Court stated, they relied on a 1983 case, *Chem-Dyne*, that pre-dated Congress's addition of explicit contribution provisions into the statute. *Burlington Northern* did nothing to alter the principles set forth in that case, which federal courts have relied on for years to discern whether or not joint and several liability may be voided by a reasonable apportionment of the harm. The Supreme Court never answered the question of what the harm is in a Superfund case involving owners who did not operate or benefit significantly from the contamination. The case is useful to consider when apportioning harm between owners, but the facts of this case may be unique in ways that render it less effective at sheathing the blade of joint and several liability in future actions, especially in actions involving multiple generators, which had been the source of most claims for apportionment under CERCLA.

The facts in this case make it unlikely to be readily replicated. Since the common law analysis is at heart a factual analysis, the facts matter. The *Burlington Northern* decision apportions harm at an unusually simple site.

C. *Burlington Northern* Presents Unique Facts.

1. *Burlington Northern* Only Involves "Owner-PRPs."

First, the parties involved are only one type of PRP, i.e., owners. The Court apportioned the harm among owners of the two properties (or at most between an owner and an owner-operator where there is no distinction between the owner and the operator), so whatever way harm is defined, the comparison is "apples to apples." There are no generators to complicate how the harm should be characterized. The problem for judges is that the factors that may provide a reasonable basis for dividing the harm between owners, when only owners are seeking divisibility, such as property boundaries and the length of a lease, are not useful in evaluating more complicated sites, where judges must divide harm caused by chemicals of different types and characteristics brought by multiple generators. Finding a common way to analyze the harm in a more complicated site may not be possible. Finding a reasonable basis for dividing harm between owners, operators and generators is much more difficult to characterize and reasonably divide.

2. *Burlington Northern* Involves a Small Number of Total PRPs.

Not only are the classes of PRPs limited, but the total number of PRPs are unusually small. Part of what made this site simple (and unique) is also

what made it a candidate for an apportionment claim. This is the fact that there were few parties responsible for the contamination and the one most culpable, B&B, was insolvent. As sellers of useful products, the other sellers of pesticides, like Shell, were not liable at all because, as the Supreme Court ruled in the first part of the decision, they did not qualify as "arrangers" under the facts presented at the Arvin site. Further simplifying the analysis were the lack of past owners or past owner-operators. Only the Railroads and B&B owned the properties since the contamination began. Apportioning harm among fewer parties, while rarely easy, is nonetheless "easier" than apportioning harm among many parties.

3. *Burlington Northern* Involves Unique Environmental Circumstances.

The facts surrounding the site and the chemicals involved in *Burlington Northern* lend themselves more readily to an owner divisibility analysis. These facts include the grading of the site in a manner that resulted in most of the contamination ending up on the B&B parcel and the unique climate and soil characteristics that suggest many of the chemicals may have evaporated, or at least reduced their likelihood of migrating to ground water from the Railroads' parcel.

Moreover, the Supreme Court and the district court recognized only a few hazardous substances at the site. Divisibility would be much more difficult if the number was five, ten, or more hazardous substances. Indeed, in one of the few other cases to recognize a reasonable basis for divisibility of harm, *In re Bell Petroleum Services*, there was only one hazardous substance involved in the divisibility analysis.[232] Cases involving one hazardous substance may be more likely candidates for apportionment because of the difficulties of dividing the harm among even three substances, which the Supreme Court contemplated in its concern about the district court's assumptions about some of the hazardous substances.

4. The Railroads Profited Little from the Contamination and Were Likely to Benefit Little from the Remediation.

The temporal component of this case is unique in that Burlington Northern leased its property to B&B some fifteen years *after* B&B had begun its sloppy operations. This supports the inference that the Railroads had little to do with the creation of the harm. Contamination of their property by the neighboring property might even predate the lease. It is possible the Railroads would have been absolved from any CERCLA liability had they not entered into the lease with B&B and had the third-

232. *In re* Bell Petroleum Servs., Inc., 3 F.3d 889, 903 (5th Cir. 1993).

party defense or the contiguous-landowner exemption to CERCLA liability been in effect at that time.[233] The remediation also provided little benefit to the Railroads since the majority of the action involved the B&B parcel. The lease also provided little financial benefit to the Railroads. This latter point has little to do with divisibility and more to do with contribution but, as will be discussed below, the district court confused apportionment and contribution.

5. Contribution Was Not Available to *Burlington Northern* to Balance the Equities.

Justice Stevens acknowledged that the district court may have confused apportionment and contribution in its analysis:

> As the Governments point out, insofar as the District Court made reference to equitable considerations favoring apportionment, it erred. Equitable considerations play no role in the apportionment analysis; rather, apportionment is proper only when the evidence supports the divisibility of the damages jointly caused by the PRPs.... [W]hile contribution actions allow jointly and severally liable PRPs to recover from each other on the basis of equitable considerations.[234]

Justice Stevens considered this confusion harmless error because the detailed findings provided by the district court provided a reasonable basis for apportioning the harm.

While the Supreme Court may consider the confusion "of no consequence,"[235] it is likely the district court would not have ventured into the laborious apportionment analysis had contribution provided a meaningful remedy for the Railroads. Judge Wanger expressed frustration with the predicament presented by the *Burlington Northern* facts:

> The concept that a passive owner of a contiguous parcel, not representing more than [nineteen percent] in area of a CERCLA site, operated less than [forty-four percent] of the time, where substantially smaller volumes of hazardous substance releases occurred, should be strictly liable for the entire site remediation,

233. *See* 42 U.S.C. § 9607(b)(3), (q) (2006). Note: these defenses would be contingent on there having been no other contractual relationships between B&B and the Railroads and the Railroads having been responsible with regard to their own hazardous substances.

234. *Burlington N.*, 129 S. Ct. at 1882 n.9.

235. *Id.*

> because no other responsible party is judgment-worthy, takes strict liability beyond any rational limit.[236]

The lack of meaningful claims for contribution shaped the district court's willingness to apportion the harm sua sponte.[237] If the past is any indication, other district courts will not so willingly shoulder the burden of an apportionment analysis when a contribution analysis will suffice to resolve the issues remaining between the parties. Moreover, the United States and others opposed to apportionment will not neglect to rebut apportionment claims in the future.

6. *Burlington Northern* Is a Federal Appellate Court Standard-of-Review Decision.

It is easy for torts and environmental law professors such as myself to overlook the evidentiary and procedural aspects of this controversial decision. In the end, however, it is the procedural and evidentiary points that cut the Sword of Damocles from its perilous position over CERCLA joint and several liability and set the sword aside for another time. Federal appellate courts review fact-intensive district court decisions for "abuse of discretion" or unreasonableness.[238] In general the deference owed to a district court increases as the factual complexity of the decision increases.[239] "The appeal turns on the appropriateness of the district court's reasoning."[240] These are considerations the Supreme Court focused on in its review of this district court's apportionment on the facts presented in *Burlington Northern*. The Supreme Court did not decide what harm is divided in the CERCLA context. It merely confirmed the applicability of joint and several liability and the role of apportionment related thereto. *Burlington Northern* serves to correct the Ninth Circuit's overly restrictive review of the district court's conclusions. The Ninth Circuit declared that "[a]pportionment is the exception, available *only* in those circumstances in which adequate records were kept and the harm is meaningfully divisible."[241]

While apportionment *is* the exception and I believe it will continue to be the exception even after *Burlington Northern*, it is not restricted only to sites with perfect records. Apportionment is, however, restricted to where

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236. United States v. Atchison, No. CV-F-92-5086 OWW, 2003 WL 25518047, at *87 (E.D. Cal. July 15, 2003).

237. *Burlington N.*, 129 S. Ct. at 1882 (Ginsburg, J. dissenting).

238. DAVID G. KNIBB, FEDERAL COURT OF APPEALS MANUAL § 31:4 (5th ed. 2007).

239. *Id.*

240. *Id.*

241. *Burlington N.*, 520 F.3d 918, 945-46 (9th Cir. 2008) (emphasis altered).

harm is meaningfully divisible *or* there is a reasonable basis for divisibility. If a district court provides a reasonable basis and reasonable support in the record for divisibility of the harm at the site, the appellate courts should defer to their conclusions. And unlike the *Burlington Northern* case, the parties will be sure to address apportionment claims at trial and in their briefs.

CONCLUSION

The Supreme Court's CERCLA "trilogy" brings us "full CERCLA" or back to where we began when Congress passed CERCLA "to make spills or dumping of hazardous substances less likely through liability, enlisting business and commercial instincts for the bottom line in place of traditional regulation."[242] By restoring cost recovery to private parties as the Supreme Court did in *Atlantic* and clarifying the role of joint and several liability and its related claims of contribution and sometimes apportionment, the Supreme Court guides those involved in cleaning up hazardous waste by establishing the foundations of CERCLA liability. CERCLA's sword of joint and several liability is sharp, newly burnished in *Burlington Northern*, and available to all who cleanup hazardous substances on their own initiative and consistent with the National Contingency Plan. But joint and several liability must not be wielded indiscriminately by either governments or private parties. When the United States or others corner PRPs through procedural games that unfairly void a party's claim to contribution, the district courts may, by their own initiative, find a basis for apportioning harm. Hopefully, however, the next time the district court will consider whether the burden of proof is met. As the Supreme Court stated:

> Not all harms are capable of apportionment, however, and CERCLA defendants seeking to avoid joint and several liability bear the burden of proving that a reasonable basis for apportionment exists. . . . When two or more causes produce a single, indivisible harm, "courts have refused to make an arbitrary apportionment for its own sake, and each of the causes is charged with responsibility for the entire harm."[243]

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242. ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 394 (6th ed. 2009) (quoting Philip T. Cummings, *NEPA to CERCLA: Completing the Circle*, 7 ENVTL. F. 6, 11 (1990)).

243. Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1881 (2009) (citing United States v. Chem-Dyne Corp., 572 F. Supp. 802, 810 (S.D. Ohio 1983) (quoting RESTATEMENT (SECOND) OF TORTS § 433 cmt. i (1964)).

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THE 2008-2009 TERM AND THE CLEAN WATER ACT: JUSTICE KENNEDY WHERE ART THOU?

MARK LATHAM*

Abstract: In the controversial *Rapanos* decision Justice Kennedy grounded his significant nexus test in the often quoted objective of the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." In doing so, Justice Kennedy appeared to recognize the important ecological underpinnings of the Clean Water Act.

This Article explores the divergence from *Rapanos* by Justice Kennedy in the two Clean Water Act cases decided by the Court during the 2008-2009 Term. This new approach revealed by Justice Kennedy during the 2008-2009 Term is inconsistent with the analytical approach he followed in *Rapanos*. This is an unfortunate development because this new approach by Justice Kennedy is not only inconsistent with *Rapanos* but offers less protection to aquatic species under the Clean Water Act

INTRODUCTION

> "There is thus much to be gained by carefully examining the Kennedy environmental record, for it may very well portend the future of environmental law in the Roberts Court."[1]

A remarkable aspect among the environmental cases decided by the Supreme Court during its 2008-2009 Term is the disregard that a majority of Justices demonstrated towards the Clean Water Act ("CWA"),[2] in

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1. Michael C. Blumm & Sherry L. Bosse, *Justice Kennedy and the Environment: Property, States' Rights and a Persistent Search for Nexus*, 82 WASH. L. REV. 667, 673 (2007).

2. The environmental cases decided during the Court's 2008-2009 Term include Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 129 S. Ct. 2458 (2009); Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870 (2009); Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498 (2009); Summers v. Earth Island Inst., 129 S. Ct. 1142 (2009); and

particular towards its stated objective "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[3] Since its enactment in 1972 as a complete overhaul of the Federal Water Pollution Control Act,[4] the CWA has substantially reduced pollutant loadings from point sources, resulting in an improvement in overall water quality.[5] The CWA also recognized the important functions that wetlands serve,[6] and has slowed their destruction by regulating fill under the section 404 permitting program.[7]

Winter v. Natural Res. Def. Council, 129 S. Ct. 365 (2008). Both *Coeur Alaska, Inc.* and *Entergy Corp.* involved issues arising under the CWA, 33 U.S.C. §§ 1251-1387 (2006). *Coeur Alaska, Inc.*, 129 S. Ct. at 2462; *Entergy Corp.*, 129 S. Ct. at 1502.

3. 33 U.S.C. § 1251(a) (2006).

4. Federal Water Pollution Control Act ("Clean Water Act"), Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1387 (2006)). In 1977, the statute was amended again and expressly recognized as the "Clean Water Act" in those amendments. *See* Clean Water Act of 1977, Pub. L. No. 95-217, § 2, 91 Stat. 1566, 1566.

5. *See* Kenneth M. Murchison, *Learning from More than Five-and-a-Half Decades of Federal Water Pollution Control Legislation: Twenty Lessons for the Future*, 32 B.C. ENVTL. AFF. L. REV. 527, 578 (2005) (remarking that the CWA has substantially reduced the discharge of pollutants from point sources). Point sources are defined as "any discernable, confined and discrete conveyance," including a "pipe." 33 U.S.C. § 1362(14); *see also* William L. Andreen, *Water Quality Today—Has the Clean Water Act Been a Success?*, 55 ALA. L. REV. 537, 591 (2004) ("The CWA has produced a great deal of progress during the past thirty years. The discharge of organic wastes from publicly-owned waste treatment facilities has dropped [forty-six percent], while similar discharges from industry have fallen [ninety-eight percent]."). Unfortunately, the effectiveness of the CWA has been hampered by less than vigorous enforcement. *See* Charles Duhigg, *Clean Water Laws Are Neglected, at a Cost in Suffering*, N.Y. TIMES, Sept. 13, 2009, at B1. However, the United States Environmental Protection Agency's Administrator, Lisa Jackson, has pledged to ramp up CWA enforcement. Press Release, EPA, EPA Administrator Announces Plan to Retool and Reinvigorate Clean Water Enforcement Program (Oct. 15, 2009) (on file with author).

6. *See* Oliver A. Houck & Michael Rolland, *Federalism in Wetlands Regulation: A Consideration of Delegation of Clean Water Act Section 404 and Related Programs to the States*, 54 MD. L. REV. 1242, 1244-45 (1995) ("Section 404 does not appear in the Clean Water Act by accident. The swamps, bogs, sloughs, marshes, bottomlands, wet meadows, prairies, ponds, seeps, potholes, dune grasses and seabeds of the American landscape are the primary pollution control systems of the nation's waters, and the primary determinants of their water quality.").

7. *See, e.g.*, Clean Water Act § 67 (codified as amended at 33 U.S.C. § 1344(a) (2006)) (requiring a permit from the Army Corps of Engineers for the discharge of dredged or fill material into navigable waters). The regulations governing permits for the discharge of dredged or fill material can be found at 33 C.F.R. §§ 323.3-.4 (2009). In *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 135 (1985), the Court held that section 404 permitting jurisdiction extended to wetlands that were adjacent to navigable waters.

The frontal assault by the Roberts Court on the CWA started several years ago with the *Rapanos* decision,[8] where writing for the plurality, Justice Scalia concluded that the statute's jurisdiction was limited to permanent, standing bodies of water.[9] This extremely narrow and unprecedented construction of jurisdiction under the CWA, if supported by a majority of the Court, would have had untoward adverse environmental consequences for many waters currently subject to federal protection.[10] Justice Kennedy's concurring opinion in *Rapanos*, however, acted to thwart the negative implications of Justice Scalia's narrow and indeed highly questionable interpretation of jurisdiction under the CWA.

The assault on the CWA that started with *Rapanos* reached new heights (or lows) during the Supreme Court's 2008-2009 Term. Two important CWA cases were included among the Court's environmental

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8. Rapanos v. United States, 547 U.S. 715 (2006). In *Rapanos*, the Roberts Court came one vote short of drastically limiting the jurisdiction of the federal government over wetlands and other waters traditionally subject to CWA jurisdiction. Justice Kennedy concurred in the judgment, and Justices Stevens, Souter, Ginsburg and Breyer dissented. *Id.* at 759, 787. As a result of the four-one-four split among the Justices, "the end product of *Rapanos* is that the scope of federal jurisdiction under the Clean Water Act is hopelessly confused." Robert V. Percival, Massachusetts v. EPA*: Escaping the Common Law's Growing Shadow*, 2007 SUP. CT. REV. 111, 122 (2008).

9. *Rapanos*, 547 U.S. at 732 (concluding that the scope of jurisdiction under the CWA extended only "to water '[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,' or 'the flowing or moving masses, as waves or floods, making up such streams or bodies'") (citation omitted).

10. *See* Bradford C. Mank, *Implementing* Rapanos*—Will Justice Kennedy's Significant Nexus Test Provide a Workable Standard for Lower Courts, Regulators, and Developers?*, 40 IND. L. REV. 291, 324 (2007) ("By excluding most intermittent or ephemeral waters, the plurality would eliminate federal regulation of many rivers and streams, especially in the often dry western states. Furthermore, this approach would have threatened federal regulation of many headwaters and canals even in generally wet Eastern and Midwestern states.") (footnotes omitted). Professor Buzbee testified that if the petitioners in *Rapanos* had prevailed on their argument that the CWA only applied to navigable in fact waters that:

> [M]ost of America's long-protected waters would have lost federal protection. Huge swaths of the West, where rains are infrequent and many tributary beds sit empty much of the year, or wetlands and tributaries near the beginning of river basins, were at risk. Decades of environmental progress stood in the balance.

Interpreting the Effect of the U.S. Supreme Court's Recent Decision in the Joint Cases of Rapanos v. United States *and* Carabell v. U.S. Army Corps of Engineers *on the "Waters of the United States": Hearing Before the Senate Environment and Public Works Subcommittee on Fisheries, Wildlife and Water*, 109th Cong. (2006) (Statement of William W. Buzbee, Professor, Emory Law School), *available at* http://epw.senate.gov/hearing_statements.cfm?id=260362 (follow link to Buzbee's testimony).

docket during that Term: *Entergy Corp. v. Riverkeeper, Inc.*[11] and *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council.*[12] In these two new additions to the Court's lengthy CWA jurisprudence,[13] which essentially considered the protection that aquatic species were entitled to receive under the statute, the majority strayed far from the express congressional objective of the CWA.

The failure to consider the express objective of the statute in the two CWA cases from the 2008-2009 Term represents an unfortunate departure for Justice Kennedy from the analytical approach to the statute that he previously employed in *Rapanos*.[14] *Entergy Corp.* and *Coeur Alaska, Inc.* also represent a retreat by Justice Kennedy from *Rapanos* because his concurring opinion in that case articulated an awareness of the adverse ecological impacts that could occur as a result of an unduly restrictive interpretation of the CWA.[15]

Precisely why Justice Kennedy opted to approach the CWA from a different analytical perspective during the 2008-2009 Term is not clear. But by ignoring the overall objective established by Congress in the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters,"[16] and by failing to consider the ecological basis of the statute, *Entergy Corp.* and *Coeur Alaska, Inc.* will impair the effectiveness of the CWA, a statute that for decades has been an effective tool in

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11. 129 S. Ct. 1498 (2009).

12. 129 S. Ct. 2458 (2009).

13. *See* Jeffrey G. Miller, *The Supreme Court's Water Pollution Jurisprudence: Is the Court All Wet?*, 24 VA. ENVTL. L.J. 125, 127, 179-80 (2005). At the time of his article Professor Miller tallied the number of CWA cases decided by the Court at twenty-three, "more than any other statute implemented by the Environmental Protection Agency." *Id.* at 127.

14. *Compare Entergy Corp.*, 129 S. Ct. at 1505-06, *and Coeur Alaska, Inc.*, 129 S. Ct. at 2471-72, *with Rapanos*, 547 U.S. at 774-75.

15. Justice Kennedy, for example, in criticizing the plurality's narrow interpretation of jurisdiction remarked that:

> [T]he discharge of fill material can impair downstream water quality. The plurality argues otherwise . . . this proposition seems questionable as an empirical matter. It seems plausible that new or loose fill . . . could travel downstream through waterways adjacent to a wetland; . . . . Silt, whether from natural or human sources, is a major factor in aquatic environments, and it may clog waterways, alter ecosystems, and limit the useful life of dams.

Rapanos, 547 U.S. at 774-75 (citations omitted).

16. 33 U.S.C. § 1251(a) (2006).

combating water pollution and protecting human health and the environment.[17]

I. Justice Kennedy's Approach in *Rapanos* to the CWA

The influential role that Justice Kennedy assumes in the Court's environmental cases cannot be overstated. To prevail in these often closely contested cases it is widely believed that one must obtain the vote of "[t]he man in the middle";[18] that is, Justice Kennedy's vote.[19] This was certainly true with respect to one of the most important environmental cases decided thus far by the Roberts Court, *Massachusetts v. EPA*.[20] Joining four of his colleagues, Justice Kennedy agreed that carbon dioxide and other greenhouse gases were pollutants that could be regulated by the United States Environmental Protection Agency ("EPA") under the Clean Air Act.[21] Absent Justice Kennedy's vote with the majority, the contrary view, led by Chief Justice Roberts and Justice Scalia, would have prevailed, and

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17. The CWA has been effective but is not a perfect statute in the fight against water pollution. *See* Andreen, *supra* note 5, at 592-93 (identifying funding, combined sewer overflows, sanitary sewer overflows, impaired water quality, and non-point source pollution as all areas requiring improvement under the CWA); Murchison, *supra* note 5 (criticizing the CWA because "the Act has not achieved either of its principal goals: It has not eliminated all discharges into the navigable waters, nor has it produced fishable and swimmable waters throughout the United States").

18. Percival, *supra* note 8, at 158. Professor Percival notes that the Justices are split into two groups in terms of their approaches to interpreting precautionary statutes such as those regulating the environment, and that "Justice Kennedy straddles both camps." *Id.* at 124.

19. *See* Blumm & Bosse, *supra* note 1. In conducting a study of Justice Kennedy's environmental decisions, the authors determined that out of the eighty cases examined that Kennedy was in the majority "an astonishing seventy-seven times, or ninety-six percent of the time. Advocates in environmental cases must tailor their arguments to win his vote or risk losing their appeals." *Id.*

20. 549 U.S. 497 (2007). In *Massachusetts v. EPA*, in a five to four decision the Court found that, despite EPA's remarkable claim to the contrary, carbon dioxide and other greenhouse gases fell within the broad definition of "air pollutant" under the Clean Air Act. *Id.* at 528-29. Chief Justice Roberts in his dissent found that the case presented a nonjusticiable question because the litigants lacked standing. *Id.* at 535 (Roberts, C.J., dissenting). Justice Scalia also dissented, agreeing with Chief Justice Roberts that there was no standing. *Id.* at 549 (Scalia, J., dissenting). Justice Scalia also found that the EPA had broad discretion regarding rulemaking petitions such as the one underlying *Massachusetts v. EPA* and concluded that "[n]o matter how important the underlying policy issues at stake, this Court has no business substituting its own desired outcome for the reasoned judgment of the responsible agency." *Id.* at 560.

21. Highlighting the importance of Justice Kennedy as "the man in the middle," Professor Percival has noted that, at the time of *Massachusetts v. EPA*, "[a]s in each of the twenty-three cases the Court decided by a single vote during this Term, Justice Kennedy cast the deciding vote." Percival, *supra* note 8, at 112.

the ongoing domestic efforts to reduce greenhouse gas emissions would face an even more difficult challenge.

The *Rapanos* decision is also illustrative of the pivotal role that Justice Kennedy plays in reaching the five votes necessary to prevail before the Supreme Court. In *Rapanos*, contrary to Justice Scalia's extraordinarily narrow interpretation of CWA jurisdiction, Justice Kennedy concluded that the appropriate jurisdictional test was the "significant nexus" test.[22] In developing his test under the CWA, Justice Kennedy recognized, and his analysis was clearly informed by, the express objective of the statute.[23] Mindful of this important statutory objective, Justice Kennedy reasoned that federal jurisdiction under the CWA "must be assessed in terms of the statute's goals and purposes."[24] It was his view that the required significant nexus existed, and therefore conferred jurisdiction, "if the wetlands, either

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22. This is not to say that Justice Kennedy's "significant nexus" test is not without its problems. *See* Mark Latham, Rapanos v. United States*: Significant Nexus or Significant Confusion? The Failure of the Supreme Court to Clearly Define the Scope of Federal Wetland Jurisdiction, in* THE SUPREME COURT AND THE CLEAN WATER ACT: FIVE ESSAYS 5, 15 (2007), *available at* http://vjel.org/books/pdf/PUBS10004.pdf. Regarding Justice Kennedy's test, the author stated:

> The difficulty, however, apart from its questionable reliance on *SWANCC* for its genesis, is that the significant nexus test is fraught with uncertainty, both in terms of application and guidance, for those mired in the current muck of wetlands jurisdictional determinations after the Court's inability in *Rapanos* to fashion a clearly articulated majority view. That is, just what constitutes the necessary significant nexus sufficient for either the Corps or EPA to assert jurisdiction over property owners' wetlands?

Id.; *see also* Robin Kundis Craig, *Justice Kennedy and Ecosystem Services: A Functional Approach to Clean Water Act Jurisdiction After* Rapanos, 38 ENVTL. L. 635, 664 (2008) ("Most obviously, Justice Kennedy's test can impose substantial, expensive, and time-consuming evidentiary burdens on federal and state governments and on citizen plaintiffs, making it more likely that these enforcers will fail to meet their burden of proof that waters are 'navigable waters' covered by the Clean Water Act.").

23. Rapanos v. United States, 547 U.S. 715, 759-60 (2006) (Kennedy, J., concurring) (citing 33 U.S.C. § 1251(a) (2006)). In *Rapanos*, by deciding that a significant nexus was the key to jurisdiction under the CWA, not only was Justice Kennedy giving effect to the express congressional command behind the CWA "to 'restore and maintain the chemical, physical, and biological integrity of the Nation's waters,'" but also was attempting to "give the term 'navigable' some meaning," consistent with the decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). *Id.* at 779. There the majority held that the jurisdiction of the CWA did not extend to wholly intrastate waters that served as a habitat for migratory birds. It was from this case that Justice Kennedy borrowed the phrase "significant nexus." *See Solid Waste Agency of Northern Cook County*, 531 U.S. at 167; *Rapanos*, 547 U.S. at 759, 779 (Kennedy, J., concurring).

24. *Rapanos*, 547 U.S. at 779 (Kennedy, J., concurring).

alone or in combination with similarly situated lands . . . significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[25] Thus Justice Kennedy's analytical framework in *Rapanos* for determining the scope of jurisdiction under the CWA was inexorably linked to the statute's fundamental objective of protecting one of our most important natural resources—water—from threats of degradation.

It is also important to understand that Justice Kennedy's analysis of CWA jurisdiction in *Rapanos* was informed in part by a basic understanding of the ecological importance that wetlands serve. For example, in justifying his approach in *Rapanos*, Justice Kennedy noted:

> [T]he Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water . . . and . . . slow the [release] of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion . . . . Where wetlands perform these filtering and runoff-control functions, filling them may increase downstream pollution, much as a discharge of toxic pollutants would. Not only would dirty water no longer be stored and filtered but also the act of filling and draining itself may cause the release of nutrients, toxins, and pathogens that were trapped, neutralized, and perhaps amendable to filtering or detoxification in the wetlands . . . . In many cases, moreover, filling in wetlands separated from another water by a berm can mean that floodwater, impurities, or runoff that would have been stored or contained in the wetlands will instead flow out to major waterways.[26]

Consequently, based on the statutory objective and ecological concerns, Justice Kennedy concluded in *Rapanos* that wetlands merited more

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25. *Id.* at 780.

26. *Id.* at 775 (internal quotation mark omitted) (citations omitted). It was for similar reasons that in *Riverside Bayview Homes, Inc.* the Court found CWA jurisdiction over wetlands adjacent to navigable waters:

> In short, the Corps has concluded that wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment . . . . [W]e cannot say that the Corps' judgment on these matters is unreasonable, and we therefore conclude that a definition of "waters of the United States" encompass[es] all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act.

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 135 (1985).

protection through a broader interpretation of CWA jurisdiction than the plurality's narrower view would have provided.[27]

In fact, Justice Kennedy's significant nexus test is more closely aligned with Justice Stevens's *Rapanos* dissent than it is with the plurality's approach to the CWA.[28] In his dissent Justice Stevens, similar to Justice Kennedy's concurrence, noted that "wetlands play important roles in maintaining the quality of their adjacent waters . . . and consequently in the waters downstream."[29] Justice Stevens further recognized that wetlands provided valuable habitat for both aquatic and terrestrial species.[30] Finally, in response to criticism leveled by the plurality at his position, Justice Stevens went on to write that "[t]hese values are hardly '*independent*' ecological considerations . . . instead, they are integral to the 'chemical, physical, and biological integrity of the Nation's waters.'"[31] This last remark by Justice Stevens from his *Rapanos* dissent loudly echoes the focus on the very same express objective of the CWA that Justice Kennedy relied upon in developing the significant nexus test.[32]

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27. In doing so, Justice Kennedy also alluded to a respect for the regulatory decisions of the executive and legislative branches of government. *See Rapanos*, 547 U.S. at 777-78 (Kennedy, J., concurring).

> [T]he plurality's overall tone and approach . . . seems unduly dismissive of the interests asserted by the United States in these cases. Important public interests are served by the Clean Water Act in general and by the protection of wetlands in particular . . . . [I]n my view the plurality's opinion is not a correct reading of the text. The limits the plurality would impose, moreover, give insufficient deference to Congress' purposes in enacting the Clean Water Act and to the authority of the Executive to implement that statutory mandate.

Id. (citations omitted).

28. *See* Blumm & Bosse, *supra* note 1, at 715 ("[Justice] Kennedy's concurrence had much more in common with Justice Stevens's dissent, which called for judicial deference to longstanding and reasonable administrative practice, than with the plurality."); *see also* Mank, *supra* note 10, at 334-35 ("Justice Kennedy's approach was closer on the whole to Justice Stevens's dissenting opinion because both focused on the statute's purposes more than its ambiguous text, although they did not agree on the amount of deference owed to the Corps' interpretation.").

29. *Rapanos*, 547 U.S. at 796 (Stevens, J., dissenting) (citations omitted).

30. *Id.*

31. *Id.*

32. The dissent did take exception to Justice Kennedy's "significant nexus" test. Justice Stevens remarked that "[w]hile I generally agree with Parts I and II-A of Justice Kennedy's opinion, I do not share his view that we should replace regulatory standards that have been in place for over 30 years with a judicially crafted rule distilled from the term 'significant nexus' as used in *SWANCC*." *Id.* at 807. Justice Stevens went on to write, nonetheless, that

After rejecting the plurality's narrow view of jurisdiction and developing the significant nexus test in *Rapanos*, Justice Kennedy then looked to the record to determine how the test might apply in the two consolidated cases pending before the Court.[33] Here, too, the ecologically grounded roots of his significant nexus test and its consistency with the stated objective of Congress in enacting the CWA are demonstrated. First, with respect to petitioner Rapanos, Justice Kennedy observed that the wetlands at issue "were performing important pollutant-trapping functions" and were connected to navigable waters through tributaries.[34] Next, regarding the *Carabell* case, Justice Kennedy found that the wetland in question there, if filled, could have adverse environmental consequences.[35]

Given the record before the Court, Justice Kennedy opined that there was "evidence suggesting the . . . existence of a significant nexus . . . . Thus the end result in these cases and many others to be considered by the Corps may be the same as that suggested by the dissent, namely, that the Corps' assertion of jurisdiction is valid."[36] Since in his view, however, neither case involved an assessment of just how significant the nexus was to a navigable water, Justice Kennedy agreed with the plurality that remand was appropriate.[37]

II. The 2008-2009 Term CWA Cases

A. *Entergy Corp. v. Riverkeeper, Inc.*

Then Circuit Judge Sonia Sotomayor succinctly summarized what was at stake in *Entergy Corp.* when she wrote for the Second Circuit that

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the "'significant nexus' test will probably not do much to diminish the number of wetlands covered by the Act in the long run." *Id.* at 808.

33. *See id.* at 783 (Kennedy, J., concurring). The *Rapanos* case consisted of two petitions for certiorari from decisions of the Sixth Circuit affirming jurisdiction under the CWA over wetlands: *Rapanos v. United States*, 376 F.3d 629 (6th Cir. 2004) and *Carabell v. U.S. Army Corps of Eng'rs*, 391 F.3d 704 (6th Cir. 2004). *Id.* at 729-30 (Scalia, J., plurality opinion). Since both cases presented the issue of the scope of jurisdiction over wetlands, the Supreme Court "consolidated the cases . . . to decide whether these wetlands constitute 'waters of the United States .'" *Id.* at 730.

34. *Id.* at 784 (Kennedy, J., concurring).

35. *See Rapanos*, 547 U.S. at 785-86 (Kennedy, J., concurring).

36. *Id.* at 783. This in part sparked Blumm and Bosse to remark, "[w]hy in light of these sentiments, Kennedy concurred in the plurality opinion was not at all clear." *See* Blumm & Bosse, *supra* note 1, at 716.

37. *Rapanos*, 547 U.S. at 786 ("A more specific inquiry, based on the significant-nexus standard, is therefore necessary. Thus, a remand is again required to permit application of the appropriate legal standard.").

"[t]his is a case about fish and other aquatic organisms."[38] The CWA provision at issue in the case, section 316(b),[39] obligated the EPA to regulate cooling water intake structures to minimize their negative impact on the environment.[40] This is an especially important CWA provision because each day more than two-hundred billion gallons of water are withdrawn from streams, rivers, lakes and other water bodies by industrial facilities, primarily electric utility power plants, for cooling purposes.[41] The adverse effects that the daily withdrawal of such vast quantities of water has on a wide range of aquatic species are not inconsequential: "[t]he direct impacts of the once-through cooling water systems include the death of over three billion fish and shellfish per year and the removal of innumerable fish eggs, larvae, plankton, and invertebrates."[42] This aquatic life is destroyed either by *impingement*, which occurs "when organisms are trapped against intake screens by the force of the water passing through the cooling water intake structure,"[43] or by *entrainment*, which "occurs when organisms are drawn through the cooling water intake structure into the cooling system."[44]

In an effort to minimize these adverse impacts and to comply with the command of section 316(b), the EPA promulgated regulations in 2004 establishing performance standards for existing electrical generating facilities utilizing cooling water intake structures.[45] The EPA did not, however, require existing facilities to install closed-cycle cooling systems, which would have reduced mortality associated with impingement and

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38. Riverkeeper, Inc. v. U.S. EPA, 475 F.3d 83, 89 (2d Cir. 2007).

39. Clean Water Act § 316(b), 33 U.S.C. § 1326(b) (2006) ("Any standard established . . . and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.").

40. *Id.*

41. National Pollutant Discharge Elimination System: Regulations Addressing Cooling Water Intake Structures for New Facilities, 66 Fed. Reg. 65,256, 65,262 (Dec. 18, 2001) (to be codified at 40 C.F.R. pts. 9, 122-25).

42. Brief for Nat'l Wildlife Fed'n and Sierra Club, at 3-4, as Amici Curiae Supporting Respondents, Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498 (2009) (Nos. 07-558, 07-598 & 07-597) (citations omitted).

43. 66 Fed. Reg. at 65,263.

44. *Id.*

45. *See* National Pollutant Discharge Elimination System—Final Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities: Final Rule, 69 Fed. Reg. 41,575 (proposed July 9, 2004) (to be codified at 40 C.F.R. pts. 9, 122-25).

entrainment to an even greater degree than that achieved by the compliance options promulgated by the EPA.[46]

Contending that the EPA had rejected closed-cycle cooling systems for existing facilities on impermissible cost-benefit grounds, Riverkeeper, Inc., among others, challenged the EPA's so-called "Phase II Rule" in the Second Circuit.[47] In a lengthy, detailed opinion, Judge Sotomayor considered other provisions of the CWA where Congress had expressly authorized the EPA to consider costs in developing a variety of implementing regulations.[48] She concluded that Congress had "clearly signaled" its intent "to move cost considerations under the CWA from a cost-benefit analysis to a cost-effectiveness one."[49] Since the record suggested that the EPA may have impermissibly used a cost-benefit analysis to determine what constituted the best technology available under section 316(b) for existing facilities, Judge Sotomayor remanded the case "for the EPA to explain its conclusions."[50]

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46. For new facilities, unlike existing facilities, the EPA concluded that closed-cycle cooling systems or technology that would achieve comparable reductions in impingement and entrainment mortality were the best technology available. *See* 66 Fed. Reg. at 65,260. Closed-cycle cooling systems withdraw less water, which results in less mortality associated with impingement and entrainment. *See* James R. May & Maya K. van Rossum, *The Quick and the Dead: Fish Entrainment, Entrapment, and the Implementation and Application of Section 316(b) of the Clean Water Act*, 20 VT. L. REV. 373, 379-80 (1995) ("Once-through cooling systems require a continual supply of cooling water and are more common than closed-cycle systems. In contrast to once-through cooling systems, closed-cycle cooling systems recirculate and reuse cooling water . . . . Accordingly, the adverse environmental impact on aquatic ecosystems is far less from closed-cycle than from once-through systems.") (footnotes omitted).

47. Riverkeeper, Inc. v. U.S. EPA, 475 F.3d 83, 97 (2007) ("Perhaps the most [serious] challenge to the Phase II Rule is the petitioners' contention that the EPA exceeded its authority in rejecting closed-cycle cooling, and select[ed] instead the suite of technologies, as the 'best . . . available' . . . in large part because the Agency engaged in improper cost considerations.").

48. *Id.* at 97-98.

49. *Id.* at 98. The distinction between the two, according to Judge Sotomayor, is that "[c]ost-benefit analysis . . . compares the costs and benefits of various ends, and chooses the end with the best net benefits. By contrast, cost-effectiveness considerations . . . determine which means will be used to reach a specified level of benefit that has already been established." *Id.* Judge Sotomayor thus determined that the EPA had to first establish a benchmark of performance for what was the best technology available to mitigate the adverse environmental impacts of existing water intake structures, and only then could the Agency consider what technology could achieve that benchmark in the most cost-effective manner. *Id.* at 99.

50. *Id.* at 103.

The Supreme Court granted certiorari and writing for the majority,[51] Justice Scalia found that the Second Circuit's construction of section 316(b) was "certainly a plausible interpretation of the statute."[52] Justice Scalia posed, though, an alternative interpretation of the term "best technology" available to perhaps mean "the technology that *most efficiently* produces some good. . . . even if it produces a lesser quantity of that good than other available technologies."[53]

Justice Scalia then examined the respondents' argument that if Congress had empowered the EPA to consider costs under section 316(b), it would have clearly stated so as it had done elsewhere in the CWA.[54] Justice Scalia found the silence regarding costs in section 316(b) unpersuasive: "[i]f silence here implies prohibition, then the EPA could not consider *any* factors in implementing § [316](b)—an obvious logical impossibility."[55] The statutory silence was, according to Justice Scalia, "meant to convey nothing more than a refusal to tie the agency's hands as to whether cost-benefit analysis should be used, and if so to what degree."[56] Consequently, the Second Circuit's contrary conclusion was reversed.[57]

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51. Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498, 1502 (2009).

52. *Id.* at 1506. Chief Justice Roberts and Justices Kennedy, Thomas and Alito joined Justice Scalia in the majority. *Id.* at 1501. Justice Breyer concurred in part and dissented in part but agreed that a cost-benefit analysis was not prohibited under section 316(b). *See id.* at 1512 (Breyer, J., concurring).

53. *Id.* at 1506 (majority opinion).

54. *Id.* at 1506-08.

55. *Id.* at 1508.

56. *Id.*

57. *Entergy Corp.*, 129 S. Ct. at 1510. Joined by Justices Souter and Ginsburg, Justice Stevens dissented. *Id.* at 1516 (Stevens, J., dissenting). He found that nothing in "[s]ection 316(b) neither expressly nor implicitly authorizes the EPA to use cost-benefit analysis when setting regulatory standards; fairly read, it prohibits such use." *Id.* Justice Stevens noted that the use of cost-benefit analysis was "particularly controversial" in environmental regulation because its "costs are often more obvious and easier to quantify than its environmental benefits." *Id.* As an example of this difficulty, he pointed out a major flaw with the EPA's cost-benefit approach taken in developing the regulation at issue, namely, that it was suspect because it assigned no value to 98.2% of the aquatic species that were not commercially or recreationally harvested. *Id.* at 1516-17. Justice Stevens found that "[t]his narrow focus in turn skewed the Agency's calculations of benefits. When the EPA attempted to value all aquatic life, the benefits measured $735 million," but by excluding "98.2 percent of fish not commercially or recreationally harvested, the benefits calculation dropped dramatically—to $83 million." *Id.* Equally important to Justice Stevens's dissent was the Court's prior determinations in cases where it found that "'[w]hen Congress has intended that an agency engage in cost-benefit analysis, it has clearly indicated such intent on the face of the statute.'" *Id.* at 1517 (citation omitted). Thus, according to Justice Stevens, the Court should have followed *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457 (2001), where, in an opinion written by Justice Scalia, it was held that the EPA was not required to engage in a

B. *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*

The first question addressed in *Coeur Alaska, Inc.*[58] was which Agency had permitting authority over the discharge of mining wastes: the EPA or the Army Corps of Engineers?[59] Under section 402(a) of the CWA, the EPA is authorized to issue permits for the discharge of any pollutant into navigable waters.[60] The Army Corps of Engineers is authorized under section 404(a) of the CWA to issue permits for the discharge of dredged or fill material into navigable waters.[61] Thus, to answer this initial question, the Court was required to characterize the nature of the discharge at issue as either a pollutant or a fill material.[62]

This important question involving the scope of agency-permitting authority arose in the context of the shuttered Kensington Mine located near Juneau, Alaska, which its owner decided to reopen.[63] To resume mining operations, Coeur Alaska, Inc. determined that the most viable technique was the "froth flotation" mining process. This particular mining process results in the generation of slurry, which requires disposal. The slurry is composed of approximately thirty percent mine tailings, with the remaining volume consisting of water.[64] Coeur Alaska, Inc. initially

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cost-benefit analysis in promulgating national ambient air quality standards under the Clean Air Act, absent express authorization by Congress. *Id.* at 1517-18; *see also Whitman*, 531 U.S. at 467-68.

58. 129 S. Ct. 2458 (2009).

59. *Id.* at 2463.

60. Clean Water Act § 402(a), 33 U.S.C. § 1344(a)(1) (2006) ("[T]he Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant . . . ."). The term "discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters." *Id.* § 1362(12). The permits issued under section 402(a) are typically referred to as "NPDES permits" after the "National Pollutant Discharge Elimination System" permitting program authorized under the CWA. *See id.* § 1342(a); *see also* EPA NPDES-Office of Wastewater Management, *National Pollutant Discharge Elimination System (NPDES)*, http://cfpub.epa.gov/NPDES (last visited Feb. 1, 2010).

61. § 402(a), 33 U.S.C. § 1344(a) ("The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites."); *see also Coeur Alaska, Inc.*, 129 S. Ct. at 2463.

62. The Court did ask for supplemental briefing on the question of whether both Agencies might have permitting authority. In response to the request for additional briefing, "[t]he parties agree, however, that a two-permit regime is contrary to the statute and the regulations." *Coeur Alaska, Inc.*, 129 S. Ct. at 2474.

63. *Id.* at 2463-64.

64. *Id.* at 2464. The discharge from the Kensington Mine associated with the froth-flotation mining process, however, also will include a number of chemicals, including aluminum, copper, lead and mercury, all of which are potentially harmful to aquatic species. *See* Se. Alaska Conservation Council v. U.S. Army Corps of Eng'rs, 486 F.3d 638, 642 (9th

planned to dispose of the slurry in a specially constructed "dry tailings facility"[65] but ultimately concluded that this option was not economically feasible.[66]

As a lower cost disposal option, Coeur Alaska, Inc. proposed to discharge the slurry into Lower Slate Lake,[67] "a 23-acre subalpine lake in the Tongass National Forest."[68] The quantity of slurry that Coeur Alaska, Inc. proposes to discharge over the operative life of the Kensington Mine is estimated at 4.5 million tons, which will basically fill the lake from its bottom to its top.[69] The impact on aquatic life that the discharge will have is undisputed: all of the fish in the lake will die.[70]

One regulatory obstacle, though, that the Lower Slate Lake disposal option presented to Coeur Alaska, Inc. was that the EPA had promulgated a "performance standard" under section 306 of the CWA that was specifically applicable to the discharge associated with the froth-flotation mining process.[71] This performance standard, which has been in place for decades,[72] imposes a stringent zero-discharge limitation "based on the fact that [forty-six] out of [ninety] existing facilities for which we have data achieve zero discharge through total recycle and evaporation of process wastewater."[73] To overcome this regulatory hurdle and avoid application of

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Cir. 2007). These chemicals conveniently went unmentioned in the discussion of the facts by the majority in *Coeur Alaska, Inc.* *See Coeur Alaska, Inc.*, 129 S. Ct. at 2464.

65. *Se. Alaska Conservation Council*, 486 F.3d at 641. The dry tailings facility received approval by the United Forest Service and was permitted by the EPA. *Id.*

66. *See id.*

67. *Coeur Alaska, Inc.*, 129 S. Ct. at 2464.

68. *Se. Alaska Conservation Council*, 486 F.3d at 642.

69. *See Coeur Alaska, Inc.*, 129 S. Ct. at 2464.

70. *Id.* at 2465. The discharge will destroy "the lake's small population of common fish." *Id.* The "common fish" that Justice Kennedy referred to includes the Dolly Varden Char. *See Se. Alaska Conservation Council*, 486 F.3d at 642. The characterization of this fish as "common" is an odd choice because, according to the Alaska Department of Fish and Game, "Dolly Varden are one of Alaska's most important and sought-after sport fish." *See* Dennis Hubartt, *Alaska Department of Fish and Game: Dolly Varden*, http://www.adfg.state.ak.us/pubs/notebook/fish/dolly_v.php (last viewed Feb. 1, 2010). Thus the term "common fish" used by Justice Kennedy in the *Coeur Alaska, Inc.* opinion does not seem to aptly describe the Dolly Varden Char.

71. *See* Clean Water Act § 306, 33 U.S.C. § 1316 (2006). "Standard of performance" is defined as "a standard for the control of the discharge of pollutants . . . achievable through application of the best available demonstrated control technology . . . including, where practicable, a standard permitting no discharge." *Id.* § 306(1)(a), § 1316(a).

72. *See* Ore Mining and Dressing Point Source Category Effluent Limitations Guidelines and New Source Performance Standards, 47 Fed. Reg. 54,598 (Dec. 3, 1982) (to be codified at 40 C.F.R. pt. 440).

73. *Id.* at 54,602.

the zero-discharge performance standard, Coeur Alaska, Inc. asserted that its discharge constituted fill and was not the discharge of a pollutant. The Army Corps of Engineers and the EPA agreed, and a section 404 permit was issued.

The issuance of the permit by the Army Corps of Engineers was successfully challenged before the Ninth Circuit.[74] Certiorari was granted, and writing for the majority on the question of which Agency was the proper permitting authority, Justice Kennedy seized upon the concession by the permit challengers that the discharge from the Kensington Mine fell within the regulatory definition of "fill material."[75] Justice Kennedy then quickly determined that, as such, the proper permitting authority was the Army Corps of Engineers, since section 404(a) "refers to all 'fill material' without qualification."[76]

Justice Kennedy next considered whether issuing the permit violated the CWA because it would allow a discharge in contravention of the zero-discharge performance standard specifically applicable to the froth-flotation mining process.[77] Here, Justice Kennedy found some evidence that Congress did not intend to subject section 404 permit holders to the performance standard of section 306.[78] He concluded, nonetheless, that it was still ambiguous whether section 306 applied to discharges of fill permitted under section 404.[79]

To resolve this ambiguity, Justice Kennedy looked to a memorandum prepared by Diane Regas (the "Regas Memorandum").[80] According to the Regas Memorandum, since the discharge was authorized by a section 404 permit, regulation under section 306 was precluded.[81] Justice Kennedy

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74. *Se. Alaska Conservation Council*, 486 F.3d at 655 (reversing district court's grant of summary judgment).

75. *Coeur Alaska, Inc.*, 129 S. Ct. at 2466.

76. *Id.* at 2469.

77. *Id.*

78. *Id.* at 2471.

79. *Id.*

80. At the time of the permitting decision, Diane Regas served as the Director of the EPA's Office of Wetlands, Oceans and Watersheds. *Id.* at 2473; *see also* Memorandum from Diane Regas to James A. Hanlon, et al., (May 17, 2004) (copy on file with author). The majority relied on the Regas Memorandum for interpretive guidance because not only were the relevant statutory provisions ambiguous but the implementing regulations also "[did] not offer a clear basis of reconciliation." *Coeur Alaska, Inc.*, 129 S. Ct. at 2472.

81. The reasoning for this conclusion in the Regas Memorandum was because section 404 regulated the discharge of fill from the mine and "[a]s a result, the regulatory regime applicable to discharges under section 402, including effluent limitations guidelines and standards, such as those applicable to gold ore mining . . . do not apply to the placement of tailings into the proposed impoundment." Memorandum from Diane Regas, Dir., Office of

found that the Regas Memorandum provided "a reasonable interpretation of the regulatory regime."[82] It was entitled to deference by the Court because it "is not 'plainly erroneous or inconsistent with the regulation[s].'"[83] Justice Kennedy, therefore, gave the green light to the destruction of Lower Slate Lake through disposing millions of tons of untreated mining wastes. The Court reached this conclusion despite the fact that the regulation adopted by the EPA in 1982 pursuant to section 306(b) was specifically applicable to the froth-flotation mining process and tailored to prohibit such discharges.[84]

III. Justice Kennedy: Where Art Thou?

Considering the analytical approach Justice Kennedy followed in his *Rapanos* concurring opinion, the two CWA cases from the 2008-2009 Term, *Entergy Corp.* and *Coeur Alaska, Inc.*, are indeed very curious decisions. The departure by Justice Kennedy in each of the 2008-2009 Term CWA cases from *Rapanos*, where he focused on the objective of the CWA in formulating his significant nexus test, merits closer examination.

Wetlands, Oceans and Watersheds, to Randy Smith, Dir., Office of Water, Region X (May 17, 2004) (copy on file with author). This reasoning down plays section 306(b) and conveniently ignores the fact that the "proposed impoundment" was Lower Slate Lake.

82. *Coeur Alaska, Inc.*, 129 S. Ct. at 2473.

83. *Id.* at 2468. Justice Ginsburg, joined by Justices Stevens and Souter dissented. *Id.* at 2480. (Ginsburg, J., dissenting). She found that "Coeur Alaska's claim to a § 404 permit carries weighty implications. If eligible for that permit, Coeur Alaska can evade the exacting performance standard prescribed by EPA for froth-flotation mills." *Id.* at 2482. Justice Ginsburg concluded her dissent by noting that "[t]he use of waters of the United States as 'settling ponds' for harmful mining waste, the Court of Appeals correctly held, is antithetical to the text, structure, and purpose of the Clean Water Act." *Id.* at 2484.

84. In an effort to clarify the regulatory definition of "fill material" and "discharge of fill material," the EPA and the Army Corps of Engineers issued a joint rulemaking in 2002. *See generally* Final Revisions to the Clean Water Act Regulatory Definitions of "Fill Material" and "Discharge of Fill Material," final rule, 67 Fed. Reg. 31,129 (May 9, 2002) (codified at 33 C.F.R. pt. 323 and 40 C.F.R. pt. 232). In the joint rulemaking, the Agencies appeared to address the *Coeur Alaska, Inc.* situation in a manner contrary to the majority opinion:

> Recognizing that some discharges (such as suspended or settable solids) can have the associated effect, over time, of raising the bottom elevation of a water due to settling of waterborne pollutants, we do not consider such pollutants to be 'fill material,' and nothing in today's rule changes that view. *Nor does today's rule change any determination we have made regarding discharges that are subject to an effluent limitation guideline and standards, which will continue to be regulated under section 402 of the CWA.*

Id. at 31,135 (emphasis added).

Although he did not author an opinion in the *Entergy Corp.* case,[85] Justice Kennedy's presence in the majority is surprising given the clear understanding he articulated in *Rapanos* about the objective of the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[86] In *Rapanos* that objective clearly informed his interpretation of the CWA and the jurisdictional test that Justice Kennedy believed appropriate. His determination that the significant nexus test was proper was also animated by the ecologically grounded justifications that he asserted in *Rapanos*.

This stands in stark relief to *Entergy Corp.* where the Court examined what level of protection was due to aquatic species from the substantial harms associated with existing cooling water intake structures, and whether a cost-benefit analysis was appropriate. In *Entergy Corp.* the express objective of the CWA played absolutely no role in the majority's analysis. The failure to consider this overarching objective of the CWA in the *Entergy Corp.* majority opinion apparently did not concern Justice Kennedy, since he joined the majority and did not write separately, as he did in *Rapanos*, or join the dissent.

The fact that Justice Scalia would not consider the objective of the CWA in his *Entergy Corp.* majority opinion is hardly surprising, since he failed to do so in his *Rapanos* plurality opinion.[87] However, given the fidelity to the statute's objective and the sensitivity to ecological considerations that Justice Kennedy expressed in his concurring *Rapanos* opinion, one might have expected him to follow an analytical approach consistent with those previously expressed views. The closed-cycle cooling systems, for which the challengers to the EPA's rulemaking advocated, withdraw substantially less water, have less adverse environmental impact, and destroy fewer aquatic species.[88] Closed-cycle cooling is thus consistent with the objective of the CWA. Further, requiring the use of closed-cycle cooling systems at existing facilities is more in tune with section 306(b)'s command to minimize environmental impact through the use of the best technology available. Nevertheless, instead of arguing as he did in his *Rapanos* concurrence that it was necessary to analyze the provision at issue

85. *See* Blumm & Bosse, *supra* note 1 ("Even when he does not write an opinion, Kennedy is often the pivotal environmental vote.").

86. 33 U.S.C. § 1251(a) (2006).

87. In the *Rapanos* plurality opinion written by Justice Scalia, joined by Chief Justice Roberts and Justices Alito and Thomas, this objective of the CWA was only mentioned in passing, but it is not discussed by the plurality in the context of determining the scope of federal jurisdiction under the CWA. *See* Rapanos v. United States, 547 U.S. 715, 722-39 (2006).

88. *See* May & van Rossum, *supra* note 46, at 379-82.

in light of the objective of the CWA, Justice Kennedy opted to silently join the *Entergy Corp.* majority.

Exactly why Justice Kennedy did not focus on the underlying objective of the statute in *Entergy Corp.* as he did in *Rapanos* is far from clear. One might surmise that his presence among the *Entergy Corp.* majority is perhaps reflective of the fact that during oral argument Justice Kennedy indicated that the case turned on the applicability of *Chevron.*[89] Justice Kennedy's only questions to counsel for the petitioners focused on that seminal Supreme Court decision.[90] Ultimately Justice Scalia held for the majority that the use of a cost-benefit analysis approach by the Agency in the rulemaking at issue was a reasonable interpretation of the CWA under step two of *Chevron.*[91]

Thus, a preference towards agency deference might explain Justice Kennedy's decision to join the *Entergy Corp.* majority. It nonetheless does not entirely explain his departure from the analytical approach to the CWA that he espoused in *Rapanos.* If deference is an important consideration for Justice Kennedy in his analysis of administrative agency actions, then in *Rapanos* he could have invoked *Chevron* to defer to the Agency's interpretation of its jurisdictional reach under the CWA. Justice Kennedy, however, did not invoke *Chevron* deference in *Rapanos* to uphold the Agency's jurisdictional determination. Rather, in *Rapanos*, he wrote a concurring opinion intently focusing on the objective of the statute and its underlying ecological concerns in arguing that the plurality was incorrect in its narrow interpretation of jurisdiction under the CWA.

If *Entergy Corp.* is inconsistent with the approach to the CWA that Justice Kennedy used in *Rapanos*, then surely *Coeur Alaska, Inc.* is wholly at odds with how he analyzed the statute in *Rapanos. Coeur Alaska, Inc.* is

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89. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

90. *See* Transcript of Oral Argument at 19, 26, Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498 (2009) (No. 07-588, No. 07-589 & No. 07-597). Justice Kennedy asked:

> JUSTICE KENNEDY: Do you agree that this is a Chevron case?
>
> MS. MAHONEY: Well, it is a Chevron case, Your Honor. And we think—certainly it could be resolved under step one, meaning the following: Can you read the statute reasonably to say that Congress unambiguously foreclosed cost-benefit analysis under 316(b)? I think the answer to that is no.

Id. at 19.

91. *Entergy Corp.*, 129 S. Ct. at 1505. Justice Scalia, in writing for the majority, cited *Chevron* for the proposition that the EPA's rulemaking utilizing a cost-benefit analysis was valid "if it is a reasonable interpretation of the statute-not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Id.*

a remarkable departure both in terms of its analytical approach and its end results from Justice Kennedy's opinion in *Rapanos*, where he grounded his interpretation of the CWA on its objective and the ecological values underlying the statute. Justice Kennedy's approach to the CWA in *Coeur Alaska, Inc.* is so at odds with his approach in *Rapanos* that it is as if the opinions were written by two completely different Justices whose only common ground was a competing, but distinctly polar opposite, view towards statutory construction.[92]

In *Coeur Alaska, Inc.* the real question at issue was whether the Court would sanction the destruction of Lower Slate Lake in the Tongass National Forest—and its aquatic species—by agreeing that the petitioner could discharge untreated mining wastes into the lake.[93] The fact that Justice Kennedy wrote the majority opinion approving of the destruction is surprising in and of itself, given his focus on the objective of the CWA in *Rapanos* and his ecological-tinged justification for disagreeing with the plurality in that case. According to what he wrote in his *Rapanos* concurrence,[94] Justice Kennedy simply does not seem the likely candidate to author an opinion so contrary to the express objective of the CWA and resulting in such devastating ecological consequences.

Abandoning his reliance on the objective of the CWA, which informed his analytical approach to the statute in *Rapanos*,[95] Justice Kennedy did not hesitate in *Coeur Alaska, Inc.* to conclude that the Army Corps of Engineers was the appropriate permitting authority rather than the EPA.[96] He also did not hesitate to find that the discharge of untreated mining wastes into Lower Slate Lake was entirely consistent with the CWA.[97]

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92. *Rapanos*, 547 U.S. at 758-60, 767.

93. The Court framed the two issues presented as whether the Army Corps of Engineers or the EPA was the proper permitting authority and whether the permit was issued in accordance with law. Coeur Alaska, Inc. v. Se. Alaska Conservation Council, 129 S. Ct. 2458, 2463 (2009). Given what the petitioner was seeking, however, it is appropriate to summarize the issue as whether the CWA allows the destruction of a lake and its aquatic life through the discharge of mining wastes. *See* Chuck Becker, Coeur Alaska v. SEACC: *When Is a Lake Really a Landfill?* BECKER'S IOWA ENVTL. L. UPDATE, July 13, 2009, http://www.iowaenvironmentallawupdate.com/2009/07/articles/case-law/coeur-alaska-inc-vs-seacc-when-is-a-lake-really-a-landfill/ ("In its final environmental ruling for this term, the United States Supreme Court went up against the fishes. The fishes lost.").

94. *Rapanos*, 547 U.S. at 759-87 (Kennedy, J., concurring).

95. *See id.* at 779.

96. *Coeur Alaska, Inc.*, 129 S. Ct. at 2469.

97. *Id.* at 2474 (finding that the interpretation of the CWA provided in the Regas Memorandum was "consistent with the regulatory scheme as a whole").

Thus, by authorizing the use of Lower Slate Lake as an appropriate disposal site for mining wastes, the petitioner will avoid the necessity of complying with the zero-discharge standard, which the permit challengers asserted was applicable.[98] Yes, the zero-discharge standard specifically adopted by the EPA to regulate the froth-flotation mining process will apply to any discharge *from* Lower Slate Lake once the disposal of mining wastes begins.[99] That is, however, of little consequence; the destruction of Lower Slate Lake and its aquatic life will have begun and, at best, the zero-discharge standard will protect other waters from the adverse consequences of the mining wastes.

Notably absent from Justice Kennedy's *Coeur Alaska, Inc.* majority opinion is any reference to the ecological underpinnings of the CWA, which he relied upon to a large extent in *Rapanos* to reject the plurality's statutory construction.[100] This omission was not because Justice Kennedy failed to understand the lethal impact that the discharge of mining wastes will have upon fish and other aquatic life currently existing in the lake. He certainly understood the adverse consequences since he wrote rather cavalierly that the disposal of 4.5 million tons of waste into Lower Slate Lake will "destroy the lake's small population of common fish."[101]

This effort to minimize the ecological significance of the Court's decision on aquatic life is troubling since, in its expression of restoring and maintaining the biological integrity of our nation's waters, the CWA draws no distinction between "common fish," rare fish, endangered fish, or other aquatic species.[102] The failure to consider the adverse environmental impact of the *Coeur Alaska, Inc.* decision is also troubling because its ecological results are inapposite with the restorative and protective water quality goals established by Congress in the CWA.[103] But then how could Justice Kennedy mention the ecological basis of the CWA in *Coeur Alaska, Inc.* with its end results so foreign to the objective and water quality goals Congress so ambitiously expressed in the CWA?

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98. *Id.* at 2466.

99. *Id.* at 2465-66.

100. *See Rapanos*, 547 U.S. at 774-75 (Kennedy, J., concurring).

101. *Coeur Alaska, Inc.*, 129 S. Ct. at 2465.

102. *See, e.g.*, Clean Water Act § 101(a), 33 U.S.C. § 1251(a) (2006). The objective of the CWA is "to restore and maintain the chemical, physical, and *biological* integrity of the Nation's waters." *Id.* (emphasis added).

103. *See, e.g., id.*; *id.* § 101(a)(2), 33 U.S.C. § 1251(a)(2) ("[I]t is the national goal that whenever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation . . . on the water be achieved by July 1, 1983 . . . .").

Similarly, *Coeur Alaska, Inc.* is problematic on ecological grounds for the unchallenged assumptions that Lower Slate Lake somehow will emerge reborn as an improved water body after the discharge of mining wastes has ceased. Justice Kennedy repeated in his majority opinion, without any question, the assertion by the Army Corps of Engineers that the reclaimed lake "will result in more emergent wetlands/vegetated shallows . . . and high values for wildlife habitat" and "when the mining ends the lake will be at least as environmentally hospitable, if not more so, than now."[104] The unquestioned acceptance by Justice Kennedy of such dubious assertions is simply astonishing for a Justice who in *Rapanos* professed justification for his construction of the CWA by intently focusing on the statute's objective and its ecological underpinnings.[105]

Here again, perhaps, *Chevron* deference explains the reason why Justice Kennedy was perfectly comfortable rendering a decision that is so inconsistent with the CWA. After all, the Army Corps of Engineers had determined that the use of Lower Slate Lake as a mining waste disposal site would result in less environmental harm than disposing of the wastes in nearby wetlands.[106] Further, the EPA could have vetoed the permit under section 404(c) but declined to exercise such authority.[107] Moreover, it was a representative of the EPA who wrote the memorandum asserting that the discharge into Lower Slate Lake was properly subject to regulation by the Army Corps of Engineers and not the EPA and its onerous zero-discharge standard.[108] So why not defer to the expertise of the regulators?

Nevertheless, once again *Chevron* deference seems an inadequate justification for Justice Kennedy's completely different approach to the

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104. *Coeur Alaska, Inc.*, 129 S. Ct. at 2465. Similar questionable assertions about the post-mining fate of Lower Slate Lake were made during oral argument and also went virtually unchallenged. *See* Transcript of Oral Argument at 20, *Coeur Alaska, Inc.*, 129 S. Ct. 2458 (No. 07-984 and No. 07-990).

105. *See* Mank, *supra* note 10, at 334 (In analyzing Justice Kennedy's concurrence in *Rapanos*, Professor Mank remarked "[b]ecause it was not possible to ascertain the precise intent of Congress as to which waters are covered by the Act, [Justice Kennedy] interpreted the term 'significant nexus' in light of the Act's broad ecological purposes.").

106. *Coeur Alaska, Inc.*, 129 S. Ct. at 2465.

107. *Id.* Section 404(c) of the CWA, 33 U.S.C. § 1344(c), provides in part that the EPA can prohibit the issuance of a permit for the discharge of dredged or fill material if it is determined "after notice and opportunity for public hearings, that the discharge of such materials . . . will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas . . . wildlife, or recreational areas." *Id.* The failure by EPA to veto the permit under section 404(c) is yet another curious aspect of the *Coeur Alaska, Inc.* decision, since the EPA noted at one point that the use of Lower Slate Lake as a disposal option "was not the 'environmentally preferable' means of dispos[al]." *See Coeur Alaska, Inc.*, 129 S. Ct. at 2465.

108. *Couer Alaska, Inc.*, 129 S. Ct. at 2473.

same statute in *Rapanos* and *Coeur Alaska, Inc.*[109] In the former, he did not defer to the Agency's interpretation of its jurisdictional reach; instead, Justice Kennedy's *Rapanos* analysis was informed by the express objective of the statute and the ecological values associated with conferring a grant of jurisdiction that was more extensive than that which was reached by the plurality. His approach in *Coeur Alaska, Inc.*, on the other hand, reflects an effort to resolve what he apparently viewed as competing environmental harms of disposing mining wastes into Lower Slate Lake or filling nearby wetlands with the wastes from the froth-flotation process.[110] In his effort, though, to resolve the dilemma he perceived, Justice Kennedy forgot the importance of the objective and ecological underpinnings of the very statute that he was trying to reconcile.

CONCLUSION

I am not suggesting here that Justice Kennedy's overall approach to environmental cases is more consistent with those of his colleagues who dissented in *Entergy Corp.* and *Coeur Alaska, Inc.* Nor am I suggesting that either CWA case decided during the 2008-2009 Term would have necessarily reached a different result had Justice Kennedy departed from the majority. One can speculate, however, that the outcomes might have been different in both *Entergy Corp.* and *Coeur Alaska, Inc.* had Justice Kennedy adopted an approach in interpreting the CWA that was more harmonious with his *Rapanos* concurring opinion, given his remarkable record of being in the majority in environmental cases.[111]

That is to say, if Justice Kennedy had followed the analytical approach he adopted in *Rapanos* and focused on the objective of the statute and its ecological underpinnings, it is difficult to see how he could have agreed with the majority in *Entergy Corp.* and *Coeur Alaska, Inc.* Perhaps then Justice Breyer would have been persuaded to join Justice Kennedy,

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109. Rather than deference, perhaps the fact that both *Entergy Corp.* and *Coeur Alaska, Inc.* involved powerful business interests helps to explain Justice Kennedy's position in those two cases. *See* Erwin Chemerinsky, *When It Matters Most, It Is Still the Kennedy Court*, 11 GREEN BAG 2D 427, 438 (2008) In commenting on the business cases appearing before the Roberts Court during the 2007 Term, Dean Chemerinsky remarked "[o]verall, the Roberts Court is quite pro-business and that was reflected in a number of its decisions. I think that it is the most pro-business Court since the mid-1930s." *Id.*

110. *See Coeur Alaska, Inc.*, 129 S. Ct. at 2465 ("If the tailings did not go into the lake, they would be placed on nearby wetlands. The resulting pile would rise twice as high as the Pentagon and cover three times as many acres."). This choice between competing environmental harms, however, is not quite the dilemma that Justice Kennedy suggests in his majority opinion. The Court could have affirmed the Ninth Circuit's determination that the permit was issued contrary to the CWA.

111. *See* Blumm & Bosse, *supra* note 1.

along with Justices Stevens, Souter and Ginsburg, as the majority.[112] Chief Justice Roberts and Justices Scalia, Alito and Thomas would then find themselves in the minority as they were in *Massachusetts v. EPA*.[113] This is admittedly, of course, pure conjecture.

Justice Kennedy's departure, though, during the 2008-2009 Term in *Entergy Corp.* and *Coeur Alaska, Inc.* from *Rapanos* is not conjecture. It represents a dramatic shift in his method of analyzing the CWA. In the CWA cases decided by the Court during the 2008-2009 Term, Justice Kennedy's focus on the statutory objective simply evaporated without a trace for inexplicable reasons. Equally striking was the absence of ecological considerations from Justice Kennedy's analytical approach in both of the 2008-2009 Term's CWA cases.

This inconsistency is particularly glaring in the *Coeur Alaska, Inc.* decision. There he wrote the majority opinion upholding the destruction of Lower Slate Lake and its aquatic life without any mention of how the Court's decision was compatible with the objective of maintaining and restoring the chemical, physical, and biological integrity of our nation's waters, an objective that underlies the structure and purpose of the CWA. It was not too long ago in *Rapanos* that this objective indisputably informed his understanding of the CWA. Given the importance of the "man in the middle," this sharp change in direction by Justice Kennedy does not bode well for other CWA cases or, for that matter, other environmental cases, which may appear before the Court in the foreseeable future.

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112. Justice Breyer did not exactly whole-heartedly agree with the results of *Entergy Corp.* and *Coeur Alaska, Inc.* In *Entergy Corp.* he concurred in part and dissented in part. *See* Entergy Corp. v. Riverkeeper, Inc., 129 S. Ct. 1498, 1512 (2009) (Breyer, J., concurring in part and dissenting in part). In *Coeur Alaska, Inc.* he concurred but recognized:

> [T]he danger that Justice Ginsburg warns against, namely, that "[w]hole categories of regulated industries" might "gain immunity from a variety of pollution-control standards," if, say, a § 404-permit applicant simply adds "sufficient solid matter" to a pollutant "to raise the bottom of a water body," thereby turning a "pollutant" governed by § 306 into "fill" governed by § 404.

129 S. Ct. at 2478 (Breyer, J., concurring) (citation omitted). Justice Breyer also joined Justice Stevens's dissent in *Rapanos*. *See* Rapanos v. United States, 547 U.S. 715, 787 (2006) (Stevens, J., dissenting).

113. Massachusetts v. EPA, 549 U.S. 497, 535 (2007) (Roberts, C.J., dissenting).

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UNPRECEDENTED HARM: WILL THE ROBERTS COURT RECOGNIZE THE DISTINCTION BETWEEN GLOBAL WARMING AND ITS EFFECTS?

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Abstract: This article examines conflicting judicial views of the harm associated with global warming and climate change. Among other disputes, a disagreement persists among circuit courts and within the Supreme Court itself over whether such harm can ever be sufficiently particularized to support standing before a federal court. It is suggested that a return to the underlying facts could help to resolve this disagreement, because the facts demonstrate that a clear distinction exists between global warming its effects, and that while global warming is a generalized phenomenon affecting humanity at large, its effects are highly particularized. Notwithstanding the significance of this distinction, it may remain obscured due to a tendency by the Roberts Court to analyze the harm in environmental cases at a distance from the facts.

INTRODUCTION: A NEW KIND OF HARM

Litigation based on claims arising from the effects of global warming has increased exponentially in recent years.[1] In grappling with what is universally agreed to be an unprecedented set of facts, courts at all levels, including the U.S. Supreme Court under Chief Justice Roberts, have struggled to reach a consensus about how basic legal principles should be applied to those facts. Among other disagreements, a preliminary dispute continues over whether the "harm" associated with global warming is

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1. *See* Michael B. Gerrard & J. Cullen Howe, Climate Change Litigation in the U.S., http://www.climatecasechart.com (last visited Feb. 1, 2010) (listing over one hundred active cases).

inherently general, or whether it is capable of being sufficiently particularized to support standing before a federal court.[2]

A review of the Supreme Court's narrowly divided opinion on this question in *Massachusetts v. EPA*[3] and the subsequent efforts by three circuit courts to interpret that ruling, which yielded three very different results, suggests that the dispute over the basic nature of the harm caused by global warming may be revisited by the Roberts Court in the near future.[4] In an effort to anticipate how that disagreement may be resolved, this Article examines the decisions issued by the Roberts Court in five environmental cases last Term, with a focus on how the legal view of "harm" related to the underlying facts in each case. Based on what may be gleaned from these recent decisions, this Article suggests that a return to the underlying facts could have a substantial effect on the Court's analysis of harm in the context of global warming, and that potential plaintiffs seeking to establish standing before the Court in global warming cases may benefit by specifically highlighting the factual distinction between the singular, generalized phenomenon of global warming and its multiple, highly particularized effects.

I. *Massachusetts v. EPA*

In its first encounter with the subject of global warming, in *Massachusetts v. EPA*, the Roberts Court was almost evenly divided on the preliminary question of whether any of the plaintiffs had suffered an injury of the kind necessary to support judicial standing. Typical of the claims involved were those brought by the lead plaintiff, the Commonwealth of Massachusetts, which alleged among other things that global warming had

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2. The particularlization requirement arises from the test for standing set forth by the Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-62 (1992). Questions also persist regarding whether the harm associated with global warming is sufficiently imminent and whether it may be traceable to a particular defendant and redressable by courts, in order to fully meet the *Lujan* test. *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 536 (2007) (Roberts, C.J., dissenting). This Article focuses only on the question of whether the harm from global warming is general or particularized.

3. 549 U.S. 497 (2007).

4. Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 338 (2d Cir. 2009); Comer v. Murphy Oil USA, 585 F.3d 855 (5th Cir. 2009); Ctr. for Biological Diversity v. Dep't of Interior, 563 F.3d 466, 477-79 (D.C. Cir. 2009). Adding to the likelihood that this issue will come before the Court again sooner rather than later are current efforts in Congress to pass new legislation to restrict greenhouse gas emissions, and recent steps taken by the U.S. Environmental Protection Agency ("EPA") to regulate emissions under the existing Clean Air Act. *See* American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009); 74 Fed. Reg. 66495, *et seq.* (Dec. 15, 2009). It is widely expected that any new law or regulation will be immediately challenged in the courts by a variety of interested parties.

led to inundation and increased flooding of its coastal land.[5] From the point of view of the dissent, *precisely because of the causal connection to global warming*, this type of harm was generalized, rather than particularized, and therefore it could not form the basis of a "case or controversy" which the Court had the authority to resolve[6]:

> "The very concept of global warming seems inconsistent with th[e] particularization requirement. Global warming is a phenomenon 'harmful to humanity at large,' and the redress petitioners seek is focused no more on them than on the public generally—it is literally to change the atmosphere around the world."[7]

In addition to being "generalized," other defects with the harms at issue, as perceived by the dissent, included their lack of imminence, lack of traceability to defendant EPA, and lack of redressability by courts.[8] On these grounds the dissenting Justices, which included Chief Justice Roberts and Justices Thomas, Alito, and Scalia, concluded that all of the plaintiffs lacked standing before the Court and therefore the case should have been dismissed.[9]

The majority opinion, which was written by Justice Stevens and joined by Justices Breyer, Ginsburg, Kennedy, and Souter, proceeded from a very different view of the harm involved. With respect to Massachusetts, it concluded that the alleged injury, a loss of sovereign territory due to rising sea levels caused by global warming, was a particularized harm and not a general one.[10] Specifically, the majority stated:

> That these climate-change risks are "widely shared" does not minimize Massachusetts' interest in the outcome of this litigation. According to petitioners' unchallenged affidavits, global sea levels rose somewhere between 10 and 20 centimeters over the 20th century as a result of global warming. These rising seas have already begun to swallow Massachusetts' coastal land. Because the Commonwealth "owns a substantial portion of the state's coastal property" it has alleged a particularized injury in its capacity as a landowner.[11]

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5. *Massachusetts*, 549 U.S. at 522-23.

6. *Id.* at 541 (Roberts, C.J., dissenting).

7. *Id.* (quoting Massachusetts v. EPA, 415 F.3d 50, 60 (D.C. Cir. 2005) (Sentelle, J., dissenting in part and concurring in part)) (citation omitted).

8. *Id.* at 542-44.

9. *Id.* at 535-36.

10. *Id.* at 522 (majority opinion).

11. *Massachusetts*, 549 U.S. at 522 (citations omitted).

The majority also found that the harm allegedly suffered by Massachusetts was sufficiently imminent, traceable to the EPA, and redressable by the Court to support standing.[12] After finding that Massachusetts, at least, had standing, the majority went on to adjudicate the merits of the case. It agreed with Massachusetts's argument that carbon dioxide ("CO_2") was a "pollutant" within the meaning of section 302 of the Clean Air Act ("CAA"),[13] and therefore that the EPA did have authority to regulate emissions of CO_2 if it were to find, under section 202 of the CAA,[14] that such emissions constituted an endangerment to public health and welfare.[15] The EPA has since made such a finding.[16]

Although the majority in *Massachusetts* found that the harm alleged by Massachusetts was sufficiently particularized to support standing, it prefaced this finding with the observation that it was "of considerable relevance that the party seeking review . . . is a sovereign State and not, as it was in *Lujan*, a private individual."[17] Moreover, it noted that Massachusetts had a procedural right under the CAA to challenge the EPA's rejection of its rulemaking petition under 42 U.S.C. § 7607(b)(1).[18] The majority stated that these two facts entitled Massachusetts to "special solicitude" in the standing analysis.[19] Unfortunately, the majority did not articulate the effect, if any, that the "special solicitude" afforded to Massachusetts had on the analysis of whether the particularization requirement was met. It simply stated in broad terms that "[w]ith that

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12. *Id.* at 526.

13. The Clean Air Act ("CAA") § 302(g), 42 U.S.C. § 7602(g) (2006). Section 302(g) defines a "pollutant" as:

> [A]ny air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substances or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant, to the extent the Administrator has identified such precursor or precursors for the particular purpose for which the term "air pollutant" is used.

Id.

14. CAA § 202, 42 U.S.C. § 7521(a)(1) ("The [EPA] Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.").

15. *Massachusetts*, 549 U.S. at 532.

16. *See supra* note 4.

17. *Massachusetts*, 549 U.S. at 518.

18. *Id.* at 520.

19. *Id.*

[special solicitude] in mind, it is clear that petitioners' submissions as they pertain to Massachusetts have satisfied the most demanding standards of the adversarial process."[20] Thus, whether Massachusetts's sovereign status and procedural right were *necessary* for it to meet the requirement of particularization, among other standing requirements, or whether those facts were only helpful in meeting that requirement, remained arguably ambiguous.

II. Confusion in the Wake of *Massachusetts v. EPA*

Within the past year, the question of whether the harm from global warming is inherently general, and therefore incapable of supporting standing, or whether it may be sufficiently particularized to support standing has come before three different circuit courts. In addressing the question, each court has attempted to apply the holding in *Massachusetts*, with three very different results, as described below.

A. *Center for Biological Diversity v. U.S. Department of Interior*

In *Center for Biological Diversity v. U.S. Department of Interior*,[21] three nonprofit organizations and the Native Village of Point Hope, Alaska, challenged the Interior Department's approval of a program that would potentially expand leasing areas for offshore oil and gas development in the Beaufort, Bering, and Chukchi Seas off the Alaskan coast.[22] Among other things, the petitioners argued that the Department of Interior's actions would lead to increased climate change, which would adversely affect the species and ecosystems in the affected areas and in turn threaten their enjoyment of those areas and their inhabitants.[23]

In an opinion authored by Judge Sentelle, the D.C. Circuit Court found that *Massachusetts* was inapplicable because the holding there had turned on unique circumstances which were not present in the case before it.[24] The court held that outside of "very limited factual setting[s]," involving a sovereign entity asserting its own rights, *Lujan* provided the

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20. *Id.* at 521.

21. 563 F.3d 466 (D.C. Cir. 2009).

22. *Id.* at 475.

23. *Id.* at 475-76.

24. *Id.* at 476. It is interesting to note that the court characterized the holding of *Massachusetts* as "*turn[ing] on* the unique circumstances of that case," and being "*based on* the uniqueness of the case before it," and described Massachusetts's sovereign status as being "critical" to the holding, all instances of limiting language which do not occur in the *Massachusetts* decision itself. *Id.* (emphasis added).

test for standing.[25] It then went on to hold that none of the petitioners had met that test:

> [C]limate change is a harm that is shared by humanity at large, and the redress that Petitioners seek—to prevent an increase in global temperature—is not focused any more on these petitioners than it is on the remainder of the world's population. Therefore Petitioners' alleged injury is too generalized to establish standing.[26]

The D.C. Circuit thus sought to establish as the default rule the idea that the harm associated with global warming is too generalized to support standing under the traditional *Lujan* test.[27] As a corollary to this rule, *Massachusetts* would provide a separate, more lenient test for unusual circumstances involving a sovereign entity:

> "*Massachusetts* stands only for the limited proposition that, where a harm is widely shared, a sovereign, suing in its individual interest, has standing to sue where that sovereign's individual interests are harmed, wholly apart from the alleged general harm."[28]

The court briefly discussed the possibility that the Village of Point Hope, as a sovereign entity, might have met the test for standing under *Massachusetts*, but it then rejected this idea, stating among other things that Point Hope had "not demonstrated that climate change would directly cause any diminution of Point Hope's territory any more than anywhere else."[29]

Significantly, Judge Rogers concurred in the opinion, but wrote separately in part to state that because the court had found that petitioners had standing on other grounds, it was unnecessary to "determin[e] the precise scope of the holding on standing in *Massachusetts*, and whether the Native Village of Point Hope ha[d] identified by affidavit *particularized* harms to its culture and way of life from climate change sufficient to

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25. *Id.* at 477.

26. *Id.* at 478.

27. *Ctr. for Biological Diversity*, 563 F.3d at 478. It is worth noting that this idea originated with Judge Sentelle in his opinion in *Massachusetts* at the appellate level. *See* Massachusetts v. EPA, 415 F.3d 50, 59-60 (D.C. Cir. 2005) (Sentelle, J., dissenting in part, concurring in part). It is also worth noting that the dissent in *Massachusetts* drew directly from that appellate opinion for its analysis of the particularization requirement. *See* Massachusetts v. EPA, 549 U.S. 497, 540-41 (2007) (Roberts, C.J., dissenting).

28. *Ctr. for Biological Diversity*, 563 F.3d at 476-77.

29. *Id.* at 477.

establish Article III standing."[30] In contrast to Judge Sentelle's view, Judge Rogers's view thus explicitly preserves the possibility of particularization, notwithstanding the fact that the plaintiffs' alleged harms were caused by global warming.

B. *Connecticut v. American Electric Power Co.*

In *Connecticut v. American Electric Power Co.*,[31] eight states, the City of New York, and three land trusts sought a reduction in carbon dioxide emissions from the power plants of six electric power companies under theories of nuisance law.[32] Specifically, the plaintiffs argued that the emissions, which constituted approximately ten percent of all carbon dioxide emissions from human activities in the United States, contributed to the ongoing public nuisance of global warming, which in turn was causing or would cause specific injuries to each of them.[33]

In analyzing the question of standing, the Second Circuit began its interpretation of the decision in *Massachusetts* by respectfully suggesting that the Court may have inadvertently conflated the tests for state *parens patriae* standing and proprietary standing.[34] However, the Second Circuit observed that the Court ultimately analyzed standing for Massachusetts in its proprietary capacity—that is, as a property owner—under the standard *Lujan* test, and found that Massachusetts had satisfied that test.[35] Thus, in contrast to the approach taken by the D.C. Circuit, the Second Circuit interpreted *Massachusetts* to *support* the idea that harms alleged to arise

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30. *Id.* at 489 (emphasis added) (citation omitted).

31. 582 F.3d 309 (2d Cir. 2009).

32. *Id.* at 314. Both *Connecticut v. American Electric Power Co., Inc.* and *Comer v. Murphy Oil USA* were dismissed at the district court level on grounds that the claims involved presented non-justiciable political questions. *Id.* at 319; Comer v. Murphy Oil USA, 585 F.3d 855, 860 (5th Cir. 2009). In each case, the appellate court disagreed with that finding and went on to analyze standing, among other questions. *See Am. Elec. Power*, 582 F.3d at 314-15; *Comer*, 585 F.3d at 860.

33. *Am. Elec. Power*, 582 F.3d at 314.

34. *See id.* at 338.

> In the midst of invoking language that hearkened to a state's quasi-sovereign interests, the *Massachusetts* Court mentioned proprietary injury to the State as a landowner, commenting: "That Massachusetts does in fact *own a great deal of the territory* alleged to be affected only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power." This sentence appears to conflate, to an extent, state *parens patriae* standing and proprietary standing. (quoting Massachusetts v. EPA, 549 U.S. 497, 519 (2007)) (citation omitted).

35. *Id.* at 338.

from global warming may satisfy the traditional test under *Lujan*. Consistent with this interpretation, the Second Circuit went on to find that the plaintiffs in the case before it had alleged a variety of harms that were sufficiently particularized to satisfy the *Lujan* test, including: damage to property and coastal infrastructure of coastal states and New York City (due to sea level rise); damage to California's water supply system (due to a diminished snow-pack); disruption of hydropower production for states bordering the Great Lakes (due to lowered water levels in the Great Lakes); and the loss of physical property and property value by the three land trusts (due to sea level rise).[36]

C. *Comer v. Murphy Oil USA*

Most recently, in *Comer v. Murphy Oil USA*,[37] the Fifth Circuit analyzed a variety of claims brought as a class action by residents and owners of land and property along the Mississippi Gulf Coast. The plaintiffs alleged that the emission of greenhouse gases by defendants, various energy and chemical companies, had contributed to global warming, which had caused sea level rise and added to the ferocity of Hurricane Katrina, the combined effects of which had destroyed both their private property and public property useful to them.[38] They sought compensatory and punitive damages based on Mississippi common-law actions of public and private nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy.[39]

With respect to the nuisance, trespass, and negligence claims, the defendants in *Comer* did not challenge whether plaintiffs had suffered particularized injury. Perhaps in part for this reason, the court did not address the issue of particularization at length in the body of its opinion, beyond stating that these were "common-law tort claims, in which plaintiffs allege that they sustained actual, concrete injury in fact to their *particular* lands and property."[40] In a footnote, however, the court made a point to distinguish these types of private law claims from claims based on public law, such as those at issue in *Center for Biological Diversity*, "that might raise concerns the standing doctrine is designed to guard against."[41] For this set of claims, the Fifth Circuit thus seemingly avoided a need to

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36. *Id.*

37. 585 F.3d 855.

38. *Id.* at 860-61.

39. Federal subject matter jurisdiction was based on 28 U.S.C. § 1332(d)(2) (2006). *Am. Elec. Power*, 582 F.3d at 860 n.1.

40. *Id.* at 863 (emphasis added).

41. *Id.* at 864 n.3 ("It is only when a question is of a public nature that the interested bystander is likely to attempt suit.").

interpret *Massachusetts*'s holding with respect to the particularization requirement.

The question of particularization reemerged in the court's analysis of the claims of unjust enrichment, fraudulent misrepresentation, and civil conspiracy. The court declined to hear these claims based on the prudential standing doctrine, explaining that:

> Each of the plaintiffs' second set of claims presents a generalized grievance that is more properly dealt with by the representative branches and common to all consumers of petrochemicals and the American public. . . . Unlike the first set of claims, the plaintiffs do not identify a *particularized* "injury [that] must affect the plaintiff in a personal and individual way."[42]

The court thus demonstrated the extremely critical point that it is possible, even in the context of global warming, to separate claims that describe particularized harms from those that in fact represent generalized ones.

D. A Need for Clarification

While the Supreme Court's holding in *Massachusetts* with respect to the question of particularization may have been ambiguous, the subsequent variety of interpretations of that holding by several circuit courts has led to even more confusion about whether potential global warming litigants may meet standing requirements. At a minimum, the different approaches contained in the three appellate decisions issued to date suggest a need for clarification of the Supreme Court's view on the question. In attempting to anticipate how the Court might ultimately resolve this issue, it is helpful first to review the Court's recent environmental decisions, and specifically to consider its analysis of the "harm" alleged in each case.

III. The Roberts Court and the Idea of "Harm" in Recent Environmental Decisions

A. *Summers v. Earth Island Institute*

At first glance, the case of *Summers v. Earth Island Institute*[43] appears to be the most relevant to this inquiry, as it turned specifically on the question of whether the plaintiffs had demonstrated sufficiently particularized harm to support standing. At issue were Forest Service regulations which the plaintiffs alleged unlawfully exempted certain salvage timber sales in the National Forests from the standard notice and

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42. *Id.* at 868-69 (emphasis added) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 n.1 (1992)).

43. 129 S. Ct. 1142 (2009).

comment process.[44] In analyzing the harm involved, the Court first found that one affidavit submitted by the plaintiffs, that of Ara Marderosian, would have been adequate to establish particularized harm because it identified a specific timber sale, the Burnt Ridge Project in the Sequoia National Forest, and demonstrated that Marderosian had repeatedly visited the Burnt Ridge site and had imminent plans to do so again.[45] However, the Court held that plaintiffs could not rely upon the Marderosian affidavit because the original dispute over the Burnt Ridge Project had since been resolved.[46] The Court then reviewed a second affidavit, that of Jim Bensman, which mentioned his desire to visit several unnamed National Forests in the future.[47] The Court emphatically took issue with this as a basis for standing, pointing out that:

> The National Forests occupy more than 190 million acres, an area larger than Texas. . . . There may be a chance, but is hardly a likelihood, that Bensman's wanderings will bring him to a parcel about to be affected by a project unlawfully subject to the regulations. . . . Accepting an intention to visit the National Forests as adequate to confer standing to challenge any Government action affecting any portion of those forests would be tantamount to eliminating the requirement of concrete, *particularized* injury in fact.[48]

Thus, the Court made clear that the harm from the Forest Service regulations could not be particularized in the absence of firm plans to visit a discrete part of a specific National Forest that was affected by the regulations.[49]

On its surface, the decision in *Summers* seems to align with the view of the dissent in *Massachusetts* in finding that the alleged environmental harm was not particularized,[50] and it is tempting to infer that the viewpoint of the dissenting Justices in *Massachusetts* may have gained additional adherents. However, a closer inspection reveals that the two opinions rest on arguments that are in fact quite different. Rather than finding that the alleged harm was *incapable* of being particularized, as the dissent argued in

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44. *Id.* at 1147-48.

45. *Id.* at 1149.

46. *Id.*

47. *Id.* at 1150.

48. *Id.* (emphasis added).

49. The Court noted that the Bensman affidavit did identify a specific series of affected timber sales in the Allegheny National Forest and described general plans to visit those areas, but found that those plans were insufficiently concrete to satisfy the requirement that the harm be "actual or imminent." *Summers*, 129 S. Ct. at 1150-51.

50. Massachusetts v. EPA, 549 U.S. 497, 541 (2007) (Roberts, C.J., dissenting).

Massachusetts,[51] the majority in *Summers* found only that the harm was *insufficiently* particularized.[52] This leaves open the possibility of particularization. With slightly different facts, such as another plaintiff with specific plans to visit a specific location affected by the Forest Service regulations, the particularization requirement presumably would have been satisfied, just as the Marderosian affidavit would have satisfied the requirement during the time that a live dispute over the Burnt Ridge Project existed. *Summers* thus concerns a curable defect with an alleged harm, rather than a fatal defect of the kind perceived by the dissent in *Massachusetts*.

B. *Winter v. Natural Resources Defense Council*

The analysis of harm also played a central role in *Winter v. Natural Resources Defense Council*.[53] There, the Court was engaged in a comparison of two very different types of injury. On one side was the harm to the National Resource Defense Council's ("NRDC") and other environmental plaintiffs' interests from injuries to marine mammals that would be caused by sonar training activities of the Navy off the southern coast of California.[54] On the other side was the harm to the Navy's level of military preparedness that would be caused by an injunction imposing restrictions on those training activities.[55]

In addition to disagreeing over *whether* significant injury to the marine mammals would occur, the parties initially disagreed about whether injury to individual animals, or only "species-level" harm, was relevant.[56] Subsequently, after the Navy had agreed to operate its training program with four of the six restrictions sought by the NRDC, there was also disagreement about how to define the "relevant harm"; the harm that would remain from the operation of the program without the two final restrictions.[57]

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51. *Id.* at 540-42.

52. *Summers*, 129 S. Ct. at 1151.

53. 129 S. Ct. 365 (2008).

54. *Id.* at 370-71.

55. *See id.*

56. "The parties strongly dispute the extent to which the Navy's training activities will harm those animals or disrupt their behavioral patterns." *Id.* at 371. "[E]ven if MFA sonar does cause a limited number of injuries to individual *marine mammals*, the Navy asserts that plaintiffs have failed to offer evidence of species-level harm that would adversely affect *their* scientific, recreational, and ecological interests." *Id.* at 375.

57. *Id.* at 376 ("The District Court did not reconsider the likelihood of irreparable harm in light of the four restrictions not challenged by the Navy.").

The district court characterized the harm to the Navy as the harm that would incur if it was "prevented from using MFA sonar . . . during a subset of their regular activities in one part of one state for a limited period."[58] The court of appeals also downplayed the harm from a potential injunction, characterizing it as "speculative" because the Navy had not previously conducted its training program under the proposed restrictions.[59] Upon review, the Roberts Court strongly disagreed with these characterizations, finding that:

> "In this case, the District Court and the Ninth Circuit significantly understated the burden the preliminary injunction would impose on the Navy's ability to conduct realistic training exercises."[60]

And later:

> "Again, we think the Ninth Circuit understated the burden this requirement [—to power down sonar during significant surface ducting conditions—] would impose on the Navy's ability to conduct realistic training exercises."[61]

The Court suggested several times that the lower courts' mischaracterization of the harm to the Navy's interests resulted from the courts' failure to defer to the Navy's identification of the relevant facts.[62] By deferring to the Navy's perspective, the Court then restored what, in its view, was the proper characterization of the harm on that side, and on that basis vacated the injunction that the district court had imposed, to the extent that it was challenged by the Navy.[63]

Because the outcome of *Winter v. Natural Resources Defense Council* turned on the comparative weighing, and therefore on the contrasting characterization, of two competing types of harm, advocates on each side focused on defining, or redefining, each harm in a manner that worked to their advantage, with varying success before different courts. As a result, the judicial articulation of the "harms" at issue can be seen to fluctuate significantly over the course of the litigation, up to and including the final

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58. *Id.* at 378.

59. *Winter*, 129 S. Ct. at 378.

60. *Id.* at 377.

61. *Id.* at 380.

62. "The lower courts failed properly to defer to senior Navy officers' specific, predictive judgments about how the preliminary injunction would reduce the effectiveness of the Navy's SOCAL training exercises." *Id.* at 368. "The lower courts did not give sufficient weight to the views of several top Navy officers . . . . [T]he Court of Appeals ignored key portions of Admiral Locklear's declaration . . . ." *Id.* at 379.

63. *See id.* at 382.

opinion from the Roberts Court. The case thus illustrates succinctly that, even when the factual content of a given "harm" is relatively fixed, the legal idea of "harm" remains elastic; its shape can always be changed, to a certain degree, through the emphasis or de-emphasis of specific facts.

C. *Entergy v. Riverkeeper*

Although the idea of harm did not play a central role in *Entergy v. Riverkeeper*,[64] it nevertheless featured as a prominent backdrop to much of the Court's analysis, which centered on divining Congress's intent in directing the EPA to reduce various kinds of damage to the aquatic environment. There, in the process of reviewing whether the EPA had permissibly engaged in a cost-benefit analysis when issuing certain regulations for power plants, the Court undertook to interpret section 316(b) of the Clean Water Act, 33 U.S.C. § 1326(b).[65] This provision states, in relevant part: "Any standard . . . applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact."[66]

To aid its interpretation of this language, the Court compared section 316(b) with several other roughly analogous provisions in the Clean Water Act, including section 301(b)(2)(A),[67] which requires the EPA to set "effluent limitations [which] shall require the elimination of discharges of all pollutants if the Administrator finds . . . that such elimination is technologically and economically achievable."[68]

The Court compared the explicit goals of the two provisions and found it significant that section 316 "has the relatively modest goal of '*minimizing* adverse environmental impact' as compared with [section 301-mandated] [Best Available Technology Economically Achievable's] goal of '*eliminating* the discharge of all pollutants.'"[69] And elsewhere:

> When Congress wished to mandate the greatest feasible reduction in water pollution, it did so in plain language: The provision governing the discharge of toxic pollutants into the Nation's waters requires the EPA to set "effluent limitations which shall require the *elimination* of discharges of all pollutants if the Administrator finds that such elimination is technologically

64. 129 S. Ct. 1498 (2009).

65. *Id.* at 1502.

66. Clean Water Act ("CWA") § 316(b), 33 U.S.C. § 1326(b) (2006).

67. *Entergy*, 129 S. Ct. at 1506.

68. CWA § 301(b)(2)(A), 33 U.S.C. § 1311(b)(2)(A).

69. *Entergy*, 129 S. Ct. at 1508 (emphasis added).

> and economically achievable." Section 1326(b)'s use of the less ambitious goal of "minimizing adverse environmental impact" suggests, we think, that the agency retains some discretion to determine the extent of reduction that is warranted under the circumstances.[70]

It is interesting to note that missing from both of these comparisons is any consideration of the underlying factual distinction between the subjects of the two different provisions. Specifically, section 316 governs the structures by which power plants draw cooling water *in*, while section 301 governs the discharge of pollutants in effluent flowing *out* from those plants. From a purely physical perspective, it is possible that the harm addressed by section 316—the impingement and entrainment of aquatic organisms in intake structures—is simply not *susceptible* to elimination, for as long as the source of the cooling water is a natural one, it will contain aquatic organisms.[71] By contrast, the harm addressed by section 301—involving the discharge of pollutants from power plants—is at least theoretically susceptible to elimination, as the pollutants were added to the water while it circulated within the power plant and therefore they are, at least technically, capable of being removed.

Had the Court taken these underlying factual distinctions into account, it might have found that the difference between the statutory goals of "minimizing" harm from cooling water intake structures in section 316 and "eliminating" harm from effluent discharges in section 301 signifies less than the plain language at first suggests. In turn, this might have inhibited the Court's conclusion that the use of the word "minimization" in section 316 implies a less rigorous standard than the one implied by section 301. Ultimately, however, the comparison of section 316 and section 301(b)(2)(A) played only a small role in the decision in *Entergy*, and it is unlikely that the outcome would have been affected, even if the Court had looked more closely at the underlying facts relevant to the harm involved in the respective provisions. Nevertheless, it is interesting to consider the influence that the facts might have had on a portion of the Court's overall analysis. The case thus serves to illustrate that when the judicial analysis of "harm" occurs at a distance from the underlying facts, it is at least possible for something significant, and potentially something outcome-determinative, to be lost in the process.

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70. *Id.* at 1506 (citations omitted) (citing 33 U.S.C. §§ 1311(b)(2)(A), 1326(b) (2006)).

71. This would be true even in the case of closed loop systems, because the water must initially be drawn in from a natural source.

D. *Burlington Northern & Santa Fe Railway Co. v. United States*

Although the Court's view of harm was likely not determinative of the outcome in *Burlington Northern & Santa Fe Railway Co. v. United States*,[72] the case provides another illustration, similar to that in *Entergy*, of the Court's tendency to deemphasize the underlying facts relevant to environmental harm in its overall analysis. There, among other issues, the Court considered whether the record provided enough support for the district court's apportionment of harm arising from contamination at a Superfund site in California.[73] In assigning to Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company ("Railroads"), the owners of a parcel within the site, liability for nine percent of the total response costs, the district court had relied on factors such as the relative size of the Railroad parcel and the length of time that it was leased by the site operator, which the court of appeals observed were not "reliable measure[s] of the harm caused by activities on the property owned by the Railroads."[74] The court of appeals also found a lack of evidence supporting the district court's conclusion that the chemicals spilled on the Railroad parcel had contributed to only two-thirds of the total contamination, pointing out that a potentially responsible party's "share of the total harm was not necessarily equal to the quantity of pollutants that were deposited on its portion of the total facility."[75]

Upon review, the Supreme Court downplayed all of these criticisms, even while agreeing with the appeals court that the lower court's use of a two-thirds multiplier "finds less support in the record."[76] The Court simply stated, "however, any miscalculation on that point is harmless in light of the [d]istrict [c]ourt's ultimate allocation of liability, which included a fifty-percent margin of error."[77] This reasoning reveals that the connection between the Court's analysis of harm and the underlying facts relevant to that harm is a relatively loose one, for the analysis countenances both significant reductions and increases in allocation of liability to the Railroads for contamination at the site without a firm basis in the record for the changes in either direction. Again, had the facts been given more emphasis in the Court's analysis, it is at least possible that the overall result would have been different, even though not every part of the Court's analysis would have changed.

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72. 129 S. Ct. 1870 (2009).

73. *Id.* at 1876.

74. *Id.* at 1882.

75. *Id.* at 1883.

76. *Id.*

77. *Id.*

E. *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*

Coeur Alaska, Inc. v. Southeast Alaska Conservation Council[78] illustrates somewhat more dramatically than *Entergy* and *Burlington Northern* what can happen when the judicial view of harm is not fully grounded in the facts. In that case, Coeur Alaska, Inc. sought to discharge waste from a gold mine into a nearby lake in the Tongass National Forest.[79] The question before the Court was whether the EPA or the Army Corps of Engineers had exclusive regulatory authority over the proposed discharge.[80] A finding that the EPA had authority would effectively have prohibited the discharge, while a decision for the Corps would have allowed the discharge to occur.[81] Both the majority and the dissent devoted significant space to a discussion of the environmental impacts that would flow from the decision.[82] However, they selected two very different—almost mutually exclusive—sets of facts to describe that harm.

The majority began its description of the harm involved by acknowledging that the lake would effectively be converted into a tailings pond.[83] It then proceeded to describe the impact of this conversion in purely quantitative terms:

> Over the life of the mine, Coeur Alaska intends to put 4.5 million tons of tailings in the lake. This will raise the lakebed [fifty] feet—to what is now the lake's surface—and will increase the lake's area from [twenty-three] to about [sixty] acres. . . . To contain this wider, shallower body of water, Coeur Alaska will dam the lake's downstream shore.[84]

Characterizing this change as a "transformation" of the lake, the majority omitted from its description the virtually complete destruction of water quality and aquatic life that would ensue from such a transformation.[85] By contrast, the dissent shone a spotlight on those facts, noting at the beginning of its opinion that "[i]t is undisputed that the discharge would kill all of the lake's fish and nearly all of its other aquatic

78. 129 S. Ct. 2458 (2009).

79. *Id.* at 2464.

80. *Id.* at 2468.

81. *See id.* at 2466.

82. *See id.* at 2465; *id.* at 2480 (Ginsburg, J., dissenting).

83. *Id.* at 2464 (majority opinion) ("Rather than build a tailings pond, Coeur Alaska proposes to use Lower Slate Lake . . . .").

84. *Coeur Alaska*, 129 S. Ct. at 2464.

85. *Id.*

life," and further, that "[w]hether aquatic life will eventually be able to inhabit the lake again is uncertain."[86]

Although the outcome of the case did not turn on the Court's analysis of harm, it nevertheless appears that the competing definitions of that harm may have played a significant role in the background, exerting an influence over one or more Justices in either accepting or rejecting the results that would flow from a decision finding that authority over the proposed discharge rested with the Corps. When viewed together with the decisions in *Entergy* and *Burlington Northern*, this case lends support to the idea that there is a tendency by a majority of Justices on the Roberts Court to analyze environmental harm at a certain distance from the underlying facts.[87] While this tendency may not always affect the outcome of the Court's decisions, it is at least arguable that in some cases, such as *Coeur Alaska*, significant aspects of the real harm at issue can be entirely omitted from the legal analysis of that harm when the distance between the analysis and the facts is too great.

IV. A Return to the Facts

The sheer variety of roles played by the idea of "harm" in the environmental cases decided last Term demonstrates that the idea itself is not a fixed concept, but rather that it is an empty abstraction, which gains substance from the facts of each particular case. Put another way, the judicial view of "harm," even within a specific field such as environmental law, does not begin with any particular content but instead is filled with content by the facts deemed to be relevant in each instance. As demonstrated in *Winter*, the idea of "harm" is also elastic, in that even when its factual content is fixed its contours can change through emphasis or de-emphasis of specific relevant facts. In the context of global warming, where the facts are literally unprecedented, this means that there is a relatively large role for advocates to play in shaping the judicial view of the "harm" involved, both through argument about which facts are relevant, and about which among the relevant facts deserve emphasis.

At the same time, and consistent with its decisions in environmental cases last Term, there are indications that at least some members of the

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86. *Id.* at 2480 n.1 (Ginsburg, J., dissenting).

87. More than one scholar has expressed this view of the Court's recent environmental decisions. *See* Adam Liptack, *Environment Groups Find Less Support on Court*, N.Y. TIMES, July 3, 2009, at A10 ("Patrick A. Parenteau, who teaches environmental law at Vermont Law School, said he was disturbed not only by the substance of the [C]ourt's recent decisions but also by what they failed to address. None, he said, involved extended discussions of the environmental consequences, whether for the future of a lake in Alaska or the practice of forestry.").

Roberts Court may be inclined to analyze the "harm" from global warming at a great distance from the facts. For example, in support of its view that the harm is too generalized to support standing, the four dissenting Justices in *Massachusetts* did not cite to any facts at all, but instead simply referenced an assertion by Judge Sentelle in the case below:

> "The very concept of global warming seems inconsistent with [the] particularization requirement. Global warming is a phenomenon 'harmful to humanity at large . . . .'" Massachusetts v. EPA, 549 U.S. 497, 541 (2007) (Roberts, C.J., dissenting) (citing Massachusetts v. EPA, 415 F.3d 50, 60 (D.C. Cir. 2005) (Sentelle, J., dissenting in part and concurring in judgment)).

In another example, during oral argument in *Massachusetts*, Justice Scalia indicated a reluctance to delve into the underlying facts of global warming:

> JUSTICE SCALIA: Mr. Milkey . . . . your assertion is that after the pollutant leaves the air and goes up into the stratosphere it is contributing to global warming.
>
> MR. MILKEY: Respectfully, Your Honor, it is not the stratosphere. It's the troposphere.
>
> JUSTICE SCALIA: Troposphere, whatever. I told you before I'm not a scientist.
>
> (Laughter.)
>
> JUSTICE SCALIA: That's why I don't want to have to deal with global warming, to tell you the truth.[88]

A tension thus exists between the potential, on one hand, for the judicial view of the harm from global warming to be significantly shaped by close attention to the unprecedented facts, and the seeming inclination, on the other hand, of a possible majority of Justices on the Court to keep at a distance from those facts.

To be sure, there are valid prudential reasons for avoiding unlimited judicial engagement with the facts of global warming. Even among scientists, the facts are considered to be voluminous, complex, and, in certain areas, subject to dispute and therefore subject to change.[89] From the

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88. Transcript of Oral Argument at 22-23, Massachusetts v. EPA, 549 U.S. 497 (2007) (No. 05-1120).

89. The website maintained by climate scientists at www.realclimate.org provides one example of the seemingly endless stream of scientific facts pertinent to the phenomenon of global warming. *See* RealClimate, Climate Science from Climate Scientists, http://www.realclimate.org (last visited Feb. 1, 2010).

perspective of the law, the factual terrain in such areas is akin to quicksand, and therefore it is rightly regarded with caution by courts.[90] However, most issues presented in global warming cases do not require a foray into areas where the science is unsettled, but instead they merely require judicial reliance on facts that are well established and accepted among climate scientists, and the question of particularization is one such issue.

As a preliminary matter, it is arguable that the particularization inquiry, when it is properly conducted, mandates against any discussion of global warming at all. This is because in asking whether a harm is concrete and personally experienced, and whether it gives the plaintiff a personal stake in the outcome of the litigation, the inquiry requires a court to focus on the plaintiff and what has happened to the plaintiff, rather than on what has happened to the planet as a whole. Therefore, to the extent the judicial focus stays on the plaintiff, and the problems directly experienced by the plaintiff, a discussion of the alleged injuries does not require a review of the physics of greenhouse gases. Instead, it requires a review of familiar, even mundane, aspects of traditional problems, such as the diminution in property value experienced by the owner of property that has been flooded, or the loss of income incurred by a farmer whose supply of irrigation water has fallen off.

A. The Chain of Causation

It is not until courts search for the cause of such injuries that the science of global warming must be included in the analysis. And while the facts relevant to causation are new, courts have generally proven to be adept at translating them into a legally recognizable chain of causation, which includes four basic links[91]

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90. Courts are not alone in keeping at a distance from the facts. The general public has also demonstrated a tendency to avoid engagement with the available scientific information pertaining to global warming, to the point that a minor specialty has emerged among psychologists, journalists, and others working in the field of communication in trying to explain the reasons for this tendency. *See generally* Nicholas D. Krisof, *When Our Brains Short-Circuit*, N.Y. TIMES, July 2, 2009, at A23; DEBIKA SHOME & SABINE MARX, THE PSYCHOLOGY OF CLIMATE CHANGE COMMUNICATION: A GUIDE FOR SCIENTISTS, JOURNALISTS, EDUCATORS, POLITICAL AIDES, AND THE INTERESTED PUBLIC (Andria Cimino ed., 2009), *available at* http://cred.columbia.edu/guide/pdfs/CREDguide_full-res.pdf; Pew Research Center for the People & the Press, http://people-press.org (last visited Feb. 1, 2010).

91. See for example Order Granting Defendants' Motions to Dismiss for Lack of Subject Matter Jurisdiction at 13, Native Village of Kivalina v. Exxonmobil Corp., 663 F. Supp. 2d 863 (N.D. Cal. 2009) (No. 08-1138): "In a global warming scenario, emitted greenhouse gases combine with other gases in the atmosphere which *in turn* results in the planet retaining heat, which *in turn* causes the ice caps to melt and the oceans to rise, which

emissions → increased GHG → global warming → effects of
of GHG[92] in atmosphere global warming

The first and second links of this chain have become familiar to courts through traditional environmental cases; emissions or discharges of a pollutant into a common resource, such as air or water, lead to elevated levels of that pollutant in the common resource. In traditional environmental cases, the first two links are followed by a third and final link that directly connects the elevated levels of the pollutant in the common resource to a harm allegedly suffered by the plaintiff. What is new about the chain of causation in a global warming case is the presence of a third link that is *not* the site of any alleged harm. Instead, this third link—global warming itself—is an intermediary effect, which in turn is a cause of other effects, and it is among these *effects* of global warming that the harms alleged in litigation are to be found.

B. The Distinction Between Global Warming and Its Effects

In order to bring into sharper focus the distinction between global warming and its effects, it is necessary to begin with a clear definition of "global warming." Although people often equate this term with an increase in temperature, "global warming" more precisely refers to increased *energy* in the global climate system.[93] Measured in watts per square meter and not in degrees, this additional energy is a direct result of elevated levels of heat-trapping gases in the atmosphere.[94] It is a truly generalized phenomenon, due to the physical path followed by greenhouse gases. Carbon dioxide and other greenhouse gases do not remain near where they are emitted, but enter the atmosphere and become "globally mixed" around the earth's surface, and while in this globally mixed state they absorb and re-emit into the atmosphere infrared radiation that would otherwise escape into space.[95]

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in turn causes the Arctic sea ice to melt, which *in turn* allegedly renders [plaintiffs' home] Kivalina vulnerable to erosion and deterioration resulting form winter storms." (emphasis in original).

92. Greenhouse gases.

93. *See* GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES 16 (Karl et al. eds., 2009). Some have noted that a more accurate term for this phenomenon would be "global heating." *See* Matthew F. Pawa, *Global Heating and Tort Law*, *in* LITIGATING CLIMATE CHANGE (ALI-ABA Telephone Seminar/Audio Webcast, Feb. 24, 2010).

94. *See* GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES, *supra* note 93, at 16.

95. Intergovernmental Panel on Climate Change, *Summary for Policymakers*, *in* CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS 4 (Susan Solomon et al. eds., 2007), *available at* http://www.ipcc-wg1.unibe.ch/publications/wg1-ar4/ar4-wg1-spm.pdf.

The observed increase in the global average surface temperature of the Earth is not exactly the same thing as global warming, but instead it is one of its primary effects.[96] Other primary effects of the additional energy in the climate system include increased rates of evaporation and transpiration, increased melting of snow and ice, and a rise in global average sea levels.[97] These primary effects of global warming are causes, in turn, of secondary effects such as drought, flooding, increased storm intensity, and increased ranges for pests and disease-carrying insects, which in turn are causes of further effects, such as increased human disease and mortality, crop failures, forest destruction, property damage, and the gradual unraveling of ecosystems at locations around the world.[98]

In contrast to global warming itself, the effects of global warming occur in specific places around the world and affect people in individual and very concrete ways.[99] Although this may be more obvious among the derivative effects, where the specific locations of drought-stricken farms, forests felled by pests, and other such impacts are readily ascertainable, it is true of the primary effects as well. Even the rise in the global average surface temperature of the Earth, which at first appears to be as generalized as global warming itself, when examined closely emerges for what it is; an *average* of individual temperature measurements taken at thousands of locations around the world.[100] So while it is true that the global average surface temperature is increasing, it is impossible for anyone (let alone everyone) to actually experience this increase. Instead, what individuals actually experience, in a concrete and personal way, is a change in the local temperature, which is specific to that location, and is not the same for all

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96. *Id.* at 5.

97. *Id.*

98. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2007: SYNTHESIS REPORT, *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf. In contrast to the term "global warming," the term "climate change" is generally used to encompass both the addition of energy to the climate system *and* its effects, and therefore it is not used in this article, which is focused on distinguishing these two things.

99. *See* GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES, *supra* note 93, at 99 ("Climate change will affect different segments of society differently because of their varying exposures and adaptive capacities."); *id.* at 107-49 (discussing the varying effects in the Northeast, Southeast, Midwest, Great Plains, Southwest, Northwest and Alaska and the Islands).

100. *See* Intergovernmental Panel on Climate Change, *Technical Summary*, at 37, *in* CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, *supra* note 95, *available at* http://ipcc-wg1.ucar.edu/wg1/Report/AR4WG1; GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES, *supra* note 93, at 17.

people everywhere.[101] The Arctic, where temperatures are rising the fastest, best illustrates this point.[102]

The rise in global average sea levels is a similar type of effect. It is also an average of measurements taken at thousands of locations around the world, and the underlying facts reveal that in some places sea level is rising more than in others, while in yet other places it is falling.[103] A perhaps more obvious feature of sea level rise is that it has no impact on people living away from coasts, while people living on coasts and owners of coastal property are affected in a very concrete and personal way, demonstrating that the effect is hardly uniform in distribution.[104]

The effect of melting snow and ice also shares this feature; it is not distributed evenly around the world and it is not actually experienced by those who live at a distance from snow and ice or who are not somehow dependent on it, for example, for drinking water or irrigation. However, in the locations where it is occurring, the damage is very concrete and specific, and very personally experienced.[105] Again the best illustration of this is in the Arctic, where the damage associated with the loss of sea ice is approaching catastrophic levels for both the ecosystem and the people who depend on it.[106]

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101. *Compare* GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES, *supra* note 93, at 110 (In the Northeast, particularly in Rhode Island and Massachusetts, lobster catch has dramatically decreased since the 1990s due to a "temperature-sensitive bacterial shell disease."), *with id.* (In the Midwest, an increase in temperature will raise the cost of livestock production as "higher temperatures stress livestock, decreasing productivity and increasing costs associated with the needed ventilation and cooling equipment.").

102. *See* Andrew C. Revkin, *Arctic Melt Unnerves the Experts*, N.Y. TIMES, Oct. 2, 2007, http://www.nytimes.com/2007/10/02/science/earth/02arct.html?_r=1.

103. *See* GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES, *supra* note 93, at 37.

104. *See id.* at 24-25 ("Higher ocean temperatures lead to stronger storms with higher wind speeds and more rainfall."); Associated Press, *Crumbling Cliffs Don't Deter Pacifica Residents*, ABC NEWS, Jan. 23, 2010, *available at* http://abcnews.go.com/US/wireStory?id=9642959 (detailing that "storm-driven surf and heavy rain have taken a toll on this stretch of coastline" and resulted in a two million dollar project to construct a sea wall in order to protect the beachfront property); Meredith Goldstein, *State Aid Sought on Beach Erosion: Residents, Officials Will Meet Tonight*, BOSTON GLOBE, June 30, 2005, *available at* http://www.boston.com/news/local/massachusetts/articles/2005/06/30/state_aid_sought_on_beach_erosion/ (commenting on the problems of erosion faced by beachfront residents in Massachusetts and New Hampshire).

105. Massachusetts v. EPA, 549 U.S. 497, 521 (2007) (The effects of global warming include "significant reduction in water storage in winter snowpack in mountainous regions with direct and important economic consequences.").

106. *See* Oleg A. Anisimov et al., *Polar Regions (Arctic and Antarctic)*, *in* CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY. CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE IPCC 653 (Roger Barry et al. eds.,

C. The Location of Legal "Harm" Among the Effects

This brief summary of the facts demonstrates that, while the phenomenon of global warming itself may be generalized, its effects are not, because, unlike global warming, the effects do not occur uniformly around the planet. In each location where an effect occurs, moreover, the result is rendered unique through various local factors. For this reason, when the facts are considered closely, it becomes clear that it is not possible to identify an *effect* of global warming that is in fact shared by humanity at large.

Even more important for the legal analysis of "harm," the facts reveal that global warming is not experienced by anyone directly, but that it is only experienced indirectly, through its effects. This is the reason that plaintiffs in global warming cases are always able to tie their alleged injuries to specific local conditions, even while alleging that the net addition of energy to the global climate system is the indirect cause of their problems. Put another way, it means that the real "harm" involved in global warming cases is not located at the stage of global warming itself, but instead that it is located among the effects.

Some might argue that there nevertheless remains an important kind of harm at the stage of global warming itself. The net addition of energy to the global climate system, this argument would run, is in itself a kind of harm, since it represents a planetary shift away from a long-standing equilibrium. This kind of harm certainly warrants attention in a broad scientific and environmental sense, but from a narrow legal point of view it does not possess the characteristics of a concrete, particularized injury necessary for judicial recognition. Stated another way, if there is harm at the stage of global warming, then it is an injury that is "harmful to humanity at large," and therefore it is too generalized to support standing before a federal court.

Recognizing the distinction between global warming and its effects thus provides a way to accommodate, to a certain extent, the currently conflicting judicial views of the harm associated with global warming. On one side of the distinction there is room for the argument that the harm embodied in the phenomenon of global warming itself is too generalized to support standing, while on the other side of the distinction there is support for the argument that harms located among the effects of global warming may be sufficiently particularized to support standing. Therefore, if the Roberts Court were to recognize the distinction, the conflicting views among members of the Court could potentially be reconciled.

2007), *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-chapter15.pdf; GLOBAL CLIMATE CHANGE IMPACTS IN THE UNITED STATES, *supra* note 93, at 69.

The implications of taking such an approach are not as broad as they might first appear. To begin with, recognizing the distinction between global warming and its effects does not mean that all alleged harms in the "effects" category will automatically satisfy the particularization requirement, but simply that they will not all automatically fail to meet that requirement. Thus, while the harms alleged by the plaintiffs in *Massachusetts*, *Center for Biological Diversity*, *Comer*, and *Connecticut v. AEP* are all in the "effects" category and should easily meet the particularization requirement,[107] it is possible to envision other alleged harms, also in the "effects" category, which would not meet the particularization requirement. For example, one could imagine potential plaintiffs seeking to establish standing based on concerns regarding the imminent collapse of the Arctic ecosystem, but who have no specific plans to visit the Arctic. Such alleged harm, although among the effects of global warming, would not be sufficiently particularized to meet the requirements of *Lujan*, just as the harm alleged in *Summers* was held to be insufficiently particularized. Similarly, potential plaintiffs concerned by the impending global loss of coral reefs, but with only vague, "someday" plans to visit any specific location containing a coral reef, should not be granted standing.

Although recognizing the distinction between global warming and its effects could significantly benefit the judicial analysis of the harm involved, the inclination of the Roberts Court to keep at a distance from the facts may nevertheless impair its ability to recognize the distinction. This is because when the analysis is conducted too far from the facts, the distinction tends to disappear. The result of viewing the facts from afar is that the third and fourth links of the chain of causation are collapsed into one:

emissions →	increased GHG →	global warming and
of GHG	in atmosphere	effects of global warming

When the third and fourth links of the chain of causation are fused together in this way, it becomes impossible to tell whether the harm from global warming is general and shared by "the public at large," or whether it is particularized and experienced in a "concrete, personal and individual way."[108] Just as in the environmental cases decided last term, there is thus the potential for something significant to be lost in the judicial analysis of harm if the facts are not closely examined.

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107. *Massachusetts*, 549 U.S. at 526; Ctr. for Biological Diversity v. U.S. Dep't of Interior, 563 F.3d 466, 475-76 (D.C. Cir. 2009); Comer v. Murphy Oil USA, 585 F.3d 855, 859 (5th Cir. 2009); Connecticut v. Am. Elec. Power Co., 582 F.3d 309, 314 (2d Cir. 2009).

108. *See Massachusetts*, 549 U.S. at 540-41 (Roberts, C.J., dissenting) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)).

CONCLUSION

When examined closely, the facts relevant to the phenomenon of global warming reveal that a significant distinction exists between global warming itself, understood as a net addition of energy to the Earth's climate system, and the effects of that warming. When this distinction is recognized, it becomes clear that the harm associated with global warming itself is indeed a generalized harm, which affects humanity at large, and for this reason a legal claim based solely on global warming should not meet the requirement of particularization contained in the *Lujan* test for standing. However, the facts also show that the *effects* of global warming, such as the loss of specific portions of coastline, changed precipitation patterns in specific places, or increased temperatures in specific locations, are highly particularized and experienced by individuals in very concrete and personal ways, and therefore a claim based on one of these effects arguably should satisfy the particularization requirement.

Unfortunately, due to a tendency by the Roberts Court to analyze environmental harm at a distance from the facts, there is a danger that this factual distinction between global warming and its effects will remain obscured, and if this distinction is not sharply drawn then the judicial analysis of the "harm" arising from global warming will remain correspondingly confused. Considerable confusion already exists due to ambiguity in the *Massachusetts* holding on this issue, and the varied attempts of circuit courts to apply that holding. The question is thus ripe for resolution by the Supreme Court through a return to the underlying facts, and advocates of standing in global warming cases could benefit by seeking specifically to achieve judicial recognition of the critical distinction between global warming and its effects.

* * * *

NOTES

"YOU'RE GONNA NEED A BIGGER BOAT"*: SOMALI PIRACY AND THE EROSION OF CUSTOMARY PIRACY SUPPRESSION

Jarret Berg[**]

Abstract: The *MV Faina*, a 530-foot Ukrainian freighter, left port near the Black Sea in late August 2008, carrying thirty-three T-72 Soviet-designed battle tanks, six anti-aircraft guns, one hundred and fifty grenade launchers, and piles of ammunition. On September 25, 2008 as the ship approached Mombasa, Kenya, three small speedboats converged on and boarded the vessel. The crew broadcasted an S.O.S., but the pirates captured the vessel and its twenty-one crewmembers before help could arrive. Pirates released the vessel five months after capture in exchange for a $3.2 million ransom payment parachuted onto the ship. The crew had been locked in a small, single room and let out only once or twice a week.

Pirates have been causing trouble to civilized society ever since man first went out to the sea in ships. The challenge posed by twenty-first century Somali piracy is merely the latest reincarnation of one of the world's oldest crimes. In the age of international peace and security, and multinational interdependence, States must work together in order to suppress a reinvigorated enemy of all mankind.

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* IMDb.com, Memorable Quotes for Jaws (1975), http://www.imdb.com/title/tt0073195/quotes (last visited Feb. 1, 2010). Chief Brody utters this after seeing Jaws for the first time. *See id.*

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Piracy ranges from simple theft to stealing entire vessels and sometimes involves murder. Annually, piracy is responsible for an estimated $16 billion in damage to international shipping. Between 1995 and 2002, 110 pirate attacks were reported for the Somali coast and the Gulf of Aden. Alarmingly, in 2008 alone there were 111 reported attacks—a 200% increase from 2007—resulting in the capture of forty-two vessels and 815 mariners taken hostage. These figures continue to rise, with 217 further attacks attributed to Somali pirates in 2009.

International custom, a recognized source of international law, may provide the impetus for multilateral treaties. A customary law typically forms over time, based on uniform State practice that is undertaken out of a sense of legal obligation. Once established, the general rule is that every State is bound to follow a given custom. Because pirates threaten to disrupt international commerce, all States have an obligation, from which no derogation is permitted, to cooperate in the suppression of piracy. Because pirates attack merchants without distinction, they have long been recognized as *hostis humani generis* and are justiciable in every civilized State.

The current piracy-suppression custom supports a robust naval presence coupled with arrests and domestic prosecutions. Following this custom would effectively save lives, protect trade, and deter pirates. While this accurately characterizes the international custom, it does not accurately describe current State practice.

This Note argues that the international response to Somali piracy by the world's most powerful naval States has markedly deviated from the long recognized piracy-suppression custom. This deviation takes five different forms, which collectively threaten to erode and perhaps transform the current suppression custom. The result could be the emergence of new customary piracy norms that are less aspirational yet more in step with reality. Nearly all captured vessels are released only upon payment of a hefty ransom. If Somali pirates are not arrested and prosecuted, it is unlikely that piracy can be stopped because of the high reward to risk ratio and the lack of meaningful deterrence. Finally, this Note suggests that the current custom could survive if States begin to act in accordance with it, or alternatively, that the suppression custom could be updated to reflect the enhanced capacity of the twenty-first century international legal system.

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INTRODUCTION

The challenge posed to modern society by the threat of Somali piracy[1] is merely the latest reincarnation of one of the world's oldest crimes.[2] Politicians and legal scholars alike[3] have grappled with this *scourge of the seas* for millennia,[4] leaving one to conclude that wherever there is sea commerce, the threat of piracy looms.[5] But in the age of international peace and security, and multinational interdependence,[6] States must work together in order to suppress a reinvigorated[7] enemy of all mankind.[8]

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1. *See generally* ENERGY INFORMATION ADMINISTRATION, COUNTRY ANALYSIS BRIEFS, WORLD OIL TRANSIT CHOKEPOINTS (2008), http://www.eia.doe.gov/cabs/World_Oil_Transit_Chokepoints/Full.html [hereinafter WORLD TRANSIT CHOKEPOINTS].

2. *See* BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 23 (2003).

3. *See, e.g.*, Eric Engle, Alvarez-Machain v. United States *and* Alvarez-Machain v. Sosa*: The Brooding Omnipresence of Natural Law*, 13 WILLAMETTE J. INT'L L. & DISP. RESOL. 149, 162-63 (2005) ("Coke influenced Blackstone's definition of piracy; particularly the idea of the pirate as *hostes humani generis* and liable by implication to universal jurisdiction."); Richard T. Robol, *Maritime Law in Classical Greek and Roman Literature*, 31 J. MAR. L. & COM. 521, 523 (2000) (noting that Pompey the Great (106 BC to 48 BC) led a military campaign to rid the Mediterranean of pirates).

4. James J. Woodruff, II, *Merchants, Traders, and Pirates: The Birth of the Admiralty Clause*, 26 TUL. MAR. L.J. 563, 576 (2002) (referring to pirates as a scourge of the sea); *see* Robert M. Jarvis, *Maritime Piracy in the Modern World: Far from Hollywood, Real Pirates Are Plaguing the High Seas*, 6 INSIGHTS ON L. & SOC'Y, Spring 2006, at 7-9. *See generally* ANGUS KONSTAM, SCOURGE OF THE SEAS: BUCCANEERS, PIRATES & PRIVATEERS (2007).

5. *See* Rosalie Balkin, *The International Maritime Organization and Maritime Security*, 30 TUL. MAR. L.J. 1, 9 (2006) ("[A]t least since the days of ancient Greece, piracy has been a constant thorn in the side of maritime trade, affecting at different times each and every maritime region of the world . . . ."); Jarvis, *supra* note 4, at 13.

6. *See* U.N. Charter art. 1, paras. 1, 3; Third United Nations Conference on the Law of the Sea, Dec. 6-11, 1982, *A Constitution for the Oceans*, xxxvii (Dec. 10, 1982) (*prepared by* Tommy T.B. Koh), *available at* http://www.un.org/Depts/los/convention_agreements/texts/koh_english.pdf [hereinafter Koh, *A Constitution for the Oceans*].

7. Jarvis, *supra* note 4, at 13 ("In July 2004, Indonesia, Malaysia, and Singapore agreed to work together to safeguard the Strait of Malacca . . . ."); R. R. CHURCHILL & A. V. LOWE, THE LAW OF THE SEA 209 (3d ed. 1999) ("Piracy remains a serious, and increasing, problem . . . .").

8. *International Piracy on the High Seas: Hearing Before the Subcomm. on Coast Guard & Maritime Transportation and the Comm. on Transportation & Infrastructure*, 111th Cong. 2 (2009) (statement of William Baumgartner, Rear Admiral, U.S. Coast Guard), *available at* http://transportation.house.gov/Media/File/Coast%20Guard/20090204/CG%20Testimony.pdf [hereinafter Baumgartner] (referring to pirates as "hostes humani generis—enemies of the human race").

Daniel Defoe, writing in the early 1700s at a time when pirate attacks were widespread,[9] illustrated the ruthlessness of ancient Mediterranean pirates:

> [W]hat was most barbarous, was a Custom they had when they took any Ship, of enquiring of the Persons on Board; . . . [I]f any of them said he was a *Roman*, they fell down upon their Knees, as if in a Fright . . . and begged Pardon for what they had done; . . . and when they found they had deceived him . . . they hung out the Ladder, . . . told him he had his Liberty, desiring him to walk out of the Ship; and this in the Middle of the Sea; and when they observed him in Surprize [sic], as was natural, they [threw] him overboard with mighty shouts of Laughter; so wanton they were in their Cruelty.[10]

While one historian believes piracy does not pose the great threat it did in the 1700s, when it interfered with sugar, rice, tobacco, and slave trades,[11] the U.S. Navy cautions that "downplaying the Somali pirate problem could set a dangerous precedent."[12]

This Note argues that the custom of piracy suppression on the high seas is in danger of erosion. Part I.A discusses the threat that piracy poses to international commerce. Parts I.B–C describe the piracies of the *MV Sirius Star* and the *MV Faina*, which occurred in late 2008. Part II discusses the circumstances that fostered piracy after Somalia's State collapse. Part III introduces principles of international law as the legal framework for analyzing the rights and duties of States addressing Somali piracy. Part IV discusses the high seas piracy-suppression custom, as essentially codified in the UNCLOS III treaty.[13] Part V of this Note argues

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9. *See* Douglas R. Burgess, Jr., *Hostis Humani Generi: Piracy, Terrorism and a New International Law*, 13 U. MIAMI INT'L & COMP. L. REV. 293, 304 (2006) (discussing pirates of the Golden Age, 1688-1725).

10. DANIEL DEFOE, A GENERAL HISTORY OF THE ROBBERIES AND MURDERS OF THE MOST NOTORIOUS PYRATES 21 (Garland ed. & comp., Michael F. Shugrue 1972) (1724).

11. Matthew Hennessey, *Somali Pirates Scuttle Sea Laws*, POL'Y INNOVATIONS, Nov. 18, 2008, http://www.policyinnovations.org/ideas/briefings/data/000090 (citing Marcus Rediker, University of Pittsburgh historian). Marcus Rediker, international lecturer, author, and former Georgetown University Professor, is currently Professor and Chair in the History Department at the University of Pittsburgh. Biography of Marcus Rediker, http://www.marcusrediker.com/biography.htm (last visited Feb. 1, 2010).

12. Hennessey, *supra* note 11 ("'It is not conducive to international order to turn a blind eye to flagrant breaches of international law . . . .'") (quoting Charles Dragonette, Senior Civil Maritime Operations Analyst at the U.S. Navy Operational Intelligence Center).

13. Because customary law is often diffuse and lacking in precision, the International Law Commission (convened in 1947) is tasked with codifying international law. The Third Law of the Sea Conference began in 1973 and opened for signature in December 1982. TIM

that the weight of State practice and declarations addressing Somali piracy are eroding this established custom, such that a less desirable custom may be emerging.[14] Finally, Part VI discusses implications for the future of international piracy under the law of nations.

I. The Threat Sea Piracy Poses to Modern Society[15]

A. Sea Piracy Threatens International Commerce.

Sea piracy as a profession, famously characterized by Johnny Depp,[16] was never completely eliminated.[17] Piracy ranges from simple theft to stealing entire vessels and sometimes involves murder.[18] Since 1977, piracy has occurred around Nigeria, Thailand, the Sulu Sea, the Java Sea, the Celebes Sea, the South China Sea, off the West Coast of Africa, and even in the Caribbean.[19] Worldwide, piracy has been on the rise: For instance, the Piracy Reporting Centre reported 329 pirate attacks in 2004, and 407 pirate attacks in 2009, up from 90 in 1994.[20] Somali pirates are encouraged by a large reward-to-risk ratio that can only be deterred by a robust international response.[21]

Modern piracy is responsible for an estimated $16 billion annually in damage to international shipping.[22] In 2008, the International Maritime

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HILLIER, SOURCEBOOK ON PUBLIC INTERNATIONAL LAW 98-99 (1998).

14. Particularly, the routine payment of ransom blackmail is detrimental to law.

15. The International Chamber of Shipping (ICS) categorizes piratical acts into Low-Level Armed Robbery (LLAR), Medium-Level Armed Assault and Robbery (MLAAR), and Major Criminal Hijack (MCHJ). MUNICH RE GROUP, PIRACY—THREAT AT SEA: A RISK ANALYSIS 14 (2006), *available at* http://www.munichre.com/publications/302-05053_en.pdf.

16. *See, e.g.*, PIRATES OF THE CARIBBEAN: DEAD MAN'S CHEST (Walt Disney Pictures 2006).

17. GERHARD VON GLAHN, LAW AMONG NATIONS: AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 262 (7th ed. 1996) (1965).

18. MUNICH RE GROUP, *supra* note 15.

19. VON GLAHN, *supra* note 17.

20. Jarvis, *supra* note 4, at 9; INT'L CHAMBER OF COMMERCE (ICC) INT'L MAR. BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS: ANNUAL REPORT 25 (2010) [hereinafter 2009 PIRACY REPORT].

21. INT'L CHAMBER OF COMMERCE (ICC) INT'L MAR. BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS: ANNUAL REPORT 26 (2009) [hereinafter 2008 PIRACY REPORT]. In 2009, the Piracy Reporting Centre attributed 217 piracy incidents to Somali pirates, with forty-seven vessels hijacked. This accounts for more than half of 2009 incidents worldwide. 2009 PIRACY REPORT, *supra* note 20.

22. Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, 33 TUL. MAR. L.J. 1, 5 (2008).

Bureau (IMB) recorded an unprecedented number of Somali pirate attacks as well as the largest tanker ever hijacked, with successful attacks carried out at greater distances from land than ever before.[23] Brazen raids launched from Somalia's 2300-mile poorly governed coast, occurring in 2.5 million square miles of ocean, pose a serious threat to unimpeded maritime commerce—the lifeblood of the global economy.[24] In 2008, Somali pirates took 815 mariners hostage, and in 2009 this figure climbed to 867.[25] One estimate claims that 1500 pirates are based in Somalia's quasi-autonomous Puntland region.[26]

The Strait of Bab el-Mandab, between Yemen and Djibouti, permits shipping between Europe and Asia without navigating around Africa, an additional distance of 6000 miles.[27] Persian Gulf exports must pass through this strait before entering the Suez Canal; in 2006, 3.3 million barrels of oil per day (bbl/d) flowed through this chokepoint, with 2.1 million bbl/d toward Europe and the United States.[28] Over 20,000 ships transit the Strait annually.[29]

The Somali pirate threat surged in 2008, with over $80 million in ransom payments[30] and 111 reported attacks for Somalia and the Gulf of Aden—a 200% increase from 2007.[31] This scourge has prompted shipping companies to take the detour around Africa[32] causing delays and increasing

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23. 2008 PIRACY REPORT, *supra* note 21.

24. Baumgartner, *supra* note 8, at 2.

25. 2008 PIRACY REPORT, *supra* note 21, at 39; 2009 PIRACY REPORT, *supra* note 20, at 25.

26. The Associated Press, *Indian Navy Captures 23 Pirates*, MSNBC.COM, Dec. 13, 2008, http://www.msnbc.msn.com/id/28209525/.

27. *See* WORLD TRANSIT CHOKEPOINTS, *supra* note 1; Jon M. Van Dyke, *A Constitution for the Oceans: A Closer Look at the United Nations Law of the Sea Convention*, 6 INSIGHTS ON L. & SOC'Y 4, 4-5 (2006).

28. WORLD TRANSIT CHOKEPOINTS, *supra* note 1.

29. Baumgartner, *supra* note 8, at 3.

30. Datuk Anifah Haji Aman, Minister of Foreign Affairs, Malaysia, Opening Ceremony of the Kuala Lumpur International Conference on Piracy and Crimes at Sea (May 18, 2009), *available at* http://www.kln.gov.my/klicc/speeches2.html [hereinafter Kuala Lumpur International Conference].

31. 2008 PIRACY REPORT, *supra* note 21.

32. Rubrick Biegon, *Somali Piracy and the International Response*, FOREIGN POLICY IN FOCUS, Jan. 29, 2009, http://www.fpif.org/fpiftxt/5827 ("AP Moller-Maersk, Europe's largest shipping company, diverted its fleet of [fifty] oil tankers . . . towards the longer and more expensive route around the Cape of Good Hope."); Catherine Philp, *Somali Pirates Hijack Saudi Oil Tanker with Britons on Board*, TIMES (London), Nov. 18, 2008, http://www.timesonline.co.uk/tol/news/world/africa/article5172770.ece (reporting that Odfjell, one of the largest shipping groups in the world, suspended its Gulf of Aden shipping routes).

costs by one-third; vessel owners also proposed a naval blockade of the Somali coastline.[33] Two high-profile incidents illustrate this age-old threat to maritime commerce.[34]

B. The Piracy of the *MV Sirius Star*

Vela[35] hoped its new vessel, the *Sirius Star*, would reliably transport Saudi Aramco's crude oil to customers as it began service in March 2008.[36] Only months later on November 16th,[37] pirates commandeered the 1080-foot supertanker[38] carrying over $100 million worth of oil,[39] 450 nautical miles southeast of Mombasa, Kenya.[40]

Well-organized pirates boarded the aircraft carrier-sized tanker[41] from tiny high-speed motorboats with grappling hooks.[42] The twenty-five-person crew was held hostage off of Somalia's eastern coast,[43] as Vela response teams negotiated the vessel's safe release.[44] Because British and Saudi officials were unwilling to negotiate with hijackers,[45] Vela was forced to

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33. *See* Posting of Graham Bowley to The Lede, The New York Times News Blog, http://thelede.blogs.nytimes.com/2008/11/24/ransoming-the-sirius-star-15-million-may-do/?scp=1&sq=ransoming%20the%20sirius%20star&st=cse (Nov. 24, 2008, 10:43 EST). The International Association of Independent Tanker Owners represents seventy-five percent of the world's fleet. *Id.*

34. *See* Balkin, *supra* note 5.

35. Vela, a subsidiary of Saudi Arabian Oil Company (Saudi Aramco), owns and operates nineteen Very Large Crude Oil Carriers (VLCCs). Vela International Marine Ltd., http://www.vela.ae (last visited Feb. 1, 2010).

36. Press Release, Vela Int'l Marine Ltd., Sirius Star Launching Ceremony (Mar. 28, 2008), *available at* http://www.vela.ae/news.php?id=61.

37. *See* Press Release, Vela Int'l Marine Ltd., Vela Press Release (Nov. 17, 2008), *available at* http://www.vela.ae/news.php?id=63 [hereinafter Nov. 17, 2008 Press Release].

38. Hari Kumar & Alan Cowell, *Indian Navy Says It Sank Pirate Ship*, N.Y. TIMES, Nov. 20, 2008, http://www.nytimes.com/2008/11/20/world/africa/20pirate.html?partner=rss&emc=rss.

39. Chip Cummins, *Oil Tanker Waylaid by Pirates*, WALL ST. J., Nov. 18, 2008, http://online.wsj.com/article/SB122693177440733229.html.

40. Philp, *supra* note 32.

41. Mohammed Ibrahim & Graham Bowley, *Pirates Say They Freed Saudi Tanker for $3 Million*, N.Y. TIMES, Jan. 10, 2009, at A6, *available at* http://www.nytimes.com/2009/01/10/world/africa/10somalia.html?scp=1&sq=pirates%20somalia%20china&st=cse.

42. Cummins, *supra* note 39.

43. Nov. 17, 2008 Press Release, *supra* note 37; *see* Cummins, *supra* note 39.

44. *See* Nov. 17, 2008 Press Release, *supra* note 37.

45. Xan Rice & Matthew Weaver, *Sirius Star Pirates Demand $25m Ransom*, THE GUARDIAN (London), Nov. 20, 2008, http://www.guardian.co.uk/world/2008/nov/20/piracy-somalia.

parley a ransom.[46] Nearly two months later, on January 11, 2009, the U.S. Navy reported that a ransom package was parachuted onto the deck of the vessel.[47] During their escape, five pirates drowned and one pirate's body washed ashore with over $150,000 in cash on his person.[48]

C. The Piracy of the *MV Faina*

The *MV Faina*, a 530-foot Ukrainian freighter,[49] left port near the Black Sea in late August 2008, carrying thirty-three T-72 Soviet-designed battle tanks, six anti-aircraft guns, 150 grenade launchers, and piles of ammunition.[50] On September 25, 2008, as the ship neared Mombasa,[51] several pirates in three small speedboats converged on and boarded the vessel.[52] The crew broadcasted an S.O.S.,[53] but the pirates captured the vessel and its twenty-one crew members before any help could arrive.[54] The freighter was finally released on February 5, 2009—five months after capture—in exchange for a $3.2 million ransom payment that was parachuted onto the ship.[55] The crew had been locked in a small, single room and "let out only once or twice a week."[56]

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46. *See id.*; Bowley, *supra* note 33.

47. Chip Cummins, *Pirates Release Hijacked Tanker*, WALL ST. J., Jan. 11, 2009, at A4, *available at* http://online.wsj.com/article/SB123153630228669237.html.

48. The Associated Press, *Body of a Somali Pirate, Carrying $153,000 of a Ransom, Washes Ashore*, N.Y. TIMES, Jan. 12, 2009, at A7, *available at* http://www.nytimes.com/2009/01/12/world/africa/12somalia.html?fta=y.

49. Paul Salopek, *For U.S. Navy, High Stakes in Pirate Standoff*, CHI. TRIB., Sept. 30, 2008, at 8, *available at* http://www.chicagotribune.com/news/chi-somalia-pirates_salopeksep30,0,3432422.story.

50. Jeffrey Gettleman, *Freighter's Long Pirate Saga Is Over: Ukrainian Ship Reaches Kenya After Months of Captivity*, INT'L HERALD TRIB., Feb. 14, 2009, at 3, *available at* 2009 WLNR 2970383.

51. Agence France-Presse, *Russia Sends Warship After Somali Pirates Seize Tank-Laden Vessel*, TIMES OF OMAN, Feb. 23, 2009, *available at* 2009 WLNR 3492588 (reporting that seventeen Ukrainians, three Russians, and one Latvian made up the crew); *see also* Maria Danilova, *Hijacked Crew Home in Ukraine*, HOUS. CHRON., Feb. 14, 2009, at A25, *available at* 2009 WLNR 3039370.

52. Jeffrey Gettleman & Mohammed Ibrahim, *Somali Pirates Get Ransom and Leave Arms Freighter*, N.Y. TIMES, Feb. 5, 2009, at A6, *available at* http://www.nytimes.com/2009/02/06/ world/africa/06pirates.html?_r=1&scp=3&sq=faina&st=cse.

53. *Id.*

54. *See* Agence France-Presse, *supra* note 51.

55. *See* Gettleman, *supra* note 50.

56. *Id.*

II. The Circumstances that Fostered Modern Somali Piracy

Somali piracy is not a coincidence but is the product of eighteen years of anarchy and failed governance, which has permitted pirates to operate with impunity.[57] Experts believe that lasting solutions to the sea piracy problem will ultimately require drastic improvements in rule-of-law on land.[58]

A. Somali Post-Colonialism

During decolonization,[59] a unified Somali Republic was formed in 1960.[60] A coup in 1969 ended constitutional democracy ushering in Major General Mohamed Siad Barre.[61] Barre reduced political freedoms using terror as a political tool.[62] By 1991, Somalia was in a complete State collapse,[63] and opposition forces drove Barre out of power.[64] U.S.-Somali relations now take place via the U.S. Embassy in Nairobi, Kenya.[65]

A humanitarian disaster in the early 1990s[66] and a failed UN relief effort resulted in the death of eighteen U.S. soldiers in 1993.[67]

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57. *See* INT'L CHAMBER OF COMMERCE (ICC) INT'L MAR. BUREAU, PIRACY AND ARMED ROBBERY AGAINST SHIPS: REPORT FOR THE PERIOD 1 JANUARY–30 JUNE 2009, at 32-33 (2009) [hereinafter 2009 Q2 PIRACY REPORT].

58. *See* Baumgartner, *supra* note 8.

59. In the late 1880's Britain and Italy established protectorates in parts of modern Somalia. In 1950, Italian Somaliland became a UN trust territory. Both gained independence in 1960. BBC News, Timeline: Somalia, http://news.bbc.co.uk/2/hi/africa/1072611.stm (last visited Feb. 1, 2010).

60. BUREAU OF AFRICAN AFFAIRS, U.S. DEP'T OF STATE, BACKGROUND NOTE: SOMALIA (2009), http://www.state.gov/r/pa/ei/bgn/2863.htm; *see also* Ioan Lewis & James Mayall, *Somalia*, *in* UNITED NATIONS INTERVENTIONISM: 1991-2004, at 108-09 (Mats Berdal & Spyros Economides eds., 2d ed. 2007).

61. BUREAU OF AFRICAN AFFAIRS, *supra* note 60; *see also* Lewis & Mayall, *supra* note 60, at 110.

62. BUREAU OF AFRICAN AFFAIRS, *supra* note 60. "In 1988, at the President's order, aircraft from the Somali National Air Force bombed the city of Hargeisa in northwestern Somalia . . . killing nearly 10,000 civilians and insurgents." *Id.*

63. *See* RAY MURPHY, UN PEACEKEEPING IN LEBANON, SOMALIA AND KOSOVO 34 (2007) (explaining that UN intervention in Somalia occurred "against a background of ongoing civil war and a [S]tate imploding on itself").

64. Lewis & Mayall, *supra* note 60, at 113 (explaining the fall of the Barre regime at the hands of the Somali National Movement, the United Somali Congress, and the Somali Patriotic Movement).

65. BUREAU OF AFRICAN AFFAIRS, *supra* note 60.

66. *See* MURPHY, *supra* note 63, at 36.

67. Alisha Ryu, *Somalia Reconciliation Talks Break Down*, VOICE OF AM., May 22, 2008, http://www1.voanews.com/english/news/a-13-2008-05-22-voa64.html; *see generally*

Approximately 300,000 Somalis died from famine while 700,000 became refugees.[68] The Transitional Federal Government (TFG) was formed in 2004,[69] with the Supreme Islamic Courts Union (ICU) as the primary TFG opposition.[70] The ICU leadership fled to Eritrea after a U.S.-backed Ethiopian military campaign in late 2006.[71]

B. Piracy Thrives in the Wake of a Failed State.[72]

Somali piracy is not new; the IMB reported 110 pirate attacks in this region between 1995 and 2002.[73] But stunningly, IMB reported 111 attacks off Somalia and in the Gulf of Aden in 2008 alone and further attributed 217 attacks to Somali pirates in 2009.[74] The immediate increase is due to the late 2007 ousting of the Islamic Courts Union,[75] under which a ban on piracy was strictly enforced.[76] Since then, bands of pirates have moved farther from shore and have gone after bigger ships, located in the Gulf of Aden, the Arabian Sea, the Indian Ocean, and off the coasts of Kenya, Tanzania, Seychelles, Madagascar, and Oman.[77]

Pirates use "mother-vessels" with speedboats in tow, to extend their range while targeting slow-moving vessels.[78] The Somali pirates are fearless, and ransom payments allow them to use GPS units and counterfeit currency detectors.[79] They then dispatch small speed-boats and fire Rocket

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MARK BOWDEN, BLACK HAWK DOWN: A STORY OF MODERN WAR (1999).

68. *See* Lewis & Mayall, *supra* note 60, at 120.

69. GlobalSecurity.org, The Supreme Islamic Courts Union, http://www.globalsecurity.org/military/world/para/icu.htm (last visited Feb. 1, 2010).

70. *Id.* Since the fall of Barre in 1991, various Islamic courts have instituted Sharia (Islamic) law. *Id.*

71. Ryu, *supra* note 67.

72. For an analysis of the post-Cold War devolution of quasi-States into failed States, see Mohammed Ayoob, *State Making, State Breaking, and State Failure, in* MANAGING GLOBAL CHAOS: SOURCES OF AND RESPONSES TO INTERNATIONAL CONFLICT 37, 46 (1996) (Chester A. Crocker & Fen Osler Hampson with Pamela Aall eds., 1996).

73. Dennis W. Sampson & Nikolas K. Gvosdev, Op-Ed, *Pirates of the Gulf a Growing Menace*, INT'L HERALD TRIB., Nov. 19, 2008, at 8, *available at* 2008 WLNR 22072016.

74. 2008 PIRACY REPORT, *supra* note 21; 2009 PIRACY REPORT, *supra* note 20, at 21.

75. Philp, *supra* note 32.

76. Alisha Ryu, *Horn of Africa Piracy Spurs International Action*, VOICE OF AM., Sept. 15, 2008, http://www1.voanews.com/english/news/a-13-2008-09-15-voa54.html.

77. 2009 PIRACY REPORT, *supra* note 20, at 23. *See* Cummins, *supra* note 39.

78. 2009 PIRACY REPORT, *supra* note 20, at 23. Reports indicate that the mother-vessels may strategically coordinate prior to launching an attack, sharing information about potential targets. 2009 Q2 PIRACY REPORT, *supra* note 57, at 34.

79. *See* Jeffrey Gettleman, *Somalia's Pirates Flourish in a Lawless Nation*, N.Y. TIMES, Oct. 31, 2008, at A1, *available at* http://www.nytimes.com/2008/10/31/world/africa/

Propelled Grenades (RPGs) indiscriminately to intimidate the crew into stopping[80] and board freighters with simple ladders.[81] Once on deck, they hold the crew hostage for ransom (usually between $1 million and $2 million)[82] before releasing the vessel and crew.[83] "Unarmed cargo ships have little option but to submit."[84]

III. The Public International Legal Framework

States[85] operate in the context of the international legal system.[86] This framework regulates international politics, as competing States vie for military power, economic resources, and national security through alliances and various forms of leverage[87] in a supposed "horizontal system."[88] The positivist international legal system[89] is based upon two basic principles that emerged from the Peace of Westphalia in 1648: (1) "non-intervention" by States into the domestic affairs of other States; and (2) the "sovereign

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31pirates.html.

80. 2009 PIRACY REPORT, *supra* note 20, at 21.

81. Cummins, *supra* note 39.

82. Gettleman, *supra* note 79.

83. *See* INTERNATIONAL CHAMBER OF COMMERCE (ICC) COMMERCIAL CRIME SERVICES, PIRACY PRONE AREAS AND WARNINGS: GULF OF ADEN, http://icc-ccs.org/index.php?option=com_content&view=article&id=70&Itemid=58 (last visited Feb. 1, 2010).

84. Chris Smyth, *Somali Pirates Release Hijacked Supertanker Sirius Star and Crew*, TIMES (London), Jan. 9, 2009, http://www.timesonline.co.uk/tol/news/world/africa/article5482389.ece.

85. A "State" is a sovereign country comprised of a politically organized body of people. *See* BLACK'S LAW DICTIONARY 1537 (9th ed. 2009).

86. *See* John Cerone, *The Nature of International Criminal Law and Implications for Investigations*, *in* FORENSIC ARCHAEOLOGY AND HUMAN RIGHTS VIOLATIONS 24, 25 (Roxana Ferlinni ed., 2007).

87. *See* LORI F. DAMROSCH ET AL., INTERNATIONAL LAW: CASES AND MATERIALS xix (4th ed. 2001) (1980). For example, in negotiating with North Korea, the United States has five major forms of policy leverage: international political pressure, economic assistance, economic sanctions, diplomatic isolation, and a threat of preemptive military action. *See* DICK K. NANTO & EMMA CHANLETT-AVERY, CONGRESSIONAL RESEARCH SERVICE, NORTH KOREA: ECONOMIC LEVERAGE AND POLICY ANALYSIS CRS-11 (2009).

88. *See* Cerone, *supra* note 86 ("[S]overeign [S]tates were horizontally juxtaposed with no higher authority . . . .").

89. Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 2 (1999) ("Positivist jurisprudence is premised on the notion of the primacy of the [S]tate. . . . [S]tates are the principal actors of international law and they are bound only by that to which they have consented[. This] continues to operate as the basic premise of the international legal system.").

equality of [S]tates."[90] Order was based on a series of reciprocal[91] treaty obligations.[92]

Today, there are various sources of international law[93] from which all international legal obligations upon States are derived.[94] They are classified broadly into four categories: (1) treaties; (2) international custom;[95] (3) general principles of law recognized by States; and (4) subsidiary sources, such as the scholarship of highly reputed scholars, lawyers, or judges.[96] This Note will focus on codified international custom and scholarship.

A. Formation and Hardening of International Custom

Evidence that a customary international law (CIL) exists requires proof of two elements: the general practice of States, and *opinio juris*—acceptance of that practice as law.[97] The Restatement (Third) of the Foreign Relations Law of the United States characterizes international custom as the result of general, consistent State practice followed pursuant to a sense of legal obligation.[98] Thus, tribunals recognize a custom only upon finding evidence of these two elements.[99] Once established, the general rule is that every State is bound to follow the given custom, even absent express consent.[100]

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90. *See* Alfred P. Rubin, *Ethics and Authority in International Law*, 22 SUFFOLK TRANSNAT'L L. REV. 335, 337-38 (1999).

91. Reciprocity describes the *quid pro quo* exchanged via treaty (like in a contract). Essentially, reciprocity is the incentive to enter into treaties. *See* 44B AM. JUR. 2D *International Law* § 6 (2007).

92. *See* Cerone, *supra* note 86.

93. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1986).

94. *See* Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1031, 1060, T.S. No. 993.

95. A practice that States initially follow out of courtesy or habit can become customary international law if States "believe that compliance with that practice is a legal obligation." *In re* Agent Orange Prod. Liab. Litig., 373 F. Supp. 2d 7, 131 (E.D.N.Y. 2005).

96. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1031, 1060, T.S. No. 993.

97. *See* DAMROSCH ET AL., *supra* note 87, at 59; MALCOLM N. SHAW, INTERNATIONAL LAW 633 (4th ed. 1997); 1 OPPENHEIM'S INTERNATIONAL LAW 32 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992).

98. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 (1986).

99. Gregory J. Kerwin, Note, *The Role of United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts*, 1983 DUKE L.J. 876, 877 (1983).

100. *See* Sir Humphrey Waldock, *General Course on Public International Law*, *in*

For example, the U.S. Navy seized Spanish fishing boats off the Cuban coast during the Spanish-American War.[101] The District Court for the Southern District of Florida condemned the vessels as U.S. war prizes because it found that fishing vessels were not exempt from capture during a war.[102] On appeal, the U.S. Supreme Court conducted a searching historical analysis to satisfy itself that a custom existed.[103] *The Paquete Habana* majority found an established custom "that coast fishing vessels . . . unarmed, and honestly pursuing their peaceful calling . . . are exempt from capture as prize of war."[104] As proof, the Court reviewed State practice between England and France dating to 1403 and later agreements between the Dutch and French.[105] The Court determined that this exemption from seizure during armed conflict had hardened into custom.[106] The majority explained when importation of international custom is appropriate: "[W]here there is no treaty . . . resort must be had to the customs and usages of civilized nations."[107]

In addition to State practice, a court must find *opinio juris*[108]—that States (subjectively) believe they are conforming to a legal obligation.[109] International scholars[110] and the International Law Association (ILA)

DAMROSCH ET AL., *supra* note 87, at 100. *But see, e.g.*, Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116, 131 (Dec. 18) (finding that the customary ten-mile rule was inapplicable as against Norway as *she* has persistently objected to attempts to apply it to the Norwegian coast).

101. The Paquete Habana, 175 U.S. 677, 678-79 (1900).

102. *Id.* at 678; *see* MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 342 (2007).

103. *See* COMM. ON FORMATION OF CUSTOMARY (GEN.) INT'L LAW, INT'L LAW ASS'N: LONDON CONFERENCE (2000), STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 25 n.64 (2000), *available at* http://www.ila-hq.org/en/committees/index.cfm/cid/30 [hereinafter ILA LONDON CONFERENCE] (follow "Conference Report London 2000" hyperlink) (discussing the representative participation necessary to find that a custom has formed).

104. 175 U.S. at 708.

105. *See id.* at 689.

106. *See id.* at 708.

107. *Id.* at 700.

108. *See* ILA LONDON CONFERENCE, *supra* note 103, at 6.

109. *See* North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 4, 44 (Feb. 20).

110. For a discussion on the relativity of the two elements of CIL, see Frederic L. Kirgis, Jr., *Custom on a Sliding Scale*, 81 AM. J. INT'L L. 146, 149 (1987) (suggesting that "[o]n the sliding scale, very frequent, consistent [S]tate practice establishes a customary rule without much (or any) affirmative showing of an *opinio juris*").

recognize a sliding-scale approach—that is, "the more the [State] practice, the less the need for the subjective element [*opinio juris*]."[111]

1. Specially Affected States and Customary International Law Formation

The practice of *specially affected States* is critical to finding custom, as *The Paquete Habana* Court implied by focusing only on the great maritime powers.[112] Since it is unlikely that States' practice would literally be universal, the ILA regards proving custom as "*qualitative* rather than quantitative. That is to say, it is not . . . how many States participate in the practice, but *which* States."[113] In a sense, representative States' practice carries "a dual aspect – negative and positive."[114] If all specially affected States participate in the custom, it is not required that a majority of States have participated.[115] But if the specially affected States do not participate in a given practice, it cannot mature into an international customary rule.[116]

For example, when Germany, Denmark, and the Netherlands disputed a boundary in the North Sea,[117] the International Court of Justice (ICJ) addressed whether State practice had risen to the level of custom.[118] Denmark and the Netherlands wanted the ICJ to apply "the principle of equidistance" because doing so would greatly favor them, leaving Germany with a far smaller share of coastal water.[119] The ICJ did not find this to be a custom but explained that, even without the passage of considerable time, widespread and representative State practice could suffice if it included specially affected States; here, the practice of coastal States.[120]

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111. ILA LONDON CONFERENCE, *supra* note 103, at 41.

112. *See, e.g.*, *The Paquete Habana*, 175 U.S. at 689-700.

113. ILA LONDON CONFERENCE, *supra* note 103, at 26.

114. *Id.*

115. *Id.*

116. *Id.*

117. North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 4, 6-7 (Feb. 20).

118. *See id.* at 43.

119. *See* DAMROSCH ET AL., *supra* note 87, at 92. "Where the same continental shelf is adjacent to the territories of two adjacent States. . . . the boundary shall be determined by application of the *principle of equidistance* from the nearest points of the baselines from which the breadth of the territorial sea of each State is measured." Convention on the Continental Shelf art. 6, ¶ 2, Apr. 29, 1958, 15 U.S.T. 471, 499 U.N.T.S. 311 (emphasis added).

120. *North Sea Continental Shelf*, 1969 I.C.J. at 42.

Thus, in order to form custom, State practice must be both extensive and representative, but does not need to be universal.[121] If there is no significant dissent, and participation is representative, there need not even be a majority for a custom to lie.[122]

2. The "Instant Custom" Doctrine[123]

In recent years, the ICJ and scholars have suggested that custom "may form in much less time than the decades upon decades of consistent practice traditionally required."[124] An "instant custom" theoretically could permit CIL to change in a moment, but the more widely held view is that custom may form in very little time.[125] Rapid political changes require equally rapid custom development.[126] Thus, a major political event followed by broad, specially affected State practice could create custom, especially if the international community acquiesces.[127]

For example, the original Bush Doctrine, equating those who harbor terrorists with the terrorists themselves,[128] may have become instant custom during the weeks following September 11, 2001, because a "myriad [of] [S]tates worldwide expressed immediate and fervent support."[129] Likewise in the Gulf of Aden, widespread conduct deviating from the piracy-

121. *See* ILA LONDON CONFERENCE, *supra* note 103, at 25-26.

122. *Id.* at 25.

123. See Bin Cheng, *Custom: The Future of General State Practice in a Divided World*, *in* THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY 513, 532 (R. St. J. Macdonald & Douglas M. Johnston eds., 1986) for a discussion that gave birth to the "instant custom" doctrine.

124. Benjamin Langille, Note, *It's "Instant Custom": How the Bush Doctrine Became Law After the Terrorist Attacks of September 11, 2001*, 26 B.C. INT'L & COMP. L. REV. 145, 145 (2003) (discussing the Bush Doctrine as "instant custom"); *see North Sea Continental Shelf*, 1969 I.C.J. at 42-43.

125. Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 157 (2006).

126. Jacob M. Harper, *Technology, Politics, and the New Space Race: The Legality and Desirability of Bush's National Space Policy Under the Public and Customary International Laws of Space*, 8 CHI. J. INT'L L. 681, 690 (2008).

127. *See* Yutaka Arai-Takahashi, *Shifting Boundaries of the Right of Self-Defence—Appraising the Impact of the September 11 Attacks on* Jus Ad Bellum, 36 INT'L LAW. 1081, 1094-95 (2002).

128. President's Address to the Nation on the Terrorist Attacks, 37 WEEKLY COMP. PRES. DOC. 1301 (Sept. 11, 2001) ("We will make no distinction between the terrorists who committed these acts and those who harbor them.").

129. Langille, *supra* note 124, at 155.

suppression custom by the world's naval States could erode the current custom and perhaps undermine its virtues.[130]

3. Multilateral Treaties and Implications for Customary International Law Formation

Although there is no presumption that treaties will form CIL, "[m]ultilateral treaties can provide the impulse or model for the formation of new customary rules through State practice."[131] Also, multilateral treaties that lay down general rules, rather than merely settling issues between specific States, may become custom and bind States not party to the treaty.[132] This could occur if parties to a treaty adopted a practice in their interactions with States not bound by treaty, and those States acquiesced to the practice.[133] It is widely held that the treaty laws regarding piracy suppression[134] have hardened into custom, binding all nations.[135]

B. Piracy Suppression as a *Jus Cogens* Norm

In addition to customary obligations, cooperation in piracy suppression is regarded as a *jus cogens* norm, a heightened category of customary absolutes from which no derogation is permitted.[136] Although providing a precise definition is difficult, during the UN Convention on the Law of Treaties, the Mexican delegate described rules of *jus cogens* as "principles that the legal conscience of mankind deemed absolutely essential to co-existence in the international community at a given stage of its historical development."[137] In addition to cooperation in piracy suppression, other rules generally accepted as possessing the status and

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130. *See infra* Part V.A–E.; *cf.* Langille, *supra* note 124, at 154.

131. ILA LONDON CONFERENCE, *supra* note 103, at 46.

132. CHURCHILL & LOWE, *supra* note 7, at 7-8.

133. *See* ILA LONDON CONFERENCE, *supra* note 103, at 46.

134. *See infra* Part IV.B–C.

135. Eugene Kontorovich, *International Legal Responses to Piracy off the Coast of Somalia*, 13 AM. SOC'Y OF INT'L L. INSIGHTS, Feb. 6, 2009, http://www.asil.org/insights090206.cfm [hereinafter Kontorovich, ASIL INSIGHTS]; *see* Craig L. Carr & Gary L. Scott, *Multilateral Treaties and the Environment: A Case Study in the Formation of Customary International Law*, 27 DENV. J. INT'L L. & POL'Y 313, 314 (1999).

136. Jarvis, *supra* note 4, at 8-9; *see* CHURCHILL & LOWE, *supra* note 7, at 6, 235. The existence of such a group of heightened peremptory norms is controversial, as are some of the included rules. *See id.* at 6.

137. U.N. CONFERENCE ON THE LAW OF TREATIES, SUMMARY RECORDS OF THE PLENARY MEETINGS AND OF MEETINGS OF THE COMMITTEE OF THE WHOLE at 294, U.N. Doc. A/CONF./39/11, U.N. Sales No. E.68.V.7 (1969) (statement of Mr. Suarez (Mexico)); G. J. H. VAN HOOF, RETHINKING THE SOURCES OF INTERNATIONAL LAW 156 (1983).

character of *jus cogens* are the prohibitions on genocide, slavery, war crimes, and crimes against humanity.[138] A nation may not persistently object to a *jus cogens* norm, as it trumps consent and may not be discarded, even by treaty.[139] The subjective elevation of piracy to this level is clarified in international[140] and American case law.[141] The international community has proscribed piracy as unacceptable conduct,[142] and all nations have an affirmative duty to cooperate in the suppression of piracy under international law.[143]

IV. Piracy Violates the International Law of the Sea.

The ocean, romantically called "the global commons," is not regulated by any one country and carries more than ninety percent of the trade between nations.[144] The United Nations Convention on the Law of the Sea (UNCLOS III), an ambitious project covering twenty-five subjects and issues, sought to produce a comprehensive and longstanding constitution for the seas.[145] UNCLOS III was the culmination, not the beginning, of this effort.[146] In 1932, the Harvard Research Group attempted to historically define international sea piracy.[147] Relying heavily on this work, the

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138. Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶¶ 143-47 (Dec. 10, 1998); *see also* Jarvis, *supra* note 4, at 8-9; CHURCHILL & LOWE, *supra* note 7, at 6.

139. 44B AM. JUR. 2D *International Law* § 7 (2007); *see* Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Treaty Convention] ("A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.").

140. *Cf. Furundzija*, Case No. IT-95-17/1-T, ¶¶ 144-47 (finding that torture, like piracy, genocide, and slavery are heightened peremptory norms from which no derogation is permitted). This suggests an *opinio juris* toward customary suppression. *Id.*; *see supra* Part III.A.

141. Filartiga v. Pena-Irala, 630 F.2d 876, 890 (2d Cir. 1980) ("[T]he torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind.").

142. *See id.* In the United States, a high seas piracy conviction carries a sentence of imprisonment for life. 18 U.S.C. § 1651 (2006).

143. United Nations Convention on the Law of the Sea, arts. 100, 105, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS III]; Geneva Convention on the High Seas, arts. 14, 19, Apr. 29, 1958, 13 U.S.T. 2312, 450 U.N.T.S. 82 (entering into force Sept. 30, 1962) [hereinafter High Seas Convention] (art. 14 duty to co-operate in the repression of piracy; art. 19 establishment of universal jurisdiction); *see* Jarvis, *supra* note 4, at 9.

144. Mabel McKinney-Browning, *Director's Note*, 6 INSIGHTS ON L. & SOC'Y, Spring 2006, at 3.

145. Koh, *A Constitution for the Oceans*, *supra* note 6, at xxxiii.

146. *See* Monica Pathak, *Maritime Violence: Piracy at Sea & Marine Terrorism Today*, 20 WINDSOR REV. LEGAL & SOC. ISSUES 65, 68 (2005).

147. *Id.*

International Law Commission developed comprehensive draft articles in the 1950s, which were adopted at the 1958 Geneva Conference on the Law of the Sea.[148] UNCLOS III is the product of sixty years of international cooperative development.[149] On December 10, 1982, 119 nations became signatories to this comprehensive treaty.[150] As of 2009, 159 nations have ratified UNCLOS III, a nearly universal achievement.[151]

A. UNCLOS III: U.S. Ratification Woes

While the United States was very influential in crafting UNCLOS III, it has failed to ratify the treaty[152] due to disagreement as to whether the treaty benefits U.S. interests.[153] The major reason the United States failed to ratify[154] UNCLOS III was the treaty's establishment of the International Seabed Authority to regulate sea floor mining.[155] President Clinton's efforts remedied these flaws and a modified version was submitted to the Senate in 1994.[156] President Bush requested ratification in 2007,[157] but as of 2009, the United States has yet to ratify.[158]

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148. *Id.* at 70-71.

149. *Id.* at 72.

150. *See* Koh, *A Constitution for the Oceans*, *supra* note 6, at xxxiii.

151. *See* Chronological Lists of Ratifications of the United Nations Convention on the Law of the Sea of 10 December 1982, http://www.un.org/Depts/los/reference_files/chronological_lists_of_ratifications.htm (last visited Feb. 1, 2010) [hereinafter UNCLOS III Ratifications].

152. A State for which a treaty does *not* enter into force is *not* bound to abide by or perform the terms of the treaty. *See* Vienna Treaty Convention, *supra* note 139, arts. 26, 34.

153. *See* LAW OF THE SEA INST., REPORTS OF THE U.S. DELEGATION TO THE THIRD UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 665-67 (Myron H. Nordquist & Choon-ho Park eds., 1983) (Occasional paper No. 33) [hereinafter U.S. UNCLOS III DELEGATION]. See Michael A. Becker, *International Law of the Sea*, 42 INT'L LAW. 797, 797-800 (2008) for a discussion of U.S. ratification efforts.

154. "[R]atification" is the action "whereby a State establishes on the international plane its consent to be bound by a treaty." Vienna Treaty Convention, *supra* note 139, art. 2(1)(b). The U.S. President may "make treaties, provided two-thirds of the Senators present concur." U.S. CONST. art. II, § 2, cl. 2.

155. Van Dyke, *supra* note 27, at 6; *see* U.S. UNCLOS III DELEGATION, *supra* note 153.

156. Van Dyke, *supra* note 27, at 6; *see* Vern Clark & Thomas R. Pickering, Op-Ed, *A Treaty That Lifts All Boats*, N.Y. TIMES, July 14, 2007, http://www.nytimes.com/2007/07/14/opinion/14pickering.html.

157. *See* Clark & Pickering, *supra* note 156.

158. *See* UNCLOS III Ratifications, *supra* note 151.

B. UNCLOS III Merely Codifies the Piracy-Suppression Custom.

Since the UNCLOS III treaty is holistic and does not permit reservations,[159] States may not pick what they like and disregard the rest.[160] How can UNCLOS III be binding if it has not entered into force for the United States?[161] While a treaty only binds the nations that consent,[162] a custom binds nations that have not persistently objected during its formation.[163] In fact, many parts of UNCLOS III, especially the piracy provisions, reflect established custom.[164]

Decades prior to UNCLOS III, legal scholars such as Green Hackworth, the first U.S. judge to sit on the ICJ, discussed the modern piracy-suppression custom.[165] In 1941, it was well settled that pirates "on the high seas are entitled to the protection of no nation and may be punished by any nation that may apprehend or capture them."[166] Today's definition of piracy was largely intact in 1941.[167]

President George W. Bush, Jr. endorsed the UNCLOS III piracy-suppression custom.[168] The President explained that U.S. policy supports

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159. A reservation is a unilateral statement made by a State, when ratifying or approving a treaty, whereby it modifies the legal effect of certain provisions in their application to that State. Vienna Treaty Convention, *supra* note 139, art. 2(1)(d).

160. Koh, *A Constitution for the Oceans*, *supra* note 6, at xxxiv.

161. The ICJ has explained that widespread participation in a treaty may itself establish a customary law. North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 42 (Feb. 20). The framers of the Vienna Convention envisioned that nothing would preclude a treaty rule from binding a third State if it became a customary rule. Vienna Treaty Convention, *supra* note 139, art. 38.

162. *See* 44B AM. JUR. 2D *International Law* § 5 (2007).

163. *See id.* § 7.

164. *See* CHURCHILL & LOWE, *supra* note 7, at 24. For the purposes of this Note, any reference to the UNCLOS III custom is intended to adduce the international piracy-suppression custom as codified in articles 100 through 107 and article 110 of that treaty, unless otherwise indicated. *See* UNCLOS III, *supra* note 143, arts. 100-07, 110.

165. *See* Source: High Seas, 2 Hackworth DIGEST § 203, at 681.

166. *Id.*

167. *Compare id.* at 681-83, *with* UNCLOS III, *supra* note 143, arts. 101, 110(1)(a) ("Piracy consists of any of the following acts: (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship . . . .").

168. *See* Memorandum from George W. Bush, Jr., President of the United States, to the Vice President, et al., at Annex B (June 14, 2007), http://georgewbush-whitehouse.archives.gov/news/releases/2007/06/20070614-3.html#_ftn2. President Bush defined piracy, recognized universal jurisdiction, and conceded that all States were "obligated to cooperate to the fullest possible extent in the repression of piracy," referring to UNCLOS III, articles 100-01. *Id.*

suppression because pirates would be held accountable for their crimes, and the United States would facilitate their prosecution.[169] Although treaties are binding only upon the nations who consent to be bound (via formal ratification), the UNCLOS III piracy provisions are binding on non-parties to the treaty because they have hardened into customary law.[170]

C. The UNCLOS III Piracy Provisions Are Customary International Law.[171]

UNCLOS III is almost universally accepted, and such disagreements that do exist are not piracy related.[172] Moreover, the United States is a party to the 1958 High Seas Convention (the UNCLOS III predecessor), and the same piracy definition therein has become CIL, binding the United States.[173] UNCLOS III contains seven articles pertaining to the definition, suppression, apprehension, and prosecution of piracy on the high seas.[174] Article 100 obligates nations to cooperate fully in piracy repression anywhere outside the jurisdiction of any State.[175] In order to fulfill this obligation, every State may seize a pirate ship, arrest the pirates, and seize the property on board.[176] Then, "the courts of the State which carried out the seizure may decide upon the penalties to be imposed" and may decide the fate of the property in good faith.[177]

Traditionally, a nation's courts established jurisdiction over an individual only by nationality (citizenship) or territoriality (committing an act on its territory).[178] This made it difficult to suppress piracy, which

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169. *See id.*

170. *See* CHURCHILL & LOWE, *supra* note 7, at 6.

171. "[T]he non-participation of the United States and Liberia does not stop UNCLOS from formulating customary international law." Carr & Scott, *supra* note 135, at 331. For a discussion on the (in)adequacy of the international legal framework at tackling piracy, see Samuel Pyeatt Menefee, Senior Associate at the Center for National Security Law, University of Virginia School of Law, *International Legal Framework (UNCLOS, SUA & UN Resolutions): How Adequate Are They in Tackling Piracy?* (May 18, 2009), *available at* http://www.kln.gov.my/klicc/programme.html (click "download" under "Session3") (presenting this issue at the Kuala Lumpur International Conference on Piracy and Crimes at Sea).

172. *See* CHURCHILL & LOWE, *supra* note 7, at 22.

173. *See* Michael Bahar, *Attaining Optimal Deterrence at Sea: A Legal and Strategic Theory for Naval Anti-Piracy Operations*, 40 VAND. J. TRANSNAT'L L. 1, 10 (2007).

174. *See* UNCLOS III, *supra* note 143, arts. 100-07.

175. *Id.* art. 100.

176. *Id.* art. 105.

177. *See id.*

178. *See* Jarvis, *supra* note 4, at 8.

usually occurred beyond any national territory.[179] On the high seas, custom dictates that the flag State (nation of registration) "has the exclusive right to exercise legislative and enforcement jurisdiction over its ships" subject to some narrow exceptions,[180] such as piracy, self-defense, and statelessness.[181]

The widespread plight of piracy on all nations[182] may itself justify the UNCLOS III obligation to cooperate and the universal jurisdiction granted to prosecute pirates,[183] but Hackworth, as advisor to the U.S. State Department, endorsed an expanded jurisdiction.[184] Because pirates threaten maritime trade and attack merchants without distinction, pirates are justiciable in every civilized nation.[185] Echoing earlier jurists,[186] Hackworth argued that when pirates attack nations indiscriminately, their practices harm the community of all States.[187] "They become the enemies of the human race and place themselves outside the law of peaceful people."[188] This custom allows prosecution of pirates wherever they are found due to "universal jurisdiction."[189]

Pirates have been thought of as *enemies of the human race* for perhaps 2000 years.[190] This demeaning title justifies suppression and is

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179. *See id.*

180. CHURCHILL & LOWE, *supra* note 7, at 208; *see* UNCLOS III, *supra* note 143, art. 92; High Seas Convention, *supra* note 143, arts. 6, 11. *But see* S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 25-26, 65 (Sept. 7) (finding that France could not conclusively show that only the flag State had jurisdiction, permitting Turkey to prosecute a French officer).

181. Matthew Allen Fitzgerald, Note, *Seizing Weapons of Mass Destruction from Foreign-Flagged Ships on the High Seas Under Article 51 of the UN Charter*, 49 VA. J. INT'L L. 473, 474 n.3 (2009); *see* UNCLOS III, *supra* note 143, art. 110.

182. *See supra* Part I.A.

183. UNCLOS III, *supra* note 143, arts. 100, 105 ("On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship . . . and arrest the persons and seize the property on board.").

184. Hackworth, *supra* note 165.

185. *Id.* at 681, 683.

186. *See, e.g.*, United States v. Smith, 18 U.S. (5 Wheat.) 153, 159, 161 (1820) ("The common law . . . punishes piracy as an offence, not against its own municipal code, but as an offence against the law of nations, . . . a pirate being deemed an enemy of the human race."); ALFRED P. RUBIN, THE LAW OF PIRACY 29 (2d ed. 1998) ("Pirates are the common enemies of all mankind . . . .") (quoting ALBERICO GENTILI, DE LURE BELLI LIBRI TRES (John C. Rolfe trans., 1933) (1612)).

187. Hackworth, *supra* note 165.

188. *Id.*

189. Jarvis, *supra* note 4, at 8.

190. Burgess, Jr., *supra* note 9, at 298. This phrase is used interchangeably with *enemy of all mankind.* S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 70 (Sept. 7)

applicable because high seas piracy "require[s] that the accused be acting against all lucrative targets—that he handle himself as '*hostis humani generis*,'" rather than politically attack only the vessels of a small group of allies.[191] In accordance with custom, only *private* vessels can commit piracy.[192] Also, any warship on the high seas may stop and seize any pirate vessel, "under whatever flag it may be sailing."[193] Finally, the duty to make reparations for an error in exercising universal jurisdiction is customary: If, after inspection, the piracy suspicion proves to be unfounded, the vessel is entitled to reparation or compensation.[194]

V. The Erosion of a Custom

It is not here disputed that the current custom supports a "robust high seas military presence coupled with domestic prosecutions that will deter pirates and thereby save the industry vast sums of money and mariners their lives."[195] While this accurately characterizes the suppression custom, it does not accurately describe current State practice.[196] This Note argues that the custom discussed above is under threat of erosion by the actions (or lack thereof) of specially affected States as those nations address Somali piracy in the Gulf of Aden and beyond.[197] Moreover, "instant custom"[198]

(Moore, J., dissenting).

191. RUBIN, *supra* note 186, at 91. The meaning of *hostis humani generis* has changed over time from its usage in ancient Rome to its reappearance in English municipal law in 1644. *See id.* at 92-93. For background on the ancient usage and meaning of the term "piracy" see generally *id.* at 93-94.

192. *Compare* Hackworth, *supra* note 165, at 682, *with* UNCLOS III, *supra* note 143, art. 101 (defining piratical acts as those "committed for private ends by the crew or the passengers of a private ship").

193. *Compare* Hackworth, *supra* note 165, at 682, *with* UNCLOS III, *supra* note 143, art. 105 ("On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship . . . .").

194. *Compare* Hackworth, *supra* note 165, at 683, *with* UNCLOS III, *supra* note 143, art. 106 ("Where the seizure of a ship . . . on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable . . . .").

195. Bahar, *supra* note 173, at 6. U.S. Navy Lt. Michael Bahar "was the Staff Judge Advocate for the NASSAU Strike Group between April 2005 and June 2006." *Id.* at 1 n.a1.

196. *See generally* J. Peter Pham, *Despite Progress, Somali Piracy Threat Persists – and May Grow Larger*, WORLD DEF. REV., Feb. 19, 2009, http://worlddefensereview.com/pham021909.shtml; Travis Kavulla, *Prosecuting Captured Somali Pirates Poses Challenges*, FOX NEWS, Nov. 26, 2008, http://www.foxnews.com/story/0,2933,457827,00.html.

197. *See, e.g.*, Geeta Anand & John W. Miller, *Hijacked on the High Seas*, WALL ST. J., Jan. 31, 2009, at A1, *available at* http://online.wsj.com/article/SB123335651246634995.html (discussing the State practice of providing escorts for merchants and permitting ransom payments); Paulo Prada & Alex Roth, *On the Lawless Seas, It's Not Easy*

may facilitate this rapid erosion in favor of new customary norms that may be less aspirational than UNCLOS III, yet more in step with reality.[199] This Note suggests five forms of custom erosion occurring in the Gulf of Aden.[200]

A. The Obligation to Cooperate to the Fullest Possible Extent in the Repression of Piracy Is Eroding Due to an Overall Failure of Nations to Cooperate.

"[T]he response of the international community to this threat has been rather haphazard."[201] This law-of-the-sea expert's assessment does not square well with the *jus cogens* obligation[202] to cooperate to the fullest possible extent to repress acts of piracy.[203] The UN Security Council first addressed the Somalia issue in 1992, recognizing the humanitarian crisis and heavy loss of life.[204] The Security Council required a complete arms embargo that is still in effect to deescalate the situation.[205] Forty-five Somali pirate attacks occurred in 2005, including the use of grenade launchers and machine guns to attack a luxury cruise liner.[206] However, it

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Putting Somali Pirates in the Dock, WALL ST. J., Dec. 12, 2008, at A16, *available at* http://online.wsj.com/article/SB122903542171799663.html (discussing Denmark's release without prosecution of ten captured pirates and recognizing that "the current piecemeal system for prosecuting pirates isn't working").

198. *See supra* Part III.A.2. For a discussion on the benefits of instant custom formation, see Langille, *supra* note 124, at 147-51.

199. *See* Harlan Grant Cohen, *Finding International Law: Rethinking the Doctrine of Sources*, 93 IOWA L. REV. 65, 71-72 (2007) (discussing a new framework for considering sources of international law that would distinguish treaty or customary "laws" from aspirational goals); *cf.* Curtis A. Bradley, Jack L. Goldsmith & David H. Moore, Sosa, *Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 900-01 (2007) (recognizing that courts will be less likely to find a custom exists if there is a gap between an aspirational CIL and the actual practice of States).

200. *See infra* Part V.A-E.

201. Donald R. Rothwell, *Maritime Piracy and International Law*, CRIMES OF WAR PROJECT, Feb. 24, 2009, http://www.crimesofwar.org/onnews/news-piracy.html.

202. Jarvis, *supra* note 4, at 8-9 ("[T]he suppression of piracy is regarded as a *jus cogens*. . . . Thus, all countries have an obligation to root out and punish pirates under international law.").

203. UNCLOS III, *supra* note 143, art. 100 ("All [S]tates *shall* cooperate to the fullest possible extent in the repression of piracy . . . .") (emphasis added).

204. S.C. Res. 733, U.N. Doc. S/RES/733 (Jan. 23, 1992); *see supra* text accompanying notes 66-68.

205. S.C. Res. 733, *supra* note 204, ¶ 5; *see* S.C. Res. 1863, U.N. Doc. S/RES/1863 (Jan. 16, 2009) ("*Recalling* its previous resolutions concerning the situation in Somalia, in particular resolution 733 (1992) . . . .").

206. 2008 PIRACY REPORT, *supra* note 21, at 5-6; *see, e.g.*, Debra A. Klein, *Practical*

was not until May 2006 that the Security Council first expressed concern about "increasing incidents of piracy and armed robbery against ships in waters off the coast of Somalia."[207]

This one-line reference, trivial compared to the focus on improving compliance with the arms embargo,[208] came nearly two months after the Security Council President encouraged nations to "be vigilant to any incident of piracy" and to take action to protect merchant shipping.[209] The Security Council President urged international cooperation and "active prosecution of piracy offenses."[210] There was no further reference to Somali piracy between May 2006 and July 2007; this inaction was notwithstanding four Security Council resolutions concerning *other* instability issues in Somalia.[211]

While the UN Secretary-General in June 2007 mentioned the "scourge of pirates," this was only in the context of strengthening the arms embargo.[212] In February 2008, the UN recognized that only France and Denmark had addressed the Somali pirate threat, albeit only in the capacity of protecting the World Food Programme (WFP).[213] Despite forty-four reported attacks off Somalia and in the Gulf of Aden in 2007,[214] it was not until June 2008 that the Security Council addressed this perpetual *jus cogens* violation head on, affirming the UNCLOS III custom "with a view to such persons being prosecuted."[215] The Security Council *decided* (with

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Traveler: Safety at Sea; After Attack, Cruise Ships Rethink Security, N.Y. TIMES, Dec. 4, 2005, at D6, *available at* 2005 WLNR 19487497.

207. S.C. Res. 1676, ¶ 9, U.N. Doc. S/RES/1676 (May 10, 2006).

208. *Id.* ¶¶ 1, 8.

209. The President of the Security Council, *Statement by the President of the Security Council on the Situation in Somalia, delivered on behalf of the Security Council*, U.N. Doc. S/PRST/2006/11 (Mar. 15, 2006).

210. *Id.*

211. *See* S.C. Res. 1766, U.N. Doc. S/RES/1766 (July 23, 2007); S.C. Res. 1744, U.N. Doc. S/RES/1744 (Feb. 21, 2007); S.C. Res. 1725, U.N. Doc. S/RES/1725 (Dec. 6, 2006); S.C. Res. 1724, U.N. Doc. S/RES/1724 (Nov. 29, 2006).

212. The Secretary-General, *Report of the Secretary-General on the Situation in Somalia*, ¶ 39, *delivered to the Security Council*, U.N. Doc. S/2007/381 (June 25, 2007).

213. S.C. Res. 1801, ¶ 12, U.N. Doc. S/RES/1801 (Feb. 20, 2008).

214. 2008 PIRACY REPORT, *supra* note 21, at 5-6.

215. *See* S.C. Res. 1816, U.N. Doc. S/RES/1816 (June 2, 2008) ("*Reaffirming* the relevant provisions of international law . . . including [UNCLOS III], and *recalling* that they provide guiding principles . . . in the repression of piracy . . . outside the jurisdiction of any [S]tate, including but not limited to boarding, searching, and seizing vessels engaged in . . . acts of piracy, and to apprehending persons engaged in such acts with a view to such persons being prosecuted.").

Somali consent[216]) that nations could enter Somali waters to repress piracy, consistent with international law, and use all means to do so.[217]

Eventually, on September 1, 2008 Somalia notified Secretary-General Ban Ki-moon that Canada, Denmark, France, Spain, and the United States had joined the fight against Somali piracy.[218] Further, NATO deployed seven ships comprised of German, Greek, Italian, Turkish, British, and American forces to protect humanitarian aid.[219] The coalition included the first EU naval force and China's first naval deployment outside of the South China Sea.[220]

While one would reasonably expect that these efforts would suppress piracy and curb the most significant attempts, exactly the opposite occurred.[221] The *MV Faina* was hijacked on September 25, 2008[222] and the *MV Sirius Star* was hijacked on November 15, 2008.[223] The IMB reports that in October and November 2008, one out of every three attacks succeeded.[224] In May 2009, the IMB reported that the "total number of pirate attacks in the Gulf of Aden and off east-coast Somalia so far in 2009 ha[d] already overtaken the figure for all of 2008," citing twenty-nine successful hijackings.[225] By the end of 2009, this figure had increased to

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216. In late February 2008, Somalia sought "urgent assistance in securing the territorial and international waters off the coast of Somalia for the safe conduct of shipping and navigation." Press Briefing, U.S. Dep't of State, Office of the Spokesman, Somali Piracy (Taken Question) (Oct. 2, 2008), http://2001-2009.state.gov/r/pa/prs/ps/2008/oct/110575.htm [hereinafter State Dep't Press Briefing].

217. S.C. Res. 1816, *supra* note 215, ¶ 7. On December 16, 2008, the Security Council passed a resolution broadening the scope of "hot pursuit," permitting States to chase pirates onto dry land. Kontorovich, ASIL INSIGHTS, *supra* note 135.

218. State Dep't Press Briefing, *supra* note 216.

219. The Secretary-General, *Report of the Secretary-General on the Situation in Somalia*, ¶ 55, *delivered to the Security Council*, U.N. Doc. S/2008/709 (Nov. 17, 2008).

220. Kontorovich, ASIL INSIGHTS, *supra* note 135.

221. *See* Biegon, *supra* note 32 ("[T]he bandits have remained relatively undeterred by the by the [sic] immense firepower that has been assembled to thwart their piratical efforts.").

222. *See* Jeffrey Gettleman, *Somalia Pirates Capture Tanks and Unwanted Global Notice*, N.Y. TIMES, Sept. 27, 2008, at A1, *available at* 2008 WLNR 18377350.

223. John S. Burnett, Op-Ed, *Grand Theft Nautical*, N.Y. TIMES, Dec. 5, 2008, at A39, *available at* 2008 WLNR 23389250.

224. 2008 PIRACY REPORT, *supra* note 21, at 39.

225. ICC Commercial Crime Services, *Pirate Attacks off Somalia Already Surpass 2008 Figures*, May 12, 2009, http://www.icc-ccs.org/index.php?option=com_content&view=article&id=352:pirate-attacks-off-somalia-already-surpass-2008-figures&catid=60:news&Itemid=51. However, while incidents of Somali piracy nearly doubled in 2009 from 2008, the number of successful hijackings is proportionately less. The Piracy Reporting Centre attributes this to the increased presence of the international navies and safer practice on the

217 incidents attributed to Somali pirates.[226] Thus, three years after the Security Council President urged international cooperation and "active prosecution of piracy offences,"[227] vessels of unprecedented size continued to fall prey to pirates traveling further from shore[228] to violate international law.[229] It took several high profile attacks, and not any sense of legal obligation, to create the political will needed to campaign against Somali pirates.[230]

State practice has begun to erode the custom,[231] because the obligation to fully cooperate in piracy suppression has given way to a practice of protecting political or economic self-interest.[232] Therefore, a new "custom" could be in the process of forming.[233]

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part of ship Masters. 2009 PIRACY REPORT, *supra* note 20, at 25.

226. 2009 PIRACY REPORT, *supra* note 20, at 21.

227. The President of the Security Council, *supra* note 209.

228. *See, e.g.*, Philp, *supra* note 32; Gettleman, *supra* note 50. For example, on August 3, 2009, after four months of negotiations, the German *MV Hansa Stavanger* and its crew of twenty-four were released following a ransom payment of $2.7 million. *See* Matthias Gebauer et al., *At the Mercy of Somali Pirates: Hansa Stavanger Crew Describe Hostage Ordeal*, SPIEGEL, Aug. 11, 2009, http://www.spiegel.de/international/world/0,1518, 641752,00.html.

229. Rothwell, *supra* note 201 ("UNCLOS makes it clear that high seas piracy is illegal . . . .").

230. Daniel Kenealy, *Somali Piracy: Chaos on the High Seas*, THE JOURNAL (Edinburgh), Nov. 23, 2008, http://www.journal-online.co.uk/article/5127-somalian-piracy-chaos-on-the-high-seas.

231. *See* Kontorovich, ASIL INSIGHTS, *supra* note 135 ("[I]n practice, the nations patrolling the Gulf of Aden have chosen not to prosecute pirates . . . .").

232. *See* 2009 Q2 PIRACY REPORT, *supra* note 57, at 33 ("Many nations are reluctant to capture Somali pirates for fear of being saddled with them after they serve their prison terms and some nations do not have the mandate by their respective governments to capture the pirates."); BBC News, *German Navy Foils Somali Pirates* (Dec. 25, 2008), http://news.bbc.co.uk/2/hi/africa/7799796.stm (reporting Germany will only bring pirates to justice if German interests were hurt—if a German ship was attacked or German citizens were killed or injured); Prada & Roth, *supra* note 197 ("'Prosecuting can be difficult because the effort often exceeds the benefit,' says Brad Kieserman, chief of the U.S. Coast Guard's operations law group."); Rothwell, *supra* note 201 (recognizing "a lack of political will on the part of some members of the international community to engage in law enforcement"); Marie Woolf, *Pirates Can Claim UK Asylum*, TIMES (London), Apr. 13, 2008, http://www.timesonline.co.uk/tol/news/uk/article3736239.ece (reporting that the British Royal Navy has been told not to detain Somali pirates fearing they could claim asylum in the UK); Stephanie Hanson, *Backgrounder: Combating Maritime Piracy*, COUNCIL ON FOREIGN REL., Apr. 13, 2009, http://www.cfr.org/publication/18376 ("Even if you have an agreement with a country, no one wants to be a dumping ground for difficult problems.") (internal quotations omitted) (quoting James Kraska). Kraska formerly served as an Oceans Policy Adviser for the Director of Strategic Plans and Policy for the U.S. Joint

B. Even if Some Nations Have Cooperated, They Have Merely Escorted Humanitarian Aid or Merchant Vessels, but Have Not *Seized* Pirate Ships or *Arrested* Pirates.

Evidence of this particular erosion is twofold: First, many reports discuss international efforts to provide only safe passage for humanitarian and commercial vessels;[234] and second, amid otherwise comprehensive reporting on Somali piracy, a lack of arrests and prosecutions can be implied from the absence of such news.[235]

UNCLOS III presents a guideline for how nations are to deal with piracy.[236] After defining piratical conduct[237] and when a vessel becomes a pirate ship,[238] it provides that every State has universal jurisdiction[239] to seize, arrest, confiscate, and prosecute.[240] While many writers have offered

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Chiefs of Staff. Foreign Policy, James Kraska's and Brian Wilson's Blog, http://experts.foreignpolicy.com/blog/4910 (last visited Feb. 1, 2010).

233. *Cf.* Melissa Robbins, Comment, *Powerful States, Customary Law and the Erosion of Human Rights Through Regional Enforcement*, 35 CAL. W. INT'L L.J. 275, 300 (2005) ("[P]owerful [S]tates, who are heavily involved in UN and other international activities, have the ability to influence the formation of customary law . . . .").

234. Anand & Miller, *supra* note 197 ("Every merchant ship is given a recommended route, near a military escort. Nevertheless, there have been [seventeen] attacks and three hijackings in January [2009]."); Benoit Finck, *Somali Pirates Give Russia Chance to Flex Muscles*, DEF. NEWS, Nov. 22, 2008, http://www.defensenews.com/story.php?i=3833357 (reporting that the Russian frigate *Fearless* has been tasked with escorting cargo vessels); Hennessey, *supra* note 11 (reporting that the EU naval mission will "chaperone commercial vessels en route to the Suez Canal").

235. *See* Prada & Roth, *supra* note 197 (reporting that shipping companies are rerouting their vessels due to an "absence of adequate enforcement [arrests] or legal recourse [prosecutions]"); *see, e.g.*, Chip Cummins, *Pirates Seen as Freeing Tanker*, WALL ST. J., Jan. 10, 2009, at A4; Chip Cummins, *U.S. Aims to Coordinate Defense Against Piracy*, WALL ST. J., Jan. 9, 2009, at A6 [hereinafter *U.S. Aims to Coordinate Defense Against Piracy*]; Ibrahim & Bowley, *supra* note 41. *But see* Tom Hays, *Abdiwali Abdiqadir Muse, Teen Somali Pirate, Pleads Not Guilty in NY*, THE HUFFINGTON POST, May 21, 2009, http://www.huffingtonpost.com/2009/05/21/abdiwali-abdiqadir-muse-t_0_n_206486.html (reporting on the arrest of "the only surviving pirate among a group that attacked the U.S.-flagged Maersk Alabama on April 8[, 2009]"); Henry Samuel, *Somali Pirates Seized After Hostages Are Freed*, THE DAILY TELEGRAPH (London), Apr. 12, 2008, http://www.telegraph.co.uk/news/worldnews/1584821/Somali-pirates-seized-after-hostages-are-freed.html (discussing proceedings commenced in France for the piracy of the *Le Ponant*).

236. *See* UNCLOS III, *supra* note 143, arts. 100-07, 110.

237. *Id.* art. 101.

238. *Id.* arts. 102-03.

239. *Id.* art. 105; Jarvis, *supra* note 4, at 8-9.

240. *See* UNCLOS III, *supra* note 143, art. 105; Jarvis, *supra* note 4, at 8-9.

excuses for why abiding by this custom has proven difficult,[241] the simple reality is that States are developing "innovative legal responses to a modern epidemic of the oldest recognized international crime,"[242] and in so doing, are eroding the age-old custom, which is proving unworkable.[243]

Indeed, some States have cooperated, forming coalitions like Combined Task Force 151 (CTF-151),[244] the European Union's Operation Atalanta,[245] or increasing coordination with maritime security organizations, such as the International Maritime Organization (IMO)[246] or the International Maritime Bureau's Piracy Reporting Centre (PRC).[247] The UN Secretary-General has recognized this, as well as the creation of the Contact Group on coastal Somali piracy.[248]

But what are the ends of this cooperation? A leaked letter from German Foreign and Defense Ministers, for example, made clear that Germany would not pursue and arrest pirates.[249] Similarly, the British Foreign Office (headed by the cabinet-level Secretary of State) directed the British Royal Navy not to detain pirates for fear they would later claim

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241. *See, e.g.*, David Charter, *Royal Navy Admiral Phillip Jones Heads EU Somali Pirate Task Force*, TIMES (London), Dec. 9, 2008, http://www.timesonline.co.uk/tol/news/world/europe/article5309165.ece ("Arrested pirates could pose a legal problem for the navy that apprehends them, because [of] . . . . the block on EU prisoners being sent to countries with capital punishment."); Cummins, *supra* note 39 (reporting that "the area under threat is vast, estimated by the Navy at 1.1 million square miles"); Rothwell, *supra* note 201 (explaining that "the current legal regime is not comprehensive with respect to enforcement" against alleged pirates).

242. Kontorovich, ASIL INSIGHTS, *supra* note 135.

243. *See id.*

244. Monique K. Hilley, *Coalition Forces Work to Deter Piracy in Gulf of Aden*, U.S. NAVY, Jan. 17, 2009, http://www.navy.mil/search/display.asp?story_id=41897 (reporting that CTF-151 was established to create lawful maritime order and develop security).

245. *U.S. Aims to Coordinate Defense Against Piracy*, *supra* note 235.

246. Press Briefing, IMO, High-Level Meeting in Djibouti Adopts a Code of Conduct to Repress Acts of Piracy and Armed Robbery Against Ships (Jan. 30, 2009), *available at* http://www.imo.org/About/mainframe.asp?topic_id=1773&doc_id=10933 (discussing a meeting attended by representatives from seventeen mostly regional nations).

247. ICC Commercial Crime Services, http://www.icc-ccs.org (follow "About Us" hyperlink; then follow "IMB Piracy Reporting Centre" hyperlink) (last visited Feb. 1, 2010) (describing its role as raising awareness and alerts as well as information sharing). Since February 2009, an Internationally Recommended Transit Corridor (IRTC) has been established to provide protection and support to merchant ships. 2009 PIRACY REPORT, *supra* note 20, at 23.

248. The Secretary-General, *Report of the Secretary-General on the Situation in Somalia*, ¶¶ 57-59, *delivered to the Security Council*, U.N. Doc. S/2009/373 (July 20, 2009).

249. Charter, *supra* note 241.

asylum.[250] In the wake of the *MV Sirius Star* capture, the U.S. Navy explained that it would not intervene calling the situation a hostage situation.[251] Following the capture of the German *MV Hansa Stavanger*, the United States was "unwilling to offer up the *USS Boxer*," which would have permitted the German elite police unit (GSG-9) to attempt to retake the vessel.[252] While raising valid concerns, these decisions, combined with complicity in ransom payments,[253] do not collectively further piracy suppression; they evince an *opinio juris* that threatens to erode the custom.[254]

Although providing escort for humanitarian aid or merchant vessels is a noble goal that may mitigate another humanitarian disaster or prevent destabilization of maritime trade, the lack of seizures and prosecutions in the face of increasing piratical attacks erodes the contrary custom.[255] The American Society of International Law (ASIL) points out that "[t]he dominant approach has been to avoid capturing pirates in the first place."[256]

The UN inadvertently contributed to this via the Security Council's *recommendations* for States to "protect merchant shipping, in particular the transportation of humanitarian aid," even after it had acknowledged Somali piracy.[257] Certain Security Council resolutions are legally binding, particularly those asserting that "the Security Council *decides*."[258] Perhaps international law is partly the solution and partly the problem.[259] For years,

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250. Woolf, *supra* note 232.

251. Cummins, *supra* note 39.

252. *See* Gebauer et al., *supra* note 228 (explaining that the United States found the operation to be too risky).

253. *See infra* Part V.E. This practice has come to represent the norm, and not the exception. *See infra* Part V.E.

254. *See* MUNICH RE GROUP, *supra* note 15, at 3 ("Like all crime, deterring piracy requires the arrest and prosecution of pirates.").

255. *Compare* Pham, *supra* note 196 ("[T]he complications of conducting modern day piracy trials has generally discouraged Western countries from undertaking prosecutions."), *and* Kavulla, *supra* note 196 ("Western countries have balked at the prospect of hosting pirates, even in prison."), *with* UNCLOS III, *supra* note 143, arts. 100, 105 (obligating international cooperation in piracy repression and granting jurisdiction to any nation to seize and prosecute alleged pirates).

256. Kontorovich, ASIL INSIGHTS, *supra* note 135.

257. *See* S.C. Res. 1838, ¶ 5, U.N. Doc. S/RES/1838 (Oct. 7, 2008); S.C. Res. 1814, ¶ 11, U.N. Doc. S/RES/1814 (May 15, 2008); S.C. Res. 1801, *supra* note 213, ¶ 12; S.C. Res. 1772, ¶ 18, U.N. Doc. S/RES/1772 (Aug. 20, 2007).

258. Christopher C. Joyner, *Conclusion: The United Nations as International Law-Giver*, *in* THE UNITED NATIONS AND INTERNATIONAL LAW 432, 439 (Christopher C. Joyner ed., 1997).

259. *See* Robert Beckman, Assoc. Professor, National University of Singapore Law

the Security Council was preoccupied with preventing a humanitarian crisis, restoring peace, or maintaining the arms embargo, instead of requiring piracy suppression via prosecution.[260] These resolutions, coupled with the binding nature of Chapter VII of the UN Charter that such *decisions* "shall be carried out by the Members of the United Nations directly,"[261] suggest that piracy suppression was trumped by other concerns, perhaps for several years.[262]

But custom is based on the practice of States, the traditional subjects of international law.[263] It is only State action that can change the custom.[264] The French frigate *Premier Maitre L'Her* is part of the European Union fleet, Atalanta.[265] Its missions have included escorting WFP humanitarian aid and merchant tankers.[266] Notably absent are reports of arrests or prosecutions, which is not surprising, as the Atalanta mandate specifically calls for WFP and merchant vessel protection, and even deterrence by force, but mandates neither arrest nor prosecution.[267]

School, Somali Piracy – Is International Law Part of the Problem or Part of the Solution? 77 (Feb. 23, 2009) (PowerPoint on file with author) (concluding that international law is partly the problem and partly the solution, due to various international legal loopholes that have hindered prosecution of pirates).

260. *See* S.C. Res. 1814, *supra* note 257; S.C. Res. 1811, ¶ 1, U.N. Doc. S/RES/1811 (Apr. 29, 2008); S.C. Res. 1801, *supra* note 213, ¶¶ 1, 3, 11, 12; S.C. Res. 1772, *supra* note 257, ¶ 18.

261. U.N. Charter art. 48, para. 2, *available at* http://www.un.org/en/documents/charter/chapter7.shtml.

262. *Compare* S.C. Res. 1772, *supra* note 257, ¶ 18 (invoking Chapter VII and merely *encouraging* nations to protect WFP aid and merchants from Somali piracy with no mention of arrest or prosecution), *and id.* ¶¶ 9, 11 (*deciding* to further reconciliation and strengthening of the embargo), *with* UNCLOS III, *supra* note 143, arts. 100, 105, 110 (obligating States to cooperate in repressing piracy via the custom of arrests and prosecutions), *and* S.C. Res. 1816, *supra* note 215, ¶¶ 7, 9, 11 (*deciding* that nations may enter Somali territorial waters and *calling upon* nations to cooperate in determining jurisdiction, investigation and prosecution of Somali pirates).

263. *See* Emeka Duruigbo, *Exhaustion of Local Remedies in Alien Tort Litigation: Implications for International Human Rights Protection*, 29 FORDHAM INT'L L.J. 1245, 1268 (2006).

264. *See id.*

265. *See* National Public Radio, *French Warship Thwarts Pirate Attack*, Jan. 6, 2009, http://www.npr.org/templates/story/story.php?storyId=99036159.

266. *Id.*

267. *See* EUR. SEC. & DEF. POLICY, EUR. UNION, EU NAVAL OPERATION AGAINST PIRACY 1 (2009), *available at* http://ue.eu.int/uedocs/cmsUpload/090313FactsheetEU-NAVFOR Somalia-v3_EN.pdf. While Atalanta is authorized to arrest and prosecute, the mandate omits mention of arrest or prosecution. *See id.* at 1-2.

In February 2008, Security Council Resolution 1801 recognized France and Denmark for cooperating in the protection of humanitarian aid vessels, but did not recognize that neither of those naval States or any others had arrested or prosecuted pirates.[268] Later in May 2008, another Security Council resolution "[*r*]*eiterate*[*d*] its support for the contribution made by some States to protect the World Food Programme[,]" but did not indicate any arrests or prosecutions of pirates.[269]

In December 2008, the Security Council noted that lack of capacity and clarity about how to prosecute pirates has "hindered more robust international action against the pirates . . . and in some cases led to pirates being released without facing justice."[270] Since the Security Council specifically mentioned when pirates were released without prosecution and mentioned by name States that cooperated, the Security Council's omission of any reference to successful prosecutions strongly suggests that no prosecutions occurred.[271] In response to the lack of prosecutions, the UN Secretary-General announced in late July 2009 that the UN was "exploring the prospects for helping Member States to ensure the prosecution of acts of piracy."[272]

C. Even When the Naval States Engaged Pirates Directly, They Either Sank Pirate Ships, Chased Pirates Away, or Let Pirates Go.

Despite logistical difficulty, "all [S]tates have a right *to seize and prosecute* those responsible for pirate acts on the high seas."[273] Many of the 111 Somali pirate incidents in 2008, and the 217 incidents in 2009,[274] met some form of naval resistance particularly once maritime powers increased their patrols.[275] These can be roughly divided into four categories based on

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268. *See* S.C. Res. 1801, *supra* note 213, ¶ 12.

269. *See* S.C. Res. 1814, *supra* note 257, ¶ 11.

270. S.C. Res. 1851, U.N. Doc. S/RES/1851 (Dec. 16, 2008). *But see* Hays, *supra* note 235. As of late August 2009, despite two resolutions regarding the situation in Somalia, the Security Council has not *decided* to further directly address Somali piracy. *See* S.C. Res. 1872, U.N. Doc. S/RES/1872 (May 26, 2009); S.C. Res. 1863, *supra* note 205.

271. *Compare* S.C. Res. 1851, *supra* note 270 (recognizing that pirates had escaped prosecution due to jurisdictional confusion and failing to mention any successful prosecutions), *with* S.C. Res. 1801, *supra* note 213, ¶ 12 (recognizing the specific actions of France and Denmark in protecting aid vessels).

272. The Secretary-General, *supra* note 248, ¶ 61.

273. Rothwell, *supra* note 201 (emphasis added).

274. 2009 PIRACY REPORT, *supra* note 20; 2008 PIRACY REPORT, *supra* note 21.

275. *See* Kontorovich, ASIL INSIGHTS, *supra* note 135 (reporting that the increased military presence has resulted in exchanges of fire with pirates on several occasions).

State practice, three of which are addressed in this subpart.[276] When States engaged pirates directly, on some occasions they sank pirate ships;[277] on other occasions they merely succeeded at chasing or scaring pirates away;[278] and in a few seemingly bizarre situations, they captured pirates only to later set them free.[279]

1. Sinking Ships

Occasionally, a naval vessel does engage pirates directly with firepower.[280] In November 2008, the Indian *INS Tabar* encountered three pirate vessels: a mother-vessel towing two speedboats.[281] The Indian Navy claimed the pirates threatened to blow up the *INS Tabar*, and several were spotted with guns and RPGs.[282] Once fired upon by the pirates, the *INS Tabar* retaliated in alleged self-defense, destroying the mother-vessel as the two speedboats fled.[283] While sinking pirate ships is more desirable than other alternatives and may be justifiable self-defense, the mother-vessel in this case was actually a captured Thai vessel, and "as many as [fifteen] civilian hostages supposedly were on board when the vessel sank."[284] Here, casualties and identities are unknown,[285] much evidence is lost at sea, and justice (apart from perhaps the poetic sort) has not been served.[286]

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276. See *infra* Part V.D for a discussion of the fourth category, namely, when States actually did seize or arrest alleged pirates.

277. *See, e.g.*, The Associated Press, *Suspected Pirate 'Mother Ship' Sunk*, Nov. 19, 2008, *available at* http://www.msnbc.msn.com/id/27766333/?GT1=43001 (reporting that an Indian naval vessel sunk a suspected pirate ship in November 2008).

278. *See* Kontorovich, ASIL INSIGHTS, *supra* note 135.

279. *See, e.g.*, BBC News, *supra* note 232 (reporting that Germany had released pirates immediately after their capture).

280. Kumar & Cowell, *supra* note 38.

281. *Id.*

282. *Id.*

283. *Id.*

284. STRATFOR Global Intelligence, *Japan, Somalia: Pirate-Infested Waters Getting Crowded*, Jan. 15, 2009, http://www.stratfor.com/analysis/20090115_japan_somalia_pirate_infested_waters_getting_crowded (last visited Feb. 1, 2010) (on file with author).

285. The Associated Press, *Crackdown on Somali Pirates! Indian Navy Captures 23 in Gulf of Aden*, Dec. 13, 2008, *available at* http://www.nydailynews.com/news/us_world/2008/12/13/2008-12-13_crackdown_on_somali_pirates_indian_navy_.html ("At least one Thai crew member was killed in the attack . . . .").

286. *See* Kumar & Cowell, *supra* note 38.

2. Cold Pursuit

"[T]he role of the naval force has been to ward off pirates, rather than to pursue or apprehend them . . . ."[287] For example, a Russian frigate, *Fearless*, chased off pirates on at least two occasions in 2008, once while working in tandem with the British frigate *Cumberland*.[288] In January 2009, a pirate speedboat chased a Danish owned cargo ship for half an hour, as the Danish ship dodged two RPG warheads.[289] A Russian warship came to the rescue, forcing the pirates to flee.[290] Only the IMB can comprehensively compile evidence of this practice[291] as foiled pirate attacks that do not lead to ship capture or arrest are hardly newsworthy,[292] but one could include the many instances when ransoms are paid and pirates flee with impunity.[293]

3. Get Out of Jail Free, Just Hand over That Rocket Propelled Grenade[294]

Remarkably, there have also been instances where naval powers sent to the Gulf of Aden to suppress piracy have actually apprehended pirates and then let them go.[295] In September 2008, Danish special forces arrested

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287. Kontorovich, ASIL INSIGHTS, *supra* note 135.

288. Finck, *supra* note 234.

289. Mike Pflanz, *Cargo Ship Escapes Somali Pirates*, THE TELEGRAPH (London), Jan. 14, 2009, http://www.telegraph.co.uk/news/worldnews/piracy/4238924/Cargo-ship-escapes-Somali-pirates.html.

290. *Id.*

291. For a comprehensive list of 2008 and 2009 Somali pirate attacks, see generally the 2009 PIRACY REPORT, *supra* note 20, at 10-12, 25-26, as well as the 2008 PIRACY REPORT, *supra* note 21, at 9, 26.

292. *See, e.g.*, Posting of International Maritime Bureau to http://www.icc-ccs.org/index.php?option=com_content&view=article&id=30&Itemid=12 (follow "Live Piracy Report" hyperlink) (Mar. 14, 2009, 06:45 UTC) (on file with author) (reporting that coalition forces responded, the pirates fled, and no pirate or mariner was captured or injured).

293. *See infra* Part V.E.

294. "250 pirates had been arrested up to the beginning of March [2009], of whom 130 were disarmed and released . . . ." Reuters, *Britain Sees Action Against Somali Piracy Is Working*, Mar. 19, 2009, http://uk.reuters.com/article/idUKTRE52I68R20090319.

295. *See* S.C. Res. 1851, *supra* note 270. In April 2009, the Norwegian *MV Sigloo Tor* "successfully used high pressure fire hoses to repel an assault by pirates in the Gulf of Aden. Unfortunately, when the pirates were intercepted a short time later . . . they threw their weapons overboard and, in the absence of other evidence of their participation in the attack, were released." J. Peter Pham, *Strategic Interests: Somali Pirates Undeterred by Naval Build-up, but Risks Heightened*, WORLD DEF. REV., Apr. 2, 2009, http://world defensereview.com/pham040209.shtml.

ten pirates.[296] A Lynx helicopter housed aboard the Danish *HDMS Absalon* spotted a speedboat tied to a mother-vessel matching the description of a pirate alert received only days earlier.[297] Despite finding notebooks outlining how ransoms would be divided, ladders and weapons for vessel capture, and a lifejacket from a previously hijacked German ship, Danish authorities released them only a week later.[298] The alleged pirates even confessed that they were in fact pirates.[299]

In February 2009, as a Chinese vessel fended off pirates with fire hoses, Denmark responded to the alert.[300] After cornering seven pirates armed with a RPG, four assault rifles, and two grenades, Denmark chose only to disarm them, making no arrests.[301] In March 2009, the U.S. Navy released nine of sixteen pirates it was holding on the *USS Vella Gulf*, due to a lack of evidence.[302] Their capture was in response to a distress alert particularly identifying these suspects.[303] While the pirates were released to Somali officials, this did little to ensure they were brought to justice; Somalia is lawless.[304] Some officials take kickbacks from pirates,[305] and sometimes the pirates escape from Somali prisons.[306] In December 2008, the German frigate *Karlsruhe* seized six pirates, foiling their plan to capture an Egyptian cargo vessel.[307] Authorities confiscated their weapons but then immediately released the pirates on orders from Berlin because German interests were not harmed.[308]

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296. Prada & Roth, *supra* note 197.

297. *Id.*

298. *Id.*; Gettleman, *supra* note 79 (reporting that the Danes released ten pirates on a beach without their guns).

299. Prada & Roth, *supra* note 197.

300. The Associated Press, *Danish, Chinese Navies Deter Suspected Pirates*, Feb. 26, 2009, *available at* http://abcnews.go.com/International/wireStory?id=6963013.

301. *Id.*

302. *Navy Releases 9 Suspected Pirates, Citing Lack of Evidence*, CNN.COM, Mar. 2, 2009, http://www.cnn.com/2009/US/03/02/somalia.pirates/index.html?eref=time_world.

303. *Id.*

304. *See supra* Part II.

305. *See* Gettleman, *supra* note 79 (reporting that much of the ransom money from piracy goes into government officials' pockets). The 2008 Corruption Perceptions Index ranks Somalia as 180, dead last, in a list of public sector corruption. J. GRAF LAMBSDORFF, TRANSPARENCY INTERNATIONAL CORRUPTION PERCEPTIONS INDEX 5 (2008), *available at* http://www.transparency.org/policy_research/surveys_indices/cpi/2008.

306. *See, e.g.*, *Hijacked Supertanker Moors off Somalia as Eight Pirates Escape Prison*, XINHUANET.COM, Nov. 18, 2008, http://news.xinhuanet.com/english/2008-11/18/content_10377891.htm.

307. BBC News, *supra* note 232.

308. *Id.*

The commander of the Danish *HDMS Absalon*, discussed above, inadvertently furthered custom erosion by enunciating his State's practice: "'We catch them, confiscate their weapons, and then we let them go.'"[309] This should alarm defenders of the UNCLOS III piracy-suppression custom especially in light of the potential for "instant custom" formation.[310] Since the world's naval States recently began protecting the Gulf of Aden trade route, the dominant practice "has been to avoid capturing pirates in the first place, or, if captured, releasing the pirates without charging them with a crime."[311]

D. Even When Naval States Sought to Prosecute, They Transferred Pirates to Other States, Violating the Custom.

As piracy increased and higher profile booty was captured,[312] global outcry led to calls from various international organizations for action by States with naval capacity.[313] The naval powers found themselves precariously wedged between their domestic and international legal obligations; they encountered hurdles regarding detention and jurisdiction to enforce or prosecute.[314] Naval States arrived at a seemingly viable solution.[315] Those States that had captured pirates agreed to turn them over to regional States with adequate judicial capacity for fair prosecutions.[316] Kenya and Yemen facilitated this option, paving the way for proper deterrence of Somali piracy.[317]

From at least an academic standpoint, however, this conduct also risks eroding the international custom.[318] According to UNCLOS III, after pirates are seized, "[t]he *courts of the State which carried out the seizure*

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309. *See* Prada & Roth, *supra* note 197.

310. *See supra* Part III.A.2.

311. Kontorovich, ASIL INSIGHTS, *supra* note 135.

312. *See supra* Parts I.A–C, II.B.

313. James Kraska & Brian Wilson, *Fighting Pirates: The Pen and the Sword*, 25 WORLD POL'Y J. 41, 47 (2008); *see, e.g.*, Int'l Maritime Org. [IMO], *Piracy and Armed Robbery Against Ships in Waters off the Coast of Somalia*, IMO Assemb. Res. A. 1002 (25) (Nov. 29, 2007), *available at* www.imo.org/includes/blastData.asp/doc_id=11283/A%201002(25).pdf; S.C. Res. 1851, *supra* note 270, ¶ 2.

314. *See* Kraska & Wilson, *supra* note 313, at 47-48 (discussing the need for real-time coordination for detention and subsequent prosecution of apprehended pirates).

315. *See* Barney Jopson, *Kenya Signs Deal to Prosecute Somali Pirates*, FIN. TIMES (London), Dec. 12, 2008, http://www.ft.com/cms/s/0/9b63b8e6-c7c4-11dd-b611-000077b07658.html?nclick_check=1 (reporting that the UK's security minister views this agreement as a good step forward).

316. *See id.*

317. *See* 2008 PIRACY REPORT, *supra* note 21, at 39.

318. *See* Kontorovich, ASIL INSIGHTS, *supra* note 135.

may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships."[319] Thus, pirate transfers deviate from the express language of UNCLOS III.[320] Furthermore, these transfers are not supported by the drafting history, which specifically contemplated and rejected such transfers.[321] The drafters of article 105 explained: "This article gives any State the right to seize pirate ships (and ships seized by pirates) and to have them adjudicated upon by its courts. *This right cannot be exercised at a place under the jurisdiction of another State.*"[322]

Notwithstanding that clear language, interstate pirate transfers began in 2006 when the *USS Churchill* rescued an Indian dhow, the *Delta Ranger*.[323] In late 2008 and early 2009, this method was revived as the United States, the UK, and the EU [324] entered into agreements with Kenya to accept transfers and prosecute pirates.[325] In late 2008, the UK transferred eight pirates, accused of an attempted capture, to Kenya after receiving assurances that any convictions would not result in death penalty sentences.[326] Germany turned over nine more alleged pirates to Kenya for prosecution in March 2009.[327]

These "test case[s]"[328] may be the beginning of bringing to justice those who commit piracy on the high seas, but each pirate transfer furthers erosion of the custom[329] because such State practice is explicitly at odds

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319. UNCLOS III, *supra* note 143, art. 105 (emphasis added).

320. *Id.*; Kontorovich, ASIL INSIGHTS, *supra* note 135.

321. *See Report of the International Law Commission to the General Assembly*, 11 U.N. GAOR Supp. (No. 9) at 283, U.N. Doc. A/3159 (1956), *reprinted in* [1956] 2 Y.B. Int'l L. Comm'n 283, U.N. Doc. A/CN.4/97 [hereinafter *ILC Report*]; Kontorovich, ASIL INSIGHTS, *supra* note 135.

322. *ILC Report*, *supra* note 321 (emphasis added); Kontorovich, ASIL INSIGHTS, *supra* note 135.

323. *See* Kraska & Wilson, *supra* note 313, at 46-47.

324. *See* Baumgartner, *supra* note 8; The Associated Press, *Germany Hands over 9 Pirate Suspects to Kenya for Prosecution*, Mar. 10, 2009, http://www.foxnews.com/story/0,2933,507749,00.html; Sarah Childress, *Pact with Kenya on Piracy Trials Gets First Test*, WALL ST. J., Feb. 17, 2009, at A8, *available at* http://online.wsj.com/article/SB123482019865794481.html; Jopson, *supra* note 315.

325. The Associated Press, *supra* note 324 (reporting that the United States, the UK, and the EU have made transfer agreements).

326. Jopson, *supra* note 315.

327. The Associated Press, *supra* note 324.

328. Childress, *supra* note 324.

329. *See* Posting of Eugene Kontorovich to One Solution to Piracy: Try Pirates in Kenya, http://opiniojuris.org/2009/02/17/one-solution-to-piracy-try-pirates-in-kenya (Feb. 17, 2009, 23:36 EST). "The plain language of Art. 105 is that the courts of the capturing [S]tate are giving [sic] adjudicative jurisdiction; no other [S]tate is given jurisdiction by that article." *Id.*; *see* Jopson, *supra* note 315 (reporting that similar arrangements could be made with

with the UNCLOS III draft history.[330] Each transfer agreement evinces an *opinio juris* that is irreconcilable with the custom therein.[331]

E. Corrosive Capitalism

A different form of erosion is manifested by way of ransom payments.[332] States have an obligation to cooperate in piracy-suppression efforts,[333] and State officials are often unwilling to negotiate a ransom,[334] as this practice encourages future piracy.[335] But States have acquiesced by permitting lucrative ransom payments,[336] and the IMB has witnessed that "[h]ijacked ships are normally released *only* after a ransom is paid."[337] As one former Somali naval captain quipped, "[a]ll you need is three guys and a little boat, and the next day you're millionaires."[338] The *MV Sirius Star* was released a day after Vela's $3 million package was parachuted onto the deck.[339] Similarly, pirates released the *MV Faina* after a $3.2 million package was delivered the same way.[340]

Djibouti, Tanzania, and Mozambique).

330. *Compare* Childress, *supra* note 324, *with ILC Report*, *supra* note 321, *and* VON GLAHN, *supra* note 17, at 261 (explaining that pirates "are supposed to be taken to the nearest appropriate court *of the arresting [S]tate*, and that court decides on the penalties to be imposed.") (emphasis added).

331. *See* UNCLOS III, *supra* note 143, art. 105; S.C. Res. 1851, *supra* note 270, ¶ 3; *see, e.g.*, Press Release, Eur. Sec. & Def. Policy, Agreement with Kenya Signed (Mar. 6, 2009), *available at* http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/esdp/106547.pdf.

332. For a discussion about paying ransoms to Somali Pirates see Robyn Hunter, *How Do You Pay a Pirate's Ransom?*, BBC NEWS, Dec. 3, 2008, http://news.bbc.co.uk/2/hi/africa/7752813.stm.

333. UNCLOS III, *supra* note 143, art. 100.

334. *See, e.g.*, Rice & Weaver, *supra* note 45.

335. Bowley, *supra* note 33 (reporting that piracies have spiked partly because ransoms have been paid in the past).

336. *See* Gettleman, *supra* note 79 (reporting that each captured ship is typically ransomed for between $1 million and $2 million); Hunter, *supra* note 332 (reporting that navies are aware of the situation because they use spy drones and keep watch over the hijacked vessels).

337. E-mail from Tanasegaran, Duty Officer, International Maritime Bureau, to Jarret Berg, Juris Doctor Candidate, New England School of Law, Boston (Mar. 26, 2009, 03:22 EST) (on file with author) (emphasis added); *see* Smyth, *supra* note 84. Somali pirates successfully captured forty-two vessels in 2008. *See* 2008 PIRACY REPORT, *supra* note 21. A ransom payment was demanded in at least thirty-seven cases. *Id.* at 28-33, 35-36.

338. Gettleman, *supra* note 79 (internal quotations omitted) (quoting Abdullahi Omar Qawden, former captain of Somalia's now-defunct navy).

339. *See* Smyth, *supra* note 84; Nov. 17, 2008 Press Release, *supra* note 37.

340. Gettleman, *supra* note 50.

The *MV Biscaglia*, a chemical tanker captured in late November 2008, suffered a similar fate.[341] For fifty-six days a flurry of negotiations took place via mysterious middlemen resulting in another airdrop of more than $1 million.[342] Also, the Egyptian cargo ship *Blue Star* was captured on January 1, 2009 and held for over two months until its owners arranged for $1 million in ransom to be dropped from a helicopter.[343] The German *MV Hansa Stavanger* was released after four months of negotiations resulting in a parachuted ransom containing $2.75 million.[344] More recently, in mid-January 2010, Somali pirates freed the giant Greek supertanker *Maran Centaurus*, after a record-breaking, multi-million dollar cash payment was parachuted onto the deck.[345] These are merely illustrative of Somali pirate ransoms that totaled over $80 million in 2008.[346]

Although States may not directly pay ransoms,[347] they permit such payments[348] inasmuch as these States' navies control access to the pirated vessels.[349] Since ransom payments encourage piracy and States are obligated to suppress piracy, State acquiescence to ransom payments erodes the custom because this failure to prevent ransom payments encourages more piracy.[350] Perhaps negotiating ransoms is *preferable*—a

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341. Anand & Miller, *supra* note 197.

342. *Id.*

343. The Associated Press, *Egyptians Tell of 'Days of Terror' in Pirate Hands*, Mar. 15, 2009, *available at* http://www.msnbc.msn.com/id/29705706/.

344. *See* Matthias Gebauer et al., *At the Mercy of Somali Pirates: Hansa Stavanger Crew Describe Hostage Ordeal,* SPIEGEL, Aug. 11, 2009, http://www.spiegel.de/international/world/0,1518,641752,00.html.

345. The exact amount paid is in dispute, but is estimated to range from $5.5 million to $7 million. Abdi Guled & Abdi Sheikh, *Somali Pirates Free Oil Tanker for Record Ransom*, REUTERS, Jan. 18, 2010, http://www.reuters.com/article/idUSTRE60H3WB20100118 ("An aircraft dropped a ransom believed to be between $5.5 million and $7 million onto the vessel . . . .").

346. Kuala Lumpur International Conference, *supra* note 30.

347. *But see* Reuters, *The Most Dangerous Seas in the World*, ECONOMIST, Jul. 17, 2008, http://www.economist.com/opinion/displaystory.cfm?story_id=11751360 (reporting that Spain likely paid $1.2 million in order to free the Spanish fishing vessel *Playa de Bakio*).

348. *See* Edmund Sanders, *Cargo Prompts Doubts on Hijacked Ship's Destination*, L.A. TIMES, Sept. 30, 2008, http://articles.latimes.com/2008/sep/30/world/fg-pirates30 (reporting that several U.S. ships surrounded the *MV Faina* "to maintain watch over the ship while negotiations [were] taking place") (quoting Lt. Nathan Christensen, spokesman for the U.S. Navy).

349. *See* Hunter, *supra* note 332.

350. *Compare* U.S. DEP'T OF STATE, MEMORANDUM OF CONVERSATION BETWEEN YUGOSLAVIA AND THE U.S. 2 (1975), http://www.state.gov/r/pa/ho/frus/nixon/e15/107810.htm ("Our position is, as it has always been, that we refuse to negotiate and to pay ransom in these cases. We do this in order not to encourage the capture of other

naval deployment is expensive relative to the costs of paying ransoms.[351] In fact, this is nothing new; historically courts have actually recognized the practice of paying a ransom payment as economically legitimate.[352]

VI. Implications for the Future of International Piracy and the Law of Nations

If pirates are not arrested and prosecuted, it is unlikely that piracy can be stopped.[353] International law scholars recognize that absent a comprehensive response that includes incapacitation of pirates and long-term stability in Somalia,[354] piracy off the Somali coast is likely to persist.[355] Given the viability of "instant custom,"[356] uniform action by the world's major naval States coupled with an *opinio juris* at odds with

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Americans for the same purpose.") (quoting Secretary of State Henry Kissinger in talks with Yugoslavia), *and* UNCLOS III, *supra* note 143, art. 100, *with* Sanders, *supra* note 348 (reporting that U.S. warships surrounded the *MV Faina*).

351. Kontorovich, ASIL INSIGHTS, *supra* note 135. Quite to the contrary, piracy insurance premiums for the Gulf of Aden have increased tenfold and shipping could continue to be forced to avoid the Suez Canal. ROGER MIDDLETON, CHATHAM HOUSE, PIRACY IN SOMALIA: THREATENING GLOBAL TRADE, FEEDING LOCAL WARS 1 (2008), *available at* www.chathamhouse.org.uk/files/12203_1008piracysomalia.pdf. This considerably adds to the costs of goods and oil from Asia and the Middle East. *Id.* Instead of ignoring the problem, this should be of grave concern. *Id.*; *see supra* note 32 and accompanying text.

352. For example, in 1821, a Pennsylvania judge explained the agency-type relationship between ship owner and ship master:

> If the master, acting for the benefit of his owner, can regain possession of the ship by a ransom, . . . he has full authority to do so, and, in the exercise of such authority, he is strictly within the line of his duty. If, by such acts . . . the master and crew render a service to the owner, it is not a meritorious service; their conduct on such occasions being such, and such only, as the owner had a right to expect from them.

Phillips v. M'Call, 19 F.Cas. 517, 519-20 (C.C.E.D. Pa. 1821). We can infer that this practice was common (if not customary) given that "the owner had a right to expect" that the master would regain the ship via ransom. *See id.* Furthermore, it is clear that paying ransom as the solution to piracy was tacitly approved. *See id.*

353. Kontorovich, ASIL INSIGHTS, *supra* note 135.

354. *See id.*

355. *See* Baumgartner, *supra* note 8 (suggesting that left unchecked, piratical activity off the coast of Somalia will continue to increase).

356. *See supra* Part III.A.2. *Cf.* Cheng, *supra* note 123 ("[I]f, instead of protesting, [other nations] all follow State A's example . . . then a new rule of international law would be born overnight. . . . [I]nstead of being sluggish and backward as a source of international law, [Customary International Law (CIL)] is in fact dynamic, living, and ever-changing . . . .").

UNCLOS III, although occurring rapidly, could erode or drastically reinterpret the piracy-suppression custom.[357]

A. The UNCLOS III Piracy-Suppression Custom Can Survive.

Aside from the logistical difficulty,[358] the current piracy-suppression custom could survive if States decide to act in accordance with it.[359] For example, universal jurisdiction permits domestic prosecutions in U.S. courts "even when the accused is not a national of the [S]tate and the act of piracy was not committed in that [S]tate's territorial waters or against one of its vessels."[360] Moreover, Congress may "define and punish Piracies and Felonies committed on the high Seas,"[361] and has enacted 18 U.S.C. § 1651,[362] allowing commanders "to seize any pirate ship that has attempted or committed an act of piracy against any U.S. or foreign flag vessel in international waters."[363] In accordance with UNCLOS III, U.S. warships are currently equipped with international[364] and domestic legal authority to suppress piracy.[365]

B. Twenty-First Century Solutions

This Note has illustrated some of the practical reasons why the current custom is unworkable and needs to be revised.[366] One solution currently being utilized is the transfer of pirates via bilateral or multilateral agreement.[367] This is viable, but some scholars have called for an

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357. *Cf.* Langille, *supra* note 124, at 151-53 (arguing that regardless of how little time passes, a particular practice may be considered CIL once States act in accordance with a U.N. General Assembly resolution).

358. *See* S.C. Res. 1851, *supra* note 270 (recognizing that pirates had escaped prosecution due to jurisdictional confusion and failing to mention any successful prosecutions).

359. *Compare* UNCLOS III, *supra* note 143, arts. 100, 105 (granting all States universal jurisdiction and providing the customary means of deterrence), *with* Reuters, *supra* note 294 (reporting that 250 pirates had been arrested through early March 2009, of whom 130 were disarmed and released without prosecution).

360. DAMROSCH ET AL., *supra* note 87, at 404-05.

361. U.S. CONST. art. I, § 8, cl. 10.

362. 18 U.S.C. § 1651 (2006) ("Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life.").

363. *See* U.S. DEP'T OF THE NAVY, THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 3-5 para. 3.5.1 (2007).

364. *See* UNCLOS III, *supra* note 143, art. 100; S.C. Res. 1851, *supra* note 270, ¶ 2.

365. *See* U.S. CONST. art. I, § 8, cl. 10; 18 U.S.C. § 1651.

366. *See* Rothwell, *supra* note 201.

367. *See supra* Part V.D.

international piracy tribunal convened via a Security Council resolution.[368] The framework for an ad-hoc tribunal is already familiar to the international community and could be modeled after the International Criminal Tribunals for Yugoslavia (ICTY) or Rwanda.[369] For the same reason that the UN Security Council decided to create the ICTY, "[t]his approach would have the advantage of being expeditious and of being immediately effective as all States would be under a binding obligation to take whatever action is required."[370] The piracy definition is custom so the tribunal may have valid legal authority to proceed.[371]

CONCLUSION

The increased threat of Somali piracy[372] has led to a range of international responses, as the world's naval States patrol the Gulf of Aden, protecting maritime shipping.[373] The UN Security Council has invoked Chapter VII, giving States extraordinary legal authority to deter pirates.[374] As a result, one estimate suggests that a sixty-four percent successful attack rate in October 2008 was reduced to a seventeen percent success rate by late February 2009.[375] Despite commendable efforts, the current legal regime cannot comprehensively enforce either international or domestic

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368. 2009 Q2 PIRACY REPORT, *supra* note 57, at 33; Kontorovich, ASIL INSIGHTS, *supra* note 135 ("Nations have called for new venues or possibilities for prosecuting the pirates, including an international tribunal . . . ."); Corey Flintoff, *Prosecuting Pirates: No More Walking the Plank*, Jan. 9, 2009, http://www.npr.org/templates/story/story.php?storyId=99169738.

369. *Cf.* S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993) (establishing an international tribunal for prosecuting violations of international humanitarian law committed in Yugoslavia); S.C. Res. 955, ¶ 1, U.N. Doc. S/RES/955 (Nov. 8, 1994) (establishing the same for violations committed in Rwanda or committed by Rwandans in neighboring nations).

370. *Cf.* The Secretary-General, *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶ 23, *delivered to the Security Council*, U.N. Doc. S/25704 (May 3, 1993).

371. *Cf.* Hirad Abtahi, *The Protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia*, 14 HARV. HUM. RTS. J. 1, 12 (2001) ("[C]ustomary international law imposes criminal responsibility for serious violations of common Article 3.").

372. For an unofficial list of Somali pirate attacks, assembled by the non-citable *Wikipedia*, see List of Ships Attacked by Somali Pirates, http://www.wikipedia.org (search for: "List of ships attacked by Somali pirates") (last visited Feb. 1, 2010).

373. Kontorovich, ASIL INSIGHTS, *supra* note 135.

374. *Id.*

375. Glenn Sulmasy, Harvard Univ. Nat'l Sec. and Human Rights Fellow, Dude, Where's My Supertanker? (Mar. 10, 2009) (on file with author).

criminal law against alleged pirates.[376] Further, there is wide consensus that Somali piracy and Somalia's failed Statehood are inextricably linked.[377]

This Note has explored the various challenges to the current legal regime, bringing to light State practices that threaten to erode the piracy-suppression custom. This conduct is particularly dangerous when States have the ability, via their declarations, conduct, and acquiescence to formulate "instant custom."[378] Perhaps the reader will conclude that this argument has inadvertently been disproved—that States with the capacity to act have not buried their heads in the sand.[379] But since "[p]irates have been causing trouble ever since men first went down to the sea in ships,"[380] international lawyers must be willing to discard or reevaluate an inefficient custom in order to effectively meet and beat this *scourge of the seas*.[381]

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376. Rothwell, *supra* note 201.

377. Agence France-Presse, *UN Identifies Two Somali Piracy Networks*, Mar. 19, 2009, *available at* http://newsinfo.inquirer.net/breakingnews/world/view/20090319-194957/UN-identifies-two-Somali-piracy-networks ("[T]he issue of [Somali] piracy . . . will be resolved only th[r]ough an integrated approach that addresses the conflict, lack of governance and absence of sustainable livelihoods on land in Somalia." (quoting UN Secretary-General Ban Ki-moon)); Peter Cassata, *EU Piracy Force Given Green Light to Sink Ships*, ATLANTIC COUNCIL (Washington, D.C.), Dec. 16, 2008, http://www.acus.org/new_atlanticist/eu-piracy-force-given-green-light-sink-ships ("There is a broad consensus that the root cause of Somalia's piracy is its collapsed [S]tatehood.").

378. *See supra* Part III.A.2.

379. *See U.S. Aims to Coordinate Defense Against Piracy*, *supra* note 235.

380. Paul Raffaele, *The Pirate Hunters*, SMITHSONIAN MAG., Aug. 1, 2007, at 38, *available at* http://www.smithsonianmag.com/people-places/pirate_main.html.

381. *See supra* Part IV.B–C; Woodruff, II, *supra* note 4.

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STATE RELIGIOUS FREEDOM RESTORATION ACTS AS A SOLUTION TO THE FREE EXERCISE PROBLEM OF RELIGIOUSLY BASED REFUSALS TO ADMINISTER HEALTH CARE

Kelleen Patricia Forlizzi[*]

Abstract: On February 27, 2009, President Obama, in conjunction with the Department of Health and Human Services, announced his intention to rescind President Bush's "right of conscience" rule. The "right of conscience" rule grants broad protections for health care employees whose religious beliefs prevent them from participating in certain medical procedures. The rescission of this rule represents an emerging trend favoring patients' equal access to medical care over the First Amendment rights of individuals working in the health care industry. Several recent decisions elevating the Equal Protection Clause over the Free Exercise Clause illustrate the potential ramifications of this movement. Every victory for patients' equal access to health care is delivered at the expense of a medical professional's fundamental right to the free exercise of religion. By ruling that health care employees must treat all patients the same, regardless of the nature of the procedure or the characteristics of the patient in question, many courts have effectively ordered doctors, nurses, and pharmacists to forsake their religious beliefs in the name of patient care.

This demotion of free exercise subjects health care employees with sincerely held religious beliefs to possible termination from their employment, as neither state nor federal employment discrimination statutes adequately protect these religiously motivated refusals. Without such protection,

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physicians and pharmacists will be forced to choose between their careers and their consciences. Because the federal government and the United States Supreme Court have spoken out against free exercise rights, individual states must take action to defend their citizens from the type of religious discrimination that our Founding Fathers worked so hard to safeguard against. This Note advocates for the adoption of individual state religious freedom restoration acts (RFRAs) to reinstate the strict scrutiny standard for all laws restricting religious activity. State RFRAs represent a viable alternative to the current methodology for analyzing free exercise claims in the context of religiously based refusals to administer health care. The enactment of these statutes will afford medical professionals the chance to keep their jobs while remaining true to their religious beliefs, as well as balance the scales between the free exercise of religion and the equal protection rights of patients.

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INTRODUCTION

Religiously based refusals to administer health care because of a certain characteristic of the patient or the nature of the requested procedure are on the rise.[1] Pharmacists have refused to fill prescriptions for emergency contraceptives and birth control pills.[2] Some doctors have refused to write Viagra prescriptions for unmarried male patients.[3] Others have refused to send patients' medical records to abortion clinics to be used in late-term abortions.[4] Anesthesiologists have refused to render their services in sterilization procedures.[5] Ambulance drivers have refused to transport women to the hospital to obtain abortions because of religious

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1. *See* Robin Fretwell Wilson, *The Limits of Conscience: Moral Clashes over Deeply Divisive Healthcare Procedures*, 34 AM. J.L. & MED. 41, 42 (2008); Hillary Rodham Clinton & Cecile Richards, Op-Ed., *Blocking Care for Women*, N.Y. TIMES, Sept. 19, 2008, at A19 (examining the Bush Administration's proposed bill that would allow health care providers to refuse medical treatment that conflicts with their religious beliefs).

2. *See, e.g.*, Michele Morgan Bolton, *Pharmacy Refusals Lead to Complaint: Group Says Women Were Improperly Denied Emergency Contraception*, THE TIMES UNION (Albany, N.Y.), Aug. 16, 2006, at A1 (discussing three pharmacists accused of refusing to refill emergency contraception prescriptions); Rob Stein, *For Some in Health Industry, There Is No Choice*, WASH. POST, July 16, 2006, at A06, *available at* 2006 WLNR 12421991 (discussing a pharmacist who was fired after refusing to fill a rape victim's prescription for the morning-after pill).

3. Stein, *supra* note 2.

4. *See, e.g.*, Rob Stein, *Pregnancy, Birth Control Refused over Moral Qualms*, FT. WAYNE J. GAZETTE (Ind.), Aug. 6, 2006, at 4D, *available at* 2006 WLNR 13655853 (discussing a case where a doctor refused to send a patient's records to a clinic where she sought an abortion).

5. *See, e.g.*, Stein, *supra* note 2 (referencing an anesthesiologist who refuses to participate in sterilizations).

objections to the procedure.[6] Fertility specialists have refused to artificially inseminate lesbian women.[7]

These religiously based refusals to treat patients have resulted in much litigation and legislation, as patients who have been refused medical care assert claims under equal protection and public accommodation laws against the offending doctors and the hospitals and medical clinics that employ them. In Wisconsin, for example, female customers filed claims against a Catholic pharmacist after he refused to fill prescriptions for birth control pills or transfer the orders to a nearby pharmacy.[8] In California, a lesbian patient brought suit against a fertility clinic after its doctors voiced religious objections to artificially inseminating a homosexual woman.[9] In both cases, the patients' right to receive equal access to medical treatment prevailed.[10] These outcomes in favor of patients represent an emerging trend in litigation involving religiously based refusals to administer health care. Courts across the country have uniformly favored equal protection in its constitutional clash against free exercise.

President George W. Bush took steps to rectify this emerging trend favoring patients' equal access to medical care over the religious beliefs of health care workers in the final days of his Administration.[11] On December 19, 2008, the Department of Health and Human Services announced the "right of conscience" rule, which granted broad protections for religious health care workers who refuse to participate in certain medical procedures.[12] The rule denies federal funding to hospitals and pharmacies that fail to accommodate employees with religious or moral objections.[13] President Bush's victory in the name of the Free Exercise Clause, however, was short-lived. On February 27, 2009, the Obama Administration announced its intention to rescind the "right of conscience" regulation.[14]

Overruling the "right of conscience" provision may have severe ramifications. Every victory for patients' equal access to health care is

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6. *Id.* (referencing an emergency medical technician who was fired for refusing to transport a patient to a hospital where an elective abortion was scheduled).

7. *See, e.g.*, N. Coast Women's Care Med. Group, Inc. v. San Diego County Superior Court, 189 P.3d 959, 963-64 (Cal. 2008).

8. *See* Noesen v. State Dep't of Regulation & Licensing, Pharmacy Examining Bd., 751 N.W.2d 385, 389 (Wis. Ct. App. 2008).

9. *N. Coast*, 189 P.3d at 963-64.

10. *Noesen*, 751 N.W.2d at 394; *see N. Coast*, 189 P.3d at 970.

11. *See* David G. Savage, *Broader Medical Refusal Rule May Go Far Beyond Abortion*, L.A. TIMES, Dec. 2, 2008, at A1, *available at* 2008 WLNR 23055310.

12. *See* 45 C.F.R. § 88 (2009); *infra* Part I.G.

13. *See id.* § 88.3-88.5.

14. *See* David Stout, *Move Toward Undoing Rule on Abortion*, N.Y. TIMES, Feb. 28, 2009, at A16, *available at* 2009 WLNR 3900611.

delivered at the expense of a medical professional's fundamental right to the free exercise of religion. By ruling that health care employees must treat all patients, regardless of the nature of the procedure or the characteristics of the patient in question, many courts have effectively ordered doctors, nurses, and pharmacists to forsake their religious beliefs in the name of patient care.[15] Following the lead of courts, several states have enacted legislation to ensure that a patient's health and well-being supersedes the First Amendment rights of health care providers.[16] Lawsuits initiated as a result of pharmacists' religious refusals to fill certain prescriptions have led Illinois, New Jersey, and Washington to enact "must-fill" statutes, which mandate that pharmacists dispense birth control and emergency contraceptives to every patient with a valid prescription, regardless of the pharmacist's personal religious objections to such medication.[17]

While this trend in favor of patients' rights can safeguard against discrimination and ensure equal access to health care, judges and legislatures are accomplishing these goals at the expense of medical professionals' free exercise rights. Decisions and legislation denying First Amendment protection to these religiously based refusals subject both doctors and pharmacists to possible termination from employment for their religious beliefs. While these professionals cannot be forced to perform any medical procedure or employment duty to which they object, they can be terminated for such a refusal. Employment discrimination statutes on both the federal and state level, such as Title VII of the Civil Rights Act of 1964 and its state equivalents, prohibit religious discrimination in the workplace and forbid an employer from terminating an employee because of his or her religion.[18] Under Title VII, an employer must attempt to "reasonably accommodate" an employee's religious beliefs or practices that conflict with his or her duties of employment.[19] If no such "reasonable accommodation" exists, however, the employer may terminate the

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15. *See id.*

16. *See, e.g.*, ILL. ADMIN. CODE tit. 68, § 1330.91(j) (2008); N.J. STAT. ANN. § 45:14-67.1 (West 2009); WASH. ADMIN. CODE § 246-869-010 (2007).

17. *See* sources cited *supra* note 16.

18. 42 U.S.C. § 2000e(j) (2006); *see, e.g.*, ALASKA STAT. § 18.80.220(a)(1) (2008); CAL. GOV'T CODE § 12940(a) (West 2005); FLA. STAT. ANN. § 760.10(1)(a) (West 2005); KY. REV. STAT. ANN. § 344.040 (West 2006); MASS. GEN. LAWS ch. 151B, § 4(1) (2006); ME. REV. STAT. ANN. tit. 5, § 4572(1)(A) (2002); NEB. REV. STAT. § 48-1104(1) (2004); N.Y. EXEC. LAW § 296(1)(a) (McKinney 2005); OHIO REV. CODE ANN. § 4112.02(A) (West 2007); OR. REV. STAT. § 659A.030(1)(a) (2007); 43 PA. STAT. ANN. § 955(a) (West 2009); WASH. REV. CODE ANN. § 49.60.180(1) (West 2008); WIS. STAT. ANN. §§ 111.321-111.322 (West 2002).

19. 42 U.S.C. § 2000e(j).

employee.[20] Because a court will likely find that no such "reasonable accommodation" exists for doctors and pharmacists who refuse to provide medical care to certain patients for religious reasons, these professionals can be fired for their religious beliefs without violating state or federal employment discrimination laws. Physicians and pharmacists will therefore be forced to "choose between their careers and their consciences."[21]

The recent decisions against doctors and pharmacists whose religious beliefs prevent them from rendering their services to all patients, coupled with the lack of protection for their religious beliefs in the form of federal and state employment discrimination statutes, will result in barring certain religious individuals from the medical field. This Note will argue that the legislative and judicial branches have swung the proverbial pendulum too far toward equal protection at the expense of free exercise. While it is important for states to ensure equal access to health care for all their citizens, this goal need not be achieved by trampling on the First Amendment rights of medical and health care professionals. To achieve a better balance between protecting the free exercise rights of employees in medical fields, such as fertility doctors and pharmacists, while continuing to guarantee equal access to health care for all, state legislatures should enact state religious freedom restoration acts (RFRAs).

Part I of this Note discusses the free exercise of religion and the history of the Federal Religious Freedom Restoration Act and its constitutional evolution into a purely state-based phenomenon. Part II discusses Title VII and identical state employment discrimination laws and the manner in which these statutes fail to protect medical professionals from termination for religiously based refusals to administer health care. Part III details recent decisions in which the judiciary has ruled against free exercise in favor of equal protection for all patients in the context of such religiously based refusals. Part IV applies State RFRAs to these past decisions, concluding that such legislation represents a viable alternative to the current methodology for analyzing free exercise claims in the context of religiously based refusals to administer health care.

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20. *See* Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977).

21. Jennifer E. Spreng, *Pharmacists and the "Duty" to Dispense Emergency Contraceptives*, 23 ISSUES L. & MED. 215, 217 (2008) (discussing whether pharmacists have a legal right not to perform services that violate their religious beliefs).

I. The Free Exercise of Religion and Religious Freedom Restoration Acts

A. First Amendment Analysis for Religious Activity

The Free Exercise Clause of the First Amendment of the U.S. Constitution declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[22] This constitutional protection of religion has a "double aspect"; the Free Exercise Clause embraces both the "freedom to believe and [the] freedom to act."[23] This "freedom to believe," such as an individual's subscription to particular religious tenets or membership in a certain religious organization, is "absolute" and may not be regulated by any type of state or federal legislation.[24] The First Amendment's safeguard of an individual's "freedom to act," or right to engage in any type of religious conduct or practice, however, may be regulated for the safety and protection of the public.[25] This means that in certain circumstances, government regulation of religious activity may be constitutional under the First Amendment.[26]

B. The Compelling Interest Test of *Sherbert v. Verner*[27]

For nearly thirty years, constitutional jurisprudence in the United States required any law that burdened an individual's "freedom to act," by regulating or restricting his or her religious practice, to pass the compelling interest test articulated by the United States Supreme Court in *Sherbert v.*

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22. U.S. CONST. amend. I. State legislatures are similarly bound by the Free Exercise Clause through the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1182 (3d ed. 2006) ("The [F]ree [E]xercise [C]lause was first applied to the states through its incorporation into the [D]ue [P]rocess [C]lause of the Fourteenth Amendment in *Cantwell*.").

23. *Cantwell*, 310 U.S. at 303 (determining that a state law requiring a license in order to distribute religious materials violated both the Free Exercise Clause and the Free Speech Clause of the First Amendment).

24. *Id.* The government also "may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma." Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 877 (1990) (citations omitted).

25. *Cantwell*, 310 U.S. at 304. Religious activity can be described as "the performance of (or abstention from) physical acts" including, but not limited to, "assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, [and] abstaining from certain foods or certain modes of transportation." *Smith*, 494 U.S. at 877.

26. *Cantwell*, 310 U.S. at 303-04.

27. 374 U.S. 398 (1963).

Verner.[28] Under this test, a plaintiff claiming that a state or federal law burdened his or her right to the free exercise of religion has to prove two elements: (1) his or her religious beliefs were sincerely held, and (2) the law in question impermissibly burdened the plaintiff's religious practices based on his or her aforementioned religious beliefs.[29] The burden then shifts to the state to prove that this regulation of religious conduct represents the least restrictive means possible for furthering a compelling state interest.[30]

C. The "Incidental Burden" of *Employment Division, Department of Human Resources v. Smith*[31]

In 1990, the United States Supreme Court changed the constitutional landscape regarding legislation aimed at regulating religious activity in its adjudication of *Employment Division, Department of Human Resources of Oregon v. Smith*.[32] In *Smith*, the plaintiffs were denied unemployment compensation benefits under an Oregon statute because their use of the drug peyote, for which they were fired, was deemed "misconduct," thus disqualifying them from receiving unemployment payments after their dismissal.[33] The plaintiffs alleged that this disqualification unconstitutionally prohibited their free exercise of religion, as their ingestion of this drug was religious conduct that occurred as part of a religious ceremony at the Native American Church.[34] Ruling against the plaintiffs, the Supreme Court announced that the State of Oregon need not show a compelling interest when the law in question, although prohibiting certain religious activity, is a "valid and neutral law of general

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28. *See Sherbert*, 374 U.S. at 403 (holding South Carolina's unemployment act eligibility provision unconstitutional for disqualifying plaintiff from unemployment benefits because of her refusal to accept employment that would require her to work on her religious holy days). The compelling interest test is also referred to as strict scrutiny. Whitney Travis, Note, *The Religious Freedom Restoration Act and* Smith*: Dueling Levels of Constitutional Scrutiny*, 64 WASH. & LEE L. REV. 1701, 1705 (2007).

29. Brian L. Porto, Annotation, *Validity, Construction, and Operation of State Religious Freedom Restoration Acts*, 116 A.L.R. 5th 233, 238 (2004).

30. *Id.*; *Sherbert*, 374 U.S. at 403. "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, only the gravest abuses, endangering paramount interest, give occasion for permissible limitation." *Id.* at 406 (internal quotations omitted) (quoting Thomas v. Collins, 323 U.S. 516, 530 (1945).

31. 494 U.S. 872 (1990).

32. *Id.*

33. *Id.* at 874.

34. *Id.*

applicability."[35] The *Smith* Court held that the federal constitutional guarantee of free exercise of religion "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability'" that happens to conflict with the individual's religious beliefs.[36] Therefore, legislation that burdens religious conduct is valid, as long as "the burden is incidental rather that [sic] intentional."[37]

The Court further reasoned that requiring a compelling interest to justify every law that is potentially objectionable under the Free Exercise Clause, even those that were not enacted with religion in mind, "contradicts both constitutional tradition and common sense."[38] Justice Scalia, writing for the majority, asserted that should this "compelling interest" standard remain, the government's authority to regulate potentially dangerous or otherwise illegal conduct would be severely limited.[39] The government would only be able to enforce such laws against individuals who did not harbor a religious objection to the statute in question.[40] Instead, the Court

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35. *Id.* at 879 (internal quotations omitted) (quoting United States v. Lee, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)). "A law is neutral so long as its object is something other than the infringement or restriction of religious practices." Grace United Methodist Church v. City of Cheyenne, 451 F.3d 643, 649-50 (10th Cir. 2006). Even after *Smith*, a law that is not neutral may not burden the free exercise of religion unless it serves a compelling state interest. Porto, *supra* note 29, at 233.

36. *Smith*, 494 U.S. at 879 (quoting *Lee*, 455 U.S. at 263 n.3 (Stevens, J., concurring in judgment)); *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 546 (1993).

37. Gregory S. Walston, *Reexamining the Implications of Expanding Constitutional Liberty: How the Supreme Court Misconstrued the Religious Freedom Restoration Act in* City of Boerne v. Flores, 21 T. JEFFERSON L. REV. 23, 25 (1999).

38. *Smith*, 494 U.S. at 885. "To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is compelling—permitting him, by virtue of his beliefs, to become a law unto himself—contradicts both constitutional tradition and common sense." *Id.* (citation omitted) (internal quotations omitted).

39. *See id.*

40. *See id.* The *Smith* Court stated that continuing to employ the compelling interest test from *Sherbert* would result in

> constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from compulsory military service, to the payment of taxes, to health and safety regulation such as manslaughter and child neglect laws, compulsory vaccination laws, drug laws, and traffic laws, to social welfare legislation such as minimum wage laws, child labor laws, animal cruelty laws, environmental protection laws, and laws providing for equality of opportunity for the races.

Id. at 888-89 (citations omitted).

determined that "[t]he First Amendment's protection of religious liberty [did] not require this."[41]

D. Congress's Response to *Smith*: The Birth of the Federal Religious Freedom Restoration Act

In abrogating the *Sherbert* compelling interest test in *Smith*, the Supreme Court lowered the level of scrutiny for neutral laws of general applicability from a strict scrutiny to a rational basis standard.[42] Under rational basis review, a law will be upheld if it is rationally related to a legitimate government interest.[43] Because this newly imposed rational basis standard allows great deference to the legislature at the expense of the individual's constitutional right to free exercise of religion, the *Smith* decision was met with great criticism.[44] Civil rights groups and public leaders alike denounced the *Smith* decision as an excessive over-regulation of religious activity, fearing *Smith* would give the government the unlimited authority to restrict free exercise under the guise that such legislation imposed a mere "incidental" burden.[45]

Fueled by the notion that the Supreme Court had dramatically weakened the constitutional protection for freedom of religion in *Smith*, Congress enacted the RFRA in 1993.[46] The Federal RFRA provided that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability"[47] unless the government "demonstrates that application of the burden to the person (1) is in furtherance of a compelling government[] interest and (2) is the least restrictive means of furthering that compelling government[] interest."[48] Thus, the RFRA restored the compelling interest test of

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41. *Id.* at 889.

42. Travis, *supra* note 28, at 1706.

43. Pennell v. City of San Jose, 485 U.S. 1, 14 (1988); City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

44. Travis, *supra* note 28, at 1707 & n.30.

45. Walston, *supra* note 37; *see also* Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. REV. 437, 438 (1994) (detailing the public outrage over the Supreme Court's decision in *Smith*).

46. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb(a)(4) (2006). The RFRA received overwhelming congressional support, as the House unanimously voted to enact the legislation and only three members of the Senate voted against the RFRA. Robert Hoff, *Losing Our Religion: The Constitutionality of the Religious Freedom Restoration Act Pursuant to Section 5 of the Fourteenth Amendment*, 64 BROOK. L. REV. 377, 392 n.97 (1998).

47. 42 U.S.C. § 2000bb-1(a).

48. *Id.* § 2000bb-1(b). The RFRA also provides "a claim or defense to persons whose religious exercise is substantially burdened by government." *Id.* § 2000bb(b)(2).

Sherbert in an attempt to reinstate the heightened level of protection for religious exercise that had existed before *Smith*.[49] Congress believed that the compelling interest test was "a workable test for striking [a] sensible balance[] between religious liberty and competing prior governmental interests," and thus, attempted to circumvent the Court's decision in *Smith* through the enactment of the RFRA.[50]

E. The United States Supreme Court Fights Back: *City of Boerne v. Flores*[51]

Congress's effort to preserve the free exercise of religion from the wrath of the Supreme Court, however, was ultimately unsuccessful.[52] Four years after Congress passed the RFRA, the Court decided *City of Boerne v. Flores*.[53] In *Flores*, the Catholic Church brought suit against a local zoning authority under the RFRA after the city declined to issue a building permit that would allow the church to expand its premises while remaining in compliance with an ordinance governing historical preservation.[54] To decide *Flores*, the Supreme Court utilized an analysis based on the principles of federalism and separation of powers, rather than an argument founded on the Free Exercise Clause of the First Amendment.[55] The Supreme Court ruled that Congress had exceeded its enforcement powers under Section Five of the Fourteenth Amendment when enacting the RFRA and imposing its requirements on the states, and thus, declared the Act unconstitutional.[56]

As applied to state and local governments, Congress enacted the RFRA pursuant to Section Five of the Fourteenth Amendment, which gives Congress the power "to enforce, by appropriate legislation, the provisions of this article."[57] Interpreting congressional authority under Section Five, the *Flores* Court announced that Congress possesses "remedial"

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49. *Id.* § 2000bb(b)(1).

50. *Id.* § 2000bb(a)(5).

51. 521 U.S. 507 (1997).

52. *See id.* at 511.

53. *Id.* at 507.

54. *Id.* at 512.

55. *See id.* at 536 ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.").

56. *See id.* at 532-36. In prior case law, the RFRA was declared unconstitutional at least as applied to state and local governments. *See id.* at 527.

57. *See* U.S. CONST. amend. XIV, § 5. Congress's Section Five powers to pass "appropriate legislation" to "enforce" the provisions of the Fourteenth Amendment have been held to apply to most of the Bill of Rights, including the Free Exercise Clause, to the states. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

enforcement powers, but not "substantive" enforcement powers.[58] Congress may exercise its authorized remedial powers by "providing enforcement mechanisms (causes of actions, fines, jurisdictional provisions, and the like) to 'prevent as well as remedy' constitutional violations as defined and determined by the Court."[59] However, Congress may not use Section Five to create statutory rights that expand constitutional rights, as doing so would constitute an exercise of impermissible "substantive" enforcement power.[60]

Because the RFRA represented a "substantive change in constitutional protections," the Supreme Court concluded that the Act was an illegitimate use of Congress's Section Five enforcement powers.[61] Writing for the majority, Justice Kennedy reasoned that "[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. Congress has been given the power 'to enforce,' not the power to determine what constitutes a constitutional violation."[62] Congress may not impose a more expansive definition of a constitutional right, such as the free exercise of religion, when the scope of religious liberty under the First Amendment has already been judicially determined.[63] The *Flores* Court reminded Congress that in such situations, "it is this Court's precedent, not RFRA, which must control."[64]

By attempting to impermissibly exercise the substantive enforcement power, which it lacks under Section Five, Congress "intruded into an area reserved by the Constitution to the States."[65] When drafting the Enforcement Clause found in Section Five of the Fourteenth Amendment, the Joint Committee on Reconstruction of the Thirty-Ninth Congress was careful not to "give Congress a power to intrude into traditional areas of

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58. *See Flores*, 521 U.S. at 532. "As broad as the congressional enforcement power is, it is not unlimited." *Id.* at 518-19 (citing Oregon v. Mitchell, 400 U.S. 112, 128 (1970)). "While the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern . . . the distinction exists and must be observed." *Id.* at 519-20.

59. Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 163-64 (1998) (quoting City of Boerne v. Flores 521 U.S. 507, 517 (1997)).

60. *Flores*, 521 U.S. at 519. "Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported by our case law." *Id.* at 527.

61. *See id.* at 532.

62. *Id.* at 519.

63. *See* Walston, *supra* note 37, at 23.

64. *Flores*, 521 U.S. at 536.

65. *See id.* at 527.

state responsibility," for such authority would be "inconsistent with the federal design central to the Constitution."[66] Bestowing upon Congress both substantive and remedial enforcement powers would represent a "dangerous centralization of power" and award Congress an extreme amount of control at the expense of the states.[67] Therefore, the final draft of the Fourteenth Amendment only grants Congress the power to "correct the unjust legislation of the States" by remedying any unconstitutional state action.[68] The Amendment does not include the authority to dictate to states which actions constitute constitutional violations, as this "power to interpret the Constitution in a case or controversy remains in the Judiciary."[69]

In striking down the RFRA, the Court once again displaced the compelling interest test as the constitutional standard for determining an individual's right to the free exercise of religion in the face of a neutral law of general applicability.[70] The Court's decision in *Flores* revived the *Smith* decision and reinstated the rational basis standard of review.[71] After *Flores*, a state or federal government need not show a compelling interest to prohibit religious activity as long as the purpose behind the law in question is not to infringe upon or restrict religious practices.[72]

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66. *Id.* at 520-21. "Congress' powers are only prohibitive, corrective, vetoing, aimed only at undue process of law." *Id.* at 523 (internal quotations omitted).

67. *See id.* at 520-22. "By exceeding its enumerated authority, the Court reasoned, Congress arrogated 'the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens.'" Gary S. Gildin, *A Blessing in Disguise: Protecting Minority Faiths Through State Religious Freedom Non-Restoration Acts*, 23 HARV. J.L. & PUB. POL'Y 411, 429 (1999) (quoting City of Boerne v. Flores, 521 U.S. 507, 534 (1997)).

68. *Flores*, 521 U.S. at 522 (internal quotations omitted).

69. *Id.* at 523-24.

> [T]he Enforcement Clause . . . [does] not authorize Congress to pass "general legislation upon the rights of citizens, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing." The power to "legislate generally upon" life, liberty, and property, as opposed to the "power to provide modes of redress" against offensive state action, [is] "repugnant" to the Constitution.

Id. at 525 (citation omitted).

70. *See* Gregory H. Fuller, *Constitutional Law—Free Exercise of Religion—Strict Scrutiny and the Religious Freedom Restoration Act*, 74 TENN. L. REV. 129, 138-39 (2006).

71. *See id.* at 139.

72. *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 878-79 (1990).

F. The Development of State Religious Freedom Restoration Acts

The Supreme Court's reliance on federalism to strike down the Federal RFRA in *Flores* incited claims that the Court had left "the door . . . open for states to enact such legislation."[73] To enact State RFRAs, a state legislature does not rely on the Fourteenth Amendment of the United States Constitution, but rather draws authority from its police powers, which allow state legislatures to "supplement rights guaranteed by the Constitution."[74] Therefore, as a response to *Flores*, several states enacted their own versions of RFRAs under their respective state constitutions.[75] Presently, ten states have passed State RFRAs into law including, Arizona, Connecticut, Florida, Idaho, Illinois, New Mexico, Oklahoma, Rhode Island, South Carolina, and Texas.[76] The State RFRAs in Florida and Illinois, both enacted in 1998, are most notable, serving as models for subsequently enacted State RFRAs and figuring "prominently in the small body of cases in which state and federal courts have construed and applied state Religious Freedom Restoration Acts."[77] The Florida and Illinois State RFRAs nearly replicate the Federal RFRA, reinstating the compelling interest test in cases involving the free exercise of religion, despite the United States Supreme Court's holding in *Smith*.[78] The Illinois RFRA

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73. Mary Jean Dolan, *The Constitutional Flaws in the New Illinois Religious Freedom Restoration Act: Why RFRAs Don't Work*, 31 LOY. U. CHI. L.J. 153, 155 (2000). "While the Court's conclusion [in *Flores*] deprived the United States Congress of the power to enact RFRA in its then-existing form, underlying the Court's repudiation lies express authority for state legislatures to achieve the same result." Gildin, *supra* note 67.

74. Gildin, *supra* note 67 (internal quotation omitted).

75. ARIZ. REV. STAT. ANN. § 41-1493.01 (2004); CONN. GEN. STAT. ANN. § 52-571(b) (West 2005); FLA. STAT. ANN. § 761.03 (West 2005); IDAHO CODE ANN. § 73-402 (2006); 775 ILL. COMP. STAT. ANN. 35/15 (West 2001); N.M. STAT. ANN. § 28-22-3 (LexisNexis 2000); OKLA. STAT. ANN. tit. 51, § 253 (West 2008); R.I. GEN. LAWS § 42-80.1-3 (2006); S.C. CODE ANN. § 1-32-40 (2005); TEX. CIV. PRAC. & REM. CODE ANN. § 110.003 (Vernon 2005). "Properly drafted, [S]tate [RFRAs] are not infected by the constitutional infirmities that doomed [the Federal] RFRA . . . ." Gildin, *supra* note 67. For a discussion of why State RFRAs may or may not violate the separation of powers doctrine and the Establishment Clause, see generally Erwin Chemerinsky, *Do State Religious Freedom Restoration Acts Violate the Establishment Clause or Separation of Powers?*, 32 U.C. DAVIS L. REV. 645 (1999).

76. *See supra* note 75 and accompanying text.

77. Porto, *supra* note 29, at 239. Because the ten State RFRAs are nearly identical, this Note will use the Florida and Illinois RFRAs as representative of all State RFRAs. *Compare* FLA. STAT. ANN. § 761.03 (West 2005) *and* 775 ILL. COMP. STAT. ANN. 35/15 (West 2001) *with* OKLA. STAT. ANN. tit. 51, § 253 (West 2008) *and* TEX. CIV. PRAC. & REM. CODE ANN. § 110.003 (Vernon 2005).

78. Dolan, *supra* note 73, at 154; FLA. STAT. ANN. § 761.03; 775 ILL. COMP. STAT. ANN. 35/15.

specifically mentions the *Smith* and *Flores* decisions, reciting that the State RFRA was enacted as a result of the Illinois Legislature's dissatisfaction with the effects of those decisions.[79]

The Florida RFRA and the Illinois RFRA both contain language that is indistinguishable to that contained in the Federal RFRA.[80] Both statutes also forbid the state government from substantially burdening an individual's exercise of religion, even if the burden results from a rule of general applicability, unless two elements are satisfied: (1) the burden "is in furtherance of a compelling governmental interest" and (2) the burden in question "is the least restrictive means of furthering that compelling governmental interest."[81] Both statutes were enacted to provide "a claim or defense" against the government for substantially burdening an individual's exercise of religion.[82] For a plaintiff to prove that a governmental regulation imposes a "substantial burden" under a State RFRA, the plaintiff must show that the law in question burdens the practice of his or her religion by pressuring the plaintiff to commit an act prohibited by his religion or by preventing the plaintiff from engaging in a practice that his religion mandates.[83]

G. President Bush's "Right of Conscience" Rule

While these ten states with State RFRAs acted swiftly to protect the free exercise of religion in the wake of the *Flores* decision, a response on the federal level was slightly delayed.[84] Recognizing the diminishing status of religious freedom in the health care field, President George W. Bush took steps to rectify the trend favoring patients' equal access to medical care over the religious beliefs of health care workers in the last days of his Administration.[85] On December 19, 2008, less than a month before the inauguration of President Barack Obama, the Department of Health and Human Services announced a Bush Administration rule, touted as the "right of conscience" rule, which granted broad protections for doctors, nurses, pharmacists, and other health care providers who refuse to

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79. 775 ILL. COMP. STAT. ANN. 35/10.

80. 42 U.S.C. § 2000bb-1 (2006), *invalidated by* City of Boerne v. Flores, 521 U.S. 507, 511 (1997); FLA. STAT. ANN. § 761.03; 775 ILL. COMP. STAT. ANN. 35/15.

81. FLA. STAT. ANN. § 761.03; 775 ILL. COMP. STAT. ANN. 35/15.

82. FLA. STAT. ANN. § 761.03(2); 775 ILL. COMP. STAT. ANN. 35/20.

83. Freeman v. Dep't of Highway Safety & Motor Vehicles, 924 So. 2d 48, 55-56 (Fla. Dist. Ct. App. 2006) (canceling the plaintiff's driver's license because she refused to have her identification picture taken without her veil did not constitute a substantial burden on her free exercise of religion, and thus, was not a violation of the Florida RFRA).

84. *See* Savage, *supra* note 11.

85. *See id.*

participate in certain medical procedures because of their religious beliefs or morals.[86] The rule, criticized by many as a "midnight regulation"[87] and a "last-gasp effort,"[88] denies federal funding to "any entity,"[89] including "state and local governments, hospitals, health plans, clinics," and pharmacies, that fails to accommodate health care workers or other employees with religious or moral objections.[90] While the rule specifically protects refusals to participate in abortion and sterilization procedures, critics feel the rule is written broadly enough to apply to fertility procedures, such as artificial insemination and dispensing birth control, as well.[91] For example, the rule prohibits "any entity" that receives federal funds of any kind from discriminating

> in the employment, promotion, termination, or the extension of staff or other privileges to any physician or other health care personnel because he . . . refused to perform, or refused to assist in the performance of any lawful health service or research activity on the grounds that his performance or assistance in performance of such service or activity would be contrary to his religious beliefs or moral convictions, or because of the religious beliefs or moral convictions concerning such activity themselves.[92]

President Bush's victory in the name of the free exercise of religion, however, was short-lived.[93] On February 27, 2009, the Obama Administration, in conjunction with the Department of Health and Human Services, announced its intention to rescind the "right of conscience" rule.[94] Supporters of President Obama's decision praise the revocation of the rule as an important win for equal access to health care and women's reproductive rights, while opponents condemn the President's stance as a

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86. 45 C.F.R. § 88.4 (2009); Savage, *supra* note 11. This "right of conscience" rule took effect on January 20, 2009, the day President Obama entered office. Stout, *supra* note 14.

87. Stout, *supra* note 14.

88. Savage, *supra* note 11.

89. 45 C.F.R. §§ 88.3-.5 (2009); *see generally* Robert Pear, *Bush Aides Rush to Enact a Rule Obama Opposes*, N.Y. TIMES, Nov. 30, 2008, at A37, *available at* 2008 WLNR 22925432.

90. Rob Stein, *Health Workers' 'Conscience' Rule Set to Be Voided*, WASH. POST, Feb. 28, 2009, at A01, *available at* 2009 WLNR 3868757.

91. Savage, *supra* note 11.

92. 45 C.F.R. § 88.4(d)(2) (2009).

93. *See* Stein, *supra* note 90.

94. *See* Stout, *supra* note 14. After an administrative agency publishes an official notice of intent in the Federal Register, it may repeal or modify the rule after a thirty-day period for notice and comment. *Id.*

"setback for freedom of religion," fearing that this rescission represents the revival of "open season to again discriminate against health-care professionals."[95]

II. Federal and State Workplace Discrimination Statutes Fail to Adequately Protect Free Exercise Through Religiously Based Refusals to Administer Health Care.

Supporters of the decision of President Obama and the Department of Health and Human Services to begin the process of rescinding President Bush's so-called "right of conscience" rule believe that this course of action represents an important victory for equal access to health care for all, as well as for women's reproductive rights.[96] The Bush Administration enacted the rule at the request of several conservative groups "that argued that workers were increasingly being fired, disciplined or penalized in other ways for trying to exercise their 'right of conscience.'"[97] Opponents of the Bush rule, however, criticize it as unnecessary, citing the existence of federal and state employment discrimination statutes, like Title VII of the Civil Rights Act of 1964.[98] These critics claim that Title VII already prohibits religious discrimination in the workplace and requires that an employer reasonably accommodate an employee's religious beliefs and practices.[99] These critics, however, are mistaken because employment discrimination statutes on both the state and federal level have failed to adequately protect the free exercise of religion in the form of medical professionals' refusals to administer health care. The adjudications of the "reasonable accommodation" standard under both Title VII and its state equivalent establish a very low threshold for what accommodations an employer must make for an objecting employee.[100] Many of the possible ways to accommodate an objecting health care employee have already been deemed "unreasonable" by the courts, underscoring the need for additional protections for certain religious individuals in the medical field.[101]

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95. Stein, *supra* note 90.

96. *See id.*

97. *Id.*

98. *See* Stout, *supra* note 14.

99. *Id.*

100. *See* 42 U.S.C. § 2000e(j) (2006).

101. *See* Noesen v. Med. Staffing Network, Inc., 232 F. App'x 581, 584-85 (7th Cir. 2007); Bruff v. N. Miss. Health Servs., Inc., 244 F.3d 495, 501 (5th Cir. 2001); Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 146 & n.6 (5th Cir. 1982); Stormans, Inc. v. Selecky, 524 F. Supp. 2d 1245, 1256-57 (W.D. Wash. 2007); Hellinger v. Eckerd Corp., 67 F. Supp. 2d 1359, 1364-65 (S.D. Fla. 1999).

A. Title VII of the Civil Rights Act of 1964 and Equivalent State Employment Discrimination Statutes

Congress enacted Title VII of the Civil Rights Act of 1964 to combat discrimination in the workplace.[102] Section 2000e-2(a)(1) of Title VII provides that it is "an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[103] Title VII defines the term "religion" to include "all aspects of religious observance and practice, as well as belief."[104]

Title VII imposes an affirmative obligation on employers to "reasonably accommodate" an employee's "religious observance or practice" to the furthest extent possible without incurring "undue hardship on the conduct of the employer's business."[105] Thus, to obey Title VII, an employer must make "reasonable accommodations, short of undue hardship, for the religious practices of his employees."[106] The United States Supreme Court has ruled that this statutory language of "undue burden" does not require an employer to "bear more than a *de minimis* cost."[107] Therefore, requiring an employer to bear anything more than a *de minimis* cost constitutes an undue hardship, and thus, is not a "reasonable accommodation" under the statute.[108] The determination of what actions by an employer constitute a "reasonable accommodation" must be made on a case-by-case basis.[109]

In response to Title VII, most states enacted analogous state legislation prohibiting religious discrimination in the workplace.[110]

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102. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 71 & n.6 (1977).

103. 42 U.S.C. § 2000e-2(a)(1).

104. *Id.* § 2000e(j).

105. *Id.*

106. *Hardison*, 432 U.S. at 74.

107. *Id.* at 84 (holding that the employer did not violate Title VII by terminating an employee who refused to work on Sundays for religious reasons because the only available accommodations would impose more than a *de minimis* cost on the employer).

108. *See* Cooper v. Oak Rubber Co., 15 F.3d 1375, 1378 (6th Cir. 1994).

109. *Id.*

110. *See, e.g.*, ALASKA STAT. § 18.80.220(a) (2008); FLA. STAT. ANN. § 760.10 (West 2005); KY. REV. STAT. ANN. § 344.040(1)-(2) (West 2006); ME. REV. STAT. ANN. tit. 5, § 4572(1) (2002 & Supp. 2008); MASS. GEN. LAWS ch. 151B, § 4(1)-(5) (2006); NEB. REV. STAT. § 48-1104 (2004); N.Y. EXEC. LAW § 296(1) (McKinney 2005 & Supp. 2009); OHIO REV. CODE ANN. § 4112.02 (West 2007); OR. REV. STAT. § 659A.030 (2007); 43 PA. CONS. STAT. ANN. § 955 (West 2009); WASH. REV. CODE ANN. § 49.60.180 (West 2008); WIS.

Presently, forty-six states and the District of Columbia have their own fair employment statutes, which prohibit discrimination on the basis of religion in both public and private employment.[111] These statutes supplement state constitutions that already prohibit religious discrimination through freedom of religion clauses.[112] Modeled after Title VII, these state statutes impose nearly identical requirements on employers to avoid engaging in religious discrimination in the hiring and firing of employees.[113] The language contained in most of these state statutes mirrors that of Title VII, similarly mandating that an employer may not "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's . . . religion."[114] Due to the similarities between the state and federal statutes, most state courts rely on Title VII and federal case law to interpret their equivalent state fair employment statutes.[115]

B. Many of the Possible Ways to Accommodate Objecting Health Care Employees Have Already Been Deemed "Unreasonable" Accommodations by the Court.

Should a conflict arise between a medical professional's religious practices and the duties of his employment, an employee may be properly terminated without violating Title VII or the equivalent state law if no "reasonable accommodation" exists.[116] An employer need not accommodate an employee's religious beliefs if doing so will cause "undue hardship."[117] Requiring an employer to incur more than a "*de minimis*" cost is deemed "unreasonable," and therefore, unnecessary.[118] Many of the possible ways to accommodate a doctor or physician with religious objections to performing certain tasks associated with his or her profession, however, have already been deemed "unreasonable" by the courts.[119]

STAT. ANN. §§ 111.321-.322 (West 2002 & Supp. 2009).

111. James A. Sonne, *Firing Thoreau: Conscience and At-Will Employment*, 9 U. PA. J. LAB. & EMP. L. 235, 267 (2007).

112. *See, e.g.*, CAL. CONST. art. 1, § 8; WASH. CONST. art. 1, § 11.

113. *See* Sonne, *supra* note 111, at 267-68; *see also* Eyana J. Smith, Comment, *Employment Discrimination in the Firm: Does the Legal System Provide Remedies for Women and Minority Members of the Bar?*, 6 U. PA. J. LAB. & EMP. L. 789, 795 (2004).

114. 42 U.S.C. § 2000e-2(a)(1) (2006).

115. Sonne, *supra* note 111, at 268.

116. *See* 42 U.S.C. § 2000e(j).

117. Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 74 (1977).

118. *See id.* at 84.

119. *See* Noesen v. Med. Staffing Network, Inc., 232 F. App'x 581, 584-85 (7th Cir. 2007); Bruff v. N. Miss. Health Servs., Inc., 244 F.3d 495, 501 (5th Cir. 2001); Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 146 & n.6 (5th Cir. 1982); Stormans, Inc. v. Selecky,

One possible accommodation is for the employer to hire additional help in order to allow a religious employee to abstain from certain duties of his employment.[120] Staffing an additional employee to cover for an objecting individual, however, puts an added cost on the employer.[121] Several courts have deemed the financial burden of staffing or hiring extra help an "unreasonable" accommodation, even when the resulting yearly cost may be small in comparison to the company's financial capabilities.[122]

In *Stormans, Inc. v. Selecky*,[123] for example, a Washington federal district court held that a "reasonable accommodation" did not exist for a pharmacy employer to fulfill an employee's request to abstain from dispensing birth control in accordance with his religion.[124] Because the pharmacy scheduled only one pharmacist per shift, the only accommodation that would allow the plaintiff to keep his job while upholding his religious beliefs and ensuring every customer received her prescription would be to hire a second pharmacist to work alongside the objecting employee.[125] This accommodation would cost the pharmacy an additional $80,000 a year and therefore constituted more than a *de minimis* expense.[126]

In *Brener v. Diagnostic Center Hospital*,[127] a case very similar to *Stormans*, the Fifth Circuit held that imposing the additional cost of $14,000 on the pharmacy employer constituted more than a *de minimis* cost under Title VII.[128] This figure, $14,000, represented the minimum cost of hiring another pharmacist to cover for the plaintiff, an Orthodox Jew, who could not work on the Sabbath and other religious holidays.[129] This cost of $14,000 in 1982, when this case was decided, equates to an estimated $32,000 in 2009.[130]

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524 F. Supp. 2d 1245, 1256-57 (W.D. Wash. 2007); Hellinger v. Eckerd Corp., 67 F. Supp. 2d 1359, 1364-65 (S.D. Fla. 1999).

120. *See, e.g.*, *Stormans*, 524 F. Supp. 2d at 1256.

121. *See, e.g.*, *id.*

122. *See, e.g.*, *Noesen*, 232 F. App'x at 581.

123. 524 F. Supp. 2d 1245 (W.D. Wash. 2007).

124. *Id.* at 1256-57.

125. *Id.* at 1256.

126. *Id.*

127. 671 F.2d 141 (5th Cir. 1982).

128. *Id.* at 146 & n.6.

129. *Id.* at 143, 146 n.6.

130. United States Department of Labor, Bureau of Labor Statistics: Consumer Price Index Inflation Calculator, http://www.bls.gov/data/inflation_calculator.htm (last visited Feb. 1, 2010).

In *Hellinger v. Eckerd Corporation*[131] the plaintiff pharmacist was terminated because of his religious objection to selling condoms.[132] The Federal District Court for the Southern District of Florida held that requiring the employer to hire an additional sales clerk, presumably at a substantially lower salary than that of a licensed pharmacist, to work alongside the Jewish plaintiff would involve more than a *de minimis* cost and thus was not required under Title VII.[133] The court also noted that the employer could not simply allow the pharmacist to refrain from selling condoms on his shift as these items represented approximately $37,726.65 in sales from 1996 through 1999 in the Miami area stores.[134] Requiring the pharmacy to forfeit such profits would constitute an undue hardship.[135]

The discrepancy regarding what monetary figure constitutes more than a *de minimis* cost allows employers great leeway in terminating religious employees under employment discrimination statutes. As the decisions in *Brenner*, *Stormans*, and *Hellinger* show, a court will likely support an employer's claim that it cannot afford to accommodate an employee's religious objections to performing an aspect of his or her job.[136] With the current state of the global economy, it is unlikely that a court will order a business to incur any type of additional financial responsibilities when faced with the very real threat of losing yet another company to the existing economic depression.[137]

A second possible accommodation, shifting the tasks that the individual finds objectionable to another employee, has also been deemed universally "unreasonable" by the judiciary.[138] In *Noesen v. Medical Staffing Network, Inc.*, a Catholic pharmacist brought suit under Title VII after he was dismissed for refusing to fill birth control prescriptions.[139] Finding for the employer, the Seventh Circuit determined that reasonably accommodating the pharmacist's beliefs did not require the pharmacy to relieve the employee of all duties relating to birth control so that he could

131. 67 F. Supp. 2d 1359 (S.D. Fla. 1999).

132. *Id.* at 1362-63.

133. *Id.* at 1364-65.

134. *See id.* at 1365.

135. *See id.*

136. *See* Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 146 & n.6 (5th Cir. 1982); Stormans, Inc. v. Selecky, 524 F. Supp. 2d 1245, 1256-57 (W.D. Wash. 2007); *Hellinger*, 67 F. Supp. 2d at 1364-65.

137. *See IMF: Global Economy to Shrink for First Time in 60 Years*, CNN.COM, Mar. 20, 2009, http://edition.cnn.com/2009/BUSINESS/03/20/imf.global.economy/index.html.

138. Noesen v. Med. Staffing Network, Inc., 232 F. App'x 581, 584-85 (7th Cir. 2007); Bruff v. N. Miss. Health Servs., Inc., 244 F.3d 495, 501 (5th Cir. 2001).

139. *Noesen*, 232 F. App'x at 584-85.

avoid contact with customers seeking this medication.[140] Such an accommodation would require other pharmacists to assume the plaintiff's counter and telephone duties.[141] The Seventh Circuit held that "an accommodation that requires other employees to assume a disproportionate workload . . . is an undue hardship as a matter of law."[142]

Similarly, in *Bruff v. North Mississippi Health Services, Inc.*,[143] a medical center dismissed a counselor who wished to be excused from treating all homosexuals because their "lifestyle" conflicted with her religious beliefs.[144] The Fifth Circuit found that fulfilling such a request was not a reasonable accommodation required by Title VII as it would entail one of the medical center's two remaining counselors to assume the responsibilities of the plaintiff.[145] The court held that providing an additional counselor for the plaintiff's shifts solely to treat homosexuals was an undue hardship on the medical center as a matter of law.[146] The medical center could not be obliged to schedule multiple counselors for each session, as doing so would constitute more than a *de minimis* cost.[147]

These two accommodations, hiring additional employees and permitting other employees to assume the objectionable duties in question, represent the best solution for allowing religious health care professionals to keep their jobs while respecting their beliefs.[148] Both accommodations, however, are likely to be deemed "unreasonable" under employment discrimination statutes, thus ensuring the termination of these employees with sincerely held religious beliefs.[149] Therefore, religious discrimination statutes like Title VII and its state counterparts are ineffective for protecting doctors, nurses, and pharmacists from termination for their

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140. *See id.*

141. *See id.* at 584.

142. *Id.* at 584-85.

143. 244 F.3d 495 (5th Cir. 2001).

144. *Id.* at 497-98.

145. *Id.* at 501.

146. *Id.*

147. *Id.*

148. *See* E.E.O.C. v. Arlington Transit Mix, Inc., 957 F.2d 219, 222 (6th Cir. 1991) (holding that an employer failed to pursue a reasonable accommodation since he had not even discussed the option of shift changes to accommodate an employee's religious needs); *see also* E.E.O.C. v. Texas Hydraulics, Inc., 583 F. Supp. 2d 904, 911 (E.D. Tenn. 2008) (holding that an employer failed to accommodate his employee's religious needs by not initiating and implementing a voluntary shift exchange or a possible transfer of the employee's company duties).

149. *See, e.g.*, Noesen v. Med. Staffing Network, Inc., 232 F. App'x 581, 584-85 (7th Cir. 2007); Stormans, Inc. v. Selecky, 524 F. Supp. 2d 1245, 1256-57 (W.D. Wash. 2007).

religious beliefs.[150] Because these statutes fail to accomplish their intended purpose, individual states must intervene and pass legislation to protect the free exercise rights our founders held so dear.[151]

III. Recent Cases Exposing the Flaws in the Current Analysis of Free Exercise Claims Involving Religiously Based Refusals to Administer Health Care

Champions of equal protection and equal access to universal health care maintain that the Supreme Court correctly decided *Smith* and support the Court's decision to impose a rational basis standard of review that provides the correct balance between an individual's right to the free exercise of religion and the government's interest in regulating potentially dangerous or illegal conduct.[152] A review of four of the most recent decisions regarding the free exercise rights of health care workers, however, reveals the flaws in the current First Amendment analysis.[153] These flaws include the difficulty in determining the neutrality of a given law in our current times of politically correct (on their face) legislatures, as well as the rational basis standard's tendency to disproportionately produce victories for equal protection at the expense of medical professionals' First Amendment rights.[154] These recent federal and state court decisions demonstrate the need for states to adopt new legislation in an effort to modify the analysis for the free exercise claims of health care employees and impose greater First Amendment protections for the individuals in the medical profession.

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150. *See, e.g.*, *Noesen*, 232 F. App'x at 584-85; Brener v. Diagnostic Ctr. Hosp., 671 F.2d 141, 146 & n.6 (5th Cir. 1982) (calculating the cost of accommodation to be $14,000—the minimum cost of hiring another to do the Orthodox Jewish pharmacist's work during Sabbath—to be an undue burden on the employer, so termination was appropriate); *Stormans*, 524 F. Supp. 2d at 1256.

151. *See* 42 U.S.C. § 2000e-2(a)(1) (2006). It is unlawful for an employer to discharge an employee on the basis of religion, however an employer may terminate an employee if the employer can satisfy the low burden necessary to show that there was no way to "reasonably accommodate" an employee's religious beliefs. *See supra* text accompanying notes 18-20.

152. *See* Maxine M. Harrington, *The Ever-Expanding Health Care Conscience Clause: The Quest for Immunity in the Struggle Between Professional Duties and Moral Beliefs*, 34 FLA. ST. U. L. REV. 779, 795 (2007) ("The absolute accommodation of an employee's religious or personal conduct may threaten the safety and health of patients, cause significant hardships on the employer's business, and undermine the workplace.").

153. *See infra* Part III.A-D.

154. *See infra* Part III.A-D.

A. The Illinois Supreme Court's Decision in *Morr-Fitz, Inc. v. Blagojevich*[155]

In a very recent case decided in the Supreme Court of Illinois, Illinois pharmacists sought to invalidate an administrative rule which forced them to dispense Plan B contraception, without delay, upon receipt of a valid prescription, regardless of the pharmacist's religious objections to this medication.[156] In vacating the state's motion to dismiss, the Illinois Supreme Court noted on remand that the outcome of this free exercise challenge would likely hinge on a determination of whether the rule in question is "neutral" under *Smith*.[157]

An inquiry regarding the neutrality of any given statute consists of more than a simple facial review of the rule's text.[158] If the text of a statute is facially neutral, like the Illinois rule in question, "a court must then look beyond the face of the rule to determine the true object of the statute."[159] To determine the real purpose behind a rule, a court must look to the rule's historical background, "the specific series of events leading to enactment," and "the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body."[160] Should the court discover that the object of the rule "is to infringe upon or restrict practices because of their religious motivation, the law is not neutral," and it must satisfy strict scrutiny to be valid.[161] The pharmacists alleged that this must-fill rule was "enacted for the purpose of compelling religious and conscientious objectors to fill Plan B contraceptive prescriptions despite those objections," and was therefore not "neutral."[162] To support this claim, the plaintiffs cited the public statements of Governor Rod Blagojevich,

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155. Morr-Fitz, Inc. v. Blagojevich, 901 N.E.2d 373 (Ill. 2008).

156. *Id.* at 377-78. Plan B, also known as the "morning after pill," is an emergency contraceptive pill. *Id.* at 377. When administered seventy-two hours after unprotected sex, it "prevents the fertilized egg from adhering to the wall of the uterus," thus averting an unwanted pregnancy. Stormans, Inc. v. Selecky, 524 F. Supp. 2d 1245, 1248 (W.D. Wash. 2007). The pharmacists in the *Morr-Fitz* case believed Plan B is an "abortifacient" and "can cause abortions by preventing an already fertilized egg from implanting in the womb." *Morr-Fitz*, 901 N.E.2d at 378-79.

157. *See Morr-Fitz*, 901 N.E.2d at 389, 392-93.

158. *See id.* at 389.

159. *Id.*

160. *See id.* (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267-68 (1977)).

161. *Id.*

162. *Id.* at 380.

made while explaining his promulgation of the rule, that "pharmacists with moral objections . . . should find another profession."[163]

B. *Menges v. Blagojevich*:[164] The Federal Counterpart of *Morr-Fitz*

In September 2006, the United States District Court for the Central District of Illinois decided the federal equivalent of *Morr-Fitz*.[165] The facts of *Menges v. Blagojevich* mirror those of *Morr-Fitz*.[166] In *Menges*, Illinois pharmacists similarly challenged the promulgation of Governor Blagojevich's must-fill rule under the Free Exercise Clause of the U.S. Constitution.[167] Denying the Illinois government's motion to dismiss, the federal court noted that the purpose stated on the face of the rule was in fact neutral, as the terms of the rule itself described its objective as "address[ing] a critical public health care issue of access to prescription contraceptives by mandating that a pharmacy has a duty to dispense contraceptives without delay."[168] The court recognized, however, that this rule may have a religiously motivated discriminatory purpose, citing the Governor's comments that the adoption of the rule "was prompted by pharmacists who declined to fill prescriptions . . . because of their religious and moral opposition," as well as the Governor's wish for religious pharmacists to "find another profession."[169] The court on remand held that the Governor's statements may establish that the object of the rule was not to make emergency contraceptives generally available but rather was "to target pharmacists . . . who have religious objections to Emergency Contraceptives, for the purpose of forcing them either to compromise their religious beliefs or to leave the practice of pharmacy."[170] If so proven, the rule's object is not religiously neutral and therefore the must-fill rule must satisfy strict scrutiny.[171]

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163. *Morr-Fitz*, 901 N.E.2d at 390. Less than two months after this decision, Illinois Governor Rod Blagojevich was removed from office amid federal corruption charges, including allegedly attempting to sell the United States Senate seat vacated by President Barack Obama to the highest bidder. Rick Pearson & Ray Long, *Governor Pat Quinn: 'The Ordeal is Over'; Senate Convicts Blagojevich, Making Him the 1st Illinois Governor to Be Thrown Out of Office*, CHI. TRIB., Jan. 30, 2009, at C1, *available at* 2009 WLNR 1788616.

164. 451 F. Supp. 2d 992 (C.D. Ill. 2006).

165. *See id.*

166. *Compare* Morr-Fitz, Inc. v. Blagojevich, 901 N.E.2d 373, 377 (Ill. 2008), *with* Menges v. Blagojevich, 451 F. Supp. 2d 992, 995 (C.D. Ill. 2006).

167. *Menges*, 451 F. Supp. 2d at 995. The plaintiffs also asserted claims under Title VII of the Civil Rights Act of 1964. *Id.*

168. *Id.* at 997, 999-1000.

169. *Id.* at 999-1001.

170. *Id.* at 1001.

171. *Id.*

C. The California Supreme Court's Decision in *North Coast Women's Care Medical Group, Inc. v. San Diego County Superior Court*[172]

In August 2001, lesbian-patient Guadalupe Benitez filed suit against two fertility doctors and the California medical clinic that employed them after the physicians voiced religious objections to artificially inseminating a homosexual woman.[173] Benitez alleged that the physicians' denial of medical treatment constituted sexual orientation discrimination under the California Unruh Civil Rights Act, a state public accommodation law.[174] The Unruh Civil Rights Act forbids any business rendering services to the public, including private hospitals and medical clinics, from discriminating against customers because of their sexual orientation, among other characteristics.[175]

Ruling in favor of patients' rights, the California Supreme Court rejected the physicians' First Amendment, Free Exercise Clause defense under the U.S. Constitution after applying the United States Supreme Court's *Smith* test.[176] The court reasoned that because the Unruh Civil Rights Act represented "a valid . . . law of general applicability" under *Smith*, the objecting physicians had no recourse under the Free Exercise Clause, and thus, were not exempt from their duty to comply with the law's prohibition against sexual orientation discrimination.[177] When analyzing the physicians' defense under the California State Constitution, however, the *North Coast* court reasoned that the *Smith* test did not apply because "construing a state constitution is a matter left exclusively to the states."[178] In the absence of the *Smith* test, the California Supreme Court did not need to determine the appropriate standard of review because the defendants' free exercise claims failed, even under a strict scrutiny standard.[179] The court announced that the State of California possessed a compelling interest in prohibiting discrimination and "ensuring full and equal access to medical

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172. 189 P.3d 959 (Cal. 2008).

173. *Id.* at 964.

174. *Id.*; CAL. CIV. CODE § 51 (West 2007).

175. *See* CAL. CIV. CODE § 51(b); *see, e.g.*, Leach v. Drummond Med. Group, Inc., 192 Cal. Rptr. 650, 655 (Cal. Ct. App. 1983); Washington v. Blampin, 38 Cal. Rptr. 235, 238 (Cal. Dist. Ct. App. 1964). The Unruh Civil Rights Act also prohibits discrimination in public accommodations based on "sex, race, color, religion, ancestry, national origin, disability, [or] medical condition." CAL. CIV. CODE § 51(b).

176. N. Coast Women's Care Med. Group, Inc. v. San Diego County Superior Court, 189 P.3d 959, 967 (Cal. 2008).

177. *Id.* at 966-67.

178. *Id.* at 968.

179. *Id.*

treatment irrespective of sexual orientation, and there [were] no less restrictive means for the state to achieve that goal."[180]

D. *Stormans, Inc. v. Selecky*[181]: The Antithesis of *North Coast*

In November 2007, the United States District Court for the Western District of Washington adjudicated a challenge to a Washington state regulation prohibiting pharmacists with religious or moral objections from refusing to fill lawful prescriptions for birth control and emergency contraceptive pills.[182] The plaintiff pharmacists sought a preliminary injunction against the enforcement of this rule, arguing that the must-fill regulation violated their right to the free exercise of religion under the First Amendment of the U.S. Constitution.[183] While noting that the rule was facially neutral as to religion because "[a] review of the subject ordinances reveals no mention of religion or any intention to burden the religious practices of others," the court nevertheless concluded that the must-fill regulation "targeted the religious practices of some citizens" and therefore was not neutral.[184] The court cited "the very press release announcing the adoption of the rules," as well as the public statements of Washington Governor Christine Gregoire, both of which conceded that the promulgation of the rule was "sparked by complaints that some pharmacists and pharmacies refused to fill prescriptions for emergency contraceptives."[185] This evidence "strongly suggests that the overriding objective of the subject regulations was, to the degree possible, to eliminate moral and religious objections from the business of dispensing medication."[186]

Any law that burdens religious activity and is not neutral must withstand strict scrutiny review.[187] The Washington State Government asserted two compelling interests: (1) ensuring equal access to health care for all pharmacy customers; and (2) preventing sex discrimination.[188] In granting the pharmacists' preliminary injunction, the court found that neither of these interests rose to the level of "compelling."[189] In rejecting the Government's contention that the must-fill rule advanced the state's

180. *Id.*
181. 524 F. Supp. 2d 1245 (W.D. Wash. 2007).
182. *Id.* at 1248.
183. *Id.* at 1255.
184. *Id.* at 1257, 1260.
185. *Id.* at 1259.
186. *Id.*
187. *See Stormans*, 524 F. Supp. 2d at 1263.
188. *Id.*
189. *Id.*

compelling interest in universal access to health care, the court reasoned that the interests promoted by the rule

> have more to do with convenience and heartfelt feelings than with actual access to certain medications. Patients understandably may not want to drive farther than the closest pharmacy and they do not want to be made to feel bad when they get there. These interests are certainly legitimate but they are not compelling interests of the kind necessary to justify the substantial burden placed on the free exercise of religion.[190]

The court similarly rejected preventing gender discrimination as a compelling state interest.[191] Stating that even the United States Supreme Court "has recognized that reasonable people disagree over when life begins," the court concluded that the pharmacists' objection to Plan B was not about gender, but rather "about the sanctity of life as defined by their religious teachings."[192] Because state and federal law "provide a clear right to health care providers to not participate in abortion procedures," the pharmacists' refusal to dispense Plan B, a "refusal to participate in an act one believes terminates a life[,] has nothing to do with gender or gender discrimination" and thus does not serve as a compelling state interest.[193]

IV. A State RFRA and Its Imposition of a Strict Scrutiny Standard Will Protect the Free Exercise Rights of Religious Medical Professionals.

These four recent federal and state court decisions each involve free exercise challenges to legislation mandating health care workers to provide treatment and services in the face of a conflict with their religious beliefs.[194] The opinions in *Morr-Fitz*, *Menges*, *North Coast*, and *Stormans* reveal the problems inherent in the application of *Smith*.[195] Because of the difficulty in discerning "neutrality" in the context of legislation mandating equal access to health care, the *Smith* test may unfairly shield religiously

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190. *Id.*

> While it is obviously conceivable that a patient in need of Plan B could ultimately be denied access to the drug during its time of effectiveness, that eventuality is just as likely to occur for reasons that are wholly acceptable under the regulations: lack of money, the drug is not in stock, no one has previously requested it, or the store is closed on Sunday.

Id.

191. *Id.*

192. *Id.* at 1263-64.

193. *Stormans*, 524 F. Supp. 2d at 1263-64.

194. *See supra* Part III.

195. *See supra* Part III.

motivated laws from strict scrutiny review. Also, the *Smith* test's universal application of rational basis will virtually always favor the patient and his equal access to health care at the expense of health care professionals' First Amendment rights. On the other hand, strict scrutiny's compelling interest standard provides a better balance between equal protection and free exercise, thus far, yielding victories for both sides.[196] The strict scrutiny standard allows a state's judiciary to assess the individual state's values without automatically ruling against free exercise.[197]

The decisions in *Morr-Fitz*, *Menges*, *North Coast*, and *Stormans*, coupled with President Obama's rescission of the federal "right of conscience" rule[198] and the lack of protection afforded by federal and state employment discrimination statutes, demonstrate the need for states to impose greater safeguards for health care employees' right to the free exercise of religion. Individual states can achieve this added protection by adopting a State RFRA, which carries with it the imposition of a mandatory strict scrutiny standard.[199] The enactment of State RFRAs will resolve the lingering issues in each of the preceding cases and swing the pendulum back to a more moderate position between free exercise and equal protection.

A. The Problem of Discerning "Neutrality" in the Context of Legislation Mandating Equal Access to Health Care

When applying the *Smith* standard to free exercise claims against legislation mandating that health care workers provide treatment and services despite their religious objections, the first question a court must ask is whether the law at issue is a "neutral law of general applicability."[200] Laws enacted with an intent "to discriminate against individuals because of their religious practices and beliefs" are not neutral.[201] An inquiry regarding the neutrality of any given statute consists of more than a simple facial review of the rule's text.[202] If the text of a statute is facially neutral, "a court must then look beyond the face of the rule to determine the true

196. *See infra* notes 225-227 and accompanying text.

197. *See* Sherbert v. Verner, 374 U.S. 398, 406-07 (1963).

198. *See supra* Part I.G.

199. *See supra* Part I.F.

200. *See supra* note 35 and accompanying text.

201. *See* Stormans, Inc. v. Selecky, 524 F. Supp. 2d 1245, 1257 (W.D. Wash. 2007).

202. Morr-Fitz, Inc. v. Blagojevich, 901 N.E.2d 373, 389 (Ill. 2008). "To determine the object of a law, the Court must first look to the text to see whether the law discriminates against religious practice on its face. A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernable from the language or context." *Stormans*, 524 F. Supp. 2d at 1257.

object of the statute."[203] A determination of the real purpose behind a rule requires an inquiry into the rule's historical background, "the specific series of events leading to enactment," and "the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body."[204] Under *Smith*, only truly neutral laws, laws that are both neutral on their face and enacted without religious motivation, are subject to rational basis review.[205] Statutes lacking facial neutrality or enacted with a religious motivation, however, must pass strict scrutiny to survive, meaning the state must demonstrate that the law serves a compelling state interest and is narrowly tailored to serve that interest.[206]

Because of the difficulty in discerning the "neutrality" of legislation mandating equal access to health care, the *Smith* test may shield religiously motivated laws from the strict scrutiny review that they deserve. As the Supreme Court noted in 1973, "[t]he search for legislative purpose is often elusive enough," perhaps becoming even more difficult to ascertain in our current time of politically correct (on their face) legislatures.[207] In the absence of incriminating statements from politicians, like former Illinois Governor Rod Blagojevich, the true meaning behind this type of legislation, to prohibit religious health care employees from carrying out their beliefs, may never come to light.[208] Without the words of Governors Blagojevich and Gregoire, the neutrality of the must-fill statutes in question would likely have been a non-issue for the court.[209] On their face, neither statute referred to religion in any way.[210] It was only upon an investigation into the legislative history of the rules did the courts discover a possible religiously motivated intent.[211] The United States Supreme Court has recognized, however, that legislative history is susceptible to manipulation

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203. *Morr-Fitz*, 901 N.E.2d at 389.

204. *Id.* (citing Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267-68 (1977)).

205. *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 879 (1990).

206. Porto, *supra* note 29.

207. *See* McGinnis v. Royster, 410 U.S. 263, 276 (1973).

208. *See* Monica Davey, *Blagojevich Speaks at Impeachment Trial, in Wiretaps Only*, N.Y. TIMES, Jan. 28, 2009, at A19, *available at* 2009 WLNR 1605269. Former Governor Blagojevich is a prime example of a lawmaker who does not know when to remain silent; a United States District Attorney allegedly has the former Illinois Governor on tape in expletive-filled tirades making threats and accepting bribes. *See id.*

209. *See* Stormans, Inc. v. Selecky, 524 F. Supp. 2d 1245, 1259 (W.D. Wash. 2007); Menges v. Blagojevich, 451 F. Supp. 2d 992, 1000 (C.D. Ill. 2006); Morr-Fitz, Inc. v. Blagojevich, 901 N.E.2d 373, 391 (Ill. 2008).

210. *Stormans*, 524 F. Supp. 2d at 1257; *Menges*, 451 F. Supp. 2d at 999-1000.

211. *See Stormans*, 524 F. Supp. 2d at 1259; *Menges*, 451 F. Supp. 2d at 1000; *Morr-Fitz*, 901 N.E.2d at 391.

at the hands of clever lawmakers.[212] In the future, legislators who wish to enact laws restricting the free exercise of health care employees will learn from the mistakes of Governors Blagojevich and Gregoire.[213] By failing to announce the true intent behind this legislation, lawmakers can manipulate legislative history and ensure a ruling of neutrality in the face of a legal challenge. Much like the California Legislature did in *North Coast*, hiding behind public accommodation laws and asserting the interest of prohibiting gender or sexual orientation discrimination, future legislatures will be able to pass regulations restricting religious activity in the medical fields with ease, soaring past the neutrality hurdle and onto a low, easily satisfied, rational basis review.[214] The neutrality prong of the *Smith* test therefore ensures these statutes will never face strict scrutiny review.

B. The Mandatory Imposition of Strict Scrutiny's Compelling Interest Standard Will Level the Playing Field for Religious Health Care Employees.

The potential to easily manipulate a court's finding of neutrality under a *Smith* analysis of a rule restricting the First Amendment activities of medical professionals ensures that such laws will always face rational basis review.[215] The application of this easily satisfied standard, however, secures a victory for the government and a defeat for the religious health care worker.[216] By adopting a State RFRA, individual states even the playing field between the Equal Protection and Free Exercise Clauses of the Constitution. A State RFRA will reinstate the strict scrutiny test, a standard which does not uniformly produce a victory for the government or for the individual.[217] By automatically requiring strict scrutiny review, a State RFRA bypasses the *Smith* neutrality analysis, thereby eliminating the possibility of future manipulation of legislative intent.[218] This strict scrutiny standard holds lawmakers accountable for the true intentions behind their actions and assures that religiously motivated laws do not slip pass the judiciary.[219]

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212. *See* Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005).

213. *See Stormans*, 524 F. Supp. 2d at 1260; *Menges*, 451 F. Supp. 2d at 999-1000.

214. *See* N. Coast Women's Care Med. Group, Inc. v. San Diego County Superior Court, 189 P.3d 959, 964, 968 (Cal. 2008).

215. *See supra* Part IV.A.

216. *See* Roy G. Spece, Jr., *AIDS: Due Process, Equal Protection, and the Right to Treatment*, 4 ISSUES IN L. & MED. 283, 287 (1988). The rational basis test "usually results in government victory." *Id.*

217. *See infra* notes 225-27 and accompanying text.

218. *See* Employment Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 879 (1990).

219. *See* Porto, *supra* note 29.

Unlike the rational basis standard's tendency to favor the government, the strict scrutiny standard of a State RFRA will not always yield a victory for objecting medical professionals.[220] To pass strict scrutiny review, the government must prove that the regulation of religious conduct represents the least restrictive means possible for furthering a compelling state interest.[221] The adjudication of this "compelling interest" prong will serve to even the playing field between equal protection and free exercise.[222] When requiring the government to produce the compelling interest that justifies a regulation of religious conduct, the state will inevitably produce the interests of "ensuring full and equal access to medical treatment" for all citizens, irrespective of their sexual orientation or gender.[223] Courts, however, disagree over whether this truly constitutes a "compelling" state interest.[224] In *Stormans*, a Washington district court rejected the government's contention that the must-fill rule advanced any compelling state interest, reasoning that the state's interest in ensuring equal access to health care for all, while legitimate, hardly rose to the level of "compelling."[225] The California Supreme Court, however, would disagree.[226] In *North Coast*, California's highest court announced, without equivocation, that the state's interest in prohibiting discrimination and promoting the equal protection of all of its citizens more than satisfied the standard required for strict scrutiny review.[227]

This disparity between the decisions of the *Stormans* and *North Coast* courts demonstrates the beauty of the strict scrutiny standard of a State RFRA.[228] Equal access to health care may be deemed a compelling state interest, but the imposition of a State RFRA and its strict scrutiny mandate will not always result in a victory for equal protection.[229] Rather, adopting a State RFRA will allow individual states to choose which interests they believe rise to a compelling level. State RFRAs afford state judiciaries with the autonomy to decide which interest they value more, a decision that they are best equipped to make. The imposition of the compelling interest test

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220. *Cf. supra* note 216 and accompanying text.

221. Sherbert v. Verner, 374 U.S. 398, 406-07 (1963).

222. *Compare* Stormans, Inc. v. Selecky, 524 F. Supp. 2d 1245, 1263 (W.D. Wash. 2007), *with* N. Coast Women's Care Med. Group, Inc. v. San Diego County Superior Court, 189 P.3d 959, 968 (Cal. 2008).

223. *See N. Coast*, 189 P.3d at 968.

224. *See* cases cited *supra* note 222.

225. *Stormans*, 524 F. Supp. 2d at 1263.

226. *N. Coast*, 189 P.3d at 968.

227. *See id.*

228. *See supra* notes 225-27 and accompanying text.

229. *See supra* notes 225-227 and accompanying text.

by way of a State RFRA awards flexibility and permits states to make individual determinations regarding the importance of the free exercise of religion in the context of the medical profession versus its citizens' claims to equal treatment under the law. The enactment of a State RFRA affords medical professionals the chance to keep their jobs while remaining true to their religious beliefs without universally mandating that a state elevate the free exercise of religion over the equal protection of its citizens.

CONCLUSION

Religiously based refusals to administer health care because of a certain characteristic of the patient or the nature of the requested procedure are on the rise.[230] Such religiously based refusals to treat patients have resulted in much litigation and legislation, as patients who have been refused medical care assert claims under equal protection and public accommodation laws against the offending doctors and the hospitals and medical clinics that employ them. The outcomes of these lawsuits favoring patients' rights are representative of an emerging trend in litigation involving religiously based refusals to administer health care. Using the test articulated by the United States Supreme Court in *Smith*, courts across the country have uniformly declared equal protection the winner in its constitutional clash against free exercise. The Executive Branch appears to have reached a similar conclusion. President Obama has announced his intention to rescind President Bush's "right of conscience" rule, which grants broad protections for religious health care workers who refuse to participate in certain medical procedures, by denying federal funding to hospitals and pharmacies that fail to accommodate employees who possess such objections.

The ramifications of this judicial and legislative victory for equal access for all, however, may be severe. Every victory for patients' equal access to health care is delivered at the expense of a medical professional's fundamental right to the free exercise of religion. By ruling that health care employees must treat all patients, regardless of the nature of the procedure or the characteristics of the patient in question, many courts have effectively ordered doctors, nurses, and pharmacists to forsake their religious beliefs in the name of patient care. Denying First Amendment protection to religiously based refusals subjects health care employees to possible termination from their employment for their religious beliefs. Employment discrimination statutes on both the state and federal level fail to adequately protect religious doctors and pharmacists, as the best ways to

230. *See* Clinton & Richards, *supra* note 1.

accommodate their religious beliefs have already been declared "unreasonable" under Title VII.

In order to prevent the eradication of individuals with sincerely held religious beliefs from the health care field, individual states must enact State RFRAs. Enacting a State RFRA will reinstate the strict scrutiny test from *Sherbert*, which adequately protects the free exercise of religion. The strict scrutiny test will provide a solution to the problems illustrated by the most recent state and federal court decisions regarding religious refusals to administer care in the context of hospitals and pharmacies. Additionally, this test will end the confusion surrounding the inquiry into the "neutrality" of a given rule and will avoid the manipulation of legislative history. The test's compelling interest prong will allow individual states to determine which interests rise to a compelling level. Unlike the *Smith* test, which involuntarily yields a victory for the patient and equal access to health care for all, strict scrutiny allows individual states to assess their values without automatically declaring either side the winner.

The enactment of a State RFRA affords medical professionals the chance to keep their jobs while remaining true to their religious beliefs and avoids sacrificing the equal protection of its citizens in favor of free exercise. By reinstating the strict scrutiny standard of review, a State RFRA elevates free exercise back to its rightful position of prominence, as envisioned by our Founding Fathers. State RFRAs prevent religious health care employees from being forced to "choose between their careers and their consciences."[231]

231. Spreng, *supra* note 21.

TAKING RESPONSIBILITY: A CASE FOR DUE PROCESS RIGHTS TO A COMMONWEALTH CARE EMPLOYER-SPONSORED INSURANCE WAIVER

Zoë Paolantonio[*]

Abstract: Massachusetts became the first state to create a universal health care system when the legislature enacted "An Act Providing Access to Affordable, Quality, Accountable Health Care" ("Chapter 58") in 2006. Chapter 58 was designed to provide health insurance coverage for nearly all of the Commonwealth's 372,000 uninsured residents. The legislation created a new administrative agency called the Commonwealth Health Insurance Connector Authority ("Connector") in charge of administering a new public program called Commonwealth Care. Commonwealth Care subsidizes health insurance for households with incomes below 300% of the federal poverty level ($63,600 for a family of four).

However, under Chapter 58, Commonwealth Care is not available to individuals who have "affordable" health insurance available to them through their employers. The Connector defines "affordable" in its annual "affordability schedule." This presents a problem for individuals and families who are deemed to be able to afford the employer sponsored insurance offered to them but cannot actually do so. The legislature addressed this problem by adding an employer-sponsored insurance waiver ("ESI Waiver") provision into the Commonwealth Care statute, which allows an individual to access Commonwealth Care under certain circumstances, even if he has

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employer-sponsored insurance "available" to him according to the Connector's affordability schedule. However, despite this provision, the Connector has made it a policy not to implement the waiver provision, and has therefore automatically and immediately denied every ESI Waiver application without review. This policy decision has created serious problems for low-to-middle income families in Massachusetts. Without ESI Waiver implementation, these families are being forced to go without health insurance, or worse, could be subject to tax penalties under Chapter 58's requirement that all individuals over age eighteen obtain health insurance.

This Note lays out the problem of the uninsured in America, explains Massachusetts health care reform legislation, and outlines the ESI Waiver problem. It then argues that, based on the language of the Commonwealth Care statute, its legislative history, and the overall policy goals of Chapter 58, individuals have a due process property interest to individualized process when applying for an ESI Waiver, and that right is violated by the Connector's refusal to review ESI Waiver applications.

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INTRODUCTION

In 2006, Massachusetts became the first state to create a universal health care system.[1] In a single legislative package, the Massachusetts legislature enacted: "An Act Providing Access to Affordable, Quality, Accountable Health Care" ("Chapter 58")[2] designed to provide health insurance coverage for nearly all of the Commonwealth's 372,000 uninsured residents.[3]

Chapter 58 created "a web of public insurance expansions"[4] including a new quasi-public agency called the Commonwealth Health Insurance Connector Authority ("Connector") in charge of administering the new Commonwealth Care Health Insurance Program ("Commonwealth Care").[5] Commonwealth Care subsidizes health insurance for households with incomes below 300% of the federal poverty level and links eligible individuals and families with new, subsidized health insurance programs.[6]

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1. *See* An Act Providing Access to Affordable, Quality, Accountable Health Care, ch. 58, 2006 Mass. Acts 77 (codified as amended in scattered sections of the General Laws of Massachusetts); *see also* Christie L. Hager, *Massachusetts Health Reform: A Model of Shared Responsibility*, 29 J. LEGAL MED. 11, 11 (2008).

2. Hager, *supra* note 1; 2006 Mass. Acts 77 (codified as amended in scattered sections of the General Laws of Massachusetts).

3. Christie L. Hager, *Massachusetts Health Reform: A Social Compact and a Bold Experiment*, 55 U. KAN. L. REV. 1313, 1313 (2007) [hereinafter Hager, *Bold Experiment*].

4. Hager, *supra* note 1, at 14.

5. *Id.* at 15.

6. *Id.* One person with an income of 300% of the federal poverty level makes $31,212 per year; a family of four with an income of 300% of the federal poverty level makes approximately $63,600 per year. Massachusetts Law Reform Institute, MassHealth Income Standards: March 1, 2008-February 28, 2009, http://www.masslegalservices.org/system/files/Combined_2008_Income_Chart.pdf (last visited Feb. 1, 2010).

Thus, Commonwealth Care offers new, affordable insurance to individuals whose income is too low to afford private insurance but too high for them to qualify for MassHealth.[7]

However, under Chapter 58, Commonwealth Care is not available to individuals who have "affordable"[8] insurance available to them through their employers.[9] This presents a problem for individuals and families who cannot afford the employer-sponsored insurance offered to them.[10] The legislature addressed this gap by adding an employer-sponsored insurance waiver ("ESI Waiver") provision into the Commonwealth Care statute.[11] The waiver provision allows an individual to access Commonwealth Care even if he does have affordable health insurance available through an employer.[12] However, despite this provision, the Connector has made it a policy not to implement the waiver, and has therefore automatically and immediately denied every ESI Waiver application.[13] This policy decision has created serious problems for low-to-middle-income families who can "afford" employer-sponsored insurance, according to the Connector Board's affordability schedule, but cannot actually do so.[14]

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7. MassHealth is the Massachusetts state Medicaid program, designed for people with a low income, including children, parents, pregnant women, and people with disabilities. MassHealth: An Overview, http://www.massresources.org/pages.cfm?contentID=35&pageID=13&Subpages=yes (last visited Feb. 1, 2010). MassHealth pays benefits including doctors visits, hospital stays, dental care and prescription drugs. *Id.*

8. The Connector Board is charged with making an "affordability schedule" each year "to determine the percentage of income that one could afford to contribute per month to health insurance." Hager, *Bold Experiment*, *supra* note 3, at 1327.

9. Commonwealth Care, http://www.massresources.org/pages.cfm?contentID=81&pageID=13&Subpages=yes (last visited Feb. 1, 2010).

10. Memorandum from Bob Carey & Melissa Boudreault to Board of Directors (Oct. 22, 2008), https://www.mahealthconnector.org (follow "About Us" hyperlink; then follow "Board Meetings & Minutes" hyperlink; then follow "Connector Board Meeting November 13, 2008" hyperlink; then follow "Final Recommendation on ESI Buy-In Project (Memo)" hyperlink) [hereinafter Connector Memo] ("The operational complexities of any effort [to implement an ESI waiver program] would be significant, and as such, it would not be possible for any implementation to be in place in FY09."); *see also* MASS. GEN. LAWS ch. 118H, § 3 (2008).

11. *See* Connector Memo, *supra* note 10; MASS. GEN. LAWS ch. 118H, § 3(b).

12. *See* MASS. GEN. LAWS ch. 118H, § 3(5)(b).

13. *See* Connector Memo, *supra* note 10.

14. JON KINGSDALE, THE MASSACHUSETTS HEALTH INSURANCE CONNECTOR AUTHORITY, REPORT TO THE MASSACHUSETTS LEGISLATURE IMPLEMENTATION OF THE HEALTH CARE REFORM LAW, CHAPTER 58 2006-2008, at 22 (2008), *available at* https://www.mahealthconnector.org/ (follow "Health Care Reform" hyperlink; then follow "Research & Data" hyperlink; then follow the hyperlink for the Report located under the "Government Agencies" section) (noting that almost all of the 1600 appeals to the Connector were

Without ESI Waiver implementation, these individuals and families are being forced to go without health insurance, or worse, could be subject to tax penalties under Chapter 58's requirement that all individuals over the age of eighteen obtain health insurance if it is "affordable" to them.[15] This Note argues that the Connector Board's immediate and automatic denial of all ESI Waiver applications not only contravenes the policies behind Chapter 58 and its "model of shared responsibility" because it keeps coverage out of reach for the most economically vulnerable people in the Commonwealth, but it also violates applicants' due process rights.

Part I of this Note explains (1) how the uninsurance problem affects Americans under the modern health insurance structure in today's economy; (2) Chapter 58 as Massachusetts's response to that problem; and (3) the Connector Board's present ESI Waiver policy. Part II describes how a due process right is created and the steps the state must take to protect that right when one exists. Finally, Part III of this Note argues that based on the language of the Commonwealth Care statute, its legislative history, and the overall policy goals of Chapter 58, individuals have a due process property interest in an individualized process when applying for an ESI Waiver, and that right is violated by the Connector Board's refusal to review waiver applications.

I. The Health Care Reform Movement in Massachusetts

A. The Underinsurance Problem

1. "A National Shame"[16]

Lack of health insurance is one of the most serious problems facing Americans today as it leads to crushing debt and the inability to access needed health care.[17] Although there is widespread agreement that the

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appealing letters informing them they would not receive the ESI waiver); *see also supra* notes 8-9 and accompanying text.

15. MASS. GEN. LAWS ch. 111M, § 2(a)-(b).

16. *New York Times* editorial columnist Nicholas D. Kristof once called the health care crisis in the United States our "greatest national shame." *See* Nicholas D. Kristof, *Our Greatest National Shame*, N.Y. TIMES, Feb. 14, 2009, at WK11, *available at* http://www.nytimes.com/2009/02/15/opinion/15kristof.html.

17. *See* KAISER COMMISSION ON MEDICAID AND THE UNINSURED, TURNING TO MEDICAID AND SCHIP IN AN ECONOMIC RECESSION: CONVERSATIONS WITH RECENT APPLICANTS AND ENROLLEES 8 (2008), *available at* http://www.kff.org/medicaid/upload/7847.pdf [hereinafter TURNING TO MEDICAID]. One Cincinnati focus group participant said, "I'm going to pray to God that we don't have a catastrophic medical need because then certainly we would go under." *Id.* The same focus group found that putting off medical care leads to deterioration of health, particularly for people with chronic illnesses that require management. *Id.*

national system needs fundamental reform, "the core problems of affordability and access continue to steadily worsen."[18] The extent of America's health care problem is reflected in the fact that although this country's health care industry makes up sixteen percent of our nation's gross domestic product, 46.5 million Americans under the age of sixty-five are currently uninsured.[19]

Stories of the uninsured are everywhere and each one more heart breaking than the next. Starla Darling, pregnant and due for delivery, had just taken maternity leave when her company informed her that it was going out of business.[20] In three days she would be laid off and lose her health insurance.[21] Remembering that her last child's delivery had cost about $9000, she knew she would never be able to pay for her impending delivery out-of-pocket.[22] To avoid the bill, she asked her midwife to induce labor while she still had insurance coverage.[23] Unfortunately, during labor, Darling experienced severe complications and needed a Cesarean section.[24] Darling and her baby survived, but the family ended up owing more than $17,000 after their insurer denied their claim for coverage.[25]

One Las Vegas man had a heart attack while uninsured.[26] He was told to follow up with a cardiologist but could not afford to do so.[27] He said, "I was told to see a cardiologist but I can't afford it. I know I am sick and I need help."[28] A Cincinnati man reported, "I lost my job and health insurance . . . . I needed my insulin, because I'm diabetic, I have heart disease, I have high blood pressure. And when I went to get my insulin, they told me I had to pay $320. So that month I couldn't get it."[29] One Bridgeport participant explained,

> I take asthma medication, I take diabetes medication. And that's only two prescriptions. So multiply that by about five or six

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18. Mary Ann Chirba-Martin & Andrés Torres, *Universal Health Care in Massachusetts: Setting the Standard for National Reform*, 35 FORDHAM URB. L.J. 409, 409 (2008).

19. *Id.*

20. Atul Gawande, *Getting There from Here: How Should Obama Reform Health Care?*, THE NEW YORKER, Jan. 26, 2009, at 26.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. TURNING TO MEDICAID, *supra* note 17.

27. *Id.*

28. *Id.*

29. *Id.* at 9 (alterations omitted).

> other medications, and those are the ones that I need. So I rob Peter to pay Paul. If I'm breathing good this month, I can't worry about the asthma. If my sugar goes up, then I have to get the sugar medication.[30]

When Louisiana mom Loretta gets sick and can actually afford over-the-counter medication, she buys "everything [she] can get [her] hands on" to make a "Molotov cocktail" of NyQuil, Vicks, Advil liquid gels, and cough syrup.[31] She estimates that she spends about $150 a month on over-the-counter medicines.[32] Though her family's income is low enough for her to qualify for Medicaid, she has had trouble with the enrollment process.[33] She was turned away from the Medicaid office several times: once for not having a proper birth certificate and, on another occasion, a Medicaid caseworker suggested she get pregnant with her sixth child just to take advantage of Medicaid's pregnancy benefits.[34]

These are not uncommon stories. In fact, the "problem of the uninsured" is pervasive and systematic in the United States.[35] Indeed, the relationship between employment and health care has become increasingly problematic for low- and middle-income families.[36] Employment has become an unrealistic platform for health care arrangements as fewer people keep the same job for more than a few years at a time.[37] The cost of health care in the United States by far exceeds the cost of comparable services in other western countries thanks to the very nature of our health care system combined with the political dominance of the medical, insurance, and pharmaceutical industries.[38] As a result, millions of Americans today find it impossible to afford health insurance.[39]

2. Understanding Obstacles to Health Insurance

Understanding why some low-income individuals cannot afford health insurance requires an understanding of the standard of living for

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30. *Id.* (alterations omitted).

31. SUSAN STARR SERED & RUSHIKA FERNANDOPULLE, UNINSURED IN AMERICA: LIFE & DEATH IN THE LAND OF OPPORTUNITY xviii-xix (2007).

32. *Id.* at xix.

33. *See id.* at xviii.

34. *Id.* at xviii, xxiii.

35. *See id.* at 4-6.

36. *Id.* at 5.

37. SERED & FERNANDOPULLE, *supra* note 31, at 5.

38. *Id.*

39. *Id.* Faced with being uninsured, many low- to middle-income Americans cannot find any comprehensive health insurance that is affordable, as high-deductible plans do not provide coverage or basic peace of mind. TURNING TO MEDICAID, *supra* note 17, at 7.

low-income families in the United States and, in particular, Massachusetts. According to the 2008 U.S. Department of Health and Human Services Poverty Guidelines, a family of four is considered "poor" if its household income dips below $21,200 per year.[40] However, research suggests that on average families need an income of more than twice the federal poverty level ($44,100 per year) to meet their most basic needs.[41]

Families who make less than 200% of the federal poverty level are considered "low income."[42] However, families in Massachusetts need to earn an even higher income in order to meet basic needs, especially those living in urban areas who experience a higher cost of living.[43] For example, for a family of four in Boston to enjoy a standard of living equal to the national average of $63,600 per year (or 300% of the federal poverty level), they would have to earn $84,173 per year (or 397% of the federal poverty level).[44]

In about eighty-five percent of low-income families, at least one parent is working full-time, year-round.[45] However, many of these parents are unable to afford basic necessities such as food, housing, or stable child care.[46] For many low-income, uninsured adults, "the resources needed to purchase health insurance are competing with meeting basic food and housing needs."[47]

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40. Annual Update of the HHS Poverty Guidelines, 73 Fed. Reg. 3971 (Jan. 23, 2008), *available at* http://www.aspe.hhs.gov/poverty/08fedreg.pdf. The poverty guidelines are a measurement done each year by the federal government used, in part, to determine eligibility for certain federal programs. *Id.* They are issued each year in the Federal Register by the Department of Health and Human Services. *Id.*

41. NATIONAL CENTER FOR CHILDREN IN POVERTY, MASSACHUSETTS: DEMOGRAPHICS OF YOUNG, LOW-INCOME CHILDREN, http://www.nccp.org/profiles/MA_profile_8.html (last visited Feb. 1, 2010). Some describe "basic needs" as food and housing, but not health insurance. *But see* Sharon K. Long, *Hardship Among the Uninsured: Choosing Among Food, Housing and Health Insurance*, *in* NEW FEDERALISM: NATIONAL SURVEY OF AMERICA'S FAMILIES 2 (2003), *available at* http://www.urban.org/publications/310775.html.

42. NATIONAL CENTER FOR CHILDREN IN POVERTY, *supra* note 41.

43. *See* Statehealthfacts.org, Massachusetts: What a Family of Four Would Need to Earn in Selected Urban Areas to Have Purchasing Power Equal to 300% of the U.S. Federal Poverty Level ($63,600), 2008, http://www.statehealthfacts.org/profileind.jsp?rgn=23&cat=1&ind=600 (last visited Feb. 1, 2010).

44. *Id.*

45. KINSEY ALDEN DINAN, NANCY K. CAUTHEN, & SARAH FASS, NATIONAL CENTER FOR CHILDREN IN POVERTY, LOW-INCOME FAMILIES IN MASSACHUSETTS: RESULTS FROM THE FAMILY RESOURCE SIMULATOR 1 (2004), http://www.nccp.org/publications/pdf/text_580.pdf.

46. *Id.*

47. *See* Long, *supra* note 41, at 5. Food or housing hardship means that "the individual's family ran out of food or skipped meals because there was not enough money for food" or

> Even a full-time job is not always enough to make ends meet, and many parents cannot get ahead simply by working more. As earnings increase—particularly as they rise above the official poverty level—families begin to lose eligibility for work supports. At the same time, work-related expenses, such as child care and transportation, increase. . . . [Thus,] [i]n some cases, earning more actually leaves a family with fewer resources after the bills are paid.[48]

"Nearly [sixty] percent of low-income adults without [health] insurance [also] faced food or housing hardship" in 2003.[49] As one low-income, uninsured mother said,

> Sometimes I have to hold off paying a bill to keep the gas and electricity on. My most important priorities are getting the girls fed and paying for the car so I can get to work, so health care falls low on the list. I wish it didn't have to be that way, but that's the way it is.[50]

Thus, health insurance is often a luxury reserved for families who do not have to choose between health insurance and basic daily subsistence.[51]

Stories like these are "unconscionable in any society that purports to serve the needs of ordinary people, and, at some alchemical point, they combine with opportunity and leadership to produce change."[52] In a "dearth of national leadership," a growing number of states have taken it upon themselves to lead health care reform.[53] However, none have received more attention than Massachusetts's Chapter 58, which is by far the boldest plan for achieving universal health care coverage.[54]

B. The Massachusetts Response to the Problem of Uninsurance

In 2006, Massachusetts took the opportunity for change and enacted Chapter 58: "An Act Providing Access to Affordable, Quality, Accountable

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"the individual's family had difficulty paying the mortgage, rent, or utility bills." *Id.* at 2.

48. DINAN, CAUTHEN & FASS, *supra* note 45.

49. Long, *supra* note 41, at 5.

50. *Id.* at 2.

51. *See generally* Long, *supra* note 41.

52. Gawande, *supra* note 20.

53. Chirba-Martin & Torres, *supra* note 18, at 409-10. Vermont, Wisconsin, and California are currently undertaking health care reform on a state level. *Id.*

54. *Id.* at 410.

Health Care,"[55] which has largely succeeded in "support[ing] care for the Commonwealth's lowest income uninsured" and "reaching beyond mere expansion of access to health care to the goal of coverage for nearly all the Commonwealth's residents."[56] The underlying principle of Chapter 58 is shared responsibility; "the idea that individuals, employers, and government would all be called upon to contribute to access to health care for all [Massachusetts] residents."[57]

The new programs and agencies created by Chapter 58 make the Massachusetts's health care system markedly different from any other health care system in the nation.[58] While sometimes controversial, both the government and its constituents are generally pleased with the outcome of its implementation, which has proven to be extremely successful.[59] In particular, "[b]y 2007 the number of uninsured in the state had decreased by half—over 300,000 fewer uninsured."[60] In no small feat, Massachusetts's implementation of Chapter 58 has accounted for over twenty percent of the decline in the number of uninsured in the nation in 2008.[61] Chapter 58 consists of a combination of provisions that rest responsibility on individuals, employers, and the state to create a shared responsibility to make health insurance affordable to all Massachusetts residents.[62]

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55. An Act Providing Access to Affordable, Quality, Accountable Health Care, ch. 58, 2006 Mass. Acts 77 (codified as amended in scattered sections of the Massachusetts General Laws).

56. Hager, *supra* note 1.

57. *Id.* at 12. *See generally* Hager, *Bold Experiment*, *supra* note 3 (providing a full history of health care reform legislation in Massachusetts, and a history of the political and legislative circumstances surrounding the passage of Chapter 58).

58. *See* Chirba-Martin & Torres, *supra* note 18, at 410.

59. *See* Elizabeth Cooney, *Health Insurance Gains Detailed: Study Finds Steep Increase in Coverage*, BOSTON GLOBE, June 3, 2008, *available at* 2008 WLNR 10445409; Health Care Payment Reform Commission Members Appointed (Jan. 13, 2009), http://www.americantowns.com/ma/boston/news/health-care-reform-comission-members-appointed-159686.

60. JOHN HOLAHAN & ALLISON COOK, KAISER COMMISSION ON MEDICAID AND THE UNINSURED, THE DECLINE IN THE UNINSURED IN 2007: WHY DID IT HAPPEN AND CAN IT LAST? 2 (2008), *available at* http://www.kff.org/uninsured/7826.cfm.

61. *See id.*

62. *See* Hager, *supra* note 1, at 14-21.

1. An Outline of Chapter 58: "An Act Providing Access to Affordable, Quality, Accountable Health Care"

Chapter 58 creates three interwoven responsibilities designed to spread the cost of universal health insurance across individual residents, private businesses, and government.[63]

a. Individual Responsibility: The Mandate

Chapter 58 creates a responsibility for individual residents.[64] That responsibility began in July of 2007 when all residents eighteen years or older were required to obtain health insurance if it was "affordable" to them.[65] Lest the problem of uninsurance turn into a problem of underinsurance, Chapter 58 requires that plans meet the new Connector Board's standard of "minimum creditable coverage," mandating that insurance cover certain basic benefits, such as preventive care and mental health care.[66] The affordability contingency required the Connector Board to establish an "affordability schedule" each year containing income guidelines to determine who would be subject to financial penalties for not obtaining insurance.[67] Penalties resulted in loss of one's personal income tax exemption in the first year of implementation; after the first year, penalties amounted up to fifty percent of the equivalent premium of the least expensive insurance policy available during each month of insurance.[68] At first the mandate was controversial,[69] but lawmakers and residents found that it ultimately fit into Chapter 58's larger scheme to make health insurance more affordable for everyone as "it is a cornerstone to increasing access while reforming the insurance market."[70]

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63. *Id.*; *see* An Act Providing Access to Affordable, Quality, Accountable Health Care, ch. 58, 2006 Mass. Acts 77 (codified as amended in scattered sections of the Massachusetts General Laws).

64. *See* MASS. GEN. LAWS ch. 111M, §§ 1-5 (2008).

65. *Id.*

66. *See id.* § 1.

67. Hager, *supra* note 1, at 15.

68. § 2; *see* Hager, *supra* note 1, at 15.

69. *See* William C. Symonds, *In Massachusetts, Health Care For All?*, BUSINESS WEEK, Apr. 4, 2006, http://www.businessweek.com/investor/content/apr2006/pi20060404_152510.htm.

70. Chirba-Martin & Torres, *supra* note 18, at 415.

b. Employer Responsibility

Several provisions of Chapter 58 address employer responsibility for the health coverage of employees.[71] At the time Chapter 58 was enacted, over 200,000 Massachusetts residents earned more than 300% of the federal poverty level but were unable or unwilling to purchase private insurance.[72] Many of these individuals worked for small and medium-sized businesses that did not offer health benefits.[73] Chapter 58's "Fair Share Contribution" provision requires employers with eleven or more full-time workers to make a "fair and reasonable" contribution toward their worker's health insurance premiums or pay $295 per worker, per year.[74] This, along with a few other similar provisions, was designed to encourage employers to take responsibility for the health of their workers who are now required by the state to purchase health insurance.[75]

c. Government Responsibility: New Programs, New Entitlements

In order to balance the significant new individual and employer responsibilities for improved health care access, Chapter 58 committed the state to a "significant investment of resources to support the ability of individuals to obtain affordable insurance."[76] In addition to its increased support for MassHealth, the legislature created an administrative agency, the Connector, charged with implementing and operating the new program Commonwealth Care.[77] Commonwealth Care is designed to help Massachusetts's low-income population—those who earn too much to qualify for MassHealth but not enough to reasonably afford health insurance—obtain the coverage they need.[78]

i. The Commonwealth Care Health Insurance Connector and the Connector Board

Chapter 58 created the Connector as an independent administrative agency.[79] The Connector is governed by the Connector Board, which is

71. Hager, *supra* note 1, at 16.

72. Chirba-Martin & Torres, *supra* note 18, at 419.

73. *See* Hager, *supra* note 1, at 16.

74. *Id.*

75. Hager, *Bold Experiment*, *supra* note 3, at 1325.

76. Hager, *supra* note 1, at 20.

77. *Id.* at 15.

78. *See* MASS. GEN. LAWS ch. 118H, § 2 (2008); *see also supra* Part I.A.2.

79. Ch. 176Q, § 2(a). A legislature can create an independent agency when it wants the agency to have some independence from executive control. *See* WILLIAM F. FOX,

comprised of a combination of ten members including insurance commissioners, gubernatorial and attorney general appointees, and representatives from small businesses and consumer organizations.[80] One of the Connector's biggest responsibilities is to administer the Commonwealth Care program, which was created to provide "subsidies to assist eligible individuals in purchasing health insurance."[81] Specifically, the legislature charged the Connector with establishing application, eligibility, enrollment, and appeals procedures for Commonwealth Care.[82]

ii. Commonwealth Care Program Details and Eligibility Requirements

Commonwealth Care has been instrumental in relieving low-income individuals and families from the financial burdens of unaffordable health insurance.[83] The program subsidizes health insurance plans for eligible residents.[84] An individual is eligible for Commonwealth Care if his household income does not exceed 300% of the federal poverty level, he has been a resident of Massachusetts for six months prior to application, and he is not eligible for any other state or federal health care program.[85] In addition, the individual must be unable to afford employer-sponsored insurance.[86] According to the statute, "[a]ll residents . . . have the right to

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UNDERSTANDING ADMINISTRATIVE LAW 9 (5th ed. 2008). Usually an independent agency will be run by a combination of political interests, not simply by people connected to the executive's political party, as is normally the case with traditional executive branch agencies. *Id.*

80. Ch. 176Q, § 2(b).

81. Ch. 118H, § 2.

82. Ch. 176Q, § 3(a)(4)&(6); *see also* 956 MASS. CODE REGS. 3.00 (2006) (codifying the Connector Board's administrative regulations concerning the eligibility and hearing process for Commonwealth Care).

83. *See* Health Connector, Welcome to Commonwealth Care, Overview http://www.mahealthconnector.org/portal/site/connector/ (follow "Commonwealth Care" hyperlink) (last visited Feb. 1, 2010).

84. *See* Hager, *Bold Experiment*, *supra* note 3, at 1322.

85. MASS. GEN. LAWS ch. 118H, § 3(a).

86. § 3(a)(4).

> An uninsured individual shall be eligible to participate in the program if . . . the individual's or family member's employer has not provided health insurance coverage in the last [six] months for which the individual is eligible and for which the employer covers at least [twenty] per cent [sic] of the annual premium cost of a family health insurance plan or at least [thirty-three] per cent [sic] of an individual health insurance plan.

Id.

apply for the program[,] . . . the right to receive a written determination detailing denial of eligibility, and the right to appeal any eligibility decision."[87]

Participants in Commonwealth Care with an income at or below 100% of the federal poverty level do not have to pay monthly premiums.[88] Participants with "income between 100%-150% of the federal poverty level can choose a plan without premiums, or choose a more expensive plan" with a monthly premium.[89] Those who earn between 200% and 300% of the federal poverty level pay small premiums on a sliding scale between $77 and $116 per month.[90] Most participants have a co-pay for doctors visits, hospital stays, and prescription drugs, which are also calculated on a sliding scale according to household income.[91] Participants who fall at or below 100% of the federal poverty level have co-pays of one to three dollars.[92] There are no deductibles.[93]

Once the Connector deems an individual eligible for Commonwealth Care, he may choose from a subsidized plan in his region and proceed to avail himself of benefits such as regular checkups, treatment when sick or injured, prescriptions at the local pharmacy, vision and dental care, mental health or substance abuse treatment.[94] The program serves as an immense help to residents whose income is not low enough to qualify for MassHealth and who are unable to afford to buy into a private health insurance plan.[95] Since the state enacted Chapter 58 in 2006, more than 194,000 people have been newly insured with Commonwealth Care.[96] One Everett man reported, "[o]nce I lost my job, I lost my health insurance. I basically had nothing else left until I got [Commonwealth Care]. Fortunately, I can now get insurance that's cost-effective for me."[97] Another Centerville man said that after losing his job and being unable to

87. § 4.

88. Healthcare for All, Health Care Resources: Commonwealth Care, http://hcfama.org/index.cfm?fuseaction=page.viewpage&pageid=498 (last visited Feb. 1, 2010).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *See* Health Connector, *supra* note 83.

95. *See generally* Health Connector, The People Behind the Numbers, http://www.mahealthconnector.org/portal/site/connector/menuitem.578a81dd8ea8984a4b8e8910c6398041 (last visited Feb. 1, 2010).

96. *Id.*

97. *Id.*

afford COBRA, he signed up for Commonwealth Care[98]: "Since then, I've broken my leg, had a double hernia operation and had two MRI's taken. I would have never been able to afford all those medical bills without [Commonwealth Care]. I'm extremely lucky."[99]

2. The ESI Waiver Problem

These accounts show that Massachusetts residents are, in fact, lucky compared to traditionally uninsured populations elsewhere in America.[100] Commonwealth Care has made it possible for those who would otherwise be unable to qualify for the state Medicaid program, and unable to afford private insurance, to access much-needed medical care.[101] However, the program has its own gap, one for which the legislature provided a solution but has nonetheless gone unaddressed.[102] In order to be eligible for Commonwealth Care, employer-sponsored insurance must be "unavailable" to the individual or household because either the individual's employer does not provide health coverage for which the individual is eligible, or the individual cannot afford the employer-sponsored insurance offered to him.[103] The gap exists where an individual has "affordable" employer-sponsored insurance available to him according to the affordability schedule, but because of the reality of his economic situation, he is actually unable to afford the insurance.[104]

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98. *Id.* COBRA stands for The Consolidated Omnibus Budget Reconciliation Act, which

> gives workers and their families who lose their health benefits the right to choose to continue group health benefits . . . for limited periods of time under certain circumstances such as voluntary or involuntary job loss, reduction in the hours worked, transition between jobs, death, divorce and other life events.

United States Department of Labor, Find It! By Topic, Health Plans & Benefits, Continuation of Health Coverage—COBRA, http://www.dol.gov/dol/topic/health-plans/cobra.htm (last visited Feb. 1, 2010).

99. The People Behind the Numbers, *supra* note 95.

100. *See supra* Parts I.A-B (discussing the plight of Americans who are unable to afford health insurance).

101. *See generally* The People Behind the Numbers, *supra* note 95.

102. *See* MASS. GEN. LAWS ch. 118H, § 3(a)(4)-(5), (b) (2008).

103. *See* § 3(a)(4)-(5). The statute defines an "affordable" plan as one "for which the employer covers at least [twenty] per cent [sic] of the annual premium cost of a family health insurance plan or at least [thirty-three] per cent [sic] of an individual health insurance plan." *Id.*

104. *See id.*; Connector Memo, *supra* note 10; *see also* Posting of Diana Ong & Lindsey Tucker to A Healthy Blog, http://blog.hcfama.org/?p=1626 (May 8, 2008, 19:31 EST).

The legislature provided a solution to this problem by providing for an ESI Waiver.[105] It added a specific provision to the Commonwealth Care statute that enables the Connector to waive the requirement that affordable employer-sponsored insurance be unavailable if the individual's employer complies with one of four different laws.[106] The text of this provision reads: "The board may waive [the unaffordable employer-sponsored insurance requirement], if the individual's employer complies with section 110 of chapter 175, section 8 1/2 of chapter 176A, section 3B of chapter 176B or section 6A of chapter 176G."[107] If an individual's situation meets this criteria, the Connector Board may decide to waive the individual into Commonwealth Care, despite the fact that he could technically "afford" the employer-sponsored insurance available to him according to the state's definition of affordability.[108]

Despite the importance of this provision and its extensive legislative history, the Connector Board made it a policy from the beginning to categorically refuse to review, grant, or deny all waiver applications.[109] According to Christie Hager, who served as Chief Health Counsel to the Massachusetts Speaker of the House of Representatives during the drafting and passage of Chapter 58, the legislature intended to leave a lot of

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105. § 3(b).

106. *Id.* In order for an individual to be eligible for an ESI waiver, his employer must comply with Massachusetts General Laws chapter 175, section 110; Massachusetts General Laws chapter 176A, section 8 1/2; Massachusetts General Laws chapter 176B, section 3B; and, Massachusetts General Laws chapter 176G, section 6A. *Id.* Chapter 175, section 110 deals with the blanket rules and policies that all employers must generally follow when offering a health plan to employees. MASS. GEN. LAWS. ch. 175, § 110. Chapter 176A, section 8 1/2 states:

> A corporation organized under [chapter 176A: Corporations] may only contract to sell a group non-profit hospital service contract to an employer if the group non-profit hospital service contract is offered by that employer to all full-time employees who live in the commonwealth; provided . . . [that] the employer shall not make a smaller health insurance premium contribution percentage amount to an employee than the employer makes to any other employee who receives an equal or greater total hourly or annual salary for each specific or general blanket policy of insurance for all employees.

Ch. 176A, § 8 1/2; *see also* ch. 176B, § 3B; ch. 176G, § 6A; ch. 175, § 110.

107. Ch. 118H, § 3(b).

108. *See id.*

109. *See* Connector Memo, *supra* note 10 (concluding that "the operational complexities of any effort [to implement an ESI waiver program] would be significant, and as such, it would not be possible for any implementation to be in place in FY09"); *see also* Posting of Diana Ong & Lindsey Tucker to A Healthy Blog, http://blog.hcfama.org/?p=1626 (May 8, 2008, 19:31 EST).

administrative flexibility to the Connector Board.[110] However, Ms. Hager said that the legislature anticipated that the Connector may be able to determine an individual's eligibility for the ESI Waiver on a case-by-case basis.[111] When the legislation was first passed and the Connector first implemented, the experimental Connector Board was not ready to address methods for waiver implementation.[112] The legislature understood that the Connector needed the flexibility to decide how to implement the various programs created by Chapter 58, which is why the language of the Commonwealth Care program eligibility statute provides that the Connector "may"—not "shall"—grant the ESI Waiver to a given applicant.[113] However, Ms. Hager said the legislature did contemplate that the Connector would implement some kind of waiver application process if feasible.[114]

By 2007, the Connector Board still had not implemented a process for an ESI Waiver application.[115] Instead, the Connector Board continued to deny all applications without any form of review.[116] The legislature addressed its concern that the process had not been implemented in: "An Act Further Regulating Health Care Access" ("Chapter 205").[117] This provision states that:

> The commonwealth health insurance connector . . . shall publish a report on implementation of [the ESI Waiver provision, found at] subsection (b) of section 3 of chapter 118H of the General Laws, including the number of eligible individuals enrolled in the [C]ommonwealth [C]are health insurance program and the projected premium contribution amounts to be paid by

110. Interview with Christie Hager, Chief Health Counsel to Massachusetts Speaker of the House of Representatives, in Boston, Mass. (Jan. 15, 2009) [hereinafter Hager Interview].

111. *Id.*

112. *See* Connector Memo, *supra* note 10.

113. *Id.*

114. *Id.*

115. *See* Posting of Diana Ong & Lindsey Tucker to A Healthy Blog, http://blog.hcfama.org/?p=1626 (May 8, 2008, 19:31 EST).

116. *See id.* ("Secretary Kirwan concluded that, given the unmet financial challenges of CommCare, the Connector needs to proceed cautiously. She suggested that the staff take no action [on ESI waiver implementation] at this time . . . .").

117. Hager Interview, *supra* note 110; *see also* An Act Further Regulating Health Care Access, ch. 205, 2007 Mass. Acts 718 (codified as amended in scattered sections of Massachusetts General Laws).

> employers. The report shall be submitted not later than January 1, 2008 to the general court . . . .[118]

According to Ms. Hager, by adding this amendment, the legislature gave the Connector Board a tool with which to begin analyzing the feasibility of ESI Waiver implementation.[119]

Despite the original ESI Waiver provision in Chapter 58 and the subsequent provision in Chapter 205, the Connector follows its original policy to immediately and automatically refuse all waiver applications.[120] This is a violation of an applicant's due process rights to an individualized application process.[121]

II. The Procedural Protections of the Due Process Clause[122]

By providing specific criteria for which an applicant is eligible for the ESI Waiver in the Commonwealth Care statute,[123] enacting an amendment directing the Connector to implement a waiver process and generally intending for all residents to have access to affordable health insurance, the Massachusetts legislature created a property interest in the right to ESI Waiver application review.[124] Once a state property interest is created, the state must afford certain due process protections to the individual or group with the property interest.[125] This section reviews basic due process principles and shows when and to what extent administrative agencies such as the Connector must afford constitutional due process rights.

A. There Must Be a State Interest for the Due Process Clause to Apply.

For due process protections to attach, there must be a state action that deprives a person of an interest secured by the Constitution or laws of the United States.[126] The interest at issue need not be a constitutional right, but

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118. 2007 Mass. Acts 718.

119. Hager Interview, *supra* note 110.

120. *See* Connector Memo, *supra* note 10; *see also* Posting of Diana Ong & Lindsey Tucker to A Healthy Blog, http://blog.hcfama.org/?p=1626 (May 8, 2008, 19:31 EST).

121. *See infra* Part III.

122. The Fifth and Fourteenth Amendments to the United States Constitution provide that no person shall be deprived "of life, liberty, or property, without due process of law." U.S. CONST. amends. V, XIV, § 1.

123. MASS. GEN. LAWS ch. 118H, § 3(b) (2008).

124. *See infra* Part III.A.

125. *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 569-70 (1972).

126. Paul v. Davis, 424 U.S. 693, 700 (1976) (citing Monroe v. Pape, 365 U.S. 167, 171 (1961)).

it does need to be a right that is created and defined by "an independent source such as state statutes or rules entitling the citizen to certain benefits."[127] For example, the Supreme Court held that despite the lack of a constitutional right to education, a constitutionally protected property entitlement to public education exists where a state statute has a compulsory attendance law for state-provided public education.[128] The state cannot withdraw a property interest without utilizing the fundamentally fair procedures of the Due Process Clause.[129]

The Supreme Court has expanded property interests well beyond the traditional confines of the common law.[130] Prior to 1970, courts recognized property interests only in those forms of property that an individual acquired through his own labor, such as real estate or a bank account.[131] Individuals facing government deprivation of this type of property interest were always entitled to procedural due process rights, typically including the right to notice and a hearing.[132] In a 1970 case, *Goldberg v. Kelly*, the Court determined that an individual's interest in welfare deserved the protection of the Due Process Clause, and thus expanded the modern definition of a protected property interest to a host of public benefits.[133]

In *Goldberg*, the Supreme Court held that welfare benefits were, in fact, state created property interests, and therefore, recipients had the right to due process before those benefits were terminated.[134] In fact, the Court held that not only were welfare benefits a protected interest, but an individual must be afforded the utmost process before termination because termination of benefits could deprive claimants of their very means of subsistence.[135] Justice Brennan went on, "[s]uffice it to say that to cut off a welfare recipient in the face of 'brutal need' without a prior hearing of some sort is unconscionable."[136] Thus, due process protections are provided to those property interests that aid the "*security* and *independence*" of an individual who relies on government assurance of essentials.[137] This

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127. Goss v. Lopez, 419 U.S. 565, 572-73 (1975) (citing *Roth*, 408 U.S. at 577).

128. *Id.* at 574.

129. *Id.*

130. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 261 (1970).

131. *See* Amy McCamphill, Note, *More Bitter Than Sweet: A Procedural Due Process Critique of Certification Periods*, 109 COLUM. L. REV. 138, 142 (2009).

132. *Id.*

133. *Id.* at 144.

134. *See Goldberg*, 397 U.S. at 261, 262 n.8.

135. *See id.* at 262 & n.8, 263, 266.

136. *Id.* at 261 (alteration omitted) (quoting Kelly v. Wyman, 294 F. Supp. 893, 899-900 (1968)).

137. *Id.* at 262 n.8 (emphasis added) (citing Charles A. Reich, *Individual Rights and*

language shows that the Court left the door open to many different kinds of property interests, including traditional common law property, as well as rights, interests and benefits created by the state and bestowed on eligible individuals.[138]

B. Necessary Due Process Protections

Once a court finds that an interest is a "protected interest" for due process purposes, generally, an individual must be afforded at least notice or both a notice and a hearing prior to a deprivation of a protected interest.[139] However, the amount of process that is constitutionally required is not static; rather, it is flexible and calls for protections as the particular situation demands.[140] In order to determine the extent of the process that is constitutionally necessary, a court must consider the governmental and private interests affected.[141] The Supreme Court articulated a three-part test to determine the amount of process a state must give before deprivation of a protected interest. To determine what amount of process is appropriate a court must balance: (1) the importance of an individual's interest in the benefit; (2) the adequacy of the procedures in place; and (3) the feasibility of creating additional safeguards.[142] However, no matter the outcome of the balancing test, some form of notice or a hearing before the deprivation is considered a paramount constitutional protection.[143]

Upon performing this balancing test to determine the amount of process due, courts must consider Justice Brennan's rationale for finding that a hearing is necessary before deprivation of welfare.[144] In *Goldberg*, the Supreme Court found that it must take into account an individual's reliance on welfare and the grievous loss that would likely occur as a result of deprivation when deciding the amount of process that was due.[145] In

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Social Welfare: The Emerging Legal Issues, 74 YALE L.J. 1245, 1255 (1965)).

138. *See id.* The Fourteenth Amendment also ensures the availability of due process rights in a variety of contexts, as it states that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. The Court determined that the vagueness of the terms "liberty" and "property" in the Due Process Clause are a necessity, as the framers of the Constitution contemplated that for society to progress there needs to be a way for its laws and values to progress as well. *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 571 (1972).

139. *Roth*, 408 U.S. at 570 n.7 (citing Bell v. Burson, 402 U.S. 535, 542 (1971)).

140. Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

141. *Id.*

142. *See id.*

143. *See Roth*, 408 U.S. at 570-71 nn.7-8.

144. *See* Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970).

145. *Id.*

doing so, it held that the more potential loss is likely to result in extreme hardship or the inability to access necessities for subsistence, the more process the state is required to provide before deprivation.[146] Therefore, a court must provide the utmost process to an individual in danger of losing a necessary benefit before it decides to deprive him of that benefit.[147] In *Goldberg*, that meant that the state had to give welfare recipients notice and a hearing before terminating their benefits because, the Court reasoned, without a considerable amount of process, the state would be in danger of wrongfully and unconscionably terminating benefits that recipients relied on for their very subsistence.[148]

C. Due Process Protections in an Administrative Setting

When an administrative agency, like the Connector Board, is the government entity charged with extending, refusing, or terminating benefits, the statutory source of any entitlement interest is the agency's enabling act.[149] If the enabling act gives the agency absolute discretion to make a finding, then the act does not create a due process entitlement to a property interest.[150] However, when an enabling act does not give an agency discretion, but rather provides that the agency "shall" make a decision based on a supplied set of guidelines, then the legislature has created a property interest that is protected by the Due Process Clause.[151]

For example, in *Board of Pardons v. Allen*, the Court reviewed a state statute that provided that "[a] prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen."[152] The Court found that the legislature's use of the word "shall" created a cognizable interest on the part of a prisoner seeking parole protected by the Due Process Clause, even though the board had some discretion to decide whether a prisoner would be a danger to society upon release.[153] The Court reasoned that the statute's use of the word "shall" made release mandatory after the requisite finding was made, thereby stripping the agency of complete discretionary powers and creating a property interest.[154] However, the Court found that if discretion of agency

146. *See id.*

147. *See id.*

148. *Id.*

149. *See* FOX, *supra* note 79, at 14-15, 123.

150. *See id.* at 127.

151. *See, e.g.*, Bd. of Pardons v. Allen, 482 U.S. 369, 376-77 (1987).

152. *Id.* at 376-77 (quoting MONT. CODE ANN. § 46-23-201 (1985)).

153. *Id.* at 381.

154. *See id.*

officials is not narrowed by statutory language, then no property interest had been created.[155]

A comparison of two Massachusetts cases helps clarify this rule.[156] In its seminal case regarding due process rights in an administrative context, *School Committee of Hatfield v. Board of Education*, the Supreme Judicial Court found that no property interest existed because the language of the deciding agency's enabling act left the determination almost entirely to the agency's discretion.[157] The enabling act provided, "upon receipt of an application . . . the (board) shall examine such application . . . and shall determine whether the proposed construction is in the best interests of the city."[158] The court reasoned that no property interest was created because the enabling act "provided no explicit standards for determining eligibility . . . and left to the discretion of the board the determination whether the proposed construction would be in the best interest of the town."[159] The court continued, "[s]uch discretion negates any claim of entitlement which would mandate the protection of the due process clause."[160] This holding demonstrates that when the language of an enabling act is discretionary and does not supply the agency a criterion within which to make its decision, the legislature has not created a protected property interest.[161]

In *Madera v. Secretary of the Executive Office of Communities and Development*,[162] the Supreme Judicial Court found that the claimant had an identifiable property interest in the review of his application for state funded public housing.[163] Upon conducting its inquiry into whether a property interest existed, the court noted that "to the extent the agency or other entity responsible for awarding the benefit possesses discretion to decide whether to grant or withhold the benefit, it becomes less likely that a potential recipient will be found to have a constitutionally protected

155. *See id.* at 375-76.

156. *Compare* Sch. Comm. of Hatfield v. Bd. of Educ., 363 N.E.2d 237, 239-40 (Mass. 1977) (holding that no due process interest existed when the enabling act gave the agency full discretion), *with* Madera v. Sec'y of the Executive Office of Cmtys. and Dev., 636 N.E.2d 1326, 1330 (Mass. 1994) (holding that a due process interest existed where the enabling language gave the agency limited discretion).

157. *Hatfield*, 363 N.E.2d at 239-40.

158. *Id.* at 239 (alterations omitted).

159. *Id.*

160. *Id.* at 239.

161. *See id.* at 238-39.

162. 636 N.E.2d 1326 (Mass. 1994).

163. *Id.* at 1331.

property interest."[164] Thus, the more discretionary power the legislature gives an agency for decision-making purposes, the less likely it is that a court will find a protected due process property interest.[165] In *Madera*, the rules giving the agency the power to grant or deny public housing provided only eight reasons for which the agency could deny an application.[166] The court found that the "regulations governing tenant selection by authorities [left] room for the exercise of discretion *only* in the application of clearly defined legal criteria, and not for other, unspecified reasons."[167] Therefore, "an applicant has an identifiable interest in his position on the list of individuals eligible for public housing."[168]

Further, the *Madera* court noted that "[i]n numerous cases . . . lower courts have accorded due process rights to the applicants for public benefits."[169] The court found that "[i]t would be inconsistent with any intelligible rationale underlying due process protection to deny all procedural safeguards to the new applicant where the law provides that all individuals meeting certain objective criteria are entitled to, say, welfare."[170] Thus, the Supreme Judicial Court mandates that agencies must afford applicants for state benefits some form of individualized review of their applications.[171]

The court also considered a housing applicant's "brutal need" for a housing benefit finding "[f]or a person in the plaintiff's position, public housing is very likely to be housing of last resort and, it is self-evident that the availability of such housing is of critical importance."[172] Thus, because the legislature provided criteria in the language of the rule, thereby curtailing agency discretion, it created a property interest in an application

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164. *Id.* at 1330.

165. *See id.*

166. *Id.* at 1330-31 & n.9. "An applicant who is otherwise eligible may be disqualified for public housing by an authority only for one of eight reasons set out in [the regulations]." *Id.* at 1330-31 (citing 760 MASS. CODE REGS. 5.09 (1989)).

167. *Id.* at 1331.

168. *Madera*, 636 N.E.2d at 1331.

169. *Id.* at 1332 (alterations omitted) (internal quotations omitted) (quoting Butland v. Bowen, 673 F. Supp. 638, 641 (D. Mass. 1987)). For additional cases that held that applications for public assistance were entitled to due process protection see *Wright v. Califano*, 587 F.2d 345, 354-56 (7th Cir. 1978); *Holmes v. N.Y. City Housing Authority*, 398 F.2d 262, 265 (2d Cir. 1968); *Dealy v. Heckler*, 616 F. Supp. 880, 886 (W.D. Mo. 1984); *Correia v. Department of Public Welfare*, 605 N.E.2d 1233, 1239 (Mass. 1993).

170. *Madera*, 636 N.E.2d at 1332 (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 690 (2d ed. 1988)).

171. *See id.*

172. *Id.*; *see also supra* notes 130-36 and accompanying text.

for public housing.[173] That criteria combined with an applicant's "brutal need" for a housing benefit created a constitutionally protected property interest.[174] Other courts and scholars agree that, if an applicant needs access to a particular benefit for his very subsistence, it is more than likely that a due process interest in the benefit exists.[175]

Thus, the language in an agency's enabling act shows whether the legislature gave an agency absolute discretion in its decision-making power, or gave individuals a property interest in certain agency actions, including the right for application review.[176] An analysis of the statutory language will prove to be the key to the inquiry of whether the legislature has created a due process interest in a certain benefit.[177] Although the Supreme Court has decided a number of cases which have strictly construed statutory language that grants powers to administrative agencies, courts will favor a liberal interpretation of a statute that enables the full benefits of a state program to be realized.[178]

III. Every ESI Waiver Application Is Entitled to Due Process.

Individuals have a due process interest in a Connector review of their ESI Waiver applications.[179] Both the language of the Commonwealth Care enabling act and the overall policy reasons for adopting Chapter 58 created this interest.[180] Thus, by immediately and automatically refusing to review all ESI Waiver applications, the Connector Board is acting outside of its administrative powers and denying applicants their due process right to full

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173. *See Madera*, 636 N.E.2d at 1332.

174. *See id.*

175. *See* McCamphill, *supra* note 131, at 180 (arguing that courts should begin to "consider more seriously the importance of a claimant's personal interest in any given governmental deprivation at step one of the due process analysis," as "[s]uch an approach is both more equitable and more logical" than considering the personal interest only when deciding how much process is due).

176. *See Madera*, 636 N.E.2d at 1330; Sch. Comm. of Hatfield v. Bd. of Educ., 363 N.E.2d 237, 239 (Mass. 1977). In his separate opinion in *Arnett v. Kennedy*, Justice Marshall went so far as to suggest that whenever a government agency takes action that adversely affects a private citizen, that citizen is due some process. Arnett v. Kennedy, 416 U.S. 134, 215 (1974) (Marshall, J., dissenting) (quoting Greene v. McElroy, 360 U.S. 474, 496-97 (1959)).

177. *See generally Madera*, 636 N.E.2d at 1330-31; *Hatfield*, 363 N.E.2d at 239.

178. NORMAN SINGER, 3 STATUTES AND STATUTORY CONSTRUCTION § 65:3 (7th ed. 2008).

179. *See* MASS. GEN. LAWS ch. 118H, § 3(b) (2008).

180. *See id.*; An Act Further Regulating Health Care Access, ch. 205, 2007 Mass. Acts 718 (codified as amended in various sections of the Massachusetts General Laws); *see also infra* Part III.A.

review of their applications.[181] Further, because an individual applicant has a "brutal need" for health insurance access, similar to a welfare recipient's need for welfare benefits, the Connector must afford each application the utmost process—a thorough review of every individual application.[182]

A. There Is a Property Interest in the Right to Review an ESI Waiver Application.

The language of the Commonwealth Care enabling statute, the subsequent related legislation, and the language of other sections of Chapter 58 create a due process property interest in a thorough review of an individual's ESI Waiver application.[183] By enacting this legislation, Massachusetts created a property interest in the review of its residents' applications for ESI Waivers.[184] The statutory criteria of Massachusetts General Laws Chapter 118 H, Sections 3(b) and 4 and Chapter 205 create a property interest in the right to review.

1. Massachusetts General Laws, Chapter 118H, Section 3(b)

Because Massachusetts General Laws chapter 118H, section 3(b) provides four specific criteria dictating when an applicant is eligible for the ESI Waiver, it is clear that the legislature intended for the Connector Board to consider each waiver application individually.[185] Similar to the provisions at issue in *Madera*, the statute gives the Connector Board a list of finite criteria within which to approve a waiver application.[186] Thus, the Connector Board has limited discretion—it must act within this legislature-provided statutory criteria.[187]

Presumably, if the applicant's employer complies with one of the four requirements listed in the statute, then an individual is entitled to take part in the waiver process and have an opportunity for the Connector to approve or deny his or her application.[188] There is no language in the statute that gives the Connector unlimited discretion to automatically deny any waiver application: the statute says that the board may grant the waiver "if the

181. *See* § 3(b); *see also supra* Part II.C; *infra* Part III.A.

182. *See* § 3(b); Goldberg v. Kelly, 397 U.S. 254, 261 (1970); *see also infra* Part III.B.

183. *See* § 3(b); *see also* 2007 Mass. Acts 718.

184. *See* § 3(b).

185. *See* § 3(b); *see also supra* Part I.B.2.

186. § 3(b); *see also supra* notes 105-108 and accompanying text.

187. MASS. GEN. LAWS ch. 118H, § 3(b) (2008); *see supra* notes 105-108 and accompanying text; *see also supra* Part II.C.

188. § 3(b); *see also* notes 105-108 and accompanying text; *supra* Part II.C.

individual's employer complies with" the four requirements supplied.[189] This standard is not subjective like that in *Hatfield*, but rather appears within the four corners of the statute.[190] Also, the statute does not include language that would suggest that the Connector may use a factor not listed in the criterion provided in the statute when making the waiver decision.[191]

Therefore, the legislature did not give the Connector the discretion to refuse waivers unless the eligibility criteria provided in the statute was utilized.[192] Thus, the statute clearly mandates that the Connector implement the process provided in the statute to determine whether an individual applicant is eligible for the ESI Waiver.[193] This mandate creates a due process interest in a case-by-case waiver determination.[194]

2. Massachusetts General Laws, Chapter 118H, Section 4

Under this provision, "[a]ll residents *shall* have the right . . . to appeal any eligibility decision, provided such appeal is conducted pursuant to the process established by [the Connector]."[195] The use of the word "shall" shows that the legislature requires the Connector to hear appeals from "any eligibility decision."[196] "Any eligibility decision" presumably includes a decision not to grant an ESI Waiver.[197] In order for there to be an appeal, there has to be an individualized decision.[198] Thus, the Connector is required to give an ESI Waiver applicant an individualized process and decision.[199] Therefore, the statute created a property interest in the waiver process.[200]

3. Chapter 205

The legislature passed Chapter 205 as a direct response to the fact that the Connector had not formally addressed the ESI Waiver provision or implemented any ESI Waiver application process.[201] The statute clearly

189. § 3(b); *see also supra* notes 105-108 and accompanying text.

190. § 3(b); *cf. supra* notes 156-160 and accompanying text.

191. *See* § 3(b).

192. *See id.*; *see also supra* Part II.C.

193. MASS. GEN. LAWS ch. 118H, § 3(b) (2008).

194. *See id.*

195. § 4 (emphasis added).

196. *See id.*

197. *See id.*

198. *See* Londoner v. Denver, 210 U.S. 373, 385 (1908).

199. § 4.

200. *See id.*

201. *See* Hager Interview, *supra* note 110. *See generally* An Act Further Regulating Health Care Access, ch. 205, 2007 Mass. Acts 718.

shows that the legislature expected the Connector to implement a waiver process.[202] Chapter 205 uses the word "shall" throughout the entire provision.[203] This language creates a due process interest in the waiver process because it takes away any discretion the Connector may have had to decide whether to begin waiver implementation.[204] Also, by telling the Connector it "shall publish a report" on the "number of eligible individuals enrolled in the commonwealth care health insurance program," the legislature required the Connector to determine eligibility on an individual basis thereby creating a due process interest in the waiver process.[205]

Therefore, because the language of Massachusetts General Laws chapter 118H, sections 3(b) and 4 and Chapter 205 do not give the Connector the discretion to, as a policy, refuse to review any and all ESI Waiver applications, the Massachusetts Legislature created a due process interest in an individualized waiver process.[206] To be clear, the statutes give the Connector the discretion to *grant* an ESI Waiver application—i.e., to determine whether an applicant is eligible—but the Connector must nonetheless consider all ESI Waiver applications individually in order to comport with the Due Process Clause. [207]

4. Chapter 58 Shows that the Legislature Intended for the Connector to Create an ESI Waiver Process.

Chapter 58 was carefully drafted.[208] When all of the sections of Chapter 58 are read together, it is clear that the legislature intended for the Connector to give claimants a process by which to apply for the ESI Waiver.[209] The language of the individual mandate provision provides that individuals eighteen or over must obtain health insurance "as it is deemed

202. 2007 Mass. Acts 718.

203. *Id.*

204. *See id.*; *see also supra* Part II.C.

205. 2007 Mass. Acts 718; *see supra* Part II.C.

206. MASS. GEN. LAWS ch. 118H, § 3(b) (2008); 2007 Mass. Acts 718; *see also supra* Part II.C.

207. *See* MASS. GEN. LAWS ch. 118H, § 3(b). The Commonwealth Care Enabling Act says that the Connector "may" waive the provision that an individual not have "affordable" health care available to her through her employer. *Id.* This indicates that the decision to grant a waiver may be discretionary, but creating a process by which to determine eligibility on a case by case basis is not. *See id.*; *see also supra* Part II.C.

208. Hager Interview, *supra* note 110.

209. *See generally* An Act Providing Access to Affordable, Quality, Accountable Health Care, ch. 58, 2006 Mass. Acts 77 (codified as amended in scattered sections of the Massachusetts General Laws).

affordable" to them.[210] This language shows that affordability is essential to the mandate itself.[211] The legislature understood that not all private insurance offered by employers is affordable; it clearly wanted to avoid individuals having to choose between buying into an employer-sponsored insurance plan and other basic necessities.[212] The ESI Waiver provision is designed to address this problem.[213] Without waiver implementation, health insurance becomes "unaffordable" to many residents and they are denied access to Commonwealth Care without due process of law.[214] The Connector's failure to implement an ESI Waiver process is contrary to the very intent of Chapter 58 and the legislature's clear objective to create a system that provides affordable health insurance to all Massachusetts residents.[215] Therefore, the Connector has no authority to adopt a position denying waiver review.[216]

Thus, the finite legal criteria provided to the Connector in chapter 118H, section 3(b) and the provisions that suggest an adoption of a liberal policy towards granting ESI Waivers both demonstrate that ESI Waiver applicants have a protected due process interest to an individualized decision-making process.[217] By not affording individualized process, the Connector is not affording ESI Waiver applicants due process of law.[218]

B. Due Process Requirements Demand Individualized Inquiry for Each ESI Waiver Application.

Since ESI Waiver applicants have a due process interest in the right to review and individualized granting or denial of their waiver applications, the Due Process Clause requires Massachusetts to provide applicants some procedural due process in its decision making.[219] In this case, the Connector must afford each ESI Waiver applicant the utmost process because applicants have a "brutal need" for Commonwealth Care.[220] Therefore, an

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210. MASS. GEN. LAWS ch. 111M, § 2(a)-(b) (2008).

211. *See id.*

212. Hager Interview, *supra* note 110; *see* Candace Nuzoo, *The Uninsured in America: Health Insurance Mandate Tested in Massachusetts*, PBS ONLINE NEWS HOUR, Mar. 4, 2008, http://www.pbs.org/newshour/indepth_coverage/health/uninsured/massachusestts_update.html.

213. Hager Interview, *supra* note 110; *see also supra* Part I.B.2.

214. Nuzoo, *supra* note 212; *see supra* Part I.B.2.

215. *See* Chirba-Martin & Torres, *supra* note 18, at 415; *see supra* Part I.B.2.

216. *See* MASS. GEN. LAWS ch. 118H, § 3(b) (2008); *see also supra* Part II.C.

217. § 3(b); *see also supra* Part II.C.

218. *See supra* Part II.C.

219. *See* Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 569-70 (1972).

220. *See* Goldberg v. Kelly, 397 U.S. 254, 261, 264 (1970); *see also supra* Part I.A.

individualized, case-by-case determination for every ESI Waiver application is necessary.[221]

1. The Private Interest Affected by Connector Action Is Extremely Great.

As discussed in detail above, the plight of low-income individuals struggling for health insurance is horrific. These individuals must often choose between paying health insurance premiums and paying for other basic necessities such as food, housing, transportation, and child care.[222] Those in poor health are forced to choose between two life-sustaining medications each month in order to survive.[223] Thus, for a low-income Massachusetts resident, the difference between having and not having access to Commonwealth Care can mean the difference between being hungry and being able to afford groceries or between taking or not taking insulin for diabetes—essentially between life and death. This is the kind of "brutal need" that Justice Brennan described in *Goldberg*.[224] Thus a thorough, individualized inquiry into each applicant's eligibility is necessary to comport with the Due Process Clause.

2. The Risk of an Erroneous Deprivation of the Interest Is Overwhelming.

As discussed above, the Connector Board has not implemented an ESI Waiver eligibility process.[225] This makes the possibility of an erroneous deprivation of someone who is eligible for the ESI Waiver almost inevitable as there are, more than likely, plenty of residents who meet the eligibility criteria provided for in the Commonwealth Care enabling act.[226] Without individualized process for every single ESI Waiver application, the Connector is wrongly denying eligible individuals a property interest.[227]

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221. § 3(b); An Act Further Regulating Health Care Access, ch. 205, 2007 Mass. Acts 718; *see also supra* Part II.B.

222. *See supra* Part I.A.2; Long, *supra* note 41; *see also* DINAN, CAUTHEN & FASS, *supra* note 45 (describing a family that could be forced to forego health insurance if one of the parents lost employer-provided insurance).

223. *See supra* Part I.A.1; TURNING TO MEDICAID, *supra* note 17, at 9 (quoting a man who must choose between taking asthma and diabetes medication each month).

224. *See Goldberg*, 397 U.S. at 261.

225. *See* MASS. GEN. LAWS ch. 118H, § 3(b) (2008); *see also supra* Part II.C.

226. *See* § 3(b). As of 2006, there were 1,392,731 people (or twenty-two percent of the population) earning below 200% of the federal poverty level. COALITION ON HUMAN NEEDS, DEPTH OF POVERTY BY STATE, 2006 (2007), http://www.chn.org/pdf/2007/depthstatepov.pdf.

227. *See supra* Part I.B.2 (explaining that the Connector immediately and automatically refuses to grant any and all ESI waiver applications).

Therefore, individualized process for every application is necessary in order to afford applicants their due process rights.[228]

3. The Government Interests Do Not Justify the Failure to Create an Individualized Waiver Process.

The Connector stated that it has not implemented a waiver process both because it is unsure how to do so, and because granting waivers may be too costly and could possibly lead to a "crowd out" in the Commonwealth Care health care system.[229] These are not legitimate justifications for denying residents their due process right to have their applications for the ESI Waiver program reviewed, especially given the serious need for access to health insurance.[230] An application process would not limit the Connector's decision-making power after the application has been reviewed.[231] Since the statute gives the Connector discretion when deciding whether to grant the waiver to a particular applicant, it may choose not to grant the waiver at any time.[232] Therefore, the Connector can observe applicants' due process rights during the review process while still ensuring that the program does not become overcrowded.[233]

Also, individuals' dire need for health insurance and the great risk of erroneous deprivation far outweigh the cost of implementing a process.[234] Indeed, the U.S. Supreme Court has ruled time and time again that the seeming inability to find the financial resources to establish procedure

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228. *Compare* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (describing the due process test), *with supra* Part I.B.

229. "Crowding out" is when individuals choose to participate in an insurance program like Commonwealth Care when they could afford an alternative; in this case the alternative would be private, employer-sponsored insurance. Leighton Ku, *"Crowd-Out" Is Not the Same As Voluntarily Dropping Private Health Insurance for Public Program Coverage*, CENTER ON BUDGET AND POLICY PRIORITIES, Sept. 27, 2007, http://www.cbpp.org/files/9-27-07health.pdf; *see also* Connector Memo, *supra* note 10; Posting of Diana Ong & Lindsey Tucker to A Healthy Blog, http://blog.hcfama.org/?p=1626 (May 8, 2008, 19:31 EST).

230. *See Mathews*, 424 U.S. at 348 ("Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision.").

231. *See* MASS. GEN. LAWS ch. 118H, § 3(b); *see also supra* Part II.C.

232. *See* § 3(b); *see also supra* Part II.C.

233. *See* § 3(b); *see also supra* Part II.C.

234. *See* Massachusetts Budget and Policy Center, Budget Monitor: The FY 2009 Conference Committee Budget (July 11, 2008), http://www.massbudget.org/file_storage/documents/FY09ConferenceMonitor[1].pdf. Commonwealth Care is financed through "off budget" spending, meaning that the state does not pay for the program through line item appropriations on the budget. *Id.* Instead, funds from the General Fund are transferred into special trust funds, which then continue to be available for spending. *Id.*

cannot be the reason for denying necessary process to an individual.[235] In *Mathews*, the Court explicitly noted that, "[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision."[236] Therefore, an individualized consideration and review of every ESI Waiver application is the only way to protect applicants' due process rights.[237]

CONCLUSION

All ESI Waiver applicants have a due process right to an individual review of their applications.[238] The State Legislature created a property interest in an ESI Waiver process in the language of the Commonwealth Care Enabling Act, in its subsequent legislation, which was designed to further regulate the Connector Board's treatment of the ESI Waiver provision, and in the language throughout Chapter 58 in general.[239] Further, because low-income individuals have a "brutal need" for access to Commonwealth Care, the Connector Board must provide the utmost process—individualized inquiry into each ESI Waiver application—in order to comport with applicants' due process rights. Anything less than an individualized inquiry will result in an unnecessary deprivation of necessary benefits and an unfair application of the law.[240] Thus, the Connector Board must provide this process to all applicants in order to protect their due process rights.

Massachusetts health care reform has nearly succeeded in eradicating uninsurance in the Commonwealth.[241] One Boston doctor told this story:

> I once took care of a nineteen-year-old college student who had maxed out her [health] insurance coverage. She had a treatable but metastatic cancer. But neither she nor her parents could afford the radiation therapy that she required. I made calls to find state programs, charities—anything that could help her—to no

235. *See, e.g.*, Stanley v. Illinois, 405 U.S. 645, 656-57 (1972) ("[P]rocedure by presumption is always cheaper and easier than individualized determination. But when the procedure . . . explicitly disdains present realities . . . it needlessly risks running roughshod over the important interests.").

236. Mathews v. Eldridge, 424 U.S. 319, 348 (1976).

237. *See id.* at 335.

238. *See generally* § 3(b); *see also supra* Part III.

239. *See* §§ 3(b), 4; *supra* Part III; *see also generally* An Act Providing Access to Affordable, Quality, Accountable Health Care, ch. 58, 2006 Mass. Acts 77 (codified as amended in scattered sections of the Massachusetts General Laws).

240. *See Mathews*, 424 U.S. at 335; *see also supra* Part III.B.

241. *See supra* Part I.B.1; Gawande, *supra* note 20 (stating that after one year around ninety-seven percent of Massachusetts residents had health insurance coverage).

> avail. She put off the treatment for almost a year because she didn't want to force her parents to take out a second mortgage on their home. But eventually they had to choose between their daughter and their life's savings.[242]

That same Boston doctor reported that, since implementation of Chapter 58, "I haven't had a single Massachusetts patient who has had to ask how much the necessary tests will cost; not one who has told me he needed to put off his cancer operation until he found a job that provided [health] insurance coverage."[243]

Indeed, Massachusetts has taken bold steps toward taking responsibility for the health and welfare of its residents.[244] However, the legislation is still new—barely four years old—and, as the ESI wavier problem shows, the government is still struggling to find its way toward its ultimate goal of providing affordable, accountable coverage for every resident. We must push our state to continue closing the gaps in order to realize all of Chapter 58's policy goals. Recognizing a due process interest in a case-by-case review of ESI Waiver applications is a necessary step towards achieving "access to affordable, quality, accountable health care" for every resident.[245]

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242. Gawande, *supra* note 20.

243. *Id.*

244. *See supra* Part I.B.1; Gawande, *supra* note 20.

245. *See* An Act Providing Access to Affordable, Quality, Accountable Health Care, ch. 58, 2006 Mass. Acts 77 (codified as amended in scattered sections of the Massachusetts General Laws).

COMMENTS

WHY THE *KENNEDY V. LOUISIANA* HOLDING DOES NOT AFFORD MISSOURI A VOICE

Jessica Cullivan[*]

Abstract: A dramatic increase in the prevalence of child sexual abuse recently prompted the State of Missouri to impose harsher sanctions against such predators. In an attempt to protect these young victims, the Missouri Legislature enacted some of the toughest laws in the country. In addition to requiring sex offender registries and imposing Global Positioning System (GPS) tracking and mandatory life sentences for the most serious offenders, the state also had a bill pending that would make the crime of rape of a child a capital offense.

Unfortunately, on its way to a seemingly zero-tolerance policy, Missouri's momentum was stopped in its tracks when the Supreme Court decided *Kennedy v. Louisiana.* Without acknowledging the increasing prevalence of child sexual abuse, or the severe impact that such crimes have on their young victims, the *Kennedy* Court held definitively that capital punishment for the crime of child rape was a violation of the Eighth Amendment. This Comment argues that in so deciding, the Supreme Court disregarded a clear trend towards harsher penalties for sex offenders, and that federalism concerns required the Court to defer to the states on the issue.

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INTRODUCTION

Up to 80,000 instances of child sexual abuse are reported each year,[1] and the majority of sex offenders who target children are repeat offenders.[2] One study found that among those imprisoned for a sex crime against a minor, seventy-four percent had at least one prior conviction for the same, or a similar offense.[3] It is estimated that the average offender "commits 282 illegal acts with 150 different victims."[4] As a result of these staggering statistics, the State of Missouri has been taking action to hold those offenders responsible and to protect the children of Missouri.[5] The Missouri State Legislature has not only passed some of the toughest laws in the country with regard to sex crimes against children, but it also has a number of prospective bills that it plans to soon enact.[6] The Supreme Court recently thwarted these efforts by the Missouri Legislature, when a five to four majority determined that imposition of the death penalty for the crime of rape of a child constituted cruel and unusual punishment in violation of the Eighth Amendment.[7]

In June 2008, the Supreme Court heard the case of *Kennedy v. Louisiana*.[8] A unanimous jury sentenced the defendant, Patrick Kennedy, to death for the aggravated rape of his eight-year-old stepdaughter.[9] On appeal, the Supreme Court held that society's "standards of decency" prohibited a state from imposing the death penalty in a case where the perpetrator raped, but did not kill, the child, regardless of other aggravating circumstances that may be present.[10] In deciding against the imposition of

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1. *Facts for Families: Child Sexual Abuse*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, May 2008, http://www.aacap.org/galleries/FactsForFamilies/09_child_sexual_abuse.pdf.

2. H.R. REP. NO. 103-392, at 4 (1993).

3. *Id.*

4. Melissa Meister, *Murdering Innocence: The Constitutionality of Capital Rape Statutes*, 45 ARIZ. L. REV. 197, 213 (2003) (internal quotations omitted) (quoting Michael G. Planty & Louise van der Does, *Megan's Laws Aren't Enough*, WALL ST. J., July 17, 1997, at A22).

5. *See infra* Part I.A.

6. Missouri is not the only state that has recently taken a strong stance against perpetrators of sexual violence on children. All fifty states have passed some version of Megan's Law requiring sex offender registration systems, and thirty-three states have passed a version of Jessica's Law imposing harsher punishments for sex offenders. *See* Megan's Law, Sex Offenders Nationwide: Registered Sex Offenders, http://www.megans-law.net/ (last visited Feb. 1, 2010).

7. *See* Kennedy v. Louisiana, 128 S. Ct. 2641, 2650-51 (2008).

8. *Id.* at 2641.

9. *Id.* at 2648.

10. *See id.* at 2665.

the death penalty, the Supreme Court disregarded the clear trend towards harsher penalties for sex offenders.[11] The Court also disregarded the fact that a number of states, including Missouri, had pending legislation that would make rape of a child a capital offense in certain circumstances.[12]

This Comment will analyze the impact of the Supreme Court's decision in *Kennedy* on the State of Missouri.[13] Part I looks at both the background of several Missouri sex offender statutes and the background surrounding the Supreme Court's consideration of the death penalty in the years preceding the *Kennedy* decision. Part II discusses the Court's holding in *Kennedy* that capital punishment for the crime of rape of a child is unconstitutional as it violates the Eighth Amendment's ban on cruel and unusual punishment. Part III criticizes the *Kennedy* holding by alleging that the Court held incorrectly, as federalism concerns require the Supreme Court to defer to the states where "society's standards" are at issue. Further, by holding definitively that capital punishment for child rape violates the Eighth Amendment, the Court has precluded society from raising the issue again in the future.

I. Background of Sex Offender Legislation

A. Recent Missouri Sex Offender Legislation

In response to the growing number of sex crimes against children, the Missouri Legislature enacted a number of statutes that provided for harsher punishments for sex offenders.[14] A clear trend toward harsher punishments and more accountability on the part of offenders has been in place for some time, as illustrated by the following discussion.[15]

The state first adopted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act in accordance with a 1994

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11. *See infra* Part III.B.

12. *See Kennedy*, 128 S. Ct. at 2651.

13. Missouri was not the only state negatively impacted by the Court's ruling in *Kennedy v. Louisiana*. Four other states (Colorado, Mississippi, Alabama, and Tennessee) also had legislation pending that would make rape of a child a capital offense. Each of those states is likely to be affected similarly, and thus the issues addressed in this Comment are likely pertinent to those states as well. *See* Brief of Amici Curiae Missouri Governor Matt Blunt and Members of the Missouri General Assembly in Support of Respondent, Kennedy v. Louisiana, 128 S. Ct. 2641 (2008) (No. 07-343), 2008 WL 742922 [hereinafter Brief of Amici Curiae].

14. *See* Mo. State Highway Patrol, Mo. Sex Offender Registry, Facts Sheet, http://www.mshp.dps.missouri.gov/MSHPWeb/PatrolDivisions/CRID/SOR/factsheet.html (last visited Feb. 1, 2010).

15. *See infra* text accompanying notes 17-28.

federal law requiring states to put into place a sex offender registry.[16] This was subsequently amended by Megan's Law, which requires convicted sex offenders to register with the chief law enforcement officer in the county where he or she resides within ten days of conviction, release from incarceration, or placement on probation.[17] In 2008, Missouri reduced the time to register from ten days to three.[18] The offender must also submit a photograph and provide the county official with the specifics of the crime for which he or she was convicted.[19] Registered sex offenders must report back semiannually to confirm the continued accuracy of the information the registry has on file.[20] In order to keep adults informed and children out of harm's way, any member of the public may obtain a copy of the complete list of names, addresses, and crimes for which offenders are registered upon request to a law enforcement official.[21]

Missouri also adopted Jessica's Law, which imposes lifetime Global Positioning System (GPS) monitoring of sex offenders and a mandatory life sentence for serious sex crimes against young children, with a minimum thirty years served in jail.[22] The Missouri version of the law also allows law enforcement to pursue sex offenders on the Internet and states that offenders will be punished even if they are communicating online to law enforcement with the belief that they are conversing with a child.[23] This version of Jessica's Law is one of the toughest in the nation, as the Missouri State Legislature continues to combat sex crimes against children.[24]

Then, in 1996, the State passed the Pam Lychner Sexual Offender Tracking Law, which allows law enforcement to track sex offenders from one location to another.[25] Prior to the passage of this law, there was no system in place to enable police in different communities to inform one

16. Mo. State Highway Patrol, *supra* note 14.

17. MO. ANN. STAT. § 589.400 (West 2003).

18. 2008 Mo. Legis. Serv. 758 (West) (codified as amended at MO. ANN. STAT. § 589.400 (Supp. 2009)).

19. MO. ANN. STAT. § 589.407.

20. *Id.* § 589.414.

21. *Id.* § 589.402.

22. Press Release, Gov. Matt Blunt, R-Mo., Gov. Blunt Renews Call for Death Penalty for Child Rapists, U.S. STATE NEWS, Apr. 21, 2008, *available at* 2008 WLNR 7456659 [hereinafter Press Release]; Matt Blunt, *Jessica's Law Means Greater Safety for Missouri Children*, June 13, 2006, http://www.mattblunt.com/news/Read.aspx?ID=178 [hereinafter Matt Blunt].

23. Matt Blunt, *supra* note 22.

24. *See* Press Release, *supra* note 22.

25. Mo. State Highway Patrol, *supra* note 14.

another of the location of sex offenders.[26] This law increased the amount of time for which sex offenders were required to register; before the Pam Lychner Law, offenders were only required to register for ten years.[27] Now, most convicted sex offenders are subject to a lifetime registration.[28]

Additionally, at the time that *Kennedy v. Louisiana* was decided, a number of bills were pending in the Missouri General Assembly that would further monitor convicted sex offenders and keep children safe from predators.[29] All of these changes were moving Missouri toward a policy of zero-tolerance for sex offenders who target children, concluding with Senate Bill 1194, which would have "increase[d] the punishment for forcible rape or sodomy of a child under the age of twelve to be either death or life imprisonment without probation or parole."[30]

B. Supreme Court Treatment of Capital Rape Statutes

The Eighth Amendment to the United States Constitution states that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[31] The Supreme Court has had many occasions to interpret this Amendment. In 1958, the Court ruled that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," and concluded that what constitutes cruel and unusual punishment will change over time.[32] In assessing what the current society views as moral, the Court looked to "objective indicia that reflect the public attitude toward a given sanction,"[33] relying on state legislatures as the "clearest and most reliable objective

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26. *Id.*

27. *Id.*

28. *Id.*

29. *See generally* H.B. 1536, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2007) (prohibiting sex offenders from being within 500 feet of a playground or a public pool); H.B. 1397, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2007) (prohibiting sex offenders from being within 500 feet of a child care facility); H.B. 1396, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2007) (proposing that a unique code be placed on the driver's license of a sex offender); H.B. 1379, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2007) (withdrawn 2007) (proposing that sex offenders must notify a park ranger before camping in a state park); H.B. 1352, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2007) (proposing no student housing for sex offenders).

30. S.B. 1194, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2008). The proposed bill would divide the trial into two parts: the first would determine guilt or innocence, and the second stage would submit the question of punishment to the trier of fact. *Id.* The second stage would include an introduction of aggravating and mitigating circumstances. *Id.*

31. U.S. CONST. amend. VIII.

32. Trop v. Dulles, 356 U.S. 86, 101 (1958).

33. Gregg v. Georgia, 428 U.S. 153, 173 (1976).

evidence of contemporary values."[34] Other objective indicia that the Court has looked to include: "historical development of the punishment at issue . . . , international opinion," and jury sentencing determinations.[35]

The Court addressed the constitutionality of capital punishment in *Furman v. Georgia*.[36] In that consolidated case, two men had been convicted of rape and one of murder.[37] The sentencing for each was left to the discretion of the respective juries, and each of the juries returned a death sentence.[38] In vacating each of the sentences, the Court declared that capital punishment itself was not necessarily cruel and unusual[39] but that the method of choosing whom to impose the sentence against was unusual as the statutes were written at the time, since they afforded juries too much discretion.[40] The Court therefore held that the death penalty statutes at issue violated the Eighth Amendment because the sentence was being imposed in a discriminatory manner.[41] In a concurring opinion, Justice William O. Douglas stated:

> [W]e know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.[42]

As a result of that decision, most state statutes authorizing the death penalty for the crime of rape were invalidated; however, a few were reenacted at a later date.[43] To remedy the discrimination that the *Furman* decision centered around, new legislation either specified the factors to be

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34. Atkins v. Virginia, 536 U.S. 304, 312 (2002) (internal quotations omitted) (quoting Penry v. Lynaugh, 492 U.S. 302, 311 (1989)); *see also* Roper v. Simmons, 543 U.S. 551, 564 (2005) (relying on recent legislative history to establish a consensus against imposition of the death penalty against juveniles).

35. Enmund v. Florida, 458 U.S. 782, 788 (1982).

36. Furman v. Georgia, 408 U.S. 238, 240 (1972) (Douglas, J., concurring).

37. *Id.*

38. *See id.*

39. *Id.* at 241.

40. *Id.* at 242. Prior to the decision in *Furman*, discretion regarding when to apply capital punishment, and for what particular crimes, was left to the trier of fact. *See* Gregg v. Georgia, 428 U.S. 153, 156 (1976).

41. *Furman*, 408 U.S. at 242 (Douglas, J., concurring).

42. *Id.* at 255.

43. Kennedy v. Louisiana, 128 S. Ct. 2641, 2651 (2008).

considered and the procedures to be followed when imposing a capital sentence, or the statute made the death penalty mandatory for certain crimes.[44]

One such state that re-enacted its capital rape provision was Georgia.[45] Georgia's capital rape statute provided that "[a] person convicted of rape shall be punished by death or by imprisonment for life, or by imprisonment for not less than one nor more than [twenty] years."[46] The issue of whether that particular imposition of capital punishment constituted cruel and unusual punishment was addressed in *Coker v. Georgia*.[47] The case involved an escaped felon who entered the home of a young couple, Allen and Elnita Carver.[48] The defendant tied up Mr. Carver, stealing his keys and money.[49] He raped Mrs. Carver and fled in the family car, taking her with him.[50]

The jury returned a guilty verdict and a sentencing hearing ensued.[51] The jury's verdict on sentencing was death by electrocution.[52] The defendant appealed and the Supreme Court declared unconstitutional the death penalty for the rape of an adult woman, holding that death was "grossly disproportionate and excessive."[53] However, the issue of whether the same was true with respect to the rape of a child was not addressed in the opinion.[54]

II. *Kennedy v. Louisiana*[55]

More than thirty years after *Coker* was decided, the Supreme Court finally addressed the issue of capital punishment for the crime of child rape.[56] In June 2008, the Court declared that the death penalty is excessive and therefore in violation of the Eighth Amendment not only for the rape of an adult woman but also for the rape of a child.[57]

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44. *Gregg*, 428 U.S. at 221-22.

45. *Kennedy*, 128 S. Ct. at 2651.

46. Coker v. Georgia, 433 U.S. 584, 586 (1977) (citing GA. CODE ANN. § 26-2001 (1972) (current version at GA. CODE ANN. § 16-6-1 (West 2009))).

47. *See id.* at 592.

48. *Id.* at 587.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Coker*, 433 U.S. at 591.

53. *Id.* at 592.

54. *See id.*

55. Kennedy v. Louisiana, 128 S. Ct. 2641 (2008).

56. *See id.*

57. *Id.* at 2660.

A. Facts and Procedural History

On March 2, 1998, Patrick Kennedy called 911 to report that his eight-year-old stepdaughter, referred to in the Supreme Court opinion as L.H., had been raped.[58] Kennedy reported that while he was in the house he heard L.H. scream and ran outside to check on her.[59] He claimed that as he approached his stepdaughter, he saw a neighborhood boy riding away on a bicycle, and that L.H. identified him as one of the two boys who had dragged her from the garage to the yard, pushed her down, placed a hand over her mouth, and raped her.[60]

Police responded to Kennedy's home where they found L.H. on her bed, bleeding heavily from the vaginal area, and wrapped in a bloody blanket.[61] Kennedy explained to police that after he discovered his stepdaughter in the yard, he carried her to the bath tub and then to her bed.[62] He had wiped blood from L.H. with a basin of water and a cloth, which prevented medical personnel from collecting a reliable DNA sample.[63] L.H. was then transported to the hospital where an expert in forensic medicine declared that L.H.'s injuries were the worst he had ever seen from a sexual assault.[64] L.H.'s extensive injuries required emergency surgery.[65]

Although L.H. continued to maintain that two neighborhood boys had been the perpetrators, the police did not believe that the story presented by she and Kennedy was plausible.[66] The area in the yard where the rape was alleged to have taken place was undisturbed, and the descriptions of the bicycle that Kennedy was alleged to have seen were inconsistent.[67] Further compounding the unlikelihood of the story was the fact that blood was found on the underside of L.H.'s mattress.[68] Police also discovered that Kennedy had left a message for his employer that he would not be able to work that day and subsequently contacted a colleague to ask how to get blood out of a white carpet.[69] As a result of these findings, the police

58. *Id.* at 2646.
59. *Id.*
60. *Id.*
61. *Kennedy*, 128 S. Ct. at 2646.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 2647.
67. *Kennedy*, 128 S. Ct. at 2647.
68. *Id.*
69. *Id.*

arrested Patrick Kennedy for the crime.[70] Several months later, L.H. told her mother that Kennedy had raped her.[71]

Kennedy was charged with aggravated rape.[72] The rape statute in Louisiana permitted capital punishment if the victim was under the age of twelve.[73] At the trial, L.H. testified that on the morning of the rape she woke up with Patrick Kennedy on top of her.[74] The jury found Kennedy guilty of aggravated rape and unanimously determined that he should be sentenced to death.[75] The decision of the trial court was later affirmed by the Supreme Court of Louisiana, which rejected Kennedy's argument that the death penalty for rape of a child under twelve years old was disproportionate.[76] The Supreme Court of the United States granted certiorari to consider the issue.[77]

B. The Supreme Court's Decision

While the Supreme Court acknowledged that the death penalty is not "invariably unconstitutional," the majority opinion held that in the instance of an individual who rapes but does not kill a child, capital punishment is excessive, and therefore unconstitutional.[78] In so deciding, the Court was "guided by objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions."[79]

The Court began its discussion by looking at the states that have recently reintroduced capital punishment for the crime of child rape.[80] The Court stated that because only six states authorize the use of the death penalty for the crime of child rape, it can be inferred that society is against its imposition.[81] It then analogized this situation to precedent where the Court has held that capital punishment is excessive for crimes committed by juveniles or mentally retarded persons; it determined that in all of those

70. *Id.* at 2650-51.

71. *Id.*

72. *Id.* at 2647.

73. LA. REV. STAT. ANN. § 14:42 (1997).

74. *Kennedy*, 128 S. Ct. at 2648.

75. *Id.*

76. *See id.*

77. *Id.* at 2649.

78. *Id.* at 2650-51.

79. *Id.* at 2650 (internal quotations omitted) (quoting Roper v. Simmons, 543 U.S. 551, 552 (2005)).

80. *See Kennedy*, 128 S. Ct. at 2651-52.

81. *Id.* at 2653.

situations, the small number of states allowing capital punishment was indicative of the fact that society as a whole was opposed.[82]

Finally, the Court looked to the number of executions that had taken place for the crime of child rape.[83] The Court said that those statistics could help to inform the consideration of whether society accepted the punishment.[84] It cited statistics indicating that no individual had been executed since 1964 for rape of an adult or a child.[85] The Court used that information in determining that "there is a national consensus against capital punishment for the crime of child rape."[86]

Citing to the decision in *Coker*, the majority decided that since the crime of rape cannot be compared to murder in its "severity and irrevocability," the punishment is excessive in the case of child rape.[87] The majority further reasoned that the death penalty serves no deterrent or retributive function.[88] Finding that society did not approve of the practice, and that the punishment was excessive in comparison to the harm done, the Supreme Court reversed the judgment of the Supreme Court of Louisiana.[89]

The dissenting opinion, on the other hand, disagreed with the majority's contention that there is a "national consensus" against imposition of the death penalty for the crime of child rape.[90] The dissent relied on the confusion surrounding the *Coker* decision regarding what was constitutionally permissible.[91] Justice Samuel Alito explained that many state legislatures in the past have incorrectly read *Coker* to stand for the proposition that the death penalty is never appropriate for the crime of rape, regardless of the victim or the circumstances.[92] He further stated that this confusion has prevented states that otherwise would have passed similar legislation from doing so.[93]

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82. *See id.*

83. *See id.* at 2651.

84. *Id.* at 2657.

85. *Id.*

86. *Kennedy*, 128 S. Ct. at 2657-58.

87. *Id.* at 2660.

88. *Id.* at 2662.

89. *See id.* at 2665.

90. *Id.* (Alito, J., dissenting). Chief Justice John G. Roberts, Justice Antonin Scalia, and Justice Clarence Thomas joined Justice Samuel Alito in his dissent of *Kennedy*, which argued that the majority's justification was unsound. *See id.*

91. *Id.* at 2666.

92. *Kennedy*, 128 S. Ct. at 2667.

93. *Id.* at 2665.

III. *Kennedy* Holding Undermines Missouri's Progress

All of the steps that Missouri has taken toward implementing harsher penalties for child sex crimes were effectively belittled by the majority opinion in *Kennedy*.[94] For more than a decade, the State imposed harsher penalties proportionally with society's increased outrage at sex offenses against children.[95] The ultimate conclusion was inevitably to impose the most serious penalty for the most heinous offenses; *Kennedy* incorrectly took this decision away from the people.[96]

A. Federalism Concerns Necessitate Leaving Determinations of Society's Standards of Decency to the Individual States.

In past decisions, the Supreme Court has acknowledged that "the primary responsibility for defining crimes against state law, fixing punishments for the commission of these crimes, and establishing procedures for criminal trials rests with the States."[97] Further, laws enacted by state legislatures are presumptively constitutional.[98] Six states allowed capital punishment for the crime of child rape at the time that this issue was decided.[99] Federalism and separation of powers issues would require an opponent of any of those statutes to overcome a heavy burden in order to determine that they do not pass constitutional muster, since the punishments were selected by a democratically elected legislature.[100]

The Supreme Court has previously held that the scope of the Eighth Amendment is not static, but that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[101] This means that what is considered to be cruel and unusual will change over time with the changing society.[102] The key to the Court's holding is that society should determine what they consider to be decent and moral.[103] It is necessarily the job of our democratic society, and not the judiciary, to make these determinations and to reach a moral consensus.[104] The Supreme Court is not in a position to decide such issues

94. *See supra* Part I.A.
95. *See supra* Part I.A.
96. *See infra* Part III.A-B.
97. Payne v. Tennessee, 501 U.S. 808, 824 (1991).
98. *See* Gregg v. Georgia, 428 U.S. 153, 175 (1976).
99. *See* Brief of Amici Curiae, *supra* note 13, at 14.
100. *See Gregg*, 428 U.S. at 175.
101. Trop v. Dulles, 356 U.S. 86, 100-01 (1958).
102. *See id.* at 100.
103. *See id.*
104. *See Gregg*, 428 U.S. at 186-87.

since "[c]ourts are not representative bodies. . . . [and] are not designed to be a good reflex of a democratic society."[105]

Instead, courts should look to our democratic society, including juries representing a random cross section of the population, in deciding where the consensus lies.[106] By coming to a unanimous decision that Kennedy's actions deserved capital punishment, the jury explicitly expressed their approval of the practice.[107] Jury sentencing "maintain[s] a link between contemporary community values and the penal system a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'"[108] If the Court then overlooks the jury's determination of what is appropriate in a particular case, contemporary community values are not addressed.

Similarly, state legislatures provide a good indication of where society stands on an issue. It has been a common practice for the Supreme Court to rely on state legislatures to determine what the societal consensus is.[109] Indeed, it is possible that "evolving standards" may necessitate an increase in a punishment for a particular crime as society learns more about the nature of the offense and, in this case, the effects that the crime has on its young victim.[110] Not only did six states already have laws similar to Louisiana's capital child rape statute, but five others—including Missouri—had similar legislation pending.[111]

B. Recent Increases in Prevalence of Child Sex Abuse and Society's Awareness of the Severity of the Issue Have Prompted States to Move Toward Harsher Punishments, Which Would Culminate in More Capital Statutes in Time.

Missouri Governor Matt Blunt asserted that there is a "clear trend . . . in favor of such punishment."[112] Given the substantial change in sex offender laws and awareness that has occurred in the last fifteen years,

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105. *Id.* at 175 (internal quotations omitted) (quoting Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring)).

106. *See id.* at 186-87, 190.

107. *See* Kennedy v. Louisiana, 128 S. Ct. 2641, 2648 (2008).

108. *Gregg*, 428 U.S. at 190 (internal quotations omitted) (quoting Witherspoon v. Illinois, 391 U.S. 510, 515 n.15 (1968)).

109. *See* Roper v. Simmons, 543 U.S. 551, 564 (2005); Atkins v. Virginia, 536 U.S. 304, 312 (2002).

110. *See* Ashley M. Kearns, *South Carolina's Evolving Standards of Decency: Capital Child Rape Statute Provides a Reminder that Societal Progression Continues Through Action, Not Idleness*, 58 S.C. L. REV. 509, 526 (2007).

111. *See* Brief of Amici Curiae, *supra* note 13, at 11.

112. *Id.* at 14.

Governor Blunt's statement holds considerable weight.[113] It was not until 1994 when the government began implementing stricter laws against sex offenders.[114] Before that time, society was unaware of the detrimental effects of child sex abuse, which include depression, insomnia, sleep disturbances, nightmares, and loss of toilet training.[115] Sexual abuse against children was not as prevalent prior to that time either.[116] In only five years, from 1986 until 1991, the instances of child sex abuse increased by 227%.[117]

It was this change in both awareness and prevalence that prompted Missouri to enact a capital rape statute, and that would result in other states following suit given the opportunity to do so.[118] Louisiana was the first state to pass a capital child rape statute in 1995.[119] By 2003, Louisiana was one of two states with such statutes.[120] However, in the five years that followed, an additional four states enacted such legislation; this tripled the total number of states with capital child rape statutes in only five years.[121] In the absence of the *Kennedy* decision, it is likely that many more states would have enacted capital rape statutes once they were given an opportunity to examine the effects that the punishment was having on deterrence of child rape.[122]

The Supreme Court has previously stated that "[i]t is not so much the number of . . . States that is significant, but the consistency of the direction of change."[123] It is evident that the direction of change nationwide is toward

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113. *See supra* text accompanying notes 16-30.

114. *See* United States Department of Justice, Bureau of Justice Assistance, Overview and History of the Jacob Wetterling Act, http://www.ojp.usdoj.gov/BJA/what/2a1jwacthistory.html (last visited Feb. 1, 2010).

115. Meister, *supra* note 4, at 209.

116. *See* Kennedy v. Louisiana, 128 S. Ct. 2641, 2669-70 (2008) (Alito, J., dissenting).

117. Arthur J. Lurigio et al., *Child Sexual Abuse: Its Causes, Consequences, and Implications for Probation Practice*, 59 FED. PROBATION 69, 69 (1995).

118. *See* Meister, *supra* note 4, at 198.

119. *See* Kearns, *supra* note 110, at 519.

120. *See* Meister, *supra* note 4, at 216-17.

121. *See Kennedy*, 128 S. Ct. at 2651. At the time *Kennedy* was decided, Louisiana, Georgia, Montana, Oklahoma, South Carolina, and Texas had capital child rape statutes in place. *Id.* Another consideration that was disregarded by the Court in the *Kennedy* case was the fact that currently only five states authorize capital punishment for the crime of treason; those statutes continue to pass constitutional muster despite the lack of endorsement. *See id.* at 2659; United States Department of Justice, Bureau of Justice Statistics, Capital Punishment, 2006 - Statistical Tables, http://www.ojp.usdoj.gov/bjs/pub/html/cp/2006/tables/cp06st01.htm (last visited Feb. 1, 2010).

122. Meister, *supra* note 4, at 217-18.

123. Atkins v. Virginia, 536 U.S. 304, 315 (2002).

harsher punishments and more accountability for sex offenders, especially those who target children.[124] The Court should not decide that a consensus has been reached when the discussion is just beginning to get underway.[125] This is especially true when the implications of the holding are so drastic.[126] The decision that capital punishment for rape of a child violates the Eighth Amendment's proscription against cruel and unusual punishment cannot be reversed without an amendment to the Constitution; therefore, "[t]he ability of the people to express their preference through the normal democratic processes, as well as through ballot referenda, is shut off."[127]

The Supreme Court in *Kennedy* stated that capital punishment should be "reserved for the worst of crimes."[128] The Missouri Legislature would undoubtedly agree with the Court's assertion.[129] However, the fact that even the majority opinion acknowledged the "permanent psychological, emotional, and sometimes physical impact" on a minor who is a victim of rape[130] leads to the logical conclusion that child rape is such a crime. Capital punishment is "an expression of society's moral outrage at particularly offensive conduct."[131] Every state in the nation now requires sex offenders to register, and a substantial majority of states have been moving toward harsher punishments for sex crimes against children.[132] This is indicative of society's increasing condemnation for these particular types of offenses, putting child sex crimes in the category of "the most extreme of crimes" for which the death penalty is suitable.[133]

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124. *See supra* note 6.

125. *See* Brief of Amici Curiae, *supra* note 13, at 4 ("By definition, there cannot be a 'consensus' before there has been a debate.").

126. *See* Gregg v. Georgia, 428 U.S. 153, 176 (1976).

127. *Id.*

128. Kennedy v. Louisiana, 128 S. Ct. 2641, 2665 (2008).

129. *See* Meister, *supra* note 4, at 211.

130. *Kennedy*, 128 S. Ct. at 2658.

131. *Gregg*, 428 U.S. at 183.

132. *See* Meister, *supra* note 4, at 214-15.

133. *Gregg*, 428 U.S. at 187. The Court in *Kennedy* relied in part on the lack of executions for rape in its decision that society does not approve of the practice. *See Kennedy*, 128 S. Ct. at 2651. That reliance was misplaced however, as the statistics are deceiving. *See* United States Department of Justice, Bureau of Justice Statistics, Key Facts at a Glance, Executions, http://bjs.ojp.usdoj.gov/content/glance/tables/exetab.cfm (last visited Feb. 1, 2010). In a span of two decades, from 1964 until 1983, only thirty-six individuals were executed in total. *See id.* Furthermore, the states that have adopted legislation that would allow them to impose capital punishment on child rapists have only begun to do so. *See supra* text accompanying notes 119-21.

CONCLUSION

The Supreme Court decision in *Kennedy v. Louisiana* was made prematurely and without consideration for the gravity of the crime or the implications on its young victims. It was made at a time when new information regarding the severe impact of child rape was just coming to light. It was made at a time when the crime was becoming increasingly prevalent. And it was made at a time when society wanted those who take away the innocence of young children to pay for their crimes. Missouri, and other states like it, were just beginning to express those desires by holding offenders to a higher level of accountability. Now they will never have that opportunity.

It is up to the states, not the judiciary, to determine what punishment is appropriate. The Court stripped the people of that privilege by deciding that capital rape statutes are unconstitutional without taking into account their opinions, as voiced in their respective legislatures.

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INCORPORATING THE ANALYSES OF THE KANSAS SUPREME COURT UNDER *IN RE L.M.* TO CREATE A MORE BROADLY APPLICABLE JUVENILE JUSTICE HOLDING

Caroline Selig[*]

Abstract: Imagine that you are on trial, charged with a violent crime. One possible sentence, should you be convicted, is that you will be required for a period of time, or even the rest of your life, to register as an offender. Now imagine that you invoke your right to a jury trial only to be told that, because you are a sixteen-year-old juvenile instead of an eighteen-year-old adult, you have no such right to invoke. L.M., a sixteen-year-old Kansas citizen, was recently in this very situation. Facing a charge of aggravated sexual battery that could result in mandatory offender registration, his motion for a jury trial was denied, and that denial was subsequently affirmed by the Kansas Court of Appeals, relying on precedential case law that held that the constitutional right to a jury trial was not afforded to juveniles. In a groundbreaking opinion, the Kansas Supreme Court held that, under Kansas's current juvenile justice scheme, juveniles are guaranteed a constitutional right to a jury trial by the Sixth and Fourteenth Amendments to the United States Constitution and the Kansas Constitution Bill of Rights, section 10.

This Comment examines the decision of the Kansas Supreme Court that found a juvenile's right to a jury trial in both the federal and the Kansas constitutions. This Comment argues that the majority was correct in

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recognizing that differences between the Kansas juvenile justice system and the adult criminal justice system have eroded to the point where it is necessary to give juveniles the right to a jury trial that is given to adults in a criminal context. This Comment also argues, however, that the majority opinion failed to take into account points made by the dissenting and concurring opinions which would have strengthened the majority opinion and made it more applicable in other jurisdictions.

Part I of this Comment examines the background of the juvenile justice system, both nationally and specifically in Kansas. Part II provides a detailed examination of the majority, concurring, and dissenting opinions of the Kansas Supreme Court in *In re L.M.* In Part III, a new analysis of the question is proposed: by combining the historical analysis utilized in the concurrence with the statutory character- and comparison-driven analysis in the majority opinion (tempered by the dissent's caution against elevating form over substance), the resulting test used may be broadly applicable in other jurisdictions struggling with similar issues in juvenile justice.

INTRODUCTION

Imagine that you are on trial, charged with a violent crime. One possible sentencing consequence, should you be convicted, is that you will be required for a period of months, years, or even the rest of your life, to register as an offender. Perhaps the crime of which you are accused is not one of a sexual nature but rather a crime thought serious enough by the state legislature to be included in the crimes for which convicted people are required to register as an offender, such as involuntary manslaughter.[1] This is a crime that is considered a serious enough offense to society to justify imposing strict registration requirements.[2] These requirements might include notifying local law enforcement within ten days of any change of address, change in employment, attendance at an institution of higher education, and reporting in person to the local sheriff's office not less than four times per year.[3] Failure to comply with these requirements can lead to an additional felony conviction.[4]

Now imagine that, considering the gravity of this possible sentence in addition to any possible incarceration or commitment, you invoke your right to a jury trial only to be told that, because you are a sixteen-year-old

1. *See* KAN. STAT. ANN. §§ 22-4902(d), -4906 (2007).
2. *See id.*
3. *See* § 22-4904.
4. *See* § 22-4903.

juvenile instead of an eighteen-year-old adult in the eyes of the law, you have no such right to invoke.[5] L.M., a sixteen-year-old Kansas citizen, was recently in this very situation.[6] Facing a charge of aggravated sexual battery that could result in mandatory offender registration, his motion for a jury trial was denied and that denial was subsequently affirmed by the Kansas Court of Appeals, relying on precedential case law that held that the constitutional right to a jury trial was not afforded to juveniles.[7] In a groundbreaking opinion, the Kansas Supreme Court, on L.M.'s appeal, held that under the current juvenile justice scheme in Kansas, juveniles are guaranteed a constitutional right to a jury trial by the Sixth and Fourteenth Amendments to the United States Constitution and the Kansas Constitution Bill of Rights, section 10.[8]

The Sixth Amendment guarantees the right to trial by an impartial jury in all criminal prosecutions.[9] That right was incorporated to the states through the Fourteenth Amendment.[10] In juvenile adjudications, however, the United States Supreme Court has held that there is no such constitutional guarantee.[11] While the Supreme Court was divided over the reasoning behind holding that states are not required to provide jury trials for juvenile adjudications, four of the Justices focused on preserving the unique nature of the juvenile system as compared to the adult criminal justice system.[12] In *McKeiver v. Pennsylvania*, Justice Blackmun pointed to the intimate and informal nature of juvenile proceedings as a justification.[13] Wishing to preserve the fairness, concern, sympathy, and paternal attention

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5. *See In re* L.M., No. 96,197, 2006 WL 3775275, at *1 (Kan. Ct. App. Dec. 22, 2006) (unpublished table decision), *rev'd*, 186 P.3d 164, 165 (Kan. 2008).

6. *See In re* L.M., 186 P.3d at 165.

7. *Id.*

8. *Id.* at 172.

9. U.S. CONST. amend. VI.

10. U.S. CONST. amend. XIV.

11. McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971). A majority of the Court agreed that juveniles are not afforded a constitutional right to a jury trial, although the Justices could not agree on the rationale behind the holding. *See id.* at 547 (Blackmun, J.) (plurality opinion) (discussing that although a state may provide jury trials for juveniles, it is a privilege, not an obligation); *id.* at 551 (White, J., concurring) ("States are not required . . . to afford jury trials in juvenile courts . . . ."); *id.* at 557 (Harlan, J., concurring) ("[C]riminal jury trials are not constitutionally required of the States, either as a matter of Sixth Amendment law or due process.").

12. *Id.* at 545-51 (Blackmun, J.) (plurality opinion).

13. *See id.* at 550.

contemplated by the juvenile system,[14] Justice Blackmun reasoned that "[i]f the formalities of the criminal adjudicative process are to be superimposed upon the juvenile court system, there is little need for its separate existence."[15]

Many states agreed with the reasoning stated in the plurality opinion in *McKeiver*, citing the nature of the juvenile justice system in refusing juveniles the right to a jury trial.[16] States' juvenile systems were seen as having a common basis:

> [F]or the adversary system, there was substituted a sociologically oriented . . . informal proceeding, which had as its underlying concept the protection of the juvenile. Judges thought not in terms of guilt, but of the child's need for protection or rehabilitation, under an extension of the doctrine of *parens patriae* . . . . No formal criminal charges were laid, rules of evidence were relaxed, psychiatric and psychological assistance was sought, many proceedings were not open to the public, and wide flexibility was allowed in the adoption of corrective measures.[17]

The Kansas Supreme Court had previously followed the rationale of many states and denied juveniles a right to a jury trial because of the informal and parental nature of the juvenile justice system.[18] In 2008, however, the Kansas Supreme Court reexamined the question of a constitutional right to a jury trial in juvenile proceedings.[19] The Kansas Supreme Court held that the unique nature of the juvenile system that *McKeiver* sought to preserve had eroded to the point that the right to a jury trial should now be afforded to juveniles.[20]

This Comment examines the decision of the Kansas Supreme Court that found a juvenile's right to a jury trial in both the federal and the Kansas Constitutions. This Comment argues that the majority was correct in recognizing that differences between the Kansas juvenile justice system and the adult criminal justice system have eroded to the point where it is

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14. *Id.*

15. *Id.* at 551.

16. *See, e.g.*, Commonwealth v. Page, 159 N.E.2d 82, 85 (Mass. 1959); *In re* Gillespie, 782 N.E.2d 140, 145 (Ohio Ct. App. 2002); State *ex rel.* Upham v. McElligott, 956 P.2d 179, 181-82 (Or. 1998).

17. *In re* Johnson, 255 A.2d 419, 422 (Md. 1969).

18. *See* Findlay v. State, 681 P.2d 20, 22 (Kan. 1984).

19. *In re* L.M., 186 P.3d 164, 165 (Kan. 2008).

20. *Id.* at 170.

necessary to allow juveniles the same right to a jury trial that is afforded adults in a criminal context. This Comment also argues, however, that the majority's opinion failed to take into account crucial points by the dissenting and concurring opinions, which would have strengthened the majority opinion and made it more applicable in other jurisdictions. Part I examines the background of the juvenile justice system, both nationally and specifically in Kansas. Part II provides a detailed examination of the specifics of the majority, concurring, and dissenting opinions of the Kansas Supreme Court in *In re L.M.* In Part III, a new analysis of the question is proposed: by combining the historical analysis utilized in the concurring opinion with the character- and comparison-driven analysis in the majority opinion (tempered by the dissent's caution against elevating form over substance), the analytical test used may be broadly applicable in other jurisdictions struggling with similar issues in juvenile justice.

I. Background of the Juvenile Justice System

A. Inception and Goals of the Formal Juvenile Justice System

The first court specifically tailored to juvenile justice was established in Chicago, Illinois, in 1899 ("Juvenile Court Act").[21] The Juvenile Court Act, passed by the Illinois Legislature, clearly expressed its parental nature and purpose: that "children were to be protected and not punished for their misdeeds."[22] Proceedings prior to the Juvenile Court Act were informal and flexible, with juveniles who "commit[ed] mischief" being summoned before a commissioner who, in a non-adversarial proceeding without counsel for the juvenile, evaluated the situation and determined whether the child should be committed to a state-run reform school, not whether criminal charges should be brought.[23] By 1870, however, the Illinois Supreme Court recognized that minors have a right to due process and held that "[i]n all criminal prosecutions against minors, for grave and heinous offenses, [juveniles] have the right to . . . a speedy public trial by an impartial jury."[24] This recognition came in response to an already-shifting course of dealing with juvenile offenders: courts, rather than commissioners, were deciding the fate of mischief-making juveniles, and

21. *See* Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1187, 1191 (1970). *See generally* Juvenile Court Act of 1899, 1899 Ill. Laws 131 (current version at 705 ILL. COMP. STAT. ANN. 405/1-2 (West 2007)).

22. Fox, *supra* note 21, at 1211-12.

23. *Id.* at 1214-15.

24. People *ex rel.* O'Connell v. Turner, 55 Ill. 280, 287 (1870).

were often sending them to jail instead of the reform schools popular in the 1850s.[25] The rest of the country soon followed Illinois's example; however, even at the very inception of the juvenile system, the distinction between juveniles and adults was unclear, as was the question whether juveniles should be afforded the same due process rights constitutionally guaranteed to adults in the criminal justice system.[26] The disagreement over whether juveniles possess the same rights to due process as adults has continued to the present day.[27]

B. Evolution of the Kansas Juvenile Justice System

The history of the juvenile system in Kansas began with much the same philosophy as that of the rest of the country; in 1905, the Kansas Legislature adopted its first juvenile court act.[28] This legislation mandated that juvenile court proceedings were not held to show criminal behavior by a child, but rather were done "in the exercise of the parental power of the state."[29] In 1966, the Kansas Supreme Court interpreted the character of juvenile justice statutes such as the one in Kansas as "reclaim[ing] and rehabilitat[ing] youthful offenders without subjecting them to the baleful influence of hardened criminals or branding them with the opprobrium

25. Fox, *supra* note 21, at 1215-16.

26. *Compare Turner*, 55 Ill. at 287 (stating that juveniles may be afforded the right to trial by jury for certain offenses), *with* Barry C. Feld, *A Century of Juvenile Justice: A Work in Progress or a Revolution that Failed?*, 34 N. KY. L. REV. 189, 196 (2007) (stating that progressive reformers in the early stages of juvenile justice rejected the procedural safeguards of the adult criminal justice system).

27. *Compare In re* J.T., 290 A.2d 821, 822-25 (D.C. 1972) (upholding a statute requiring bench trials for juvenile cases), *cert. denied* 409 U.S. 986 (1972), *and In re* Geiger, 169 N.W.2d 431, 433 (Neb. 1969) (holding that juveniles do not have a right to a jury trial), *with In re* Hezzie R., 580 N.W.2d 660, 663 (Wis. 1998) (holding that juveniles have no constitutional right to a jury trial but striking down a statute allowing juveniles to receive adult sentence without a jury trial), *and id.* at 679 (Bradley, J., dissenting) (asserting that juveniles have a right to a jury trial in all cases), *and* R.L.R. v. State, 487 P.2d 27, 33 (Alaska 1971) ("[W]henever a child . . . is charged with acts which would be a crime, subject to incarceration if committed by an adult, the Alaska Constitution guarantees him the right to jury trial.").

28. State v. Fountaine, 414 P.2d 75, 79 (Kan. 1966).

29. *Id.*

which follows conviction of crime."[30] In 1982, Kansas adopted the Kansas Juvenile Offenders Code ("KJOC"), which stated:

> [T]he [KJOC] . . . shall be liberally construed to the end that each juvenile coming within its provisions shall receive the care, custody, guidance, control and discipline . . . as will best serve the juvenile's rehabilitation and the protection of society. In no case shall . . . any proceedings under the provisions of this code, be deemed or held to import a criminal act on the part of any juvenile; but all proceedings . . . shall be deemed to have been taken and done in the exercise of the parental power of the state.[31]

Interpreting the KJOC, the Kansas Supreme Court found that because juvenile proceedings are explicitly deemed by the legislature not to be criminal in nature, there was no constitutional right to a jury trial in juvenile adjudications.[32] In 2006, however, the Kansas Legislature repealed the KJOC, adopting in its place the Revised Kansas Juvenile Justice Code ("RKJJC").[33] In 2008, the Kansas Supreme Court analyzed and interpreted the revised code, leading to different conclusions regarding both the policy and purposes of the juvenile system in Kansas and the constitutional guarantee of a jury trial in juvenile proceedings.[34]

II. *In re L.M.*

A. Facts and Procedural History

L.M. was a sixteen-year-old male who was charged and prosecuted in the juvenile system on one count of aggravated sexual battery and one count of minor in possession of alcohol.[35] One night, after consuming alcohol, L.M. encountered a female neighbor who was walking home and grabbed her and asked for a kiss.[36] When the neighbor refused to kiss him,

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30. *Id.* at 80.

31. KAN. STAT. ANN. § 38-1601 (1982) *repealed by* Revised Kansas Juvenile Justice Code, ch. 169, 2006 Kan. Sess. Laws 1060.

32. Findlay v. State, 681 P.2d 20, 22 (Kan. 1984).

33. *See* Revised Kansas Juvenile Justice Code, ch. 169, 2006 Kan. Sess. Laws 1060 (codified at KAN. STAT. ANN. § 38-2301 (Supp. 2008)).

34. *See In re* L.M., 186 P.3d 164, 168-70 (Kan. 2008).

35. *Id.* at 165.

36. *In re* L.M., No. 96,197, 2006 WL 3775275, at *1 (Kan. Ct. App. Dec. 22, 2006) (unpublished table decision), *rev'd*, 186 P.3d 164 (Kan. 2008).

L.M. allegedly licked and kissed her cheek, held onto her when she tried to leave, and asked her if she "liked to fuck."[37]

During the adjudication, L.M. requested a jury trial, and the district court denied his request.[38] After a bench trial, L.M. was found guilty and part of his sentence was that he had to register as a sex offender.[39] A juvenile offender subject to registration requirements must, in addition to other conditions and obligations, give written notice to law enforcement within ten days of any subsequent change in address, termination of or change in employment, or attendance at an institution of higher education.[40] The duration of this registration is determined by the sentencing judge.[41] L.M. appealed the denial of his request for a jury trial, among other issues, to the Court of Appeals of Kansas.[42]

In reviewing the denial of L.M.'s request for a jury trial, the court of appeals conceded that L.M. made "some rather good arguments as to why the rationale of the *Findlay* decision is no longer compelling under the current juvenile offender system."[43] Under Kansas law, however, the court of appeals is bound to follow Kansas Supreme Court precedent, unless there is some indication that the supreme court is departing from its previous holdings.[44] The court of appeals, therefore, affirmed the denial of a jury trial by the district court.[45] L.M. next appealed this decision to the Kansas Supreme Court, asserting "sweeping changes to juvenile justice procedures in Kansas since 1984 merit renewed scrutiny under applicable constitutional protections."[46]

A majority of the Kansas Supreme Court held that, due to fundamental changes in the character of the juvenile justice system that previously distinguished it from the adult criminal system, "juveniles have a constitutional right to a jury trial under the Sixth and Fourteenth Amendments."[47] Like the difficulty the United States Supreme Court had in

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37. *Id.*

38. *Id.*

39. *Id.*

40. KAN. STAT. ANN. § 22-4904 (2007).

41. *Id.* § 22-4904(a)(7).

42. *See In re* L.M., No. 96,197, 2006 WL 3775275, at *1 (Kan. Ct. App. Dec. 22, 2006) (unpublished table decision), *rev'd*, 186 P.3d 164 (Kan. 2008).

43. *Id.*

44. *Id.*

45. *Id.*

46. *In re* L.M., 186 P.3d 164, 165 (Kan. 2008).

47. *Id.* at 170.

McKeiver, where it held that a right to trial by jury was *not* constitutionally guaranteed,[48] the Kansas Supreme Court could not achieve absolute uniformity in its rationale for *finding* a right to trial by jury for juveniles.[49] One justice concurred in the holding that there is a constitutional right to a jury trial, but based her conclusion on rights guaranteed by the Kansas Constitution Bill of Rights as opposed to the Federal Constitution.[50] Additionally, one justice of the Kansas Supreme Court filed a dissenting opinion, focusing on the discrete differences that still exist between the adult and juvenile justice codes of Kansas.[51]

B. The Majority's Rationale: Kansas Bill of Rights and Changes in Juvenile Code Necessitate Right to a Jury Trial

First, the majority addressed L.M.'s claim to a constitutional right to trial by jury as guaranteed by the Sixth Amendment to the United States Constitution.[52] The majority acknowledged *Findlay*, a case in which, twenty-four years earlier, the supreme court held that neither the federal nor state constitutions gave juveniles a constitutional right to a jury trial.[53] *Findlay* adopted the United States Supreme Court's reasoning in *McKeiver*, discussed above, holding that the constitutional right to a jury trial guaranteed in the Sixth and Fourteenth Amendments does not extend to juveniles.[54] The Kansas Supreme Court, in *In re L.M.*, analyzed two issues in determining whether to hold with precedent or to interpret the constitution in a new light: (1) whether the changes to the juvenile justice code in Kansas sufficiently eroded the "child-cognizant, paternal, and rehabilitative purposes of the juvenile offender process" such that recognition of a juvenile's right to a jury trial under the Federal

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48. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971) (Blackmun, J.) (plurality opinion) (stating that juvenile justice system policy goals are distinguishable from those of the adult criminal system); *id.* at 553 (White, J., concurring) (stating that substantive differences between juvenile and adult systems are enough to justify not requiring jury trials for juveniles); *id.* at 553-54 (Brennan, J., concurring and dissenting) (stating that states are not bound to provide jury trials for juveniles as long as some other aspect of the juvenile system protects the interests that a right to a jury trial is intended to serve); *id.* at 557 (Harlan, J., concurring) (stating that criminal jury trials are not constitutionally required of the states for juveniles *or adults*, either as a matter of Sixth Amendment law or due process).

49. *See In re* L.M., 186 P.3d at 172 (Luckert, J., concurring).

50. *Id.*

51. *Id.* at 175 (McFarland, C.J., dissenting).

52. *Id.* at 166 (majority opinion).

53. *Id.*; Findlay v. State, 681 P.2d 20, 22 (Kan. 1984).

54. *In re* L.M., 186 P.3d at 166.

Constitution is now required; and (2) whether juveniles are entitled to a jury trial under the Kansas Constitution.[55]

1. Similarities Between Juvenile Justice and Adult Criminal Codes

a. Language

In analyzing L.M.'s claim under the Federal Constitution, the Kansas Supreme Court compared the language of the KJOC (the controlling law when *Findlay* was decided) with the RKJJC (the current law).[56] The KJOC focused on rehabilitation of juveniles through the state's "parental" role in providing control, discipline, and guidance.[57] The legislature enumerated the purpose of the RKJJC, on the other hand, as "to promote public safety, hold juvenile offenders accountable for their behavior and improve their ability to live more productively and responsibly in the community."[58] The Kansas Supreme Court determined that the new purposes of the RKJJC were "more aligned with the legislative intent" for adult criminal justice statutes than with the previous juvenile justice code.[59] The court saw similarities between the adult criminal justice statutes and the RKJJC because the adult criminal statutes were also enacted to focus on "protecting the public by incarcerating dangerous offenders for a long period of time, holding offenders accountable by prescribing appropriate consequences for their actions, and encouraging offenders to be more productive members of society by considering their individual characteristics" at sentencing.[60]

Additionally, the RKJJC includes language similar to that found in the Kansas Criminal Code, language that had not been included in the previous juvenile justice code.[61] Under the new juvenile justice code, juveniles are required to "plead guilty, not guilty, or nolo contendere," just as adults are required to do; previously, juveniles were required only "to admit or deny the allegations against them or plead nolo contendere."[62] What was previously a "dispositional proceeding" became a "sentencing

55. *Id.* at 168-72.
56. *Id.* at 168.
57. *Id.*
58. *Id.*
59. *Id.*
60. *In re* L.M., 186 P.3d at 168; *see also* KAN. STAT. ANN. § 21-4601 (2007).
61. *In re* L.M., 186 P.3d at 168-69.
62. *Id.* at 168.

proceeding," what were previously known as "[s]tate youth center[s]" became "[j]uvenile correctional facilit[ies]," and the "term of commitment" became the "term of incarceration."[63]

b. Structure

Structurally speaking, the RKJJC also more closely parallels the Kansas Sentencing Guidelines for adults than the previous juvenile justice statutes; it establishes a sentencing structure for juveniles based on offense levels and, in some circumstances, the individual's history of juvenile adjudications.[64] In addition, the RKJJC sentencing structure allows consideration of aggravating factors, just as the adult sentencing matrix does.[65] The RKJJC further emulates adult criminal codes in that it allows for the opportunity to earn "good time credits" to reduce a term of incarceration.[66] In addition, both adults and juveniles are now eligible for probation, house arrest, conservation camps, community-based programs, or incarceration in a correctional facility; may be ordered to either pay restitution or participate in mediation; or may be ordered to pay a fine.[67]

c. Loss of Protective Provisions in Previous Juvenile Justice Code

The majority in *In re L.M.* also noted the RKJJC's removal of some of the protective provisions included in previous juvenile justice statutes.[68] Under the prior code, juvenile proceedings, court files, and police records of juveniles under the age of sixteen were confidential.[69] Under the RKJJC, however, the official file must be public unless a judge orders it closed in the case of a juvenile under age fourteen, and police records for juveniles fourteen years old and older fall under the same public disclosure provisions as records for adults.[70]

All of these changes to the juvenile justice code, considered cumulatively, "eroded the benevolent *parens patriae* character that distinguished [the juvenile justice system] from the adult criminal

63. *Id.* at 169.
64. *Id.*
65. *Id.*
66. *Id.*
67. *In re* L.M., 186 P.3d at 169.
68. *Id.* at 169-70.
69. *Id.* at 169.
70. *Id.* at 170.

system."[71] Because both the *Findlay* court and the *McKeiver* Court relied on that character in holding that the right to a jury trial was not guaranteed to juveniles, the subsequent erosion necessitated the Kansas Supreme Court's holding that neither *McKeiver* nor *Findlay* are binding precedent.[72] Therefore, the Kansas Supreme Court held that the Sixth and Fourteenth Amendments provide a constitutional right to a jury trial to juveniles as well as adults.[73]

2. The Kansas Constitution

The Kansas Supreme Court also found a basis for L.M.'s right to a jury trial in the language of the Kansas Constitution Bill of Rights, holding that proceedings under the RKJJC fit within the parameters of section 10 of the Kansas Constitution Bill of Rights.[74] Section 10 of the Kansas Constitution Bill of Rights provides:

> In all prosecutions, the accused shall be allowed to appear and defend in person, or by counsel; to demand the nature and cause of the accusation against him; to meet the witness face to face, and to have compulsory process to compel the attendance of the witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.[75]

The Kansas Supreme Court has long construed the phrase "all prosecutions" from this section to mean "all criminal prosecutions for violations of the laws of the state."[76] The language guaranteeing a jury trial in "all prosecutions" was examined and interpreted as early as 1883, when the Kansas Supreme Court stated that a civil prosecution does not necessarily invoke the right to a trial, but "where the charge is of an act . . . criminal at common law, criminal in its nature, and an offense against the public, the constitutional guaranty [sic] is applicable, and cannot be ignored or disregarded."[77]

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71. *Id.*

72. *Id.*

73. *In re* L.M., 186 P.3d at 170.

74. *Id.* at 172.

75. KAN. CONST. Bill of Rights, § 10.

76. *See* State *ex rel.* Curtis v. City of Topeka, 12 P. 310, 316 (Kan. 1886).

77. *See* Rolfs v. Shallcross, 1 P. 523, 526-27 (Kan. 1883).

Because the RKJJC refers to its proceedings as "prosecutions," because proceedings under the RKJJC are "based on allegations that juveniles have violated the criminal laws of this State," and because the RKJJC stripped the juvenile code of its previous *parens patriae* nature, the Kansas Supreme Court determined that juvenile proceedings now fall in the category of "all prosecutions" as discussed in the Kansas Bill of Rights.[78] Therefore, juveniles also have the right to a jury trial under the Kansas Constitution.[79]

C. The Concurrence's Rationale: Historical Analysis and the Kansas Constitution Require a Limited Right to a Juvenile Jury Trial

In her concurring opinion, Justice Luckert found that the district court erred in denying L.M. a jury trial, but she based her decision on section 5 of the Bill of Rights of the Kansas Constitution, not section 10 of the Kansas Bill of Rights or the Sixth and Fourteenth Amendments to the United States Constitution.[80] Section 5 of the Bill of Rights of the Kansas Constitution states that "[t]he right of trial by jury shall be inviolate."[81] An early interpretation of this provision by the Kansas Supreme Court interpreted section 5 to mean that "a jury trial is preserved in all cases in which it existed prior to the adoption of the constitution."[82]

Relying on this plain language, Justice Luckert analyzed a juvenile's right to a jury trial from a historical viewpoint.[83] Citing two California Court of Appeal decisions, Justice Luckert examined English common law in the first half of the nineteenth century, which is relevant to Kansas because the Kansas Constitution became effective in 1861.[84] Therefore, if a right to a jury trial was in existence at that time, it should still be preserved today under section 5 of the Kansas Bill of Rights.[85] Ultimately, Justice Luckert concurred with the California Court of Appeal's finding that, at the relevant time, the "legislative history and comments of members of Parliament . . . provide sound support for [the] conclusion that '[d]espite the *parens patriae* relationship between the English government and its

78. *In re* L.M., 186 P.3d at 172.
79. *Id.*
80. *Id.* at 172-73 (Luckert, J., concurring).
81. KAN. CONST. Bill of Rights, § 5.
82. *Rolfs*, 1 P. at 525-26.
83. *In re* L.M., 186 P.3d at 173-75 (Luckert, J., concurring).
84. *Id.* at 174.
85. *See Rolfs*, 1 P. at 525-26.

minor citizens, those same minors enjoyed an unequivocal right to jury trial when accused of crime in the law courts.'"[86]

Additionally, the Kansas Supreme Court has noted that at common law a minor at least fourteen years old was presumed capable of committing a crime and the court recognized that the common law treated those juveniles as adults in the criminal justice system.[87] Therefore, Justice Luckert concluded, section 5 of the Kansas Constitution Bill of Rights guarantees a right to a jury trial to all juveniles at least fourteen years old who are charged with a felony.[88] Under this analysis, L.M. was entitled to a trial by jury, as he was sixteen years old and charged with aggravated sexual battery, which is a felony.[89]

Regarding the application of the Sixth Amendment, Justice Luckert stated that the due process considerations relied upon by the majority were largely unaffected by the revisions to the Kansas juvenile code in many juvenile cases.[90] There are still enough unique characteristics of the juvenile system when compared with the adult system to justify different treatment of juveniles and adults when considering the right to a jury trial.[91] "When these options apply and are utilized, the rationale of *McKeiver* and *Findlay* remains valid and applicable."[92]

Justice Luckert, however, believed that for a discrete population of juveniles, the RKJJC does not treat juveniles differently than adult criminal offenders; because of prior juvenile adjudications, for example, some juveniles are treated much the same as an adult charged with the same crime.[93] For a juvenile in this situation, "the denial of a jury trial is not constitutionally justified on due process grounds."[94]

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86. *In re* L.M., 186 P.3d at 174 (Luckert, J., concurring) (quoting *In re* Javier A., 206 Cal. Rptr. 386, 398 (Cal. Ct. App. 1984)).

87. *Id.*

88. *Id.* at 174-75.

89. *Id.* at 175.

90. *Id.* at 173.

91. *Id.* "When these options apply and are utilized, the rationale of *McKeiver* and *Findlay* remains valid and applicable." *Id.*

92. *In re* L.M., 186 P.3d at 173 (Luckert, J., concurring).

93. *Id.*

94. *Id.*

D. The Dissent's Rationale: The Majority Placed Form over Substance

Chief Justice McFarland, in her dissent in *In re L.M.*, responded to each of the four bases on which the majority rested its determination that the RKJJC became sufficiently parallel to the adult criminal justice code to require that juveniles be afforded the same right to a jury trial as adults.[95] She identified the four justifications as: (1) the shifting of policy goals from rehabilitation to public protection and juvenile accountability; (2) parallel language between the juvenile and adult justice codes; (3) closely similar sentencing schemes in the two codes; and (4) elimination of some previously required confidentiality features in the juvenile justice code.[96] Warning of the dangers of placing form over substance, Chief Justice McFarland stated the majority "overstates and overemphasizes" the changes, which do not ultimately require recognition of a juvenile's constitutional right to a jury trial.[97]

1. Policy Goals Did Not Shift from Previous to Revised Juvenile Code

While the RKJJC has much more specific language regarding the ways in which its goals will be met, the dissent contended that the goals themselves, protection of the public and rehabilitation of juvenile offenders, remain consistent.[98] Chief Justice McFarland looked to the policy discussion in both the KJOC and the RKJJC and compared the language, concluding that, although differently worded, the goals remain the same.[99] Like the RKJJC, the KJOC stated in its plain language that protection of the public was a goal.[100] By the express declaration of the legislature, the KJOC was meant to be liberally construed so that its application would "best serve the juvenile's rehabilitation *and the protection of society*."[101] The RKJJC, similarly, states its "primary goals . . . are to promote public safety, hold juvenile offenders accountable

95. *Id.* at 175-82 (McFarland, C.J., dissenting).

96. *Id.* at 175-76.

97. *Id.* at 175.

98. *In re* L.M., 186 P.3d at 176 (McFarland, C.J., dissenting).

99. *See id.*

100. *Id.*

101. Kansas Code for the Care of Children, ch. 182, 1982 Kan. Sess. Laws 765, 798 (emphasis added), *repealed by* Revised Kansas Juvenile Justice Code, ch. 169, 2006 Kan. Sess. Laws 1060.

for their behavior and improve their ability to live more productively and responsibly in the community."[102] While the majority noted a definite shift from rehabilitation-oriented goals to public protection as the primary goal,[103] the dissent saw no such differentiation.[104] Additionally, the goals of the RKJJC, even if more closely aligned with the adult criminal code than with the previous juvenile code, retain an aspect of rehabilitation; the dissent saw no language in the adult criminal code suggesting such a goal.[105]

2. Language Shifts Not Indicative of Underlying Change

In responding to the majority's point that the shift in language of the RKJJC more closely mirrors the adult criminal justice code, the dissent cautioned that "form must not be placed over substance."[106] Conceding that there have been definite language changes,[107] Chief Justice McFarland pointed to one example of such a change and illustrated why the terminology used may not indicate a true shift, either practical or ideological:

> The facilities denominated as state youth centers, and now juvenile correctional facilities, are one and the same. [The Youth Center at Topeka was renamed Topeka Juvenile Correctional Facility, the Youth Center at Larned was renamed Larned Juvenile Correctional Facility, etc.] Regardless of their names, these facilities have always been institutions where juvenile offenders are sent to serve a period of court-ordered confinement.[108]

3. Sentencing Schemes Still Show Significant Differences for Adults and Juveniles.

The majority found that the sentencing schemes in the juvenile justice system were revised through the RKJJC and that the revised Act brought sentencing of juveniles more closely into alignment with the adult criminal

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102. KAN. STAT. ANN. § 38-2301 (Supp. 2008).

103. *See supra* Part II.B.1.

104. *In re* L.M., 186 P.3d at 176 (McFarland, C.J., dissenting).

105. *Id.* at 176-77.

106. *Id.* at 177.

107. *See supra* Part II.B.1.

108. *In re* L.M., 186 P.3d at 177 (McFarland, C.J., dissenting).

system.[109] The dissent, however, turned to the "[s]ignificant differences" that remain between the two.[110] Although certain aspects of the sentencing structure, including the juvenile judge's discretionary ability to impose sentences that depart upward from prescribed sentencing guidelines, are similar to the structure in place in the adult criminal justice system, there is still a difference in the final sentences imposed on juveniles and adults for the same criminal behavior.[111]

> For example, a juvenile adjudicated for an offense which if committed by an adult would be classified as a nondrug severity level 1 felony offense, would face a minimum [commitment] term of [twenty-four] months and a maximum term that could not extend beyond the juvenile [becoming twenty-two years and six months old].[112]

An adult convicted of the same crime, with no criminal history, would face a term of 147 to 165 months of imprisonment.[113] Further, juvenile judges may not impose consecutive sentences while judges in the adult criminal system may, and juveniles must age out of a juvenile correctional facility upon attaining the age of twenty-two years and six months.[114]

Chief Justice McFarland pointed out several other differences between the sentencing schemes of the juvenile justice and adult criminal justice systems as well: incarceration is discretionary in juvenile adjudications, while in adult sentencing it may be mandatory; juvenile judges may modify sentences after imposition, while judges in the adult criminal justice system do not have that discretionary power; and the mechanism of extended-jurisdiction juvenile prosecution is peculiar to the juvenile justice system.[115] In an extended-jurisdiction juvenile prosecution, the offender is sentenced to both an adult and a juvenile sentence but the adult sentence is stayed on the condition that the offender meets the requirements of the juvenile sentence.[116] The juvenile court may revoke the juvenile sentence, impose the adult sentence, and transfer jurisdiction to an adult court if the offender violates the juvenile sentence.[117] Obviously, the

109. *See supra* Part II.B.1.

110. *See In re* L.M., 186 P.3d at 177-79 (McFarland, C.J., dissenting).

111. *See id.* at 177-78.

112. *Id.* at 177.

113. *Id.*

114. *Id.* at 177-78.

115. *Id.* at 178.

116. *In re* L.M., 186 P.3d at 178.

117. *Id.*

converse, an adult who could be transferred to a different, more severe court, is not practicable; this illustrates the continuing recognition of the differences between the adult and juvenile systems and "evidences a last-ditch effort to extend the favorable protections of juvenile court and the benefits of its less severe sentences to juvenile offenders who previously would have been waived to adult court."[118]

Additionally, sentencing options are different for juveniles and adults.[119] Juveniles have access to a diversionary program to avoid prosecution that, unlike adult diversion, is available before charges are filed.[120] Intake procedures when an individual is taken into custody by law enforcement differ from juveniles to adults as well.[121] Juveniles are generally taken to a local juvenile intake and assessment program for evaluation and may be released from there to a parent or legal guardian, with or without conditions, if the intake assessment worker believes it is in the best interests of the child to do so.[122] Also pointing to the rehabilitation goals of the juvenile justice system, Chief Justice McFarland cited the procedure, unique to the Kansas juvenile process, by which local citizen review boards may become involved by evaluating a juvenile offender's progress and recommending future action to a judge involved with a juvenile offender's case.[123]

4. Protective Provision Changes Do Not Significantly Erode *Parens Patriae*.

Finally, Chief Justice McFarland addressed the majority's contention that reduction of confidentiality and other protective provisions under the RKJJC eroded the *parens patriae* character of the juvenile system.[124] She pointed out that there are only two differences between the former and revised versions of the juvenile justice code with respect to confidentiality of juvenile records: (1) the age of protection was lowered from fifteen to thirteen years old, and (2) the juvenile's file is not open for public inspection unless a judge determines that such inspection is not in the best interests of the juvenile and the juvenile is under age fourteen.[125]

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118. *Id.* at 179.

119. *See id.*

120. *Id.*

121. *See id.*

122. *In re* L.M., 186 P.3d at 179.

123. *Id.* at 180.

124. *See id.* at 181; *see supra* Part II.B.1.c.

125. *In re* L.M., 186 P.3d at 181 (McFarland, C.J., dissenting).

In total, Chief Justice McFarland concluded that "[t]he changes to the juvenile code cited by the majority have not so eroded the features of the juvenile system that distinguish it from the adult system that it can be said that the rationale underlying *McKeiver* and *Findlay* is no longer valid."[126] For further support, Chief Justice McFarland noted that the majority's holding was against the weight of authority from other jurisdictions.[127]

III. Incorporating the Opinions into a Stronger Analysis

The Kansas Supreme Court's holding in *In re L.M.* is a bold move that affords an across-the-board right to jury trials to juveniles under the Sixth and Fourteenth Amendments to the United States Constitution and section 10 of the Kansas Constitution Bill of Rights.[128] Recognizing that the ideal of rehabilitation as the goal of the juvenile justice system is no longer a reality in Kansas under the current juvenile justice code, a majority of the Kansas Supreme Court determined that such changes superseded the United States Supreme Court's reasoning in *McKeiver* and the Kansas Supreme Court's own prior reasoning in *Findlay*.[129] Thus, the Kansas Supreme Court was no longer bound to follow those precedential cases.[130] The Kansas Supreme Court was correct in this reasoning because reality has shifted in the juvenile justice system.[131]

"In place of an ideal system, the reality of the juvenile court system has become one of punishment for the offense and has led to a system through which juveniles are processed in a manner nearly identical to [adult] criminals."[132] This was amply demonstrated by the Kansas Supreme Court to be the case under the RKJJC through the court's detailed

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126. *Id.*

127. *Id.* at 182; *see also* Valdez v. State, 801 S.W.2d 659, 660-61 (Ark. Ct. App. 1991) (rejecting the argument that juvenile adjudications under the revised code were similar to criminal prosecutions and therefore required a right to a jury trial); State *ex rel.* D.J., 817 So.2d 26, 32 (La. 2002) (holding that statutes that "blur[] the distinction" between adult and juvenile proceedings do not necessarily offend due process to the extent that a jury trial would be required); State v. Chavez, 180 P.3d 1250, 1254 (Wash. 2008) (holding that amendments to the juvenile justice system did not so alter it in nature that juveniles charged with violent and serious violent offenses were afforded the right to a jury trial).

128. *See supra* Part II.B.

129. *In re* L.M., 186 P.3d at 170.

130. *Id.*

131. *See* Gerald P. Hill, II, *Revisiting Juvenile Justice: The Requirement for Jury Trials in Juvenile Proceedings Under the Sixth Amendment*, 9 FLA. COASTAL L. REV. 143, 165 (2008).

132. *Id.*

discussion of policy changes and closer alignment with the adult criminal justice system as evidenced through language changes in the revised code.[133] However, the majority opinion would have done well to consider Chief Justice McFarland's caution about placing the value of form over substance.[134] By declining to use the historical analysis proffered by Justice Luckert in her concurrence, the majority of the Kansas Supreme Court largely based its rationale on specific language of the KJOC and the RKJJC, opening the door to Chief Justice McFarland's criticism that the majority opinion was too narrowly focused.[135]

A. Language and Policy Goals: Heeding the Dissent's Caution

While realistic assessment of how changes in statutory language imply changes in legislative intent is a valid analytical tool, as Chief Justice McFarland pointed out in her dissent, some of the language changes made in the revised code are mere renaming of facilities that may not actually mean a change in the nature of the activities undertaken therein.[136] It is dangerous to rely too heavily on the semantics of a statute when interpreting against the weight of precedent.[137] The Washington Supreme Court recognized this danger when it chose to interpret revised language in a juvenile justice code in concordance with the long-established goals of the juvenile justice system:

> For more than [seventy] years, this state has been trying to avoid accusing and convicting juveniles of crimes. While the [more recent] Juvenile Justice Act . . . placed more emphasis on a juvenile's criminal activity than [the previous version], . . . this new emphasis may "[do] as much to rehabilitate, correct and direct an errant youth as does the prior philosophy . . . ." Even though the Legislature changed the methods of dealing with juvenile offenders, it did not thereby convert juvenile proceedings "into a criminal offense atmosphere totally comparable to an adult criminal offense scenario." "The new legislation clearly does not set up a rigidly punitive system which mirrors in every respect the adult criminal justice system." To interpret [the statute at issue in this way] would mean

133. *See supra* Part II.B.

134. *In re* L.M., 186 P.3d at 177 (McFarland, C.J., dissenting).

135. *See supra* Part II.D.

136. *See supra* Part II.D.2.

137. *See* State v. Schaaf, 743 P.2d 240, 247 (Wash. 1987).

> overlooking . . . the attempts of the juvenile justice system to distinguish juvenile offenders from their adult counterparts.[138]

This attempt to distinguish juvenile offenders from adult criminals was instrumental in the creation of the juvenile justice system as discrete from the adult criminal system.[139] Had the majority in *In re L.M.* merely relied upon changes in language such as "youth center" to "correctional facility," it would have incorrectly disregarded the important and longstanding goals behind the juvenile justice system.[140] Here, however, the legislature changed the language of the juvenile code to such an extent and so pervasively that the majority was justified in construing the amended code as a result of a shift in the policy goals behind the statute itself.[141]

The rehabilitative goals of the juvenile justice system and the differentiation between the juvenile and adult systems are important and should not be lightly discarded in the face of changed statutory provisions for juvenile justice.[142] Indeed, the dissent and majority opinions in *In re L.M.* closely examined the similarities and differences between the underlying policy goals of the juvenile and adult justice systems.[143] The concurring opinion by Justice Luckert, however, analyzed the juvenile right to a jury trial in a historical light, which may be more broadly accepted and applicable in jurisdictions outside of Kansas.[144] Analysis of a juvenile's right to a jury trial under section 5 of the Kansas Constitution Bill of Rights is not addressed by the majority and is not even mentioned by the dissent.[145]

B. The Historical Analysis: A Compromise

Justice Luckert, citing support from the California Court of Appeal, utilized a historical analysis test.[146] Ultimately, she concluded that because minors charged with a felony were provided the right to a jury trial under English common law at the time of ratification of the Kansas Constitution and because Kansas cases have recognized common-law treatment of

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138. *Id.* (internal citations omitted).

139. *See supra* Part I.A.

140. *See Schaaf*, 743 P.2d at 247.

141. *See supra* Part II.B.

142. *See* Gordon A. Martin, Jr., *The Delinquent and the Juvenile Court: Is There Still a Place for Rehabilitation?*, 25 CONN. L. REV. 57, 58-66 (1992).

143. *See supra* Parts II.B, D.

144. *See supra* Part II.C.

145. *In re* L.M., 186 P.3d 164, 173 (Kan. 2008) (Luckert, J., concurring).

146. *See supra* Part II.C.

juveniles fourteen years old or older as part of the adult criminal system, section 5 of the Kansas Constitution Bill of Rights "grants a right to a trial by jury to all juveniles [fourteen] years of age or older who are charged with a felony."[147] This sort of historical analysis has long been adopted and approved of by the United States Supreme Court.[148] In 1908, the Supreme Court was asked to rule on whether a judge erred in instructing a jury that a criminal defendant's failure to take the stand and deny charges made against him was a violation of his Constitutional due process rights.[149] The right to exemption from testimonial self-incrimination was examined by the Court from a historical viewpoint: "At the time of the formation of the Union the principle that no person could be compelled to be a witness against himself had become embodied in the common law and distinguished it from all other systems of jurisprudence."[150] Although a historical inquiry is not the only factor to consider in a due process analysis, the right's "historical pedigree" is still an important consideration.[151]

In *Duncan v. Louisiana*, the United States Supreme Court again used traditional inquiry methods and looked into legal practice regarding jury trials at the time of the framing of the Constitution.[152] Writing for the Court, Justice White found jury trials were guaranteed by "[t]he constitutions adopted by the original States" and "the constitution of every State entering the Union thereafter in one form or another."[153] Further, Justice White stated that "[e]ven such skeletal history is impressive support for considering the right to jury trial in criminal cases to be fundamental to our system of justice, an importance frequently recognized in the opinions of this Court."[154]

Justice Luckert's application of such a time-honored analytical technique in determining that the right to a jury trial is afforded under section 5 of the Kansas Constitution Bill of Rights is solidly based in

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147. *In re* L.M., 186 P.3d at 174-75 (Luckert, J., concurring).

148. *See* Ronald J. Krotoszynski, Jr., *Dumbo's Feather: An Examination and Critique of the Supreme Court's Use, Misuse, and Abuse of Tradition in Protecting Fundamental Rights*, 48 WM. & MARY L. REV. 923, 942-43 (2006).

149. Twining v. New Jersey, 211 U.S. 78, 90-91 (1908), *overruled in part on other grounds by* Malloy v. Hogan, 378 U.S. 1 (1964).

150. *Id.* at 91.

151. *See* Krotoszynski, *supra* note 148, at 944.

152. *Id.* at 946.

153. Duncan v. Louisiana, 391 U.S. 145, 153 (1968).

154. *Id.* at 153-54.

analytical precedent by the United States' highest court.[155] Because the analytical process used in the concurring opinion is based upon history and not upon the specific statutory language of the RKJJC as compared with both the KJOC and the adult criminal code in Kansas, the concurring opinion is more likely to be broadly applied in other jurisdictions.[156] By not focusing on the specifics of the juvenile code at issue and focusing on the larger issue of a historical constitutional right to a jury trial for certain types of juvenile offenders, Justice Luckert seems to have found a compromise among the majority and dissent's argument regarding the legislative intent and policy goals underlying the RKJJC.[157] Regardless of whether the Kansas Legislature intended to restrict the *parens patriae* nature of the juvenile justice system in Kansas to the extent that a juvenile would be afforded a constitutional right to a jury trial, Justice Luckert's historical analysis is legitimate; indeed, Justice Luckert did not discuss in detail the nature of the current juvenile justice code in Kansas.[158]

Some commentators and highly esteemed jurists have warned that "[i]f English common law established the requirements of due process, 'the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straightjacket, only to be unloosed by constitutional amendment.'"[159] This caution is overcome in this instance, however, by the existence of recent Kansas cases that support Justice Luckert's assertion that Kansas law has recognized common-law treatment of juveniles as part of the adult criminal prosecution system.[160] When considered in tandem with the majority's convincing argument that under the RKJJC, the distinction between juvenile offenders and adult criminals is becoming ever narrower,[161] the historical analysis concretely

155. *See id.*; Twining v. New Jersey, 211 U.S. at 90-91, *overruled in part on other grounds by* Malloy v. Hogan, 378 U.S. 1 (1964).

156. *Cf.* Roper v. Simmons, 543 U.S. 551, 560 (2005) ("[E]xpansive language in the Constitution[] must be interpreted according to its text, by considering history, tradition, and precedent, and with due regard for its purpose and function in the constitutional design."); State v. Sapps, 820 A.2d 477, 481-91, 495-97 (Del. Fam. Ct. 2002) (applying historical analysis in determining whether Megan's Law may be applied to minors); State v. Smith, 75 P.3d 934, 940 (Wash. 2003) (stating that "[t]he purpose of [the relevant constitutional provision] was to preserve inviolate the right to a trial by jury as it existed at the time of the adoption of the constitution").

157. *See supra* Part II.

158. *In re* L.M., 186 P.3d 164, 172-75 (Kan. 2008) (Luckert, J., concurring).

159. Krotoszynski, *supra* note 148, at 943 (quoting *Twining*, 211 U.S. at 101).

160. *In re* L.M., 186 P.3d at 174 (Luckert, J., concurring).

161. *See supra* Part II.B.1.

supports the assertion that juveniles are guaranteed the right to a jury trial by section 5 of the Kansas Constitution Bill of Rights if the juvenile is fourteen years of age or older and charged with a felony offense.[162] Therefore, the majority of the Kansas Supreme Court would have had a more solidly reasoned opinion had it incorporated the concurrence's historical analysis and heeded the dissent's warning that it placed too much emphasis on form over substance of the RKJJC. Standing alone, none of the three opinions fully addresses the constitutional issue; components of each must be incorporated to create a truly comprehensive analysis.

CONCLUSION

The Kansas Supreme Court, in its groundbreaking decision in *In re L.M.*, held that there is a constitutional guarantee to a jury trial for juvenile offenders.[163] Although the majority and dissenting opinions focused mainly on the specific language and revisions to the Kansas Juvenile Justice Code, it is the concurring opinion's careful historical analysis that allows this decision to be widely influential in other jurisdictions. When combined with the majority's convincing argument that the *parens patriae* nature of the juvenile justice system has sufficiently eroded to require giving juveniles the right to a jury trial and the dissent's important caution that form not take precedence over substance, the historical examination provides the final step in creating an analysis of a juvenile's right to a jury trial in today's changing juvenile justice system. This analytical method is not specific to Kansas, as the majority or dissent's reasoning may seem if considered alone, but is broadly applicable and may be used by other jurisdictions in addressing the question of how the changing nature of the juvenile justice system affects a juvenile's right to a jury trial.

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162. *In re* L.M., 186 P.3d at 172-75 (Luckert, J., concurring).

163. *Id.* at 170.

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FOREWORD: TAX-EXEMPT ORGANIZATIONS AND THE STATE: NEW CONDITIONS ON EXEMPT STATUS

ERIC A. LUSTIG*

The Symposium panel discussions, and corresponding articles, examine two central but distinct groups of current issues involving charitable endowments and property tax exemptions. These issues are analyzed at the federal and state levels, respectively. This examination is through a common lens that examines these issues through the turbulence of fairly recent economic run-ups and even more recent economic downturns.

It's probably a good omen when the Chronicle of Higher Education publishes a feature on one of your symposium topics on the day the symposium is held.[1] The Chronicle featured "town versus gown" issues involving property tax exemptions for colleges and universities. The examination focused specifically on the use of payments in lieu of taxes (PILOTs). The other symposium topic relating to endowments has certainly generated significant press coverage as well.[2]

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* Professor of Law, New England School of Law. The author thanks Martha Drane, Philip Mantis and Gerrit Betz of the *New England Law Review* for their efforts in organizing this Symposium. The author also thanks Sue Finneran and Craig Levey of the Business Law Center for their efforts. The author also expresses his appreciation to the Symposium participants—Johnny Rex Buckles, Linda Sugin, Fran Hill, Darryll Jones and Evelyn Brody—all of whom added incredible insight and perspective to the topics discussed. Finally, the author thanks his colleagues, Ron Chester and Kent Schenkel, for moderating the Symposium panels.

1. Evelyn Brody, *Payments in Lieu of Taxes Is 'Contribution,' Say the Town; 'Extortion,' Say the Colleges*, CHRON. OF HIGHER ED., Feb. 5, 2010, at A88; Karin Fischer, *Town, Gowns & Taxes*, CHRON. OF HIGHER ED., Feb. 5, 2010, at A1; Eric Kelderman, *Colleges and Cities Square Off Over Tax Demands*, CHRON. OF HIGHER ED., Feb. 5, 2010, at A3.

2. *See, e.g.*, Johnny Rex Buckles, *Should the Private Foundation Excise Tax on Failure to Distribute Income Generally Apply to "Private Foundation Substitutes?"*

Johnny Rex Buckles leads off with his contribution—*Should the Private Foundation Excise Tax on Failure to Distribute Income Generally Apply to "Private Foundation Substitutes?" Evaluating the Taxation of Various Models of Charitable Entities*.[3] In his article, Professor Buckles examines the expansion of the private foundation excise tax model to entities and insiders beyond the original scope of private foundations. Professor Buckles finds that excise tax consequences are often contingent on the type of charity involved.[4] Professor Buckles examines the current application of the distribution requirement and gleans the apparent underlying assumptions. He then considers the implications of extending the distribution requirement to private foundation alternatives and university endowments.

Linda Sugin's Article—*Lifting the Museum's Burden from the Backs of the University: Should the Art Collection Be Treated as Part of the Endowment*—examines issues raised by a recent trend of universities deaccessioning (or attempting to do so) some or all of their art collections.[5] Professor Sugin explores the legal pattern resulting from this trend and finds that one of the key factors is a general lack of legal precedent. She posits that legislation may be necessary to create the appropriate standard for deaccessioning. But Professor Sugin argues that the real problem in setting an appropriate legal standard is a conflict in conceptualizing the nature of the art collection between the universities, which view them as resources, and critics of deaccessioning, who view the collections as art. Professor Sugin finds that these disparate views arise from a lack of common understanding of the public interest in university art collections. Professor Sugin examines these sometimes competing conceptualizations of cultural property and instrumental property. With respect to university art collections, Professor Sugin argues for a hybrid approach, depending on context and function.

In her contribution, *University Endowments: A (Surprisingly) Elusive Concept*, Frances Hill argues that a necessary step before considering university endowment distribution requirements is to explore the conceptual models of such endowments. As Professor Hill's title suggests, she finds a commonly accepted conceptual and operating definition

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Evaluating the Taxation of Various Models of Charitable Entities, 44 NEW ENG. L. REV. 493, 496 n.12 (2010) and accompanying text (citing extensive coverage of university endowments, tuition costs and wealth disparity among institutions of higher education).

3. 44 NEW ENG. L. REV. 493 (2010).

4. *Id.* at 496.

5. Linda Sugin, *Lifting the Museum's Burden from the Backs of the University: Should the Art Collection Be Treated as Part of the Endowment*, 44 NEW ENG. L. REV. 541 (2010).

"surprisingly elusive."[6] Professor Hill addresses two "unarticulated" models of endowment: "money in waiting" and "money in use."[7] Professor Hill sees these models as only beginning points for further analysis for classifying the types of colleges and universities by type of endowments. Professor Hill then examines how endowments are held across the spectrum of colleges and universities. She next explores problems in collecting data on endowments and their uses. Professor Hill considers new information that will now be provided by the recently-revised IRS Form 990. Professor Hill then considers policy arguments for endowment-distribution requirements. She also examines various tax provisions to see whether they can support requiring distribution. Professor Hill concludes that universities and colleges are different from other public charities in that they are more dependent on government assistance (both at the student and institutional levels), which should be reflected in their exempt status.

In my Article, *The Boston City PILOT Task Force: An Emerging Best Practice?* I examine the work of this new task force to review Boston's Payment In Lieu of Taxes (PILOT) program.[8] The Article provides background for Boston's current program as well as comparative data for other municipalities in Massachusetts. The Article focuses on the process by which the task force approached its charges and the data collected. The article considers the Task Force's recommendations, particularly in light of whether they represent a best practice.

In her Article, *All Charities Are Property-Tax Exempt, but Some Charities Are More Exempt than Others*, Evelyn Brody continues her long look at property-tax exemptions with a focus on the tumultuous economic times of the last two years.[9] Professor Brody examines property-tax exemptions in light of the renewed pressure at the local and state levels. Professor Brody's article surveys fifty-one jurisdictions (all states and the District of Columbia). Professor Brody first examines the sources of tax exemption across the jurisdictions (e.g., state constitution) and requirements, such as ownership and use of the exempt property. Professor Brody then examines how the property exemption is administered in

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6. Frances R. Hill, *University Endowments: A (Surprisingly) Elusive Concept*, 44 NEW ENG. L. REV. 581 (2010). Professor Hill also finds a lack of a statutorily defined metric to measure endowments similarly elusive.

7. *Id* at 585.

8. Eric A. Lustig, *The Boston City PILOT Task Force: An Emerging Best Practice?*, 44 NEW ENG. L. REV. 601 (2010).

9. Evelyn Brody, *All Charities Are Property-Tax Exempt, but Some Charities Are More Exempt than Others*, 44 NEW ENG. L. REV. 621 (2010) (citing PROPERTY TAX-EXEMPTION FOR CHARITIES: MAPPING THE BATTLEFIELD (Evelyn Brody ed., 2002) and Evelyn Brody, *The States' Growing Use of a Quid-Pro-Quo Rationale for the Charity Property Tax Exemption*, 56 EXEMPT ORG. TAX REV. 269 (2007)).

practice across the surveyed jurisdictions. This inquiry also examines "work-arounds," such as user fees and PILOTs.[10] Appended to Professor Brody's article is the comprehensive fifty-one jurisdiction survey.[11]

These symposium articles address timely and important issues. It is hoped that they will be a voice going forward in these evolving areas.

10. *Id.* at 658.

11. *Id.* at 671.

SHOULD THE PRIVATE FOUNDATION EXCISE TAX ON FAILURE TO DISTRIBUTE INCOME GENERALLY APPLY TO "PRIVATE FOUNDATION SUBSTITUTES"? EVALUATING THE TAXATION OF VARIOUS MODELS OF CHARITABLE ENTITIES

JOHNNY REX BUCKLES*

Abstract: Under current law, only private foundations are subject to federal excise tax for failing to distribute a portion of their investment assets for charitable purposes. However, the Treasury Department has recently issued proposed regulations largely extending the distribution requirements governing private foundations to certain supporting organizations, and the prospect that Congress will impose similar distribution requirements on other entities looms. This Article reviews the current state of the law, identifies the apparent assumptions underlying it, and discusses the implications of these assumptions for evaluating the regulation of charity "endowment" spending through federal tax law, including the federal excise tax regime. More specifically, after surveying the major types of charitable entities, this Article discusses the distribution requirements governing such entities under the current excise tax regime and other pertinent federal tax rules. This Article then conceptualizes the status quo as embracing a framework for regulating various models of charity, explains these models and the framework that governs them, and identifies the apparent assumptions underlying the framework. Next, this Article discusses the implications of this analysis for evaluating the desirability of imposing distribution requirements on private foundation alternatives and university endowments. This Article then briefly discusses the relevance of an important trend in state laws governing endowment spending, as well as the theoretical underpinnings of the charity income tax exemption. This Article identifies an apparently strong congressional assumption that charities which

are directly or indirectly accountable to the donating public should be free to determine what percentage of investment assets to expend currently. This reliance on the monitoring function performed by the donating public suggests that Congress should reconsider its regulation through federal tax law of at least two private foundation substitutes. The analysis also suggests that the case for subjecting university endowments to a mandatory payout rule is far from obvious.

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INTRODUCTION

The types of transactions triggering excise tax under the Internal Revenue Code (the "Code"), as well as the types of entities and their "insiders" subject to these taxes, have expanded greatly over the past four decades. No longer are private foundations and their managers the only actors in the nonprofit sector that must concern themselves with federal excise taxes. Excise taxes do or may apply when several types of charities engage in all sorts of transactions including compensating insiders,[1] making grants to natural persons,[2] extending loans to insiders,[3] selling (or purchasing) assets to (or from) insiders,[4] holding relatively large shares of

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* Associate Professor of Law, University of Houston Law Center. I thank the New England School of Law for hosting the symposium at which the draft of this Article was presented, and all those at the event who offered comments following the presentation. I also thank my wife, Tami, for her constant support.

1. *See, e.g.*, I.R.C. §§ 4941(a)-(b), (d)(1)(D), 4958(a)-(b), (c)(1)(A) (2006).
2. *See, e.g., id.* §§ 4945(a)-(b), (d)(3), 4966(a), (c)(1)(A).
3. *See, e.g., id.* §§ 4941(a)-(b), (d)(1)(B), 4958(a)-(b), (c)(2)(A), (c)(3)(A)(i).
4. *See, e.g., id.* § 4941(a)-(b), (d)(1)(A).

business enterprises,[5] making unsupervised grants to other charities,[6] and using assets to influence legislation or elections for public office.[7]

The excise tax consequences of these transactions often depend upon the type of charity involved. This "entity contingent" feature of the excise tax regime more or less holds true, directly or indirectly, in the case of distribution requirements governing investments. Strictly speaking, only private foundations are subject to federal excise tax for failing to distribute a portion of investment assets for charitable purposes.[8] However, in response to the Pension Protection Act of 2006 (the "PPA"),[9] the Treasury Department recently issued proposed regulations largely extending the distribution requirements governing private foundations to another type of charity. Should this type of charity fail to comply with the new requirements (once adopted), it would be classified as a private foundation, and fully taxable as such. Further, the PPA directs the Secretary of the Treasury to study whether a certain type of charitable entity component should be subject to minimum distribution requirements.[10] Moreover, as other essays in this symposium issue discuss, interest on Capitol Hill in imposing analogous distribution requirements on university endowments is real.[11]

This Article reviews the current state of the law, identifies the apparent assumptions underlying it, and discusses the implications of these assumptions for evaluating the regulation of charity "endowment" spending through federal tax law, including the federal excise tax regime.[12] Part I

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5. *See, e.g., id.* § 4943(a)-(b), (e)-(f).

6. *See, e.g., id.* §§ 4945(a)-(b), (d)(4), 4966(a), (c)(1)(B)(ii).

7. *See, e.g.*, I.R.C. §§ 4911(a), 4912(a)-(b), 4945(a)-(b), (d)(1)-(2), 4955(a)-(b).

8. *See id.* § 4942(a)-(b).

9. Pub. L. No. 109-280, 120 Stat. 780.

10. *Id.* § 1226(a)(2) (requiring a study of donor-advised funds).

11. *See Offshore Tax Issues: Reinsurance and Hedge Funds: Hearings Before the S. Comm. on Finance*, 110th Cong. (2007) (statement of Jane G. Gravelle, Senior Specialist in Economic Policy, Congressional Research Service), *available at* http://finance.senate.gov/imo/media/doc/092607testjg1.pdf. The congressional concern over university endowment spending has not escaped the attention of the popular press. *See* Sarah E. Waldeck, *The Coming Showdown Over University Endowments: Enlisting the Donors*, 77 FORDHAM L. REV. 1795, 1798-99 (2009) ("Between January and March 2008, for instance, the New York Times published almost fifteen pieces that discussed endowments, college tuition, or the growing wealth gap between institutions of higher education.").

12. In so characterizing the inquiry, I am not using the term "endowment" solely to refer to the portion of a charity's investment portfolio that is subject to donor-imposed restrictions preventing current exhaustion thereof. Rather, I intend the more colloquial sense of the term "endowment" (i.e., the investment assets of a charity that are held to produce returns that will be expended both currently and in future years). The more technical, limited meaning of an "endowment fund" is, of course, very important for many other purposes of law. *See,*

surveys the major types of charitable entities. Part II discusses the distribution requirements governing such entities under the current excise tax regime and other pertinent federal tax rules. Part III conceptualizes the status quo as embracing a framework for regulating various models of charity, explains these models and the framework that governs them, and identifies the apparent assumptions underlying the framework. Part IV discusses the implications of this analysis for evaluating the desirability of imposing distribution requirements on private foundation alternatives and university endowments. Part IV also briefly discusses the relevance of an important trend in state laws governing endowment spending, as well the theoretical underpinnings of the charity income tax exemption.

I. General Classification of Charitable Entities

Code § 501(c)(3) exempts from federal income taxation entities that are organized and operated exclusively for religious, charitable, educational, or certain other purposes and that satisfy specified requirements.[13] Code § 509 classifies charitable entities according to their sources of support, their affiliation with other charities, and in a few cases, the nature of their operations. A charity that is not described in one of the subsections of Code § 509(a) is classified as a private foundation.[14] The following briefly describes the major types of charities.

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e.g., UNIF. PRUDENT MGMT. OF INST. FUNDS ACT § 2(2) (2006) (defining an endowment fund as an institutional fund "that, under the terms of a gift instrument, is not wholly expendable by the institution on a current basis").

13. *See* I.R.C. § 501(c)(3). Code § 501(c)(3) organizations include only the following:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

Id.

14. *See id.* § 509(a) (opening sentence).

A. Unaffiliated Public Charities

A tax-exempt charity described in Code § 509(a)(1) or 509(a)(2) is best described as an "unaffiliated public charity."[15] These organizations first include traditional public charities—churches, primary and secondary schools, colleges, universities, hospitals, and certain medical research organizations affiliated with hospitals—which derive their non-private foundation status by virtue of their operations, rather than their sources of funding.[16] Other types of charities may fall within the class of unaffiliated public charities by virtue of their sources of funding. One type includes any organization that normally receives a substantial portion of its total support—exclusive of income received in performing its charitable function—from a governmental unit or from direct or indirect contributions from a broad segment of the general public.[17] Another type of unaffiliated public charity includes any organization that does not normally receive more than one-third of its total support from unrelated business activities and investments, and normally receives more than one-third of its total support from any combination of gifts, grants, membership fees, and income from performing an exempt function.[18]

B. Supporting Organizations

1. In General

Another type of charity classified as other than a private foundation is a supporting organization ("SO"). An SO maintains an affiliation with another charity often akin to a subsidiary-parent or brother-sister relationship between for-profit corporations.[19] An SO must satisfy three requirements. First, it must be organized and operated solely "for the benefit of, to perform the functions of, or to carry out the purposes of" a §

15. Although an entity described in paragraph (1) or (2) of Code § 509(a) may in fact have a formal affiliation with another charity, that affiliation is not essential to the entity's classification as other than a private foundation. Hence, the term "unaffiliated public charity" in this Article refers to any organization described in Code § 509(a)(1) or (2), regardless of its relationship to another charity.

16. *See* I.R.C. § 170(b)(1)(A)(i)-(iii).

17. *See id.* §§ 170(b)(1)(A)(vi), 509(a)(1); Treas. Reg. § 1.170A-9(e) (as amended in 2008) (setting forth two alternative tests for qualifying as a publicly supported organization).

18. I.R.C. § 509(a)(2). For these purposes, qualifying support does not include receipts from certain insiders of the charity or from non-publicly supported charities. *See id.* § 509(a)(2)(A).

19. *See* Treas. Reg. § 1.509(a)-4(g)(1)(i); JOINT COMM. ON TAXATION, PUB. NO. JCX-38-06, TECHNICAL EXPLANATION OF H.R. 4: THE "PENSION PROTECTION ACT OF 2006" 331-32 (2006), *available at* http://www.jct.gov/x-38-06.pdf.

509(a)(1) or 509(a)(2) entity (hereinafter referred to as a "supported organization").[20] Second, the SO must satisfy one of three alternative statutory requirements ensuring that the supported organization controls the SO, or that the two entities share common supervision or complementary operations.[21] These requirements give rise to the classification of an SO as a "Type I," "Type II," or "Type III" SO in common nomenclature. Finally, designated insiders, including large donors and their family members, must not control the SO.[22]

2. Classifying Supporting Organizations on the Basis of Three Types

The classification of SOs into three types merits elaboration. Several tax implications arise from the qualification of an SO according to its type. This section describes the basic classification system.

a. Type I Supporting Organizations

A Type I SO is the common designation of an SO that is "operated, supervised, or controlled by"[23] one or more supported organizations. This relationship exists if a majority of the officers, directors, or trustees of the SO are appointed or elected by the governing body (as a group or by members thereof), officers acting ex officio, or membership of the supported organization(s).[24] An SO may be operated, supervised, or controlled by one or more supported organizations and be operated for the benefit of one or more different supported organizations only if benefiting the latter furthers the former's purposes.[25]

b. Type II Supporting Organizations

A Type II SO is the common designation of an SO that is "supervised or controlled in connection with"[26] one or more supported organizations. A Type II relationship is present if there is common supervision or control by the persons supervising or controlling both the SO and the supported organizations that is sufficient to ensure that the SO will be "responsive to the needs and requirements" of the supported organizations.[27] A Type II

20. I.R.C. § 509(a)(3)(A).
21. *See id.* § 509(a)(3)(B); Treas. Reg. § 1.509(a)-4(f)(2)(i)-(iii).
22. *See* I.R.C. §§ 509(a)(3)(C), 4946.
23. Treas. Reg. § 1.509(a)-4(f)(2)(i).
24. *Id.* § 1.509(a)-4(g)(1)(i).
25. *Id.* § 1.509(a)-4(g)(1)(ii).
26. *Id.* § 1.509(a)-4(f)(2)(ii) (as amended by T.D. 7784, 1981-2 C.B. 133).
27. *Id.* § 1.509(a)-4(h)(1).

relationship requires that the control or management of the SO "be vested in the same persons that control or manage" the supported organizations.[28]

c. *Type III Supporting Organizations*

A Type III SO is the common designation of an SO that is "operated in connection with"[29] one or more supported organizations. In general, an SO will qualify as a Type III SO only if it satisfies several requirements, including a "responsiveness test" and an "integral part test" under the Treasury regulations.[30] In response to the PPA, the Treasury Department recently issued proposed amendments to the regulations setting forth these requirements.[31]

i. *Responsiveness Test*

Under the responsiveness test of the proposed regulations, virtually all Type III SOs[32] would be required to establish one of the following three conditions:

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28. *See id.*

29. Treas. Reg. § 1.509(a)-4(f)(2)(iii).

30. *Id.* § 1.509(a)-4(i)(1)(i).

31. As the Treasury has observed, the PPA made five changes to the requirements an organization must meet to qualify as a Type III SO:

> (1) It removed [an] alternative test [set forth in the existing Treasury regulations] for charitable trusts as a means of meeting the responsiveness test;
>
> (2) It required the Secretary of the Treasury to establish a new payout requirement for [Type III SOs] that are not functionally integrated; . . .
>
> (3) It provided that a Type III [SO] must annually provide to each of its supported organizations . . . information . . . to ensure that the [SO] is responsive to the needs or demands of its supported organization(s);
>
> (4) It prohibited a Type III [SO] from supporting any supported organization not organized in the United States; and
>
> (5) It prohibited a . . . Type III [SO] [as well as a Type I SO] from accepting a gift or contribution from a person who, together with certain related persons, directly or indirectly controls the governing body of a supported organization of the [SO].

Payout Requirements for Type III Supporting Organizations That Are Not Functionally Integrated, 74 Fed. Reg. 48,672, 48,674 (proposed Sept. 24, 2009) (to be codified at 26 C.F.R. pt. 1).

32. An exception, which effectively expands the factors that may be taken into account to establish compliance with the responsiveness test, applies to Type III SOs operating before November 20, 1970. *See* Prop. Treas. Reg. § 1.509(a)-4(i)(3)(v), 74 Fed. Reg. 48,672, 48,681 (Sept. 24, 2009).

> (1) one or more officers, directors, or trustees of the [SO] are elected or appointed by the officers, directors, trustees, or membership of the supported organization; (2) one or more members of the governing body of the supported organization are also officers, directors, or trustees of, or hold other important offices in, the [SO]; or (3) the officers, directors, or trustees of the [SO] maintain a close and continuous working relationship with the officers, directors, or trustees of the supported organization.[33]

In addition, a Type III SO must establish that, by reason of these conditions, the officers, directors or trustees of the supported organization have a significant voice with respect to the SO's investment policies, how and when the SO makes grants, and the SO's selection of grant recipients, as well as in otherwise directing the use of the SO's income or assets.[34]

ii. Integral Part Test

An SO can demonstrate that it is an integral part of a supported organization—thereby satisfying the integral part test of the proposed regulations—only if it qualifies as a "functionally integrated" Type III SO or as a "non-functionally integrated" ("NFI") Type III SO.[35] Generally, an SO meets the integral part test as a functionally integrated Type III SO if it engages in certain activities that would normally be engaged in by the SO's supported organization(s) but for the SO's involvement.[36] Substantially all of these activities in which the SO engages must directly further the exempt purposes of the supported organization(s) to which the SO is responsive by virtue of the SO performing the functions of such supported organization(s), or by virtue of the SO carrying out the purposes of such supported organization(s).[37] For these purposes, activities that directly further the exempt purposes of the supported organization include holding title to exempt-use property and managing exempt-use property, but generally do not include fundraising, investing and managing non-exempt-

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33. *Id.* § 1.509(a)-4(i)(3)(ii), 74 Fed. Reg. at 48,680-81.

34. *Id.* § 1.509(a)-4(i)(3)(iii), 74 Fed. Reg. at 48,681.

35. *Id.* § 1.509(a)-4(i)(1)(iii), 74 Fed. Reg. at 48,680.

36. *Id.* § 1.509(a)-4(i)(4)(i)(A)(2), 74 Fed. Reg. at 48,681.

37. *Id.* § 1.509(a)-4(i)(4)(i)(A)(1), 74 Fed. Reg. at 48,681. Alternatively, an SO meets the integral part test as a functionally integrated Type III SO if it is the "parent of each of its supported organizations" (i.e., if the SO "exercises a substantial degree of direction over the policies, programs, and activities of the supported organization, and a majority of the officers, directors, or trustees of the supported organization is appointed or elected, directly or indirectly, by the governing body, members of the governing body, or officers (acting in their official capacity)" of the SO). Prop. Treas. Reg. § 1.509(a)-4(i)(4)(i)(B), 74 Fed. Reg. at 48,681.

use property, and making grants (whether to the supported organization or to third parties).[38]

The grounds for qualifying as an NFI Type III SO are very different. Under the proposed regulations, an NFI Type III SO generally must satisfy both a distribution requirement (described *infra*) and an attentiveness requirement.[39] Under the attentiveness requirement, an NFI Type III SO "must distribute one-third or more of its annual distributable amount to one or more supported organizations that are attentive to the SO's operations and to which the SO is responsive" (as described *supra*).[40] In general terms, a supported organization is considered attentive to the SO's operations if the SO distributes annually to such supported organization an amount of support that represents a sufficient part of the supported organization's total support.[41]

C. Private Foundations

A tax-exempt charity that is neither an SO nor one of the various types of unaffiliated public charities is classified as a private foundation.[42] Usually, a single large donor or small group of donors (such as an individual, a family, or a corporation) primarily or exclusively funds a private foundation.[43] As discussed more fully below, private foundations may further be classified as "operating foundations" or not.

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38. *Id.* § 1.509(a)-4(i)(4)(ii), 74 Fed. Reg. at 48,681.

39. *Id.* § 1.509(a)-4(i)(5)(i)(A), 74 Fed. Reg. at 48,672, 48,682.

40. *Id.* § 1.509(a)-4(i)(5)(iii)(A), 74 Fed. Reg. at 48,683.

41. *Id.* § 1.509(a)-4(i)(5)(iii)(B), 74 Fed. Reg. at 48,683. More precisely, one of the following three conditions must exist: (1) the SO distributes annually to the supported organization an amount that is ten percent or more of the supported organization's total support; (2) the amount of support received from the SO is necessary to avoid the interruption of the carrying on of a particular function or activity (including a substantial program or activity supported by the SO through earmarked grants); or (3) based on all relevant facts including the number of supported organizations, the length and nature of the relationship between the supported organization and the SO, and the use of the SO's financial support, the amount of support is a sufficient part of a supported organization's total support. *Id.* Attentiveness is more likely to be present when the percentage of the supported organization's total support attributable to funds transferred by the SO is high, but a showing that the supported organization is actually attentive to the operations of the SO is also highly probative. *See id.* § 1.509(a)-4(i)(5)(iii)(B)(3), 74 Fed. Reg. at 48,683.

42. *See* I.R.C. § 509(a) (2006).

43. *See* STAFF OF JOINT COMM. ON TAXATION, 109TH CONG., TECHNICAL EXPLANATION OF H.R. 4, THE "PENSION PROTECTION ACT OF 2006" 335 (Comm. Print 2006).

D. Donor-Advised Funds

A donor-advised fund ("DAF") is actually a component of a charity, rather than a separate legal entity. However, transactions involving a DAF are subject to special excise tax rules that practically require one to analyze the DAF as though it were a charitable entity for some purposes. Subject to narrow exceptions,[44] a DAF is a fund or account which meets the following four requirements. First, the charity that sponsors the fund must separately identify it "by reference to contributions of a donor or donors."[45] Second, the sponsoring charity must own and control the fund.[46] Third, by reason of her status as a donor, the donor of the fund, or her designee, must have advisory privileges with respect to the distribution or investment of fund assets.[47] Finally, the charity sponsoring the DAF must not be a private foundation.[48]

II. Regulation of Distributions of Endowment Assets of Charities Under Current Law

A. Private Foundations

1. In General

Code § 4942 generally imposes an excise tax on a private foundation's failure to distribute five percent of the net fair market value of its investment assets to accomplish purposes described in Code § 170(c)(2)(B) (i.e., charitable purposes).[49] The tax equals thirty percent of the amount required to be distributed, but has not been distributed within a specified time period.[50]

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44. *See* I.R.C. § 4966(d)(2)(B)(i)-(ii) (excepting from the definition of a DAF those funds that distribute money only to a single entity and those from which money may be distributed only for certain education-related grants upon the recommendation of a committee appointed by the sponsoring organization).

45. *Id.* § 4966(d)(2)(A)(i).

46. *See id.* § 4966(d)(2)(A)(ii).

47. *See id.* § 4966(d)(2)(A)(iii).

48. *See id.* § 4966(d)(1)(B) (defining "sponsoring organization" to exclude a private foundation). The definitional requirements of a DAF do not imply that a private foundation is prohibited from soliciting funds and holding them in separate accounts. Rather, any such account would simply not meet the definition of a DAF. *See id.*

49. *See id.* § 4942(a), (c)-(e).

50. *See* I.R.C. § 4942(a). This excise tax does not apply if the failure to distribute income arose from the failure to value the private foundation's assets properly, as long as this failure was not willful and was based upon reasonable cause, provided that the private foundation corrects the deficiency by making adequate distributions within a certain time period. *See id.* § 4942(a)(2).

More specifically (and technically), the tax is imposed on "undistributed income" for any taxable year, which has not been distributed before the first day of the second (or any succeeding) taxable year following the taxable year in question.[51] The tax is imposed on any portion of the income in question that remains undistributed at the beginning of such second (or succeeding) taxable year.[52] For these purposes, "undistributed income" means the amount by which the "distributable amount" for the taxable year exceeds the "qualifying distributions" from such distributable amount.[53] The "distributable amount" for a taxable year is, in general, the private foundation's "minimum investment return" minus certain taxes on the private foundation's income.[54] The "minimum investment return" for a given taxable year is five percent of the excess of "(A) the aggregate fair market value of all assets of the foundation other than those which are used . . . directly in carrying out the foundation's exempt purpose, over (B) the acquisition indebtedness associated with such assets."[55] Finally, the term "qualifying distributions" generally means any amount, including reasonable and necessary administrative expenses, paid to accomplish one or more purposes described in Code § 170(c)(2)(B), as well as any amount paid to acquire an asset used directly in carrying out one or more purposes described in Code § 170(c)(2)(B).[56]

2. Transfers That Do Not Count as Qualifying Distributions

Transfers to the following charitable organizations do not constitute qualifying distributions:[57]

1) "An organization controlled (directly or indirectly) by the private foundation or one or more disqualified persons,"[58] unless the distributing

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51. *See id.* § 4942(a).

52. *Id.*

53. *Id.* § 4942(c).

54. *Id.* The "distributable amount" also includes recoveries of amounts previously accounted for as qualifying distributions. *Id.* § 4942(d)(1), (f)(2)(C).

55. *Id.* § 4942(e)(1). "Acquisition indebtedness" is determined under Code § 514(c)(1). *See id.* § 4942(e)(1)(B).

56. I.R.C. §§ 4942(g)(1)(A)-(B). Special rules apply to charitable set-asides for a specific project. *See id.* § 4942(g)(2).

57. *See id.* §§ 4942(g)(4)(A)(i)-(ii).

58. *Id.* § 4942(g)(1)(A)(i). A disqualified person includes an officer or director of the private foundation, see § 4946(a)(1)(B), (b)(1), any substantial contributor to the foundation, see § 4946(a)(1)(A), a member of the family of the foregoing, § 4946(a)(1)(D), and entities in which any of the foregoing hold an ownership interest exceeding thirty-five percent. *Id.* § 4946(a)(1)(E)-(G). A disqualified person also includes one whose ownership interest in a substantial contributor exceeds twenty percent, § 4946(a)(1)(C), and a member of the family of any such owner. *Id.* § 4946(a)(1)(D). For these purposes, a "substantial contributor"

private foundation can obtain evidence that the transferee has distributed the amount as a qualifying distribution from corpus by the end of the taxable year following the year of the transferee's receipt;[59]

2) Any private foundation that is not an operating foundation,[60] unless the distributing private foundation can obtain evidence that the transferee has distributed the amount as a qualifying distribution from corpus by the end of the taxable year following the year of the transferee's receipt;[61]

3) A Type III SO that is not functionally integrated with its supported organization;[62] and

4) Any other SO, if a disqualified person with respect to the private foundation directly or indirectly controls the SO or its supported organization.[63]

3. Special Treatment of Private Operating Foundations

A private operating foundation[64] is exempt from the excise tax imposed by Code § 4942.[65] Unlike the typical private foundation that furthers charitable purposes primarily by making grants, a private operating foundation conducts charitable activities directly. A private foundation qualifies as a private operating foundation if it satisfies an income test and one of three alternative tests: an asset test, an endowment test, or a support test.

a. Income Test

Under the income test, the foundation generally must make qualifying distributions directly for the active conduct of its exemption-furthering activities equal to substantially all of the lesser of "(i) its adjusted net income . . . or (ii) its minimum investment return."[66] "If the foundation's qualifying distributions exceed its minimum investment return (but are less than the foundation's adjusted net income) substantially all of such

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generally means someone who has given more than $5,000 to the foundation, if her cumulative gifts exceed two percent of total gifts received by the foundation through the close of the year in which the person in question has made gifts to the foundation. *Id.* §§ 507(d)(2)(A), 4946(a)(2).

59. *See id.* § 4942(g)(3).

60. *See id.* § 4942(g)(1)(A)(ii).

61. *Id.* § 4942(g)(3)(A).

62. *See* I.R.C. § 4942(g)(4)(A)(i). This rule applies only to distributing private foundations that are not private operating foundations. *Id.* § 4942(g)(4)(A).

63. *See id.* § 4942(g)(4)(A)(ii). This rule applies only to distributing private foundations that are not private operating foundations. *Id.* § 4942(g)(4)(A).

64. See *id.* § 4942(j)(3) (defining private "operating foundation").

65. *See id.* § 4942(a)(1).

66. *See id.* § 4942(j)(3)(A)(i)-(ii).

qualifying distributions must be made directly for the active conduct" of its exemption-furthering activities.[67]

> However, if the foundation's minimum investment return is less than its adjusted net income and the foundation's qualifying distributions equal or exceed such adjusted net income, only that portion of the qualifying distributions equal to substantially all of the foundation's adjusted net income must be made directly for the active conduct [of its exemption-furthering activities].[68]

For these purposes, "substantially all" means eighty-five percent or more.[69]

b. Alternative Tests: Asset, Endowment, or Support

i. Asset Test

A foundation generally satisfies the asset test if substantially more than half of its assets (generally valued at fair market value)[70] are devoted directly to the active conduct of its exemption-furthering activities or to functionally related businesses.[71] For these purposes, a functionally related business is a trade or business which is not an unrelated trade or business, or an activity that is "carried on within a larger aggregate of similar activities or within a larger complex of other endeavors" related to the foundation's exempt purposes.[72] Assets held for the production of income, for investment, or for some other similar use (e.g., stocks, bonds, or generally, leased real estate) are not devoted directly to the active conduct of the foundation's exempt activities.[73] For purposes of the asset test, substantially more than half means sixty-five percent or more.[74]

ii. Endowment Test

A foundation satisfies the endowment test if it normally makes qualifying distributions directly for the active conduct of its exemption-furthering activities in an amount not less than two-thirds of its minimum

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67. Treas. Reg. § 53.4942(b)-1(a)(ii) (2009).

68. *Id.*

69. *Id.* § 53.4942(b)-1(c).

70. *Id.* § 53.4942(b)-2(a)(4).

71. I.R.C. § 4942(j)(3)(B)(i); Treas. Reg. § 53.4942(b)-2(a)(1)(i). For purposes of the asset test, stock in a corporation which is controlled by the foundation and substantially all of the assets of which are devoted to the purposes described in the text is treated the same as assets directly owned by the foundation and used for such purposes. *See id.* § 53.4942(b)-2(a)(1)(ii).

72. I.R.C. § 4942(j)(4)(A)-(B).

73. Treas. Reg. § 53.4942(b)-2(a)(2)(i).

74. *Id.* § 53.4942(b)-2(a)(5).

investment return (i.e., in general, approximately 3.33% of its net investment assets).[75]

iii. Support Test

A foundation satisfies the support test by meeting the following three conditions:

> (i) Substantially all of the foundation's support (excluding its gross investment income) is normally received from the general public and from five or more exempt organizations which are not described in Code section 4946(a)(1)(H) with respect to each other or the recipient foundation;
>
> (ii) Not more than twenty-five percent of the foundation's support (excluding gross investment income) is normally received from any one such exempt organization; and
>
> (iii) Not more than one half of the foundation's support is normally received from gross investment income.[76]

B. Unaffiliated Public Charities

No excise tax on the failure to distribute income for charitable purposes applies to unaffiliated public charities.

C. Supporting Organizations

1. Type I, Type II, and Functionally Integrated Type III Supporting Organizations

Current law imposes no quantitatively determinable distribution requirements on Type I SOs, Type II SOs, or functionally integrated Type III SOs.

2. Type III Non-Functionally Integrated Type III Supporting Organizations

Section 1241(d) of the PPA requires the Treasury to publish regulations on the payout required of Non-Functionally Integrated (NFI) Type III SOs. As discussed *supra*, the Treasury Department recently

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75. I.R.C. § 4942(j)(3)(B)(ii); Treas. Reg. § 53.4942(b)-2(b)(1).

76. I.R.C. § 4942(j)(3)(B)(i)-(iii); Treas. Reg. § 53.4942(b)-2(c)(1).

published proposed regulations implementing this congressional mandate.[77] In general, the proposed regulations require a Type III SO that is not functionally integrated with its supported organization(s) to distribute on or before the last day of each taxable year its "annual distributable amount"[78]—broadly speaking, an amount equaling or exceeding five percent of the aggregate net fair-market value of its non-exempt-use assets.[79] Excluded from this base are all assets used (or held for use) to carry out the SO's exempt purposes.[80]

An asset is so used for an exemption-related purpose (and therefore excluded from the base) only if (1) the SO actually uses the asset in activities that carry out the exempt purposes of its supported organization(s); or (2) the SO owns the asset and establishes that its immediate use for such exempt purpose is not practical, and that definite plans exist to begin such use on behalf of its supported organization(s) within a reasonable period of time.[81] An asset is not so used for an exemption-related purpose if it is "held for the production of income or for investment ([e.g.,] stocks, bonds, interest-bearing notes, endowment funds, or, generally, leased[82] real estate)."[83]

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77. *See generally* Payout Requirements for Type III Supporting Organizations That Are Not Functionally Integrated, 74 Fed. Reg. 48,672 (Sept. 24, 2009).

78. Prop. Treas. Reg. § 1.509(a)-4(i)(5)(ii)(A), 74 Fed. Reg. 48,677 (Sept. 24, 2009).

79. *See id.* § 1.509(a)-4(i)(5)(ii)(B), 74 Fed. Reg. 48,674. Technically, the annual distributable amount for a taxable year is: (1) five percent of the excess of the aggregate fair market value of all of the SO's non-exempt-use assets over the acquisition indebtedness with respect to those assets (determined under Code § 514(c)(1)); (2) increased by amounts received or accrued as repayments of amounts which the SO previously included in satisfying its annual distribution requirement for any taxable year; (3) increased by amounts received or accrued from the sale or other disposition of property to the extent that the acquisition of such property was taken into account in meeting the SO's distribution requirement for any taxable year; and (4) reduced by the amount of federal income taxes imposed on the SO for such taxable year. *Id.*

80. *See id.* § 1.509(a)-4(i)(8)(i)(B)(5), 74 Fed. Reg. 48,683. For other assets excluded from the base, see *id.* § 1.509(a)-4(i)(8)(i)(B)(1)-(4), 74 Fed. Reg. 48,684.

81. *See id.* § 1.509(a)-4(i)(8)(i)(C)(1), 74 Fed. Reg. 48,684.

82. "Property acquired by the [SO] to be used to carry out the exempt purposes of its supported organization(s) may be considered as used (or held for use) to carry out such exempt purposes even though the property . . . is leased for a limited period of time during which arrangements are made for its conversion to the use for which it was acquired, provided such income-producing use of the property does not exceed a reasonable period of time, [generally, one year])." Prop. Treas. Reg. § 1.509(a)-4(i)(8)(i)(C)(1), 74 Fed. Reg. 48,684.

83. *Id.* Under a special rule, if an SO uses property "both to carry out the exempt purposes of the supported organization(s) and for other purposes, if the former use represents ninety-five percent or more of the total use, [the] property shall be considered to be used exclusively to carry out an exempt purpose of the supported organization(s)." *Id.* If

D. Donor-Advised Funds

No excise tax on the failure to distribute income for charitable purposes applies to DAFs or their sponsoring organizations. However, the PPA requires the Secretary of the Treasury to study various issues associated with the operation of DAFs, including whether a DAF should be required to distribute for charitable purposes a specified portion of its income or assets.[84]

III. Conceptualizing Entity Models and the Distribution Requirements That Govern Them Under Federal Tax Law

In determining whether federal tax law should effectively impose quantitative distribution requirements upon one or more types of charities, a salutary starting point is to conceptualize the models of charitable entities that occupy the sector. After identifying these models, one can both determine how federal tax law currently regulates them and articulate the probable assumptions that underlie the decision to impose, or refrain from imposing, quantitative distribution requirements on the various models.

Of course, one may conceptualize models of charitable entities according to multiple criteria. This Article conceptualizes charities first on the basis of their organizational independence—i.e., whether the charity is controlled by another charity (or is under common control with another charity). Another conceptual distinction is between charities that are largely funded by a broad segment of the general public and those that are predominantly funded by only a few sources. Yet another conceptual distinction is between charities that further their charitable missions primarily by conducting charitable activities directly and those that primarily make grants to charities that directly carry out a charitable program.

This Part of the Article describes the major models and two hybrid models, discusses how federal tax law regulates their distributions from investment assets, and explores the probable assumptions upon which the current tax regime rests.

A. Independent Charity Grant-Making Models

The independent charity is governed by a board of directors elected by its own members or by the members of the charitable entity itself. The institution's officers are typically appointed by the board of directors. Some

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the exemption-related use of such property is less than ninety-five percent of the total use, the SO must reasonably allocate between such use and other use. *Id.*

84. *See* Pension Protection Act of 2006, Pub. L. No. 109-280, § 1226(a)(2), 120 Stat. 780, 1094.

independent charities make grants to other charities, whereas others conduct charitable activities directly (e.g., by running a soup kitchen or a homeless shelter). Further, an independent charity may be either publicly or privately funded. Federal tax law's regulation of charitable distributions varies with the assorted combinations and permutations of these characteristics of charitable entities.

1. The Publicly Funded Independent Grant-Maker

The model described in this Article as the "publicly funded independent grant-maker" is structurally unaffiliated with any other charity, is publicly supported, and fulfills its mission largely by issuing grants to other charities. An example of this model is a local United Way. Certainly, such a charity is subject to the fundamental requirement that it operate for a charitable purpose.[85] However, this model of charity is otherwise subject to very little regulation of its distributions and other operations through the Code.[86] Specifically, with respect to this model, the Code and regulations: (1) *do not* impose a quantitative distribution requirement; (2) *do not* limit potential grantees to those falling within a specified public charity classification; (3) *do not* limit potential grantees to those designated by name or class in the grant-maker's governing instrument; (4) *do not* require that distributions further a particular, governmentally favored purpose or function for which the grant-maker is organized; (5) *do not* regulate or limit grants to individuals; (6) *do not* impose ceilings on the amount of distributions to charitable grantees; and (7) *do not* impose requirements on the composition of the grant-maker's governing board (except when public support is not sufficiently high).[87]

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85. *See* I.R.C. § 501(c)(3) (2006); Treas. Reg. § 1.501(c)(3)-1(a)(1), (c).

86. Like every charity, the independent, publicly funded grant-maker must also meet other basic requirements for maintaining federal income tax exemption. *See* I.R.C. § 501(c)(3) (listing requirements for federal income tax exemption of charitable entities).

87. Organizations are described in Code § 170(b)(1)(A)(vi) if they normally receive one-third of their total support from governmental units and/or direct or indirect contributions from the general public. *See* Treas. Reg. § 1.170A-9(f)(1)-(2). Moreover, an organization that fails this mechanical test can still qualify under Code § 170(b)(1)(A)(vi) if it passes a facts and circumstances test. *See id.* § 1.170A-9(f)(3). Under the facts and circumstances test, multiple factors pertaining to the actual financial support received and expected to be received by the charity are considered. Further, one factor set forth in the regulations that indicates that an entity is publicly supported under the facts and circumstances test is that its governing body "represents the broad interests of the public." *Id.* § 1.170A-9(f)(3)(v). According to the regulations:

> An organization will be treated as meeting this requirement if it has a governing body (whether designated in the organization's governing instrument or bylaws as a Board of Directors, Board of Trustees, etc.) which is comprised of public officials acting in their capacities as such;

What assumptions underlie this minimal regulation of distributions by the independent, publicly funded grant-maker? The most obvious assumption is that the members of the governing board can be trusted to exercise their fiduciary duties in such a way that further regulation of the making of charitable distributions through tax law is unnecessary. But what renders this assumption plausible? There is no tax law guaranteeing that the publicly funded independent grant-maker's board of directors consists of people who have technical competence, an awareness of the universe of potential grantees, a mindset to further charity rather than build an investment portfolio, an ability to evaluate which grantees most merit funding, or even a commitment to charitable efficiency. The most plausible basis for the assumption is the predicate assumption that the charity's reliance on support from the general public obviates the need for the tax system to restrict or otherwise regulate distributions beyond the most basic requirements for tax exemption.

This predicate assumption is sensible if the "market in altruism" effectively regulates the behavior of charity fiduciaries,[88] at least in

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> of individuals selected by public officials acting in their capacities as such; of persons having special knowledge or expertise in the particular field or discipline in which the organization is operating; of community leaders, such as elected or appointed officials, clergymen, educators, civic leaders, or other such persons representing a broad cross-section of the views and interests of the community; or, in the case of a membership organization, of individuals elected pursuant to the organization's governing instrument or bylaws by a broadly based membership.

Id.

88. The "market in altruism" is a central feature of the donative theory of federal income tax exemption proffered by Professors Mark Hall and John Colombo. *See* Mark A. Hall & John D. Colombo, *The Donative Theory of the Charitable Tax Exemption*, 52 OHIO ST. L.J. 1379, 1410 (1991). In explaining the role of donations, Hall and Colombo write as follows:

> The market in altruism works as follows. Those donors who desire to make some personal contribution to the betterment of society will have many choices from which to satisfy this desire. They will naturally tend to choose the outlet that provides the most satisfaction. We can generally assume that, for most donors, this will be the worthy objects they perceive as needing the most support. However, as gifts combined with subsidies begin to approach the socially desired level (as measured through the perceptions of those inclined to give), gifts will begin to taper off. In stable social settings, these countervailing forces may settle at an equilibrium, but as social conditions change, this market in altruism redirects philanthropy and the accompanying tax subsidy to new objects. That some giving is uninformed, over-reactive, or otherwise might come from donors who are oblivious to social worth or need is troubling, but no more so than similar defects in the private or

contexts not involving conflicts of interest.[89] Although one may legitimately question whether the market in altruism actually does effectively regulate fiduciary behavior, present purposes are served simply by observing the premise. The premise also implies that the entity's reliance on support from the general public obviates the need for the tax system to regulate the composition of the grant-maker's governing board. Apparently, the assumption is that the public's "invisible hand" can so control the charity's purse-strings that its board will be responsive to the public's assessment of whether the entity is sufficiently meeting charitable needs. Finally, observe that the Code's apparent reliance on the public's oversight of the publicly funded independent grant-maker implies that Congress believes that whatever objectives it would achieve through more direct regulation of charitable distributions are adequately served by relying on the public to monitor charities. In other words, not only is the publicly funded grant-maker assumed to be accountable to the public, but also the accountability provided by the public is assumed to be sufficient to preempt direct governmental regulation of distributions through federal tax law.[90]

2. The Privately Funded Independent Grant-Maker

The model described in this Article as the "privately funded independent grant-maker" is structurally unaffiliated with any other charity, fulfills its mission by issuing grants to other charities, and receives the bulk of its support from only a few sources (rather than from a broad section of the general public). A typical grant-making private foundation illustrates this model.

> political markets. Moreover, the fact that a recipient must show a substantial level of donative support before qualifying for the charitable exemption means that minor aberrational patterns are usually screened out.
>
> *Id.*

89. Code § 4958 imposes an excise tax on excess-benefit transactions between certain insiders and public charities. Augmenting the basic prohibition against private inurement of a charity's net earnings, *see* I.R.C. § 501(c)(3), the excess-benefit transactions excise tax increases the cost of exploiting a charity intentionally or through negligence. The tax obviously reflects a congressional judgment that conflict-of-interest transactions are not sufficiently regulated by state fiduciary law and the market in altruism.

90. The federal tax laws governing the various types of charitable entities rest on additional assumptions, of course. For example, the current tax regime assumes that the grant-making charity's indirect method of furthering charity—through making grants to other entities—is consistent with the grant-maker's charitable donee tax status for purposes of receiving tax-deductible contributions under Code § 170. *See generally* I.R.C. § 170. The scope of this Article does not require identification of all assumptions underlying the treatment of charitable distributions under current federal tax law.

This model of charity is subject to significant regulation of its distributions and other operations through the Code. With respect to this model, the Code and regulations: (1) *do* impose a quantitative distribution requirement;[91] (2) *do* limit potential grantees to those falling within a specified public charity classification,[92] or, in the alternative, require the exercise of expenditure responsibility;[93] and (3) *do* regulate or limit grants to individuals (under § 4945[94] and also under § 4941 in the case of grants to disqualified persons).[95] Even so, the Code and regulations: (1) *do not* limit potential grantees to those designated by name or class in the grant-maker's governing instrument; (2) *do not* require that distributions further a particular, governmentally favored purpose or function among several for which the grant-maker is organized; (3) *do not* impose ceilings on the amount of distributions to charitable grantees; (4) *do not* absolutely

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91. *See supra* Part II.A.1.

92. *See supra* Part II.A.2.

93. *See* I.R.C. § 4945(d)(4), (h). A private foundation exercises expenditure responsibility by establishing procedures: (1) to ensure that its grant is spent for the purpose for which it was made; (2) to obtain complete reports from the grantee on how the funds have been spent; and (3) to make reports with respect to such expenditures to the government. *See id.* § 4945(h)(1)-(3).

94. *See id.* § 4945. Under Code § 4945(d)(3), a "taxable expenditure" (which results in imposition of excise tax under Code § 4945(a) & (b)) includes "a grant to an individual for travel, study, or other similar purposes by such individual, unless such grant satisfies the requirements of subsection (g)." *Id.* § 4945(d)(3). Code § 4945(g), in turn, excludes from the definition of taxable expenditure a "grant awarded on an objective and nondiscriminatory basis pursuant to a procedure approved in advance by the Secretary," if one of the following is true:

> (1) the grant constitutes a scholarship or fellowship grant which would be subject to the provisions of section 117(a) (as in effect immediately prior to the enactment of the Tax Reform Act of 1986) and is to be used for study at a school described in section 170(b)(1)(A)(ii);
> (2) the grant constitutes a prize or award which is subject to the provisions of section 74(b) (without regard to paragraph (3) thereof), if the recipient of such prize or award is selected from the general public; or
> (3) the purpose of the grant is to achieve a specific objective, produce a report or other similar product, or improve or enhance a literary, artistic, musical, scientific, teaching, or other similar capacity, skill or talent of the grantee.

Id. § 4945(g)(1)-(3).

95. Acts of self-dealing between a disqualified person and a private foundation are subject to excise tax. *See id.* § 4941(a)-(b). A grant to a disqualified person constitutes an act of self-dealing. *See id.* § 4941(d)(1)(E) (defining self-dealing to include a "transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a private foundation").

prohibit grants to individuals; and (5) *do not* impose requirements on the composition of the grant-maker's governing board.

The apparent assumptions underlying the excise-tax regime governing the privately funded independent grant-maker are interesting. The most obvious apparent assumption contrasts with its parallel discussed in the previous subsection: the members of the governing board of the privately funded independent grant-maker *cannot* be wholly trusted to exercise their fiduciary duties with respect to the making of charitable distributions without further regulation through federal tax law. Because the only distinction between this model of charity and the publicly funded independent grant-maker is the source of funding, a logical further premise of this assumption is that the privately funded independent grant-maker's *lack of reliance* on support from the general public generally compels the tax system to restrict or otherwise regulate distributions beyond the most basic requirements for tax exemption.[96] The tax system further assumes that it must require the privately funded independent grant-maker to distribute a quantifiably determined amount each year, though it need not impose a ceiling on the same. Apparently, Congress believes private foundations are inclined to expend too little for present needs, rather than too much.

Nonetheless, the system does not imply a complete lack of faith in the ability of private foundations to function effectively. The excise tax regime appears to assume that, with the quantitative distribution requirement in place, the *lack of reliance* on support from the general public does not require the tax system: (1) to limit the potential grantees by name or

96. *Cf.* STAFF OF JOINT COMM. ON TAXATION, 109th CONG., TECHNICAL EXPLANATION OF H.R. 4, at 335 (Comm. Print 2006) ("Because private foundations receive support from, and typically are controlled by, a small number of supporters, private foundations are subject to a number of anti-abuse rules and excise taxes not applicable to public charities."). One other observation may be relevant. The members of the governing board of a private foundation are often related to the foundation's major donor(s). *See id.* ("Donors to private foundations and persons related to such donors together often control the operations of private foundations."); *see also* Dana Brakman Reiser, *Director Independence in the Independent Sector*, 76 FORDHAM L. REV. 795, 818-19 (2007) ("Foundations, especially ones associated with the generosity of a particular family, may have . . . boards composed largely of family members."). Perhaps Congress also assumed that private-foundation boards do not adequately discharge their fiduciary duties because of their deference to the desires of related donors who serve as fellow directors. Under this assumption, boards of private foundations might not distribute sufficient assets to charity absent a mandatory distribution requirement. The problem with any such assumption is that it: (1) fails to explain why certain private foundations—namely those governed by independent boards—should be subject to a mandatory distribution requirement; and (2) fails to explain why a public charity that is dominated by a major supporter should not also be subject to a mandatory distribution requirement.

general purpose; (2) to prohibit grants to individuals; (3) to limit distributions only to those that further a particular, governmentally favored purpose or function among several for which the grant-maker is organized; or (4) to regulate the composition of the privately funded independent grant-maker's governing board. These assumptions plainly imply congressional confidence in the ability of private foundation boards to make numerous responsible decisions with respect to distributions, regardless of who sits on their governing boards.

B. Independent Charity Operating Models

The only difference between the independent charity operating models and the independent charity grant-making models is that the former primarily carry out their purposes directly through charitable operations, rather than indirectly through the making of grants to other charitable entities. Once again, the distinction between the publicly funded entity and the privately funded entity is significant.

1. The Publicly Funded Independent Operator

The assumptions underlying the tax regime governing the publicly funded independent grant-maker generally apply in the context of the publicly funded independent operator, except that one must replace "distributions" with "expenditures" in the analysis. Thus, the tax regime assumes that very little regulation of the expenditures of a publicly funded independent operator is necessary, presumably for the same reasons articulated above with respect to the publicly funded independent grant-maker.[97] In brief, the tax regime generally appears to assume that the market in altruism effectively regulates the behavior of charity fiduciaries in contexts not involving conflicts of interest, and the entity's reliance on support from the general public obviates the need for the tax system to regulate the composition of the independent publicly supported operator's governing board. Further, the accountability provided by the public is assumed to be sufficient to preempt direct governmental regulation of expenditures through federal tax law.

2. The Privately Funded Independent Operator

The analysis becomes more complex when applied to the privately funded independent operator. An example of such an entity is the typical private operating foundation. The detailed rules for qualifying as a private

97. *See supra* Part III.A.1.

operating foundation under the Code may be summarized as follows.[98] First, the Code and regulations *do* impose a quantitative-expenditure requirement based on the entity's income. Second, the law effectively imposes ceilings on the amount of distributions to charitable grantees that the operator may make. This restriction follows from the requirement that the entity expend a specified portion of its income directly to accomplish an exempt purpose, rather than indirectly through grants.[99] However, the Code and regulations *do not* (1) require that expenditures further a particular, governmentally favored purpose or function among several for which the operator is organized; or (2) impose requirements on the composition of the operator's governing board.

As in the case of the privately funded independent grant-maker, the law apparently assumes that the members of the governing board of the privately funded independent operator *cannot* be wholly trusted to exercise their fiduciary duties with respect to making charitable expenditures without further regulation through federal tax law. Once again, because the only distinction between this model of charity and the publicly funded independent operator is its source of funding, the further premise of this assumption must be that the privately funded independent operator's *lack of reliance (or only partial reliance)*[100] on support from the general public generally compels the tax system to restrict or otherwise regulate expenditures beyond the most basic requirements for tax exemption. However, this distrust is not categorical. The law also assumes that the entity's *lack of reliance (or only partial reliance)* on support from the general public does not require the tax system: (1) to dictate the precise charitable use of funds expended directly to advance the operator's mission; or (2) to regulate the composition of the operator's governing board.

C. Public Charity-Controlled Entity Models

The public charity-controlled entity is affiliated closely with a publicly funded charity. Either the public charity's governing board, members, or officers appoint a majority of the board members or officers of the entity, or the two entities are under common control (i.e., a majority of

98. For a technical discussion of the rules governing private operating foundations, see *supra* Part II.A.3.

99. *See* I.R.C. § 4942(j)(3)(A)(i)-(ii). Presumably, the significance of this requirement lies in the assumption that the charitable operator's attempt to further charity indirectly—through making grants to other entities—is largely *inconsistent* with the operator's charitable donee tax status under Code § 170.

100. As discussed previously, some private operating foundations may qualify as such in part because of their receipt of fairly broad public support in some years. *See supra* Part II.A.3.b.ii.

the persons serving as board members and/or officers of the two entities are the same people). An example of an entity described in the former category is a Type I SO, and an example of an entity described in the latter category is a Type II SO. As in the case of independent charities, the public charity-controlled entity may function either as a grant-maker or an operating charity. Because federal tax law makes no distinction between grant-makers and operators in the case of Type I and Type II SOs, this Article will focus on the public charity-controlled grant-maker for ease of discussion. It will similarly refer to both Type I SOs and Type II SOs as "public charity-controlled" grant-makers for convenience.

If the public charity-controlled grant-maker is itself publicly supported, the analysis of Part III.A.1 applies. Otherwise, the public-charity controlled grant-maker is subject to the rules governing Type I and Type II SOs.[101] The tax regime governing SOs differs from that governing any other model of charity. In brief, the Code and regulations governing SOs: (1) *do* require that the organization further the exempt purpose of controlling/co-controlled organization(s) designated by name or class in the SO's governing instrument;[102] and (2) *do* impose requirements on the composition of the SO's governing board (both positive and negative). The positive requirement referred to in (2) is simply one which ensures public-charity control, or common control with the SO, as previously discussed.[103] The negative requirement referred to in (2) is that disqualified persons of the SO not directly or indirectly control it.[104] However, the Code and regulations: (1) *do not* impose a quantitative distribution requirement; (2) *do not* require that distributions further a particular governmentally favored purpose or function among several for which the grant-maker is organized; (3) *do not* expressly regulate or limit grants to individuals;[105] and (4) *do not* impose ceilings on the amount of distributions to charitable grantees.

The apparent assumptions supporting the tax regime governing the public charity-controlled grant-maker reveal the depth of congressional reliance on the efficacy of charity monitoring supplied by the donating public. This reliance is not entirely obvious, however, and fully unveiling it requires some effort. Initially, one should identify the obvious congressional assumption that formal control of an entity's board by a

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101. This assertion assumes that the entity prefers not to be classified as a private foundation under the Code. If the entity is amenable to classification as a private foundation, obviously it need not satisfy the conditions for qualifying as an SO under § 509(a)(3) of the Code.

102. *See* Treas. Reg. § 1.509(a)-4(d)(2)(i) (2009).

103. *See supra* Part I.B.2.

104. *See* I.R.C. §§ 509(a)(3)(C), 4946.

105. *See* Treas. Reg. § 1.509(a)-4(e)(1); Rev. Rul. 75-436, 1975-2 C.B. 217. Of course, any such grant must further the exempt purposes of the supported organization(s).

public charity (or by those who formally control that public charity) is not alone sufficient to ensure that the members of the governing board of the public charity-controlled grant-maker will exercise their fiduciary duties with respect to distributions in a manner that is consistent with the entity's preferential tax-exempt status. Otherwise, this formal control alone would remove a Type I or Type II SO from classification as a private foundation. Likewise, a similar assumption must be that requiring an organization to further the exempt purpose of a publicly funded controlling/co-controlled organization(s) designated by name or class in the SO's governing instrument is, by itself, insufficient to ensure that the fiduciaries of the SO will cause the SO to operate appropriately.

However, when these complementary safeguards are coupled with the requirement that disqualified persons not control the board of the entity formally controlled by/with the public charity, the assumptions of the tax regime begin to have a familiar ring. Namely, with these three safeguards in place, the law apparently assumes that *the SO's lack of reliance on public support does not create any need*: (1) to require the controlled/co-controlled entity to distribute a quantifiably determined amount each year for charitable purposes; (2) to prohibit grants to individuals; or (3) to limit distributions only to those that further a particular governmentally favored purpose or function for which the grant-maker is organized.[106] But why does the SO's lack of reliance on public support not compel greater regulation of distributions? *Apparently, the law assumes that the donating public's influence on the public charity that controls the SO (or with which the SO is under common control) is sufficient to ensure that the SO will act responsibly.* The law's prohibition of de facto control of the SO by disqualified persons is apparently thought to ensure that the formal control of the SO by the public charity supported by the SO is real. Further, if the formal control of the SO by the public charity is real, and if the public charity is truly responsive to the donating public, then the fiduciaries who govern the public charity should act responsibly in how they exercise control over the SO.

So understood, the assumptions underlying the tax regime governing the public charity-controlled grant-maker are largely consistent with those governing the independent, publicly funded grant-maker. Board composition rules are apparently assumed to ensure that the fiduciaries overseeing the public charity have the ability to control the SO, and the requirement that the SO further the purposes of its supported organizations is apparently assumed to ensure that the same fiduciaries will exercise

106. Moreover, as in the case of other entities, federal tax law reflects an assumption that a public charity-controlled grant-maker is not inclined to distribute too much for charitable purposes.

control in a manner that is consistent with the missions of the controlling public charities. They will do so if the donating public can (and does) demand that they do so.

D. Hybrid Models

Other charitable entities may be understood as hybrids of the various models discussed *supra*. For example, one may conceptualize a Type III SO that is "functionally integrated" as a hybrid between an independent, privately funded operator and a public charity-controlled operator. One may conceptualize an NFI Type III SO as a hybrid between an independent, privately funded grant-maker and a public charity-controlled grant-maker, with greater "genetic material" from the former. A DAF also bears the marks of a hybrid between an independent, privately funded grant-maker and a public charity-controlled grant-maker, but with greater "genetic material" from the latter (because ultimate control over a DAF is vested in the board of directors of the sponsoring organization).

The remainder of this Article does not attempt an exhaustive analysis of every conceivable hybrid model. Rather, it focuses on two hybrid models that are often considered substitutes for a private, grant-making foundation: (1) the NFI Type III SO; and (2) the DAF.

1. The Non-Functionally Integrated Type III Supporting Organization

The NFI Type III SO may be loosely understood as a "public charity-influenced grant-maker." With respect to this hybrid entity, the Code and existing and proposed regulations: (1) *do* generally require that the organization further the exempt purpose of the controlling/co-controlled organization(s) designated by name in the SO's governing instrument;[107] (2) *do* impose a quantitative distribution requirement;[108] (3) *do* require that the organization distribute amounts to or for the use of one or more supported organizations designated in the SO's governing instrument;[109] and (4) *do* generally impose requirements on the composition of the SO's governing board (both positive and negative). The positive requirement referred to in (4) is the responsiveness test governing all Type III SOs, which does not go so far as to require that a public charity formally control

107. *See* Treas. Reg. § 1.509(a)-4(d)(4)(i).

108. Prop. Treas. Reg. § 1.509(a)-4(i)(5)(ii), 74 Fed. Reg. 48,680, 48,682 (Sept. 24, 2009).

109. The requirement that Type III non-functionally integrated SOs make distributions "to or for the use of" supported organizations may well limit the degree to which such an SO may make grants to individuals. *Id.*

the SO.[110] The negative requirement referred to in (4) is that disqualified persons of the SO not directly or indirectly control it.[111] Although the tax system (including proposed regulations) regulates distributions from NFI Type III SOs more heavily than those made by any other charitable entity discussed *supra*,[112] the Code and proposed regulations: (1) *do not* require that distributions further a particular, governmentally favored purpose or function among several for which the grant-maker is organized; and (2) *do not* impose ceilings on the amount of distributions to charitable grantees.

The assumptions upon which this tax regime rest are rather apparent. First, Congress assumes that the members of the governing board of the NFI Type III SO *cannot* be wholly trusted to exercise their fiduciary duties with respect to distributions in a manner that is consistent with the entity's preferential tax-exempt entity and charitable-donee status. The law further assumes that a public charity's modest influence on the board of a Type III SO, a provision in the SO's governing document requiring it to further the charitable purposes of one or more designated public charities, and the inability of disqualified persons to control the SO are not, separately or in the aggregate, sufficient to ensure that the NFI Type III SO will operate appropriately. Rather, Congress assumes that the law must additionally impose a payout requirement—one that mandates distributions to one or more public charities that in some meaningful sense depend on these distributions to conduct charitable operations. However, even with all of this regulation, the law reflects an assumption that there is no need to limit distributions to those that further a particular, governmentally favored purpose or function among several for which the grant-maker is organized.[113]

These assumptions are largely consistent with the assumptions apparently underlying the regulation of other charity models through federal tax law. Because the NFI Type III SO is not accountable to the general public directly, and because the indirect influence of the general public over the SO by a supported organization through the responsiveness test may be modest, the law reflects a congressional judgment that expanded regulation of distributions is warranted. Interestingly, because of the combination of payout requirements, board composition requirements,

110. *See id.* § 1.509(a)-4(i)(3); *supra* Part I.B.2.c.i.

111. *See* I.R.C. §§ 509(a)(3)(C), 4946 (2006).

112. The regulation of distributions by an NFI Type III SO is even more rigid than the regulation of distributions of a private foundation when one considers that, unlike distribution decisions made by a private foundation, decisions concerning distributions from an NFI Type III SO must be made by a board whose composition is often modestly dictated by federal tax law.

113. Moreover, as in the case of other entities, federal tax law reflects an assumption that an NFI Type III SO is not inclined to distribute too much for charitable purposes.

and attentiveness requirements governing NFI Type III SOs, distributions from this hybrid entity are actually more highly regulated than distributions from private foundations. Presumably, the justification for this more extensive regulation is the favorable charitable-donee status of the Type III SO under Code § 170,[114] a status not enjoyed by the typical private grant-making foundation.[115]

2. The Donor-Advised Fund

As current law stands, DAFs are not required to distribute any portion of assets to other charitable entities. Although the congressionally mandated study of DAFs by the Secretary of the Treasury reveals a legislative suspicion of the status quo, for present purposes this Article takes the law as it is. What assumptions would justify the decision not to regulate distributions by DAFs? The most plausible assumption is that the same forces which justify the decision not to regulate distributions by an independent, publicly funded grant-maker justify the decision to do the same in the case of DAFs. That is, if one assumes that the donating public—through the market in altruism—can effectively supervise grant-making by public charities generally, one may likewise assume that the donating public can do the same when the grant-making is conducted by a charity maintaining DAFs. As long as the public charity relies on the public for donations, the argument would go, one should assume that the charity's fiduciaries will act just as responsibly in authorizing distributions from DAFs as they do in authorizing distributions from funds that are not donor-designated.

Whether this assumption is entirely plausible is debatable.[116] At a minimum, it does seem quite consistent with most of the assumptions apparently underlying the tax regime governing other models of charity.

IV. Implications and Assessment

The preceding discussion helps frame an analysis of whether the private foundation excise tax on failure to distribute a percentage of investment assets should apply to private foundation "substitutes." This analysis also provides insight for evaluating whether university endowments should be subject to a similar excise tax regime on distributions. Part IV.A discusses the implications of the preceding

114. *See* I.R.C. § 170(b)(1)(A)(viii) (imposing a ceiling on charitable contribution deductions in an amount equal to fifty percent of the taxpayer's contribution base).

115. *See id.* § 170(b)(1)(B) (imposing a ceiling on charitable contribution deductions in an amount equal to thirty percent of the taxpayer's contribution base in the case of donations to entities not described in Code § 170(b)(1)(A)).

116. *See infra* Part IV.A.3.

discussion for regulating distributions of private foundation substitutes through the federal tax system, and Part IV.B briefly comments on how the analysis informs discussions of regulating university endowment spending through federal tax law. Part IV.C takes a step back and offers a broader perspective—one informed by: (1) observing a significant nationwide development at the level of state law; and (2) appreciating the need to consider the theoretical justification(s) for exempting charities from federal income taxation in the first instance.

A. Private Foundation Substitutes

The charitable entities most often conceptualized as private foundation substitutes are SOs and DAFs. This section analyzes the sensibility of imposing payout requirements on these entities in view of the assumptions that apparently underlie current law's regulation of the models of charity through the Code and regulations.

1. The Public Charity-Controlled Grant-Maker

Let us begin with the apparent assumptions of current law's treatment of the public charity-controlled grant-maker—i.e., a Type I SO or Type II SO that primarily furthers its charitable purposes by making grants to one or more charities. As discussed *supra*, current law imposes no distribution requirement on this model, apparently because of the assumption that the general public can and will adequately monitor such a charity through the public charity that controls it (or with which it is under common control). The idea seems to be that, if the formal control of the SO by the public charity is real, and if the public charity is truly responsive to the donating public, then the fiduciaries who govern the public charity should act responsibly not only in how they oversee distributions or other expenditures made directly by the public charity, but also in how they exercise control over the SO with respect to the SO's distributions to charities.

For the sake of argument, let us stipulate (without actually accepting) the veracity of the assumption that a publicly funded charity's accountability to the general public justifies the absence of any federal tax regulation of distributions made by the charity. Can one craft a plausible rebuttal of the concomitant assumption that control of an SO by this same publicly funded charity ensures that the general public will indirectly hold the SO accountable for its distributions? One possible rebuttal is that, unlike their monitoring of distributions made directly by the publicly funded charity, the monitoring of the SO's distributions by the board of the SO's affiliated public charity is likely to be lax. The rebuttal would rest on two premises.

The first premise is that the board of the controlling public charity tends to exercise minimal oversight of the SO because it has an incentive to encourage the formation of SOs, and prospective donors are less likely to create and fund SOs if they anticipate rigorous oversight by the public charity. After all, the more oversight that the public charity's board in fact exercises, the less the SO is like a private foundation, whose boards can be (and often are) dominated by large donors. So, the argument would reason, in order to encourage the formation of SOs, and thereby enhance the prospect that the public charity will financially benefit to some degree from the SO, the boards of controlling public charities could be expected to maintain a "hands off" policy in overseeing the SO's operations, including its distributions.

The second premise of the rebuttal is that the donating public, notwithstanding its general ability to "police" publicly funded charities, is ineffective in monitoring the public charity's oversight of SOs. Perhaps the public lacks adequate information in assessing the publicly funded charity board's oversight of controlled organizations. For example, perhaps the public does not have sufficient information regarding: (1) the amount of time devoted to oversight of SOs; (2) what aspects of an SO's operations the governing board of the controlling charity deems most important; or even (3) the identity of SOs controlled by the publicly funded charity.

The rebuttal is not entirely persuasive. The first premise is problematic because, if the board of a public charity in fact is lax in its oversight of an SO, the public charity is less likely to benefit significantly from the SO. The whole point of an SO is to benefit a public charity. A policy by the board of a public charity to exercise little oversight of an SO dims the prospect that the charity will benefit from the SO significantly in practice. There is little incentive for a public charity, ex ante, to desire such a state of affairs.

Further, even if one finds the first premise plausible, the second premise is problematic because it proves too little. A reasonable solution to the problem identified in the second premise is to increase information provided to the public. Mandating expanded reporting by SOs to their supported organizations, as well as enhanced information reporting by supported organizations to the general public, should increase the ability of the general public to monitor the oversight exercised by a publicly funded charity over its affiliated SOs. Of course, one may retort that no amount of information will enable the donating public to monitor publicly funded charities adequately. *But if this retort is true, then the common thread of assumptions governing all models of charities discussed in this Article is suspect, and we have much bigger problems than those associated simply with distributions by SOs.* That is, if no amount of information will enable the donating public to monitor a public charity's oversight of its affiliated

SOs, there is little reason to accept the current regime governing all models of charity—a regime with distribution rules that appear to hinge largely on an assumption that the donating public can be trusted to monitor the activities of publicly funded charities.

2. The Non-Functionally Integrated Type III Supporting Organization

The NFI Type III SO is the hybrid entity most similar to a private foundation. Of course, a substantial contributor cannot directly or indirectly control an NFI Type III SO as she can a private foundation.[117] On the other hand, because, at most, only one board member or officer of the NFI Type III need be appointed by (or serve in a similar capacity for) the publicly funded supported organization affiliated with the SO, the affiliated public charity typically cannot exercise formal control over the NFI Type III SO's operations, including its distributions. That Congress would analogize this entity to the private foundation, and impose a distribution requirement on it, is not terribly surprising.

Presumably, the reason a donor would prefer an NFI Type III entity over a Type II or Type III SO is the expanded influence—relative to that of the public charity—that this model affords the donor. Because a public charity's influence over the affairs of the NFI Type III SO falls short of formal control of the board, Congress is apparently concerned that, without a distribution requirement, the board of the NFI Type III SO may hoard assets. Although this concern is not entirely implausible, it is at least peculiar in view of the responsiveness test. This test requires an NFI Type III SO to establish that, by reason of the public charity's voice on the SO's board (or the entities' close working relationship), the officers, directors or trustees of the SO "have a significant voice" with respect to the SO's investment policies, how and when the SO makes grants, and the SO's selection of grant recipients.[118]

One should at least question why the law imposes both the responsiveness test and a distribution requirement on NFI Type III SOs. If the responsiveness test is accomplishing its purpose, a mandatory distribution requirement appears unnecessary. If the responsiveness test is not fulfilling its purpose, then it should either be: (1) jettisoned; or (2) augmented by whatever is necessary to make it function as intended. As to (2), perhaps the SO should be required to provide additional information to

117. I.R.C. §§ 509(a)(3)(C), 4946(a)(1)(A).

118. Prop. Treas. Reg. § 1.509(a)-4(i)(3)(iii), 74 Fed. Reg. 48,672, 48,681 (Sept. 24, 2009).

both the supported organization[119] and the general public (through Form 990) that evidences its responsiveness to the supported organization(s) over time.[120] Perhaps the law also should require a supported organization to file with the IRS a report reflecting the supported organization's assessment of the responsiveness of affiliated NFI Type III SOs. Another idea is to offer a safe harbor for SOs that meet a distribution threshold. If the SO distributes a sufficient fraction of its investment assets to its supported organization(s) over the relevant period, responsiveness would be conclusively presumed; if the SO did not do so, it would be required to demonstrate responsiveness through the suggested information reporting system.

One virtue of shunning the post-PPA distribution requirement on NFI Type III SOs and augmenting the currently proposed responsiveness test with greater information reporting is consistency with the apparent assumptions underlying the current tax regime governing the major models of charity. Enhanced information enables the donating public to monitor the operations of charities. If publicly funded entities to which NFI Type III SOs are supposed to be responsive are not effectively monitoring their loosely affiliated SOs, enhanced information requirements should help reveal this problem, and the market in altruism should respond.[121] Once

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119. Proposed Treasury regulations do require Type III SOs to provide the following information to each of their supported organizations:

> (i) A written notice addressed to a principal officer of the supported organization indicating the type and amount of support provided by the supporting organization to the supported organization in the past year;
>
> (ii) A copy of the supporting organization's most recently filed Form 990, "Return of Organization Exempt from Income Tax," or other return required to be filed under section 6033; and
>
> (iii) A copy of the supporting organization's governing documents, including its charter or trust instrument and bylaws, and any amendments to such documents. Copies of governing documents need not be provided in a given year if such documents have previously been provided and have not subsequently been amended.

Id. § 1.509(a)-4(i)(1)(i), (2)(i)-(iii), 74 Fed. Reg. 48,672, 48,680.

120. Information tending to establish responsiveness would include: (1) specific requests for support from the supported organization(s); (2) proof that the board of the SO deliberated upon such requests; (3) evidence of substantive communications between the SO and its supported organization(s) concerning such requests; (4) proof of distributions funding such requests; and (5) evidence that, if the SO does not ultimately fund such requests, the governing board of the SO had a reasonable basis for its decision and used SO funds in some other way that was responsive to the needs of the supported organization(s).

121. If an NFI Type III SO is itself to blame for failing to be responsive to the needs of its supported organization(s), the latter can so inform the IRS, who could then classify the nonresponsive SO as a private foundation.

again, if lawmakers do not believe that the donating public is capable of assimilating such information, then Congress should revisit the entire framework governing distributions by charities under federal tax law.

3. The Donor-Advised Fund

The absence of a distribution requirement on DAFs is probably the most intriguing feature of the tax regime governing distributions by hybrids of the major models of charity. On the one hand, as discussed *supra*,[122] if one assumes that the donating public can effectively supervise grant-making by public charities generally, one may likewise assume that the donating public can do the same when public charities sponsor DAFs. From this perspective, the decision not to impose quantitative distribution requirements on charities sponsoring DAFs is entirely sensible.

On the other hand, since the enactment of the PPA, the Code has reflected a deep distrust of fiduciaries in their supervision of DAFs. DAFs are subject to some of the most rigid excise tax provisions governing charities; in some cases, DAFs are treated as suspiciously as, and sometimes even more suspiciously than, private foundations. To illustrate, the Code taxes, as an "excess-benefit transaction," certain transactions between a DAF and its donors-advisers (and certain related persons) ("DAF insiders")[123] even when the transactions are fairly priced. Specifically, an excess benefit transaction includes "any grant, loan, compensation, or other similar payment" provided by the DAF to a DAF insider.[124] In addition, under Code § 4967, a tax is imposed if, upon the advice of a DAF insider, a distribution from the DAF is made so as to result in that person or any other DAF insider receiving, directly or indirectly, a more than incidental benefit as a result of the distribution.[125] Moreover, an excise tax on excess business holdings applies to a DAF as though it were actually a private foundation.[126] Further, Code § 4966 imposes an excise tax on "taxable distributions" made by a DAF.

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122. *See supra* Part III.D.2.

123. The statutorily described persons referred to in this Article as "DAF insiders" include the following disqualified persons with respect to a DAF: (1) any fund donor who has advisory privileges with respect to fund distributions or investments by virtue of her status as a donor; (2) the designee of any such donor; (3) a member of the family of any such donor or designee; and (4) any business entity in which the ownership interest of the foregoing exceeds thirty-five percent. *See* I.R.C. §§ 4958(f)(7)(A)-(C), 4966(d)(2)(A)(iii) (2006).

124. *Id.* § 4958(c)(2)(A).

125. *Id.* § 4967(a)(1).

126. *See id.* § 4943(e)(1). In applying the excise tax, disqualified persons essentially include DAF insiders. *See id.* § 4943(e)(2).

Distributions from a DAF to an NFI Type III SO,[127] and to any other SO if a DAF insider directly or indirectly controls its supported organization,[128] constitute taxable distributions, unless the DAF exercises expenditure responsibility.[129] A taxable distribution also includes a distribution from a DAF for any purpose other than one specified in § 170(c)(2)(B) (i.e., a charitable purpose),[130] as well as a distribution from a DAF to any natural person.[131]

The apparent assumptions underlying the taxes described in the preceding paragraph are in tension with the apparent assumption underlying the absence of a mandatory distribution requirement for DAFs. The former assume that the donating public will not, standing alone, ensure that boards of public charities responsibly oversee the administration of the DAFs that they sponsor. If the boards of publicly funded sponsoring organizations cannot be trusted to monitor most transactions involving DAFs, why can the same boards be trusted to ensure that DAFs make sufficient distributions? Stated in reverse, if the boards of publicly funded sponsoring organizations can be trusted to ensure that DAFs make sufficient distributions, why can they not be trusted to monitor most transactions involving DAFs? The law appears to be hopelessly schizophrenic in its regulation of DAFs.

At a minimum, one may argue that the proper treatment of DAFs should be more nuanced than that provided by current law. Whether fiduciaries governing every type of publicly funded charity will act just as responsibly in authorizing distributions from DAFs as they do in authorizing distributions from funds not designated by reference to donors is questionable. Consider an independent, publicly funded grant-maker that receives the vast majority of its donations from donors establishing DAFs with the charity. Donors who give to this charity obviously want to retain a voice in how their donations are ultimately expended. They would look favorably upon a donee that defers to their wishes. The best way to predict such deference is by observing how deferential the donee is with other donors. In order to attract gifts from such donors, the donee may well exercise only modest oversight of distributions from the DAF. Further, those who establish DAFs have little incentive to attempt to pressure donees to exercise rigorous oversight of how other donors' funds are being

127. *See id.* § 4966(d)(4)(A)(i).

128. *See id.* § 4966(d)(4)(A)(ii)(I).

129. Failure to exercise such expenditure responsibility results in the characterization of the distribution as a taxable distribution. In the case of a taxable distribution from a DAF, a tax is imposed on both the sponsoring organization and a fund manager who agreed to the distribution while knowing that it is a taxable distribution. I.R.C. § 4966(a)(1) & (2).

130. *Id.* § 4966(c)(1)(B)(i).

131. *Id.* § 4966(c)(1)(A).

expended; after all, if they can pressure the donee to actively question the amount of distributions made from other donors' DAFs, what is to stop other donors from doing the same with respect to distributions from their DAFs? Most donors would be content to "live and let live"—or, in this case, "give and let give." In this state of affairs, the "market in altruism" would very likely not provide meaningful oversight of fiduciaries' monitoring of the quantity of distributions being recommended by donors of DAFs.

The same observation may not hold in the case of a charitable donee that maintains DAFs on a smaller scale relative to all donated receipts. Consider, for example, an independent, publicly funded grant-maker that receives ninety percent of its support from donors who make unrestricted gifts and ten percent from donors who establish DAFs. Those who have donated the ninety percent of support received by the charity probably care about how the charity uses all of its donations to the same extent that those who have donated to a charity that does not maintain DAFs care about their donee's use of funds. If donors to the latter charity can be trusted to monitor the charitable donee through the market in altruism, donors to the former charity probably can as well. They have little incentive to tolerate, let alone favor, patterns of deference to DAF donors who recommend minimal distributions from DAFs—provided that they receive adequate information. Thus, in the case of charities whose donations are largely not maintained in DAFs, the absence of a distribution requirement governing the DAFs that they sponsor may well be justified.

B. Implications for University Endowments

The analysis of whether mandatory distribution requirements should apply to common substitutes for private foundations is relevant to the question of how, if at all, the tax system should regulate distributions from university endowments. A few brief observations demonstrate this point.

First, many university endowments are held by nonprofit corporations distinct from those entities that conduct academic programs and those that hold title to campus buildings.[132] Some of these separately incorporated nonprofits likely qualify as public charities by virtue of their broad base of donations from the general public, whereas others likely avoid private foundation status by virtue of being SOs. With respect to those incorporated endowments that are themselves publicly supported, the logical starting point is to assume that their donors are just as willing and able to monitor their distributions as are other donors to charity. If Congress assumes that the role of the donating public generally obviates

132. *See* Mark J. Cowan, *Taxing and Regulating College and University Endowment Income: The Literature's Perspective*, 34 J.C. & U.L. 507, 511-12 (2008).

the need to regulate a publicly funded charity's distributions, there would be little principled basis for subjecting only one type of publicly funded charity—a university endowment—to a mandatory distribution rule. Certainly, those who contribute to a broadly supported nonprofit corporation holding an endowment to benefit a particular university may have charitable goals that coincide with personal, even selfish, goals—like enhancing the value of the donors' educational degrees, erecting monuments bearing donors' names, or improving the educational experience of a student body that includes relatives and friends of donors.[133] But essentially the same may be said of numerous types of philanthropy.[134] To single out charitable giving in higher education on these grounds makes little sense.

For similar reasons, it is not obvious that regulation of distributions through federal tax law is necessary even if a university endowment is held by a separately incorporated Type I or Type II SO, or even directly by the same nonprofit organization that operates academic programs. The many constituents of the modern university—students, alumnae, professors, administrators, significant private grant-makers, public grant-makers, and public oversight agencies—serve a monitoring function analogous to that served by the donating general public in the case of an entity that is classified as a public charity by virtue of its support.[135] Indeed, many universities likely meet the conditions for qualifying as other than private foundations on multiple grounds.[136] Although they are public charities because they are described in Code §§ 170(b)(1)(A)(ii) and 509(a)(1), many of them also would likely qualify as public charities under Code § 509(a)(2), and some would probably qualify as public charities under Code §§ 170(b)(1)(A)(vi) and 509(a)(1) by virtue of their support. Thus, the accountability to a broad section of the public that the law assumes in the case of publicly supported charities and public charity-controlled entities in general may be just as plausibly assumed in the case of universities and university-controlled entities specifically.

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133. For a discussion of several reasons that donations may serve as an imperfect indication of charitable efficiency and merit, largely because of the mixed motives of donors, see Waldeck, *supra* note 11, at 1819-22.

134. *See* Hall & Colombo, *supra* note 88, at 1402-13.

135. *See* Cowan, *supra* note 132, at 548-50 (discussing the constituencies to which universities must answer); *cf.* Waldeck, *supra* note 11, at 1814 ("Because private foundations typically are funded by a single individual or family, they are far less accountable than colleges and universities, which usually receive funding from government, corporations, foundations, and private donors.").

136. For empirical support for this assertion, see John D. Colombo, *Why Is Harvard Tax-Exempt? (and Other Mysteries of Tax Exemption for Private Educational Institutions)*, 35 ARIZ. L. REV. 841, 881-85 (1993).

Finally, it should be observed that the entire framework regulating the models of charities and their hybrids through federal tax law assumes that there is no need to limit distributions to those that further a particular, governmentally favored purpose or function among several for which the grant-maker is organized. Not even in the case of the charity models or hybrids of which government is most suspicious does the law micro-manage the decision of how best to further charitable purposes. Thus, any governmental decision to dictate precisely how university endowments should be expended (e.g., for reducing tuition, for augmenting faculty salaries, or for funding research)[137] would represent a significant departure from the existing tax regime. One should question whether universities should be treated drastically different from other charities.

C. A Broader Perspective

The discussion thus far may fairly be described as an inductive study of the legal letter and assumptions of the current tax regime governing distributions of a percentage of investment assets by the major models of charity and their hybrids, and an analysis of how these models and their hybrids should be regulated in a manner consistent with the underlying assumptions of the regime. No analysis would be complete, however, without considering how other legal regimes, and tax exemption theory, may bear upon the question of how (if at all) federal tax law should regulate distributions from endowment assets. Although extensively developing this expanded perspective is not the aim of this Article, two observations are highly relevant. One relates to the enactment of the Uniform Prudent Management of Institutional Funds Act ("UPMIFA"), and the other concerns the theoretical justification for exempting charities from federal income taxation.

1. Uniform Prudent Management of Institutional Funds Act

The first observation is that the primary concern addressed in this Article—to what degree should federal tax law effectively require certain types of charity to distribute a *minimum* amount to other charities—is quite the opposite of the concern that appears to have driven one feature of a significant uniform act recently adopted in the vast majority of states. In 2006, the National Conference of Commissioners on Uniform State Laws promulgated UPMIFA to replace the Uniform Management of Institutional Funds Act.[138] UPMIFA seeks to apply consistent standards for managing

137. As others have noted, research may be even more important than education in some universities. *See, e.g.*, Waldeck, *supra* note 11, at 1804.

138. As of the date of this article's submission for publication, forty-four states and the District of Columbia have enacted versions of UPMIFA. *See* UPMIFA, Enactment Status

and investing charitable funds held by various forms of charitable entities.[139] In brief, UPMIFA adopts a modern prudence standard based on the Uniform Prudent Investor Act, amends the rules governing expenditures in order to provide more guidance and flexibility to charitable institutions, and updates the provisions related to the release and modification of fund restrictions based on similar provisions in the Uniform Trust Code.[140]

Most relevant for present purposes are UPMIFA's default rules governing expenditures from an endowment fund. When a donor's intent with respect to the portion of an endowment that may be expended currently is not specified in a gift instrument, UPMIFA generally requires the charity to spend an amount that is prudent in view of the fund's and the institution's purposes, economic factors, the need to preserve the fund, the expected total return of the fund, other resources of the institution, and the institution's investment policy.[141] Under an optional provision of UPMIFA, the appropriation for expenditure in any year of an amount greater than seven percent of the fair market value of an endowment fund is presumed (but not conclusively) to be imprudent.[142] In discussing the rationale for the presumption, the official comment states as follows, in relevant part:

> Those in favor of the presumption of imprudence argued that the presumption would curb the temptation that a charity might have to spend endowment assets too rapidly. Although the presumption would be rebuttable, and spending above the identified percentage might, in some years and for some charities, be prudent, institutions would likely be reluctant to authorize spending above seven percent. In addition, the presumption would give the attorney general a benchmark of sorts.[143]

The comment emphasizes that the presumption "does not create an automatic safe harbor[,]" and cautions that expending six percent of endowment assets "might well be imprudently high."[144] The comment further admonishes as follows:

> A presumption of imprudence can serve as a reminder that spending at too high a rate will jeopardize the long-term nature

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Map, www.upmifa.org/DesktopDefault.aspx?tabindex=5&tabid=68 (last visited Apr. 15, 2010).

139. *See* UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT, Prefatory Note (2006).

140. *See id.*

141. *See id.* § 4(a).

142. *Id.* § 4(d).

143. *Id.* § 4(d) cmt.

144. *Id.*

> of an endowment fund. If an endowment fund is intended to continue permanently, the institution should take special care to limit annual spending to a level that protects the purchasing power of the fund.[145]

As if there were any doubt as to the nature of the concern driving this rebuttable presumption, the comment expresses no fear that institutions will spend too little "[s]ubsection (d) does not require an institution to spend a minimum amount each year. The prudence standard and the needs of the institution will supply sufficient guidance regarding whether to accumulate rather than to spend in a particular year."[146]

The differing concerns underlying UPMIFA and those leading to efforts to impose minimum distribution requirements on private foundation substitutes and university endowments are striking. Whereas the federal tax regime governing distributions of investment assets assumes that private foundations and at least one private foundation substitute must be subject to a minimum payout rule, UPMIFA assumes that no institution need be subject to such a requirement.[147] Whereas federal tax law reflects an assumption that there is no need to impose any type of quantitative ceiling on the amount of distributions that may be made by *any type* of grant-making charity, UPMIFA's optional provision imposes a presumptively valid ceiling on the amount of expenditures that a charity may make from an endowment fund.[148] In short, the optional provision of UPMIFA attempts to protect against the spendthrift charity, whereas the Code and regulations attempt to guard against the miserly privately funded charity.

Admittedly, UPMIFA's concerns reflect primary goals that do not necessarily coincide with the primary goals of Congress in regulating endowment distributions through federal tax law. The official comments to UPMIFA approvingly explain that the Act's regulation of endowment spending "allows the charity to give effect to donor intent, protect its endowment, assure generational equity, and use the endowment to support the purposes for which the endowment was created."[149] UPMIFA obviously seeks generally to honor the wishes of donors concerning the perpetuity of endowment funds. Further, UPMIFA's rejection of historic dollar value as a benchmark[150] reflects a desire to ensure that a charity does not overspend

145. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 4(d) cmt.

146. *Id.*

147. *See id.*

148. *See id.*

149. *Id.* Prefatory Note.

150. *See id.* (stating that UPMIFA eliminates "the concept of historic dollar value. . . . [A] charity can spend amounts above historic dollar value that the charity determines to be prudent").

its endowment.[151] Congress, on the other hand, is concerned more about ensuring that charitable entities, which enjoy the benefit of both federal income tax exemption and the ability to receive donations that are deductible by donors, operate in a manner consistent with the purpose for extending these benefits under federal tax law.

Accordingly, a second inquiry is necessary: precisely why are charities exempt from federal income tax? The next section briefly discusses this question as it relates to efforts to regulate endowment spending through federal tax law.

2. The Theoretical Basis for the Charity Income Tax Exemption

Interest in imposing a distribution requirement on charity endowments often appears to be based on the assumption that the benefits enjoyed by charities under federal income tax law constitute indirect government subsidies.[152] The idea is that government has a right to direct how charities expend their endowments because government provides a significant portion of their funding.[153] The subsidy theory is widely held, or at least perceived to be so.[154]

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151. *See* UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT, Prefatory Note ("Without better guidance on spending the increase in value of the fund, historic dollar value does not provide adequate protection for the fund. If a charity views the restriction on spending simply as a direction to preserve historic dollar value, the charity may spend more than it should.").

152. *See, e.g.*, Waldeck, *supra* note 11, at 1797 (stating that the Senate Finance Committee "has been interested in endowment spending policies because colleges and universities receive enormous subsidies from the federal government").

153. Professor Waldeck, who rejects imposition of a mandatory five percent distribution rule on university endowments akin to that governing private foundations, characterizes the inquiry as follows: "[t]he five-percent rule and questions about whether universities are hoarding their endowments have a superficial similarity, in that both aim to ensure that the public receives benefits in exchange for the tax subsidies given to charitable organizations." *Id.* at 1814.

154. *See, e.g.*, Ellen P. Aprill, *Churches, Politics, and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843, 873 (2001) ("[G]overnmental policymakers have viewed the charitable contribution deduction from its beginning as an incentive and a subsidy . . . ."); Laura Brown Chisolm, *Politics and Charity: A Proposal for Peaceful Coexistence*, 58 GEO. WASH. L. REV. 308, 320 (1990) ("It is nearly as settled, at least in Congress and the courts, that permitting a section 501(c)(3) organization to engage in election-related activity would be equivalent to granting a 'subsidy' of public funds for the activity."); John D. Colombo, *The Marketing of Philanthropy and the Charitable Contributions Deduction: Integrating Theories for the Deduction and Tax Exemption*, 36 WAKE FOREST L. REV. 657, 682 (2001) ("[T]he most widely accepted rationale for the section 170 deduction remains that the deduction helps subsidize the activities of charitable organizations."); Ann M. Murphy, *Campaign Signs and the Collection Plate—Never the Twain Shall Meet?*, 1 PITT.

The theory finds expression in Supreme Court case law. For example, in *Regan v. Taxation with Representation*,[155] the Court upheld the constitutionality of Code § 501(c)(3)'s requirement that "no substantial part" of the activities of a tax-exempt charity consist of "carrying on propaganda, or otherwise attempting to influence legislation."[156] The Court reasoned that both income tax exemption and the ability to receive tax-deductible contributions are forms of a governmental subsidy.[157] Similarly, in *Texas Monthly, Inc. v. Bullock*,[158] in which the Court found a state sales tax exemption for sales of Bibles to violate the Establishment Clause, the Court stated that "[e]very tax exemption constitutes a subsidy."[159]

However, the United States Supreme Court has not endorsed the subsidy theory consistently. In *Walz v. Tax Commission*,[160] the Court held that exempting property owned by religious organizations (among other types of nonprofit organizations) from property tax did not violate the Establishment Clause.[161] *Walz* concedes that tax exemption conferred an "indirect economic benefit" on religious entities,[162] but contrasts this benefit and direct subsidies:

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees "on the public payroll."[163]

Plainly, *Walz* does not view tax exemption as the functional equivalent of (i) a decision to tax, followed by (ii) a direct governmental grant of tax receipts. *Walz* therefore cautions against an unqualified reliance upon the subsidy theory for all purposes of law.

TAX REV. 35, 79-81 (2003); Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)s, Dangerous for Democracy*, 95 GEO. L.J. 1313, 1317 (2007) (citing Regan v. Taxation with Representation, 461 U.S. 540, 544 (1983)); Edward A. Zelinsky, *Are Tax "Benefits" for Religious Institutions Constitutionally Dependent on Benefits for Secular Entities?*, 42 B.C. L. REV. 805, 808 (2001) ("Perhaps the most common characterization of tax exemptions, exclusions, and deductions is that they subsidize.").

155. 461 U.S. 540 (1983).

156. *See id.* at 542 n.1 (internal citation omitted) (emphasis omitted); *see also id.* 542-51.

157. *See id.* at 544-51.

158. 489 U.S. 1 (1989).

159. *Id.* at 14.

160. 397 U.S. 664 (1970).

161. *See id.* at 679-80.

162. *Id.* at 674.

163. *Id.* at 675.

One may offer several justifications for *Walz*'s refusal to equate tax exemption with direct governmental funding.[164] For present purposes, one should at least ponder whether *Walz* was correctly decided because the subsidy theory erroneously conceptualizes the normative tax base—not just a state's property tax base, but also the federal income tax base. Several alternatives to the subsidy theory may explain Code §§ 170 and 501(c)(3).[165] Under these theories, tax exemption bestows no "subsidy" upon tax-exempt entities, because their income is not properly included in the tax base.[166]

Probably most recognized is Professor William Andrews's defense of the charitable contributions deduction.[167] Professor Andrews argues that a properly conceived "income" tax reaches a taxpayer's "aggregate personal consumption and accumulation of real goods and services and claims thereto."[168] If income means consumption plus accumulation, a deduction should obtain whenever a taxpayer pays for items that are not personal

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164. *See, e.g.*, Johnny Rex Buckles, *Does the Constitutional Norm of Separation of Church and State Justify the Denial of Tax Exemption to Churches that Engage in Partisan Political Speech?*, 84 IND. L.J. 447, 456-61 (2009).

165. For a summary of the major theories supporting the exemption of charitable organizations from federal income taxation, see Johnny Rex Buckles, *The Case for the Taxpaying Good Samaritan: Deducting Earmarked Transfers to Charity Under Federal Income Tax Law, Theory and Policy*, 70 FORDHAM L. REV. 1243, 1284-96 (2002). *See generally* Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501 (1990); Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299 (1976); Nina J. Crimm, *An Explanation of the Federal Income Tax Exemption for Charitable Organizations: A Theory of Risk Compensation*, 50 FLA. L. REV. 419 (1998); Hall & Colombo, *supra* note 88; Henry Hansmann, *The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation*, 91 YALE L.J. 54 (1981).

166. One alternative to the subsidy theory, which the late Professor Boris Bittker and George Rahdert posited, is that the concept of taxable income is mostly relevant only to profit-seeking taxpayers, with little value in describing the financial activity of nonprofits. Nonprofits often do not earn "receipts" from commercial sales, and they often do not incur "expenses" in order to earn profits. Bittker & Rahdert, *supra* note 165, at 307-14. For a critique of this explanation, see Hansmann, *supra* note 165, at 58-62.

167. *See* William D. Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309, 312 (1972) (stating that the ideal income tax must be "refined to reflect the intrinsic objectives of the tax," and that it is "imperative to consider carefully whether a provision can be defended by reference to intrinsic matters of tax policy before evaluating it as if it were something else"). For critiques of Professor Andrews's theory, see, e.g., Colombo, *supra* note 154, at 679-82; Mark G. Kelman, *Personal Deductions Revisited: Why They Fit Poorly in an "Ideal" Income Tax and Why They Fit Worse in a Far from Ideal World*, 31 STAN. L. REV. 831, 831-58 (1979); Stanley A. Koppelman, *Personal Deductions Under an Ideal Income Tax*, 43 TAX L. REV. 679, 688-90 (1988).

168. Andrews, *supra* note 167, at 313.

consumption or accumulation.[169] The former consists of the consumption "by one household" of "divisible, private goods and services" which "precludes enjoyment by others."[170] A taxpayer's consumption of "collective goods whose enjoyment is nonpreclusive" is not taxable consumption, and neither is "nonmaterial" satisfaction derived from a taxpayer's donations.[171] Because charitable contributions do not constitute personal consumption under these principles, they should be deductible in computing income.[172]

Also important is Professor Evelyn Brody's "sovereignty" theory.[173] Professor Brody explains that charities historically have been regarded as limited co-sovereigns with the state.[174] Because charities are qualified co-sovereigns,[175] government traditionally views them as improper objects of taxation. From this perspective, when government "exempts" the income of charities from tax, it does so not to subsidize them, but to acknowledge their sovereign prerogative to operate free from governmental intrusion.

A third alternative to the subsidy theory, which extends Professor Andrews's thesis and tends to complement Professor Brody's sovereignty notion, is the "community income theory" of the charitable contributions deduction and the charity income tax exemption.[176] This theory argues that current law properly excludes from the individual federal-income-tax base numerous forms of benefits enjoyed by taxpayers because they are more appropriately attributed not to individual community members,[177] but to the community itself.[178] The community itself may be viewed as properly exempt from taxation because government exists primarily to promote the welfare of the community.[179] The exemption of charities derives from their

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169. *See id.* at 325.

170. *See id.* at 314-15.

171. *See id.*

172. Professor Andrews justifies a deduction for contributions to non-redistributive charitable donees because they generally produce public goods that contributors do not enjoy in proportion to their contributions. *See id.* at 358-59.

173. *See generally* Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 J. CORP. L. 585 (1998).

174. *See id.* at 585-96.

175. Charities are "qualified" co-sovereigns because the state views charities with suspicion and refuses to recognize their co-sovereignty for all purposes of law. *See id.* at 629.

176. *See generally* Johnny Rex Buckles, *The Community Income Theory of the Charitable Contributions Deduction*, 80 IND. L.J. 947 (2005).

177. *See id.* at 970-74.

178. *See id.* at 973.

179. *See id.*

relationship to the community.[180] Functioning properly, charities exist to benefit the community[181] (i.e., to generate community income) and therefore may be viewed as community agents. Federal income tax law attributes to a principal whatever income is earned by an agent for the principal.[182] Hence, if the law properly exempts the principal (i.e., the community) from taxation, so should the law exempt from taxation the income earned by the community's agent (i.e., a charity). A similar analysis may justify the charitable contributions deduction.[183]

These academic theories provide us with viable alternatives to the subsidy theory as we seek to understand the charity income tax exemption and the charitable contributions deduction. Rather than imparting a governmental subsidy, Code §§ 170 and 501(c)(3) may simply preclude the federal government from taxing that which theoretically should not be taxed—community income. Once we question the subsidy theory of the charity income tax provisions, we begin to understand why the knee-jerk reaction that government obviously has an interest in dictating endowment payouts is highly debatable.

Consider, for example, the community income theory of the charitable contributions deduction and the charity income tax exemption. In evaluating whether to impose mandatory distributions from charity endowments, an apropos question is whether a charity can legitimately function as an agent of the community without spending X percent of its assets every year for a charitable purpose. Surely there are reasons that it can do so.[184] A further legitimate question is whether the government generally should defer to the decision of a charity's governing board concerning how best to advance its charitable mission. As long as the charity is actually furthering a charitable purpose and not conferring an

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180. *See id.* at 977-79.

181. *See* Bob Jones Univ. v. United States, 461 U.S. 574, 591 (1983) ("Charitable exemptions are justified on the basis that the exempt entity confers a public benefit . . . ."); *id.* at 590 n.16 ("The common-law requirement of public benefit is universally recognized by commentators on the law of trusts."); Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (as amended in 1990) ("An organization is not organized or operated exclusively for one or more [exempt purposes] . . . unless it serves a public rather than a private interest.").

182. *Cf.* Poe v. Seaborn, 282 U.S. 101 (1930) (equating community property with principals and husbands and wives with agents).

183. *See* Buckles, *supra* note 176, at 979-84.

184. For example: (1) its endowment has lost great value due to a market down-turn; (2) it expects a much greater need for funding charitable projects in future years; (3) it self-insures against various risks; (4) it is able to attract more donations when donors know that the charity is not "forced" to spend currently to fund non-critical needs; and (5) it can avail itself of an unusually attractive investment opportunity. For a discussion (and critique) of common justifications for building a university endowment, see Waldeck, *supra* note 11, at 1805-12.

improper private benefit (or otherwise acting outside the scope of its agency), the community income theory suggests that government ought not substitute its vision of the public good for the charity's vision. Government and charities are both agents of the community, and each has a proper role. Only when the actions of a charitable entity belie its status as an agent of the community should government intervene.

Government would rightly penalize—through revoking tax exemption—a charity that fails to function as an agent of the community. An entity that consistently expends hardly any funds to advance a charitable mission is not functioning as a charitable agent on behalf of the community and therefore is not entitled to an exemption. On the other hand, if a charity consistently spends so much that, given reasonable projections of investment returns, it merely maintains the purchasing power of its donated endowment, the charity appears to be functioning in a manner that is consistent with its exempt status.[185] Charities falling in between these extremes tend to spawn governmental mischief. What is the proper role of government in regulating those charities that fall between the extremes?

A governmental approach that has great intuitive appeal to the author is to defer to the charitable choices made by governing boards of charities when they are produced by reliable processes. A governing board that follows sound governance procedures, receives and acts upon reliable information, and extensively reports on operations and finances to the government, donors, and other constituents who are likely to hold the charity accountable is much more likely to ensure that its charity will act as a faithful agent of the community than one that does not do so.[186] When

185. *Cf.* Hall & Colombo, *supra* note 88, at 1466 (stating that an organization normally "must have both a capital base and a means of meeting operating expenditures in order to produce goods and services"); *id.* at 1467 ("Donors to endowment funds, like donors to capital campaigns, probably believe their gift has a lasting quality.").

186. In discussing the virtues of requiring additional reporting by universities on Form 990, the form that the IRS generally requires public charities to file annually, Professor Waldeck argues as follows:

> Revisions to Form 990, of course, would not compel any particular changes in endowment spending policies. Because a completed Form 990 is publicly available, however, the answers to these questions would add transparency to a particular institution's policies, as well as illuminate standard practices. A university, knowing its information was public, might feel compelled to spend more. In any event, a revised Form 990 would be useful to a Congress that periodically reevaluates its treatment of universities. The rare donor who is diligent enough to seek out the Form 990 might find the revisions useful as well. Moreover, the answers to at least some of the revised questions are likely to find their

circumstances are such that government simply cannot trust the process by which a governing board makes decisions, more direct governmental regulation of distributions through federal tax law may well be necessary. Certainly, further study and articulation of these principles is warranted. What is probably unwarranted is an expanded set of bright-line payout rules that ignore the potential of prophylactic measures to ensure that charity boards actually serve charitable purposes.

CONCLUSION

The existing framework for regulating distributions from investment portfolios owned by various models of charity reveals a strong congressional assumption that charities that are directly or indirectly accountable to the donating public should be free to determine what percentage of investment assets to expend currently. This reliance on the monitoring function performed by the donating public suggests that Congress should reconsider its regulation through federal tax law of at least two private foundation substitutes—NFI Type III SOs and DAFs. The analysis also suggests that efforts to subject university endowments to a mandatory payout rule should be viewed with a critical eye. Finally, both the adoption of UPMIFA by numerous states and the presence of multiple theories of the charity income tax exemption indicate that Congress should exercise great caution in exploring whether to broaden the ranks of charities subject to federal tax laws that effectively impose mandatory endowment payout rules.

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way into the media and thereby color perceptions of particular institutions.

Waldeck, *supra* note 11, at 1816.

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LIFTING THE MUSEUM'S BURDEN FROM THE BACKS OF THE UNIVERSITY: SHOULD THE ART COLLECTION BE TREATED AS PART OF THE ENDOWMENT?

LINDA SUGIN*

Abstract: A few universities in economic straits have recently attempted to sell artwork to address their financial woes, causing much consternation in the museum community. This Article relates the stories of some institutions' attempts to deaccession artworks, and explains why universities may suddenly perceive their art collections as important assets to monetize. It contends that the universities and their critics have fundamentally divergent conceptions of the role of the art collection in the university, which explains why they cannot agree on the legal responsibilities of universities vis-à-vis their art. The critics have a strong cultural-property conception that privileges art, while these universities see their collections as similar to other property they use in carrying out their programs. This article advocates a contextual approach for choosing among these conceptions.

The legal regime that governs the responsibilities of university fiduciaries in managing and selling property generally depends on categorization as endowment or program-related property. Unfortunately, there is no clear law determining whether university art collections should be treated as endowment property subject to the statutory rules of investment responsibility, program-related property governed by fiduciary duties, or cultural property subject to its own unique standards. The Article concludes that university art collections are hybrid cultural-instrumental property, and that universities should be subject to a more flexible standard than museums in making deaccessioning decisions. It argues that university trustees would be faced with too great a fiduciary-duty conflict if subject to the stricter museum standard. To accommodate the cultural-property concerns, it proposes that trustees exercise a heightened level of attention when selling art, but retain their discretion to act in the best interests of the university.

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INTRODUCTION

Universities seem to be increasingly turning to their art collections as piggy banks. On January 26, 2009, the trustees of Brandeis University announced their decision to close the University's Rose Art Museum and sell the art collection.[1] Brandeis had suffered a loss in its endowment, and the University's trustees, who had been particularly hurt by the Madoff fraud, were unable to increase their giving to address the fiscal problems.[2] In the museum world, selling art for operating expenses is an unthinkable transgression.[3] As soon as the decision was announced, protests were staged at the school,[4] newspapers published Op-Ed pieces condemning the

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1. *See* Ellen Howards, *Cutting off the Rose: Brandeis Not Smelling So Sweet*, ART NEW ENGLAND, Apr.-May 2009, *available at* http://www.artnewengland.com/issues/April_May_2009/cutting-off-the-rose.html; Randy Kennedy & Carol Vogel, *Outcry over a Plan to Sell Museum's Holdings*, N.Y. TIMES, Jan. 28, 2009, at C1, *available at* 2009 WLNR 1605421.

2. *See* Howards, *supra* note 1; Kennedy & Vogel, *supra* note 1.

3. *See, e.g.*, Lee Rosenbaum, *He's a Museum Leader for These Troubled Times*, WALL ST. J., Jan. 27, 2009, at D7, *available at* http://online.wsj.com/article/SB123301149409717313.html (showing that Michael Conforti, the President of the Association of Art Museum Directors (AAMD), does not believe that deaccessioning to raise funds is a viable option for struggling museums).

4. *See* Lisa Kocian, *Students Rally for Brandeis Museum: Loss Will Hurt School Stature, Protestors Say*, BOSTON GLOBE, Jan. 30, 2009, *available at* 2009 WLNR 1775207.

decision, and the presidents of the American Association of Museums, the College Art Association and the Association of College and University Museums and Galleries all issued statements critical of the decision.[5] Shortly thereafter, heirs of donors and museum overseers filed suit to enjoin the closure and sale,[6] and the Attorney General of Massachusetts started an investigation.[7] There is a trial set for July 2010, though it is still unclear whether it will be necessary.[8] The massive outpouring of criticism apparently led the University to reconsider.[9] For now, the sale is on hold, and the Rose is open with an exhibition of its collection.[10] The museum's director has been let go,[11] and Brandeis's President, Jehuda Reinharz, has announced that he will step down.[12]

Fisk University, Nashville's oldest African American university, was established in 1866 to educate newly freed slaves.[13] It boasts an impressive list of alumni and has long been highly respected in the educational community. In 1949, Georgia O'Keeffe, as executor of her husband's estate, gave Fisk the Alfred Stieglitz collection of paintings and photographs by Stieglitz and other artists.[14] She also supplemented Stieglitz's collection with four additional paintings that she owned.[15] The gift came with restrictions against dividing up or selling the collection,[16] modification of which would require a court to determine that it would be impossible or impracticable for the University to comply with the restrictions. In 2005, when the University found itself in fiscal distress,

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5. *See* Howards, *supra* note 1.

6. *See* Alana Abramson, *Discovery Process Begins in Lawsuit*, JUSTICE ONLINE.COM, Oct. 20, 2009, http://media.www.thejusticeonline.com/media/storage/paper573/news/2009/10/20/News/Discovery.Process.Begins.In.Lawsuit-3807495.shtml.

7. *See* Howard, *supra* note 1.

8. *See* Abramson, *supra* note 6.

9. *See* Ariel Wittenberg, *Rose Blooms Again at Brandeis*, DAILY NEWS TRIB. (Waltham, Mass.), Oct. 29, 2009, *available at* http://www.dailynewstribune.com/news/x876590494/Rose-blooms-again-at-Brandeis (showing that Brandeis has left the question of what will happen to the art in the Rose Art museum unanswered).

10. *Id.*

11. *See* Amy Rogers Nazarov, *Death with Dignity: Ethical Considerations for Museum Closures*, MUSEUM, July-Aug. 2009, at 38.

12. *See* Judith H. Dobrzynski, Op-Ed., *The Art of the Deal*, N.Y. TIMES, Jan. 1, 2010, at A21, *available at* http://www.nytimes.com/2010/01/02/opinion/02dobrzynski.html.

13. *In re* Fisk Univ., No. 05-2994-III, slip op. at 2 (Tenn. Ch. Ct. Feb. 8, 2008), *rev'd sub nom*, Georgia O'Keeffe Found. (Museum) v. Fisk Univ., No. M2008-00723-COA-R3-CV, 2009 Tenn. App. LEXIS 434 (Tenn. Ct. App. July 14, 2009).

14. *Georgia O'Keeffe Found.*, 2009 Tenn. App. LEXIS 434, at *7-8.

15. *Id.* at *2.

16. *Id.*

Fisk filed a *cy pres* petition[17] requesting judicial permission to sell two paintings from the collection in order to "generate funds for the University's 'business plan' to restore its endowment; improve its mathematics, biology, and business administration departments; and build a new science building."[18] The Georgia O'Keeffe Museum intervened, and the original petition to the court was changed to a request to approve a "settlement" with the O'Keeffe Museum. Under that settlement agreement, the Museum would buy "Radiator Building" from Fisk for $7.5 million.[19] While that motion was pending with the court, the University conducted discussions with another museum that was also interested in acquiring an interest in the collection. As a result, Fisk further modified its request to the court, proposing instead that the court approve a sale of a fifty percent undivided interest in the entire Stieglitz collection for $30 million to the Crystal Bridges Museum of American Art.[20] That museum is currently being built by Alice Walton, the Wal-Mart heiress, in Bentonville, Arkansas.[21] Pursuant to the proposed agreement, Fisk University and Crystal Bridges would each have the right to display the collection at their respective facilities for six months each year.[22]

The trial court refused to grant *cy pres* relief to Fisk, which was necessary for it to enter into one of the proposed agreements,[23] and it seemed that Fisk was required to keep the art, no matter how severe its financial problems might become. But on appeal, the court opened the door to possible *cy pres* relief by deciding first, that the O'Keeffe Museum lacked standing in the case and, second, that the trial court had erred in applying the *cy pres* doctrine in too restrictive a manner.[24] Specifically, it determined that the gift of the Stieglitz collection to Fisk was motivated by a general charitable intent, overturning the trial court's decision that it was motivated by a specific intent that would have operated to bar *cy pres* relief.[25] The case was remanded back to the trial court with directions to determine the final prong of the *cy pres* analysis: whether "compliance with

17. C*y pres* is "[t]he equitable doctrine under which a court reforms a written instrument with a gift to charity as closely to the donor's intention as possible, so that the gift does not fail." BLACK'S LAW DICTIONARY 444 (9th ed. 2009).

18. *Georgia O'Keeffe Found.*, 2009 Tenn. App. LEXIS 434, at *4.

19. *Id.* at *4-5.

20. *Id.* at *5.

21. *See* Theo Emery, *Fisk University and Museum of Wal-Mart Heiress Agree to Share Prized Art*, N.Y. TIMES, Sept. 26, 2007, *available at* http://www.nytimes.com/2007/09/26/arts/design/26fisk.html.

22. *Georgia O'Keeffe Found.*, 2009 Tenn. App. LEXIS 434, at *5.

23. *See id.*

24. *Id.* at *36 & n.9.

25. *Id.* at *47-48.

the conditions imposed by Ms. O'Keeffe are impossible or impracticable."[26] The parties are currently hopeful that they will be allowed to proceed with the deal.[27]

In 2007, Randolph College, a small college in Lynchburg, Virginia, petitioned the court for approval to sell a small number of the paintings that it had purchased with funds from a trust created by a donor for the purpose of forming "a permanent collection of art."[28] The college had been put on warning in 2006 by the Southern Association of Colleges and Schools for spending its endowment too quickly, and sale of the paintings was part of a larger strategy to rebuild the endowment and improve the financial condition of the college.[29] Angry alumnae, who may have been primarily concerned about the decision of the college to become co-educational,[30] intervened and were granted a temporary injunction against the sale.[31]

That injunction prevented the college from selling the paintings in the November 2007 auctions, a high point in art values.[32] The injunction was lifted when the plaintiffs were unable to assemble the necessary $1 million bond to secure the injunction.[33] In May 2008, the college sold only a single painting, Rufino Tamayo's *Troubador* for $7,209,000,[34] determining that it was not advantageous to sell the other works at that time.[35] The college did not lose its accreditation,[36] and despite public criticism of its decision to

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26. *Id.* at *49.

27. *See* Emery, *supra* note 21; *see also* Lindsay Pollock, *On the Road: Nashville's Fisk University*, ART MARKET NEWS, Aug. 6, 2009, http://lindsaypollock.com/news/on-the-road-nashville%E2%80%99s-fisk-university/.

28. Complaint at 2, Randolph Coll. v. Suntrust Bank, No. CL07001745-00 (Va. Cir. Ct. Aug. 21, 2007).

29. *Id.* at 3-4.

30. Dodge v. Trs. of Randolph-Macon Woman's Coll., 661 S.E.2d 801, 802 (Va. 2008).

31. *See id.*; *see also* John E. Klein, *College Will Sell Painting in Latin American Auction*, RANDOLPH C. NEWS, Apr. 25, 2008, http://web.randolphcollege.edu/newsevents/pressreleases/news_detail.asp?id=992; Posting of Randolph College Plays Hardball; Anti-Art Sales Lawsuit Dropped to ARTSJOURNAL Weblog, http://www.artsjournal.com/culturegrrl/2008/03/randolph_college_plays_hardbal.html (Mar. 10, 2008, 12:13 EST).

32. *See* JIANPING MEI & MICHAEL MOSES, 2009 YEAR END ART MARKET INSIGHTS fig. 1 (2009), http://www.artmarketmonitor.com/wp-content/uploads/2010/01/Mei-Moses-2009-Year-End-Alert.pdf.

33. *See* Klein, *supra* note 31.

34. *See* Christa Desrets, *Randolph College's 'Troubadour' Sells for $7.2 Million*, NEWS & ADVANCE (Lynchburg, Va.), May 28, 2008, *available at* http://www2.newsadvance.com/lna/news/local/article/randolph_colleges_troubadour_sells_for_72_million/5279/.

35. Klein, *supra* note 31.

36. *See* Randolph College Family Advisory Council, http://www.randolphcollege.edu/x15119.xml (last visited Apr. 15, 2010).

deaccession art for operating funds, the college has indicated that it still intends to sell the three other works when it is profitable to do so.[37]

In the spring of 2008, there were big floods in the Midwest, one of which inundated the University of Iowa Museum of Art[38] and caused $16 million in damages to the arts campus.[39] One member of the Iowa Board of Regents, Michael Gartner, thought it would be a good idea to have the University's painting *Mural* by Jackson Pollock appraised in case the University needed to sell it to finance the repairs.[40] The outpouring of concern and condemnation was overwhelming, coming from the Association of Art Museum Directors, blogging critics, local newspapers, the Wall Street Journal, the Chronicle of Higher Education, and even Iowa's Lieutenant Governor.[41] Unlike many university museums, the University of Iowa Museum of Art and its director were members of the American Association of Museums and Association of Art Museum Directors at the time, important organizations in the museum community. These organizations adhere to demanding standards for deaccessioning works.[42] In addition, the University had a policy containing procedures for selling art, which also limited the circumstances of any sale.[43] The Iowa Regents requested that the University conduct a study concerning the Pollock.[44] Completed in October 2008, that study estimated that the painting was worth $140 million.[45] It also revealed that 181,575 people visited the University of Iowa Museum of Art over the five years between 2003 and 2008,[46] a miniscule number of visitors compared to major museums.[47] On the receipt of the report, the Board of Regents concluded its

37. *See* Desrets, *supra* note 34.

38. *See* Scott Jaschik, *Avoiding the Next Brandeis*, INSIDE HIGHER ED., Oct. 1, 2009, http://www.insidehighered.com/news/2009/10/01/art.

39. News Release, Univ. of Iowa, FEMA Announces Financing Options for Flood-Damaged UI Buildings (Jan. 26, 2009), *available at* http://www.news-releases.uiowa.edu/2009/january/012609fema.html.

40. *See* Posting of Repose for Iowa's Pollock? Museum Director Is Optimistic to ARTSJOURNAL WEBLOG, http://www.artsjournal.com/culturegrrl/2008/08/repose_for_iowas_pollock_museu.html (Aug. 13, 2008, 10:53 EST) [hereinafter *Iowa's Pollock*]; *see also* Jaschik, *supra* note 38; UNIV. OF IOWA, REPORT ON QUESTIONS RELATED TO SALE OF JACKSON POLLOCK'S 1943 PAINTING MURAL 1 (2008), *available at* http://www.regents.iowa.gov/news/Pollockquestions1008.pdf [hereinafter REPORT].

41. *See Iowa's Pollock*, *supra* note 40; REPORT, *supra* note 40, at 4, 6, 9.

42. *See infra* notes 147-151 and accompanying text.

43. *See generally* REPORT, *supra* note 40, at 8.

44. *Id.* at 1.

45. *Id.* at 4.

46. *Id.* at 7.

47. Posting of MoMA Monster Refuses to Shrink: NY City Council Committee Hearing

inquiry into the matter, and no further steps have since been taken to sell the painting.[48]

For $200 in 1878, Thomas Jefferson Medical College purchased a painting by Thomas Eakins depicting Dr. Samuel D. Gross, a Jefferson Medical College professor, lecturing a group of students.[49] About 500 people a year would go to see it in a medical college building.[50] On November 10, 2006, the Thomas Jefferson University Board voted to sell the painting for $68 million to the National Gallery of Art in Washington and the Crystal Bridges Museum of American Art.[51] Philadelphia Mayor John Street immediately nominated the painting "for protection under the city's historic preservation ordinance, noting the painting's deep historical and cultural resonance throughout Philadelphia."[52] A designation under that ordinance would allow the city to prevent it from being moved.[53] The city never had to go through with that process because the deal the University struck with the intended purchasers gave local museums and government institutions forty-five days to match the offer.[54] After a citywide fundraising effort and the sale of two paintings and two drawings, the Philadelphia Museum of Art and the Pennsylvania Academy of the Fine Arts managed to raise the $68 million needed to keep *The Gross Clinic* in Philadelphia.[55]

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to ARTSJOURNAL Weblog, http://www.artsjournal.com/culturegrrl/2009/10/moma_monster_refuses_to_shrink.html (Oct. 6, 2009, 17:53 EST); Museum of Modern Art (MoMA), New York, Case Studies, http://www.acoustiguide.com/case-studies/54130 (last visited Apr. 15, 2010) (noting that the Museum of Modern Art receives 2.5 million visitors per year).

48. *See* Jaschik, *supra* note 38.

49. *See* Carol Vogel, *A Fight to Keep an Eakins Is Waged on Two Fronts: Money and Civic Pride*, N.Y. TIMES, Dec. 15, 2006, at E43, *available at* http://www.nytimes.com/2006/12/15/arts/design/15voge.html.

50. *See id.*

51. *See id.*

52. Posting of New Wrinkles in Philly's Save-the-Eakins Campaign to ARTSJOURNAL Weblog, http://www.artsjournal.com/culturegrrl/2006/11/new_wrinkles_in_phillys_saveth.html (Nov. 21, 2006, 09:05 EST).

53. Vogel, *supra* note 49.

54. *See* Carol Vogel, *Philadelphia Raises Enough Money to Retain a Masterpiece by Eakins*, N.Y. TIMES, Apr. 24, 2008, at E3, *available at* http://www.nytimes.com/2008/04/24/arts/design/24gros.html.

55. *Id.*

I. Understanding the Deaccessioning Conflict

A. Practical Explanations for the University Deaccessioning Trend

Why are universities suddenly deaccessioning art works, many of which they have held for decades? The first explanation is that art has become very valuable, and universities own a substantial amount of it. Universities generally own the art in their university museums.[56] The Rose Art Museum does not own the art that it displays; Brandeis University does.[57] If the museums within colleges and universities independently controlled their art collections, their singular focus on art and familiarity with museum norms would make them significantly less likely to turn to their collections for financial support. Compared to a diversified portfolio over time, art has been a surprisingly good investment.[58] As of year-end 2009, compound annual returns for art were 5.5% (ten year average annual return) and 3.3% (five year average annual return), substantially exceeding the returns on stocks of -1.3% and -0.1% respectively.[59] The years at issue in each story described above were bonanza years for the art market. From 2002 to 2007, annual growth in the value of art averaged almost twenty percent.[60] Over longer terms, art has not performed quite as well as stocks, but it has not been a bad investment.[61]

At the same time that art values were soaring, financial pressures on universities were increasing, prompting widespread searching for resources. Endowments have declined, state funding has declined, and universities have responded aggressively to financial conditions by cutting staff and programs and halting expansion projects.[62] According to the most recent study by the National Association of College and University Business Officers, university endowments have declined by an average of 18.7% for the latest fiscal year (July 2008–June 2009), a devastating loss in

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56. *See* Daniel Grant, *When the Going Gets Tough*, WALL ST. J., Feb. 3, 2009, at D7, *available at* http://online.wsj.com/article/SB123361946627041509.html.

57. *See* Geoff Edgers, *Ailing Brandeis Will Shut Museum, Sell Treasured Art*, BOSTON GLOBE, Jan. 27, 2009, http://www.boston.com/news/education/higher/articles/2009/01/27/ailing_brandeis_will_shut_museum_sell_treasured_art/?page=2.

58. *See* MEI & MOSES, *supra* note 32.

59. *Id.* at 2.

60. *Id.*

61. *See id.* at 4 fig.1 "Stocks outperformed art over the last twenty five years with a compound annual return ("CAR") of 10.4 percent compared to 6.5 percent for art. However, for the last fifty years the returns were very close with art achieving a CAR of 8.9% compared to the 9.4% for equities." *Id.* at 2.

62. *See* Louis Lavelle, *University Endowments: Worst Year Since Depression*, BUS. WK., Jan. 28, 2010, http://www.businessweek.com/bschools/content/jan2010/bs20100127_360651.htm.

value.[63] Universities have responded with cuts to all sorts of programs and have resisted privileging any single facet of their institutions.[64] The formulas that universities use to determine their endowment spending will result in significantly less money over the next few years on account of these losses.[65]

The search for value in university art collections is consistent with the latest public debate about university endowments. Until the market collapse in late 2008, the big question about endowments was whether universities were hoarding their resources.[66] Universities came to lawmakers' attention for failing to provide current value from their considerable wealth,[67] and it seemed possible that they would become subject to a mandatory payout rule.[68] Under current law, only private foundations are required to pay out an annual fixed percentage of their endowments.[69] Identifying the untapped value in university art collections is related to the pre-recession pressure on universities to extract current value from long-term investments because they are both about realizing current value from stores of wealth. While calls for compelling payouts died down as the wealthiest universities enhanced their financial aid programs with greater spending from their endowments,[70] and endowment values declined, the idea of looking for untapped sources of revenue is even more important as the financial problems facing universities worsen.

The issue of deaccessioning art by universities in financial straits deserves attention because there are a huge number of art museums and

63. Press Release, Nat'l Ass'n of Coll. & Univ. Bus. Officers, 2009 NACUBO-Commonfund Study of Endowments (Jan 28, 2010), http://www.nacubo.org/Documents/research/2009_NCSE_Press_Release.pdf.

64. *See Responses to the Downturn: A Survey of Colleges*, CHRON. OF HIGHER EDUC., Jan. 9, 2009, http://chronicle.com/article/Responses-to-the-Downturn-A/47421/ (showing hiring freezes, layoffs, and budget cuts in various areas).

65. *See* Peter Conti-Brown, Scarcity Amidst Wealth: What Law, Finance, and Culture Can and Cannot Explain About University Endowments in Financial Crisis (Summer 2009), http://works.bepress.com/peter_conti_brown/1.

66. *See generally* Sarah E. Waldeck, *Coming Showdown over University Endowments: Enlisting the Donors*, 77 FORDHAM L. REV. 1795 (2009).

67. *See* Press Release, Sen. Chuck Grassley, Endowments May Help Rein in Tuition Hikes (Oct. 29, 2007), *available at* http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=14508.

68. *See* Conti-Brown, *supra* note 65, at 2-3.

69. Internal Revenue Code § 4942 imposes an excise tax on private foundations that fail to distribute a required minimum. I.R.C. § 4942(a) (2006).

70. *See generally* Alan Finder, *Yale Plans to Increase Spending from Its Endowment*, N.Y. TIMES, Jan. 8, 2008, http://www.nytimes.com/2008/01/08/education/08yale.html.

galleries associated with universities,[71] and the law is unclear. Because so many universities have museums, they are an important repository of art and objects, and it is important that the status of those collections and the universities' responsibilities with respect to them be clear. There is enough art owned by universities to consider that the legal obligations might be defined uniquely for university-owned collections. The motto of the Association of College and University Museums and Galleries is: "Great Universities and Colleges Have Great Museums."[72] While it seems the motto is true, in at least some cases, it is not self-evident why it is and whether it should be.

The current pattern is predictable, though clearly undesirable: an educational institution decides to sell art, it gets pilloried in the media, people who may or may not have legal standing go to court,[73] and everyone spends a lot of money on lawyers. Unfortunately, there is precious little law produced by this process to guide the behavior of university trustees and their challengers. Settlements can reduce costs for the parties, but the charitable community is then deprived of the benefit of clarification in the law. There are not even norms recognizing that universities have a special role in the art-deaccessioning debate. The public debate about deaccessioning assumes that it is a conflict concerning only museums.

While emotions may run too high when a deaccessioning issue arises,[74] the problem seems to be a legal one: a university cannot be sure that its decision to sell some (or all) of the university's art collection will withstand legal challenge. The university cannot even predict who will be allowed to oppose its decision, and there is no reason to believe that courts will settle this issue any time soon. Courts will be involved where there are restrictions attached to particular pieces of art and *cy pres* proceedings are required;[75] but even there, institutions cannot be confident that unknown challengers will not intervene on a motion to the court. While courts might be the best institutional choice for resolving the issue, they have little

71. There are over 2000 participants in the Association of College & University Museums & Galleries (ACUMG) listserv. *See* David Robertson, Association of College & University Museums & Galeries, A Case for Membership, http://www.acumg.org/memberopps.html (last visited Apr. 15, 2010).

72. ACUMG, About ACUMG, Mission Statement, http://www.acumg.org/mission_statement.html (last visited Apr. 15, 2010).

73. Strict application of standing rules could be the most important mechanism for controlling anti-deaccessioning litigation. Unfortunately, legal proceedings can consume significant resources even if they are ultimately dismissed for lack of standing.

74. The attempt to protect *The Gross Clinic* under Philadelphia's historic-preservation statute can only be explained by too much excitement.

75. *See, e.g.*, Georgia O'Keeffe Found. (Museum) v. Fisk Univ., No. M2008-00723-COA-R3-CV, 2009 Tenn. App. LEXIS 434, at *1 (Tenn. Ct. App. July 14, 2009).

opportunity to comprehensively address it. Consequently, legislation may be necessary to create the proper standard for deaccessioning decisions, without resort to litigation in every case. There must be a better procedure for determining whether the Rose may close than slogging it out in court for the next decade.

B. Theoretical Source of the Struggle over University Art Collections

The practical explanations for the university-deaccessioning trend do not reach the source of the problem, and focusing on the market value of art and the financial troubles of universities will not produce lasting solutions. The problem can only be addressed by grappling with the underlying conflict, which is one of inconsistent conceptualization. The universities that have turned to their art collections as resources, and the critics who have attacked them for it, lack a common understanding of the nature of the public interest in those art collections and the role of the collections in the charitable mission of educational institutions. On account of those inconsistent perspectives, they disagree about the obligations of the trustees who oversee those institutions. The critics of university deaccessioning fail to distinguish museums from other institutions that own art—but are not primarily museums—because their approach to the issue is defined by the fact that it concerns art. To the contrary, universities attempting to sell art approach the issue from the perspective of their complex educational responsibilities. While art remains the subject of every deaccessioning case, this Article argues that is not the determinative legal factor. Because the question is one of mission implementation, the differences among institutions may justify different obligations with respect to the same subject. The public interest carried out by universities on the one hand, and museums on the other, diverge enough to justify one perspective on art collections for museums and another for universities. Those differing perspectives should justify different deaccessioning standards for museums and universities. This contextual approach to art collections is consistent with the private property approach, which imposes no obligation to protect, display, or lend to museums or private owners of art, simply because they are private owners rather than public or charitable institutions.

There are two distinct ways to conceptualize the art that institutions hold. Both are legitimate and both can apply at the same time to the same art. The first concept is art as "cultural property."[76] In the cultural property conceptualization, there is something important about art to society that

76. *See* John Nivala, Droit Patrimoine: *The Barnes Collection, the Public Interest, and Protecting Our Cultural Inheritance*, 55 RUTGERS L. REV. 477, 479-81 (2003) (arguing that the Barnes Collection is cultural property).

imbues it with a common interest, whether it is owned by the government, private institutions, or even individuals.[77] The key aspect of conceptualizing art as cultural property for purposes of thinking about the obligations of art-holding institutions is that the art is valuable in itself, regardless of its instrumental value,[78] and that holding the art is itself fulfillment of charitable purposes.[79] All works of art are held in a kind of public trust.[80]

An alternative to the cultural property conceptualization is what I will call the "instrumental property" perspective. Unlike art as cultural property, this conceptualization resists treating art as a unique asset. Instead, the art is related to the mission of the organization because it enables the organization to carry out its charitable purpose.[81] Instrumental property has a meaningful legal status only because it is held by a nonprofit organization. Compared to cultural property, there is nothing inherently worthy of legal protection in instrumental assets. Rather, their legal importance derives from their context. All the conventional assets that charities own are generally instrumental property, whether those assets are part of the institution's endowment or part of the program assets used in operating the charitable activities. Nevertheless, charitable trustees have obligations with respect to both endowment assets and program assets.

C. The Consequences of Conceptualization as Cultural Property or Instrumental Property

The legal consequences that flow from the cultural property/instrumental property conceptualizations may conflict, with cultural property demanding greater protection than instrumental property. In disputes over deaccessioning, the two models might explain the divergent positions because anti-deaccessionists elevate continued public access to art above all other interests, in keeping with the common

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77. *See id.* at 487 (arguing that because the Barnes Collection was public art "there is a legitimate public interest in its management and preservation which, in turn, justifies public intervention when that management goes bad or that preservation is threatened").

78. *Id.* at 480 ("The Barnes Collection as an ensemble has a public value that transcends the value of its constituent parts.").

79. *See* INT'L COUNCIL OF MUSEUMS, ICOM CODE OF ETHICS FOR MUSEUMS 2.0, at 3 (2006), *available at* http://icom.museum/ethics.html ("Museums have the duty to acquire, preserve and promote their collections as a contribution to safeguarding the natural, cultural and scientific heritage.").

80. *Id.*

81. *See generally* Jennifer L. White, Note, *When It's OK to Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art to Meet Museum Operating Expenses*, 94 MICH. L. REV. 1041 (1996) (proposing a trust model for fiduciary duties in deaccessioning art to accommodate the public interest in art).

patrimony perspective of cultural property. Adherents to an instrumental property approach can tolerate greater uncertainty regarding public access in deaccessioned works in order to carry out other charitable purposes that they perceive as equally compelling, for which there is no room in the cultural property approach. If understood as cultural property, art is unique among the assets that institutions own.[82] Cultural property classification reflects an inherent public interest in the objects themselves, and the government is justified in regulating and protecting them.[83] This is the model underlying laws that treat antiquities as government property.[84]

The cultural property perspective as applied to art implies a particular basis for tax exemption: furthering that public trust by protecting and maintaining cultural property should constitute a sufficient public benefit to qualify the organization as charitable under Code § 501(c)(3). This is not the approach generally taken by institutions that hold art, even museums. Under current practice, museums are generally exempt as educational organizations.[85] Educational charities serve people, rather than objects, and the regulations define "educational" as "instruction of the public on subjects useful to the individual and beneficial to the community."[86] Adoption of the cultural property conceptualization of art means that museums could be "charitable" even if they serve no educational function. Museums do not need to be educational to qualify for tax exemption because the regulations define "charitable" to include "maintenance of public buildings, monuments or works."[87] Art as cultural property seems to fit nicely within that definition. It would not be unreasonable for museums to conceptualize art this way and for them to define their missions in terms of the stewardship of the cultural property they hold.[88]

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82. *See* Hector Feliciano, Owen Pell & Nick Goodman, *Nazi Gold and Other Assets of the Holocaust: The Search for Justice*, 20 WHITTIER L. REV. 67, 72 (1998) ("Art is unique and can often be distinguished from other assets.") .

83. *See* Nivala, *supra* note 76, at 542 ("We have come to recognize that government should act to preserve our cultural inheritance while acknowledging that such action requires explicit protection of both the private owner's and the public's interests.").

84. *See* Christopher D. Cutting, Comment, *Protecting Cultural Property Through Provenance*, 32 SEATTLE U. L. REV. 943, 950 (2009) ("The United States' first law aimed at the protection of cultural property was the Antiquities Act of 1906.").

85. *See* A COMPANION TO MUSEUM STUDIES 443 (Sharon Macdonald ed., 2006) ("The tax code requires that charitable organizations serve a public purpose. In the case of museums this is an educational . . . purpose.").

86. Treas. Reg. § 1.501(c)(3)-1(d)(3) (2009).

87. *Id.* § 1.501(c)(3)-1(d)(2).

88. *See, e.g.*, Guggenheim, Mission Statement, http://www.guggenheim.org/guggenheim-foundation/mission-statement (last visited Apr. 15, 2010) (defining their mission in part as "to collect, conserve, and study the art of our time").

The most vocal opponents of deaccessioning seem to adopt this cultural property conception and therefore fail to distinguish among types of institutions. Lee Rosenbaum argues that art is placed in museums for "the collective cultural patrimony of the people who live in this country. They are not fungible assets."[89] Others claim that "[t]he institution is there to safeguard the art. The art is not there to support the institution."[90] In New York, a bill was introduced in the legislature last year that would restrict the circumstances under which any museum (and some other non-museum nonprofit institutions) may sell their art.[91] This reflects a strong notion of art as cultural property, very far on the spectrum towards public control and away from the private discretion that flows from the law of private property.

The demands that cultural property characterization places on holders of that property are unusual in the legal regime. Generally, the law in this country does not reflect strong notions of public rights in art owned privately—either by individuals, for-profit, or nonprofit institutions.[92] Private property rights predominate. Some states, like California, have passed legislation that protects non-owner rights in art,[93] and the federal government has adopted the Visual Artists Rights Act (VARA).[94] But the legislation in this country seems to be more about the rights of artists than creating public rights in the art.[95] Compared to European countries, the recognized "moral rights" in art are quite limited in the United States.[96]

We can imagine a spectrum of regulation relating to art from strictly protecting it as cultural property at one end, to the other extreme of not

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89. Lee Rosenbaum, *He's a Museum Leader for These Troubled Times*, WALL ST. J., Jan. 27, 2009, at D7, *available at* http://online.wsj.com/article/SB123301149409717313.html.

90. Jim Zarroli, *Museums Exhibit Signs of Economic Distress*, NPR, Jan. 5, 2009, http://www.npr.org/templates/story/story.php?storyId=99017732.

91. *See* A. 6959, 2009-2010 Assem., Reg. Sess. (N.Y. 2009), *available at* http://public.leginfo.state.ny.us/menugetf.cgi.; Robin Pogrebin, *Institutions Try to Slow Bill to Curb Sales of Art*, N.Y. TIMES, June 23, 2009, at C1, *available at* http://www.nytimes.com/2009/06/23/arts/design/23deaccess.html.

92. *See* JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT 21 (1999) ("Until quite recently, it would have been correct to assume a total absence of restriction on owners [of art], at least in America.").

93. CAL. CIV. CODE § 986 (West 2007).

94. Visual Artist Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 0128 (codified at 17 U.S.C. § 106A (2006)).

95. SAX, *supra* note 92, at 22 ("[T]he law was protecting the art, even if only in the name of protecting the artist.").

96. *Id.* at 21 ("While . . . France took the view that artists have an interest in works they create, known as *droit moral*, the United States had resolutely rejected even that limitation on owner autonomy.").

recognizing anything special about art at all. While the cultural property model resonates, it ultimately fails to define the way people generally understand art. Therefore it is unsurprising that the law has failed to develop robust rights for either artists or the community vis-à-vis owners of art. Even though the public might recognize a shared loss in the destruction of a great work of art, the American culture of private property resists substantial legal demands on *anyone* who owns art. For art owned by private individuals (and business corporations), rejection of the cultural property perspective correspondingly strengthens ownership claims.

The uproar over decisions by universities reflects greater public interest in the nonprofit sector than the private sector even though charitable institutions are private organizations, albeit ones with public-oriented goals. The issue of categorization and its consequences for nonprofit organizations maps onto the more familiar debate about the public versus private nature of such institutions.[97] An organization may have a public function that supports cultural property characterization for the property it holds. But charities are not homogeneous, and they are essentially private organizations with public missions, so the private property model is an appropriate starting point for analyzing them. However, for art owned by nonprofit organizations, rejection of the strict cultural property perspective is just a first step toward defining obligations. If art is an instrumental asset to an institution, then it still needs to be further categorized within the conventional taxonomy for assets owned by nonprofits—endowment assets and program assets. Characterization as an endowment or program asset will determine the content of the governing board's obligations with respect to the property.

II. Context Should Determine Category.

A. Cultural Property Is for Museums.

The roles of art collections in the charitable missions of different institutions need not be, and should not be, uniform. The cultural property perspective and its focus on objects is only appropriate for institutions that have missions directly related to art preservation and stewardship, i.e. museums. This is because the nature of the institution and its mission—rather than the nature of the property—should determine the proper conceptualization along the spectrum from cultural property to instrumental property. As a consequence, the obligations of different institutions should

97. *See generally* EVELYN BRODY & JOHN E. TYLER III, HOW PUBLIC IS PRIVATE PHILANTHROPY? (Suzanne Garment ed. 2009) (examining the major claims for greater public control of charities), *available at* http://www.philanthropyroundtable.org/files/Public_Private%20Monograph_high%20res_Final.pdf.

appropriately vary according to their places on that spectrum. Because universities have wide-ranging purposes beyond art preservation and stewardship, universities need to conceptualize their art as largely instrumental to their charitable missions and not primarily as cultural property.

Finding the right balance on the spectrum is complex for institutions that are not museums. The mission of museums is relatively narrow compared to the mission of universities. Because of their sharper focus, it makes sense for museums to conceptualize their collections more in terms of cultural property than instrumental property and self-select into demanding requirements for preservation and presentation. Members of the American Association of Museums (AAM) and the Association of Art Museum Directors (AAMD) seem to have done this by accepting strict deaccessioning standards as conditions of membership. Consider the following reflection of a cultural property approach from the AAM Code of Ethics:

> The distinctive character of museum ethics derives from the ownership, care, and use of objects, specimens, and living collections representing the world's natural and cultural common wealth. This stewardship of collections entails the highest public trust and carries with it the presumption of rightful ownership, permanence, care, documentation, accessibility, and responsible disposal.[98]

The AAMD, a more exclusive club[99] than the AAM with just 193 members,[100] has the strictest deaccessioning policy: "Proceeds from a deaccessioned work are used *only* to acquire other works of art—the proceeds are never used as operating funds, to build a general endowment, or for any other expenses."[101] This policy is consistent with a strong cultural property perspective because rules against deaccessioning resist treating art as a fungible asset. If the object's preservation is the objective

98. American Association of Museums, Code of Ethics for Museums, http://www.aam-us.org/museumresources/ethics/coe.cfm (last visited Apr. 15, 2010) [hereinafter AAM, Code of Ethics].

99. Association of Art Museum Directors, About AAMD, http://www.aamd.org/about/ (last visited Apr. 15, 2010) [hereinafter About AAMD]. Only large institutions are eligible for membership in the AAMD because of its budget requirements, which require a professional staff and an annual operating budget equivalent to or exceeding $2 million for two consecutive years. *Id.*

100. *Id.*

101. ASS'N OF ART MUSEUM DIRS., ART MUSEUMS AND THE PRACTICE OF DEACCESSIONING 1 (2007), http://aamd.org/papers/documents/FINALPositionPaperDeaccessioning.doc [hereinafter DEACCESSIONING].

of the institution, the object can never be sold to achieve another purpose. This is the burden of great museums.

B. University Art Collections Are Hybrid Cultural and Instrumental Property.

Universities have a harder task than museums in conceptualizing their art collections because they must determine what role the art plays in an institution's mission where, by definition, it is not the central focus. Universities must weigh science labs against athletic facilities against financial aid. The cuts in programs and personnel that universities have suffered highlights the problem of incommensurable trade-offs that universities face.[102] The art collection should not be immune from compromises, unless the art itself is unique or the art is functionally indispensible to the organization. Universities focused on their educational missions might decide that art education requires museum stewardship, but it would be a mistake to assume that universities need to *own* art in order for students to have access to art and art education.

A hybrid model that incorporates the perspectives of both cultural property and instrumental property, with a greater emphasis on the instrumental, best reflects the charitable mission for universities. University purposes are varied and complex; trustees need to exercise a high degree of judgment and compromise among competing objectives is unavoidable. University trustees need to understand the role that art plays in their educational mission and behave responsibly within that constraint. Sometimes that will mean sacrificing other interests for maintenance and preservation of an art collection, but in some cases, particularly for schools with severe financial troubles, deaccessioning may be a responsible decision.

Consider the case of the New York Public Library. Although it is not a university, like universities, it is an institution with a core mission, which an art collection is clearly related to, but is not central to. It has long owned some high-quality art.[103] During the period that the universities described at the beginning of this Article thought it would be advantageous to sell artwork, the Library came to the same judgment about an Asher Durand painting that it owned. Despite media attacks, it sold *Kindred Spirits* to the Crystal Bridges Museum for $35 million. It had decided that, as a library, rather than keep the painting, it would be better to devote the money it could raise from its sale to create an endowment to acquire library research

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102. *See Responses to the Downturn: A Survey of Colleges*, *supra* note 64, at A14.

103. *See* New York Public Library, Collections: The Heart of the Library, http://www.nypl.org/help/about-nypl/collections (last visited Apr. 15, 2010) ("[U]nique among the NYPL's libraries, it actively collects art as part of its mission . . . .").

materials.[104] Its trustees determined that the institution was not primarily a museum and that it was more important to devote its resources to core library collections.[105] The Library's behavior reflects a hybrid property approach because the trustees recognized that the painting was a special object requiring extra careful consideration in its disposition. Respecting the cultural property aspects, the purchaser was a museum that will continue to provide access to the public and protection of the object. Reflecting the instrumental property aspects, the trustees treated the painting as a valuable commodity worth selling to enable the organization to invest in other assets that the trustees considered more relevant.

C. Legal Ramifications of Classification as Instrumental Assets

In addition to adopting elements of the cultural property model, the hybrid model incorporates the multi-faceted nature of instrumental property. Thus, decisions about art collections owned by universities must reflect both the special nature of art and the specific function of the collection within the university's set of resources. The category of instrumental assets encompasses a variety of resources that are not always clearly distinguished from one another. When art collections function as instrumental assets, they need to be divided into three further classes—endowment assets, program-related assets, and liabilities—in order to investigate the legal regime that should control the obligations with respect to the collections.

Charitable organizations are generally aware of the difference between their endowment assets and their program-related operating assets. Endowments are committed to investments that provide income to fund current expenses. They also represent a store of wealth that an organization might partially liquidate in challenging financial periods, but are generally considered permanent. Program-related assets are property that an organization uses to carry out its charitable activities. They can be valuable and long-lived assets, like buildings in which the organization runs its programs, but they are program-related because they are used in operations and not because they constitute financial resources. Program assets are different from endowments; they are used, rather than preserved. Institutions do not always think of their valuable assets as possible liabilities as well, but they are well aware of the continuing costs incurred in maintaining more assets, whether endowment or program-related. For example, program-related buildings demand a steady stream of funds for

104. *See also* Carol Vogel, *New York Public Library to Sell Major Artworks to Raise Funds*, N.Y. TIMES, Apr. 11, 2005, at A1, *available at* http://www.nytimes.com/2005/04/11/arts/design/11libr.html.

105. *See id.*

upkeep, imposing substantial increased costs on institutions that expand their physical plant, even when the construction has been fully funded.

When owned by universities, art collections resemble all three of these categories, often simultaneously. They resemble portfolio endowments because they constitute valuable assets owned by an organization that are not used up in the course of operations over time. Art collections also need to be protected from loss and waste, just like financial endowments. Pursuant to state statutes governing endowment assets, institutions are obligated to manage endowments with a view towards preservation for permanent duration,[106] which is how art needs to be maintained. At the same time, art collections resemble endowment assets because of their *potential* liquidity.[107] Unlike the buildings in which a university operates its educational program, its art collection is movable and composed of multiple pieces that can be sold individually. Like the market for portfolio investments, there is a relatively liquid market in art; auction houses and private dealers make the sale of valuable art easy and efficient. Finally, the prices of art in the market as a whole have exceeded any reasonable range for consumer assets; on account of their extremely high values, art collections must be understood as investment assets, regardless of who owns them. Despite the stories at the beginning of this Article, art collections, similar to endowments, constitute a stock of wealth that organizations generally do not liquidate.[108] The issue is as contentious as it is because deaccessioning for operating funds is rare, and the announcement that Brandeis made concerning the Rose Museum is unprecedented. These cases are important because they are a departure from the norm and therefore challenge the assumptions people have about art collections owned by universities.

Art collections resemble program assets because they are used in carrying out the mission of the organization.[109] For universities, they are one among many assets that promote educational purposes—they are an important tool for students learning about art and a great resource for

106. *See* UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 4 (1972).

107. Auction houses exist for this precise purpose. They even have special departments for museums interested in buying and selling. *See, e.g.*, Christie's Museum Services, http://www.christies.com/services/museum (last visited Apr. 15, 2010).

108. *See* White, *supra* note 81, at 1041 ("Art museums present the paradox of being simultaneously very rich, because of the value of the assets they hold, and very poor, due to the illiquidity of those assets . . . .").

109. *See, e.g.*, Rose Art Museum, Mission Statement, http://www.brandeis.edu/rose/aboutus/mission.html (last visited April 15, 2010) ("The programs of the Rose adhere to the overall mission of the University, embracing its values of academic excellence, social justice, and freedom of expression.").

scholarship by faculty and students.[110] Like other program assets, they cannot be outsourced to financial managers but must be managed by charitable trustees and the officers and employees whom they supervise.[111] Unlike pure investments, and more like special property devoted to operations, the individual items in a collection are not fungible like financial assets.

Finally, art is also a liability. Compared to financial endowments, art is expensive to conserve, store and insure. In its petition for *cy pres* relief, Fisk University represented that it would need $560,000 to restore the gallery in which the Stieglitz Collection is displayed.[112] Restrictions that require organizations to keep their art mandate that funds come from elsewhere for these kinds of expenses. In this way, art resembles capital improvements in operating assets, which permanently increase operating costs. But unlike those improvements, these costs for art collections may rival the benefits of those collections in the educational mission.

These three categories are important because they form the foundation for the regulatory scheme. Each of these categories demands different behavior from trustees, and the law governing behavior is somewhat clearer once we get to the level of these categories. The problem with university deaccessioning decisions stems from a lack of conceptualization of art collections in charitable institutions, and the consequent inability to map onto this set of rules. The law governing trustee behavior assumes that we know which category a particular asset falls, and the category determines the obligation. In this section, I consider how classification of university art collections as endowment assets, program-related assets, and liabilities might affect the legal rules applicable to trustee decisions and the consequences for deaccessioning.

1. Endowment

If the art collection is characterized as an endowment asset, it must be administered pursuant to the standards of "investment responsibility."[113] Treating art collections as endowments would provide considerably more

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110. *See, e.g., id.*

111. This is because the trustees are responsible for carrying out the charitable purposes of the organization. *See, e.g.*, PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS § 320 (Tentative Draft No. 1, 2007).

112. *In re* Fisk Univ., No. 05-2994-III, slip op. at 4 (Tenn. Ch. Ct. Feb. 8, 2008), *rev'd sub nom* Georgia O'Keeffe Found. (Museum) v. Fisk Univ., No. M2008-00723-COA-R3-CV, 2009 Tenn. App. LEXIS 434 (Tenn. Ct. App. July 14, 2009).

113. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 6 cmt. (1972) ("The standard of Section 6 was derived in part from Proposed Treasury Regulations § 53.4944-1(a)(2) dealing with the investment responsibility of managers of private foundations.").

certainty than categorizing them as program assets, liabilities, or cultural property because endowments are subject to relatively specific statutory rules about management, liquidation, and modification. Versions of the uniform laws concerning management of institutional funds, Uniform Management of Institutional Funds Act (UMIFA) and Uniform Prudent Management of Institutional Funds Act (UPMIFA),[114] have been adopted across the country.[115] The statutory rules are based on managerial "prudence" that seeks to preserve value for the institution.[116] As a practical consequence of applying these statutory standards, art collections subject to the rules for endowments would not be easy to sell, but they would not be impossible to sell either. Because of their conservative approach, applying the endowment rules to art collections would not be a bad solution for modulating the debate.

The rules for managing endowments under the uniform acts would permit universities to invest in art as part of a diversified portfolio. UPMIFA requires managers to consider total return from investments including income and appreciation,[117] suggesting that art, primarily on account of its record as a good long-term investment, is a prudent endowment asset. In addition, managers must consider an asset's special relationship to the charitable purpose of the institution in making decisions regarding endowment funds.[118] That language suggests more permissive investment in items like art that are useful in the charitable mission.

Appropriation from an endowment for expenditure—i.e., selling the art—is also subject to a standard of prudence. For financial assets, the standard suggests moderation, which is not immediately translatable to investments in art. For works of art, there is no separable income to withdraw for current use, and the appreciation cannot be extracted separately from the capital. In this way, art collections fail to resemble some, but not all, endowment assets. Even for some strictly financial assets, holders cannot sell a part of an investment that has appreciated in value.

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114. *See generally* UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT; UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT (2006).

115. *See* UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT prefatory note ("[Forty-Seven] jurisdictions have enacted [UMIFA]."); Unif. Prudent Mgmt. of Institutional Funds Act, Enactment Status Map, http://upmifa.org/DesktopDefault.aspx?tabindex=5&tabid=68 (last visited Apr. 15, 2010) (showing forty-four states have enacted UPMIFA).

116. *See* UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT prefatory note ("The prudence standards in UMIFA have provided useful guidance, but prudence norms evolve over time. The new Act [,UPMIFA,] provides modern articulations of the prudence standards for the management and investment of charitable funds and for endowment spending.").

117. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 3(e)(1)(E).

118. *Id.*

Thus, the question under the legal standard becomes how to liquidate the return consistent with the required prudence.

Under UMIFA, endowment funds can be withdrawn to the extent that the fund currently exceeds its "historic dollar value" (HDV), which is defined as the value of contributions to the fund.[119] If art was acquired by an institution a long time ago, the HDV is likely to be significantly below the current fair market value, suggesting discretion for trustees to appropriate some amount for expenditure. However, the inseparable nature of art objects pose a problem depending on whether all of a university's art is considered a single fund, or whether each individual artwork constitutes its own fund. If each work of art is a separate fund, then no sale is possible under UMIFA because every sale will, by definition, eat into the HDV. But if the entire collection of art is treated as a fund, or the fund consists of art and other assets, then the HDV limitation is unlikely to restrict sales. While the shortcomings of the HDV benchmark are widely acknowledged,[120] its application to an art collection in these two alternative ways suggests a particularly arbitrary determination of prudence.

Most states no longer use HDV because they have adopted the revised version of the uniform law, which rejects the HDV concept. Under UPMIFA, prudence in appropriation for expenditure depends on a more contextual analysis in place of HDV, so trustees must consider the factors listed in the statute in any individual sale, but there are no bright-line limits.[121] The core premise is that trustees must approach spending decisions with a view towards preserving the endowment; consideration of the duration and preservation of the fund is the first factor, among many, to be considered in appropriation decisions.[122]

Art collections present an interesting case for the "preservation" imperative because preservation of art differs from preservation of other assets. Preserving financial endowments is about preventing losses in value suffered by the institution, but preserving art can concern the objects themselves in addition to their value to the institution holding them. Some institutions have trouble preventing the art objects in their care from deteriorating, which reflects a preservation problem in both respects. This was true in Fisk's stewardship of the Stieglitz Collection.[123] During her

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119. UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 2 (1972).

120. *See* UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT prefatory note, Endowment Spending ("UPMIFA improves the endowment spending rule by eliminating the concept of historic dollar value . . . .").

121. *See* UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT §§ 4(a)(1)-(7).

122. *Id.*

123. *See* Georgia O'Keeffe Found. (Museum) v. Fisk Univ., No. M2008-00723-COA-R3-CV, 2009 Tenn. App. LEXIS 434, at *2 (Tenn. Ct. App. July 14, 2009) ("These

lifetime, O'Keeffe expressed concern with the conditions under which the works were housed at the University.[124] She offered to find them a better home, in spite of the fact that she had no right to take the works back because the gifts were complete.[125] A claim of imprudence under UPMIFA might be compelling where an institution is unable to properly maintain its collection because it then wastes the value of its assets. In such a circumstance, it might be required, as the prudent course of action, for the institution to divest itself of the collection and replace it with something (like financial assets) that it is better able to preserve.

The objective of endowment preservation distinguishes situations in which universities sell art to pay the bills, and situations in which they sell art to bolster their endowment of financial assets. Institutions like Randolph and Fisk that plan to devote the proceeds of their art sales to their endowments[126] should easily satisfy the UPMIFA prudence standard because they were not, in fact, appropriating for expenditure but were rather changing the composition of the assets in their endowment portfolio. Finally, another factor for trustees to consider in deciding what is prudent to appropriate for expenditure is "the purposes of the institution and the endowment fund."[127] The distinction between museums and universities might make a significant difference under this factor.

In addition to the rules for managing and appropriating from endowments, the investment responsibility rules include standards governing modifications of restrictions contained in gift instruments. Application of these rules to art collections could provide some needed clarity. Under the rules for endowments, the intent of the donor expressed in the gift instrument is a limitation on the fund, and institutions must seek court approval for any modifications to the terms of the gift.[128] Court proceedings are necessary for institutions to sell art when the gift instrument restricts sales. Both Fisk University and Randolph College initiated court proceedings because the works they wanted to sell were gifts subject to restrictions (which may have affected their ability to sell).[129] If

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proceedings began when Fisk University . . . could no longer afford to maintain the collection pursuant to the conditions imposed [fifty] years earlier.").

124. *Id.* at *31-34.

125. *Id.* at *32-33.

126. *See supra* Part I.

127. *See* UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 4(a)(2).

128. *Id.* § 6(b).

129. In *Randolph College*, the art itself was not gifted, but the fund from which the art was purchased was a restricted fund. Depending on interpretation, the sale of the works may not have been restricted under the terms of the gift. *See* Complaint, *supra* note 28, at 2 (providing the will of a trustee which directed that the money she gave to Randolph was only to be used "to form a permanent collection of art").

the endowment statutes were clearly applicable in those cases, courts might be more amenable to the institutions attempting to sell art because UPMIFA has more generous modification provisions than its predecessor or the common law: it allows *cy pres* modifications for wasteful restrictions, in addition to unlawful, impracticable, and impossible purposes.[130] Fisk argued that maintenance of the collection was a drain on its other resources and that a sale of some of the collection would finance renovation of the gallery in which it was displayed.[131] Application of the endowment rules might have led the trial court in *Fisk* to weigh the interests before it differently, with greater attention to the financial demands that the collection imposed on the school. It could have ruled for the University on the grounds that the restrictions in the gift operated to waste the University's other assets because the collection was not sufficiently endowed with money to support itself over time.

Applying the endowment rules to university art collections would have efficiency advantages because those rules would then provide a default against which donors and institutions could contract. A UPMIFA default might also give institutions some sorely needed leverage in their negotiations with donors because it contemplates modifications on wastefulness, which might encourage greater underwriting of restricted gifts. Under current law, there is no clear benchmark against which institutions and donors can begin negotiating gift restrictions. Consequently, restricted-gift contracts are more cumbersome to draft and to litigate than they might otherwise be.

The most important consequence of applying the endowment modification rules to art collections is that the regime would make clear that there is no need for court approval where there are no restrictions. Heirs of donors and other opponents of deaccessioning would like to see courts impose restrictions on art sales even where there is no restriction in the gift instrument. Treatment under the endowment rules would clarify when a modification is necessary at all. For example, the art involved in the Rose Museum dispute was generally not subject to donor-imposed restrictions, and Brandeis did not initiate a court proceeding prior to announcing its decision to deaccession.[132] Nevertheless, others hauled the University into court as though the default rule prohibited Brandeis's

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130. UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(c). UMIFA, however, only allows the governing board to go around donor restrictions "[i]f written consent of the donor cannot be obtained by reason of his death, disability, unavailability, or impossibility of identification." UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 7(b).

131. *See supra* text accompanying notes 13-27.

132. *See* Daniel Grant, *The Brandeis Bombshell: Is the University's Museum Just a Rose to Be Plucked?*, WALL ST. J., Feb. 3, 2009, at D7 ("Restrictions on gifts to the Rose Art Museum tend to be very few . . . .").

deaccessioning.[133] Because Massachusetts's version of UPMIFA (adopted after the trustees announced the decision, but before any art was actually sold)[134] is not clearly the governing law in this situation, the standard that will be applied to Brandeis, if it pursues the sale and the suit continues, is unclear. Much of the art owned by universities is not subject to restrictions,[135] and where that is the case, if the investment-responsibility rules control, the trustees would be governed by the prudence standard—rather than the more demanding modification rules—in deciding how to manage and whether to spend from the fund.

2. Program-Related Assets

If art collections are classified as program-related assets, the applicable legal rules consist of the fiduciary duties of charitable directors: care, loyalty, and obedience. These rules are characterized by significant discretion for trustees and protection of the best-judgment rule[136] for decisions concerning operation of the organization's program.[137] The best-judgment rule protects trustees from challenges to their decision, as long as those decisions were made with sufficient inquiry and without conflicts of interest. In this category, we should have less court involvement than in decisions regarding endowments on account of the room trustees have for exercising directorial judgment. The investment responsibility rules applicable to endowments create obligations that can be enforced in court,[138] but in this category, courts refrain from acting as super-trustees in cases in which they are called upon to second-guess the wisdom of trustee decisions.[139]

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133. *See* Abramson, *supra* note 6.

134. MASS. GEN. LAWS ch. 180A, § 11 (1975) (current version at MASS. GEN. LAWS ch. 180A, § 1 (2009)).

135. *See* Howards, *supra* note 1, at 11 ("Most artworks are given as unrestricted gifts . . . .").

136. This is a variant of the business judgment rule. *See* Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) ("The business judgment rule . . . is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.").

137. *See* PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS, *supra* note 111, § 365.

138. *See* Lynch v. John M. Redfield Found., 88 Cal. Rptr. 86, 92 (Cal. Ct. App. 1970) (holding that trustees breached the prudent man rule by failing to invest income over a five-year period).

139. *See* Fleck v. Cent. Steel & Wire Co., No. 92-C-7988, 1993 U.S. Dist. LEXIS 5951, at *8 (N.D. Ill. Apr. 30, 1993) ("This Court does not sit as a super-administrator or a super-Trustee . . . rather the role of this Court is limited to determining the rationality of the Trustees' decision and the absence of bad faith on their part.").

Best-judgment rule protection does not imply unlimited power.[140] Under the fiduciary-duty standard, trustee discretion is limited by gross negligence (or simple negligence, if organized as a trust) and conflict of interest rules.[141] Thus, applying the fiduciary standards to university trustees making deaccessioning decisions allows exercise of judgment regarding the best interests of the institution but not unreviewable freedom. In fact, the duty of care demands careful consideration of a decision to sell an artwork long associated with the institution. Closing a university's museum and selling all the art demands careful study. Massachusetts's Attorney General was justified in getting involved in the Rose Museum transaction, and the Brandeis decision may have been deficient under a straightforward fiduciary-duty analysis. Consider the following excerpt from a letter to the Brandeis community from its own Department of Fine Arts:

> Late Monday afternoon (January 26) the Department of Fine Arts was notified that the University Board of Trustees resolved to disband the Rose Art Museum and sell the collection at auction to raise funds for the university. In addition to despairing at the Trustees' action, we wish to make clear that at no point in the decision making process was the Department of Fine Arts faculty consulted. Neither was there any communication regarding the decision with the Rose Board of Overseers on which a member of the faculty sits. Nor was any reference made to the museum at the university-wide faculty meeting last Thursday (January 22) when strategies to confront the current fiscal crisis were discussed.[142]

How would an attorney general analyze the trustees' action if this were the description of how the university handled the sale of some very valuable scientific equipment, for example, instead of the Rose Museum collection? Governance questions would arise, even though the sale concerned wholly program-related assets without any special status under the law. If the trustees determined that the university already owned enough of that type of equipment, or if the only faculty member who knew how to use the equipment retired, or if there were not enough students

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140. *See Lynch*, 88 Cal. Rptr. at 92 ("[T]he directors failed to meet the standards of the prudent man investment rule . . . none of the circumstances exonerate them from liability.").

141. Stern v. Lucy Webb Hayes Nat'l Training Sch. for Deaconesses & Missionaries, 381 F. Supp. 1003, 1013 (D.D.C. 1974) ("[A] director must often have committed 'gross negligence' or otherwise be guilty of more than mere mistakes of judgment.").

142. Christopher Howard, *Brandeis Department of Fine Arts Responds to Museum Closing*, COLL. ARTS ASS'N NEWS, Feb. 3, 2009, http://www.collegeart.org/news/2009/02/03/brandeis-department-of-fine-arts-responds-to-museum-closing/.

interested in the field of study that made the equipment necessary, the trustees might have decided that it was not worth keeping, insuring and maintaining. Some people would be upset, of course, because a major might be discontinued, or a lab might have to close, and it might have been shortsighted for the trustees to sell. But under the best-judgment rule, even foolish decisions are protected from challenge in court if they are made after proper deliberation with sufficient information and no conflict of interest.[143] Given the precipitous dip in the art market that occurred at the time that Brandeis announced its decision, a sale at that moment might have seemed foolish, but mere foolishness is not a fiduciary-duty violation.[144]

The problem that the Fine Arts Department's letter raises about the Rose decision was that the trustees apparently made it without a full and fair consideration of the costs and benefits of deciding to close the museum. Without the views of the fine arts faculty and the Rose Board of Overseers, the trustees may have underestimated the important contributions of the Rose to the Brandeis mission. How could the trustees decide whether the museum was an important part of the mission without consulting the people who knew what the role of the museum was in both the educational program (the fine arts faculty) and in the University's fundraising (the Rose board)? Even without any special limitation on the sale of art by institutions, the trustees' actions may have been grossly negligent and in violation of the duty of care.[145] In this case, it is appropriate for the Attorney General to prevent the sale, but that does not imply that it is always a violation of fiduciary duty to deaccession art holdings.

The solution to this problem is process, which is the solution of choice in questions of care. In the Sibley Hospital case, the leading case on the duty of care in nonprofit corporation law, the court imposed policies

143. *See* Aronson v. Lewis, 473 A.2d 805, 812-13 (Del. 1984) (explaining business judgment rule); Shlensky v. Wrigley, 237 N.E.2d 776, 781 (Ill. App. Ct. 1968) (refusing to second-guess questionable business decision made by directors); PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS, *supra* note 111, § 365.

144. *See* Gagliardi v. Trifoods Int'l, Inc., 683 A.2d 1049, 1052-53 (Del. Ch. 1996) ("[The business judgment rule] provides that where a director is independent and disinterested, there can be no liability for corporate loss, unless the facts are such that no person could possibly authorize such a transaction if he or she were attempting in good faith to meet their duty.").

145. "The duty of care requires each governing-board member—(a) to become appropriately informed about issues requiring consideration, and to devote appropriate attention to oversight; and (b) to act with the care that an ordinarily prudent person would reasonably exercise in a like position and under similar circumstances." PRINCIPLES OF THE LAW OF NONPROFIT ORGANIZATIONS, *supra* note 111, § 315.

and procedures on the organization to ensure that sufficient investigation and deliberation would take place.[146] Where art is concerned, sufficient process is particularly important because it can guarantee that the cultural property aspect of the property receives some consideration in the decision. The best way to accommodate both the cultural property concerns and the program objectives of an organization is through enhanced process, which is in keeping with the direction of nonprofit fiduciary duty law generally.

The problem with deaccessioning decisions where art collections are program-related assets goes beyond fiduciary duties. Public criticism of the Brandeis trustees' decision was not based on the trustees' failure to exercise care, but on the University's failure to adhere to museum expectations of behavior. Industry standards may apply when program assets are at issue, and the AAMD and AAM both have demanding standards for deaccessioning.[147] For member museums, selling art for operating funds is cause for loss of accreditation and censure by the industry organizations.[148] In a position paper published by the AAMD, the standard is unequivocal: "*Proceeds from a deaccessioned work are used only to acquire other works of art—the proceeds are never used as operating funds, to build a general endowment, or for any other expenses.*"[149] In a similar vein, AAM's Code of Ethics for Museums requires that "[p]roceeds from the sale of nonliving collections are to be used consistent with the established standards of the museum's discipline, but in no event shall they be used for anything other than acquisition or direct care of collection."[150] Director members of the AAMD and museums that are members of the AAM have represented to the world that they intend to abide by the deaccession policies of the associations by dint of their membership.

However, it would be a mistake to impose industry standards as the legal benchmark, particularly to institutions that are not primarily participants in the industry. The Rose was not a member of these organizations, so they had no jurisdiction over it.[151] Nevertheless, Ford W.

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146. *See Stern*, 381 F. Supp. at 1018.

147. *See* DEACCESSIONING, *supra* note 101.

148. *See* Press Release, Association of Art Museum Directors, AAMD San Diego Meeting Featured Lively Discussion of Current Issues Affecting America's Art Museums (Feb. 2, 2009), http://www.aamd.org/newsroom/documents/2009PostSanDiegoMeeting PressRelease_FINAL.pdf ("When AAMD was informed that the National Academy had violated the Association's prohibition against using funds from deaccessioning for operations, AAMD censured and imposed sanctions on the National Academy.").

149. DEACCESSIONING, *supra* note 101 (emphasis added).

150. AAM, Code of Ethics, *supra* note 98.

151. For the Rose Art Museum, and many other university-affiliated museums, the standards of the AAM are not binding because university museums often fail to become

Bell, President of AAM issued a statement condemning Brandeis for its decision to close the Rose, claiming that "Brandeis University is in fundamental violation of the public trust responsibilities it accepted the day it founded the Rose Museum."[152] The statement is most interesting for the following final paragraph:

> If it cannot afford to maintain and exhibit its collection, we urge Brandeis University to seek another steward of it. There are many fine museums in the region capable of caring for these works, even on a temporary basis, while the university explores other options. In choosing an alternate solution to the sale and irrevocable loss of the collection that was entrusted to its care, the university would serve as a role model for its students, faculty and community.[153]

This statement reveals the conflict that museum industry standards can create for universities. Bell suggests that it would have been more ethical for Brandeis to relocate the art to another museum in the area without accounting for the interests of the University's educational program in such a relocation. While the statement is not precise about what it means to find another steward for the art, if the suggestion is that Brandeis transfer the art to a Boston-area museum, the ethical demands of the museum association undermine the fiduciary obligations of the University trustees. Brandeis's trustees' central obligation is to the educational mission of the University. If having the art on campus is a necessary component of that mission, as some have argued,[154] then moving it to the Museum of Fine Arts in Boston, for example, would not serve that objective.

Bell's perspective, predictably, is the cultural property perspective of museums, and not the more nuanced hybrid perspective that universities need to have. As fiduciaries to a university, the central question for the

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AAM members for reasons not connected to a desire to deaccession more freely. *See* Bd. & Membership of the Ass'n of Coll. & Univ. Museums & Galleries, Comments on Academic Museums and the AAM Accreditation Process, 1, http://www.acumg.org/files/Comments_on_academic_museums_and_the_AAM_Accreditation_process.pdf (last visited Apr. 15, 2010) ("[T]he vast majority of museums in the U.S. don't apply [to the AAM] for a variety of reasons.").

152. Press Release, Am. Ass'n of Museums, AAM Statement on the Closure of the Rose Museum at Brandeis Univ. (Jan. 29, 2009), http://www.boston.com/ae/theater_arts/exhibitionist/2009/01/aam_condemns_br.html.

153. *Id.*

154. *See* Letter from Annette DiMeo Carlozzi, Curator of Am. & Contemporary Art and Dir. of Curatorial Affairs, Blanton Museum of Art, Univ. of Tex. at Austin, to Brandeis Univ., http://www.brandeis.edu/rose/letters.html ("An art museum is absolutely central to the teaching mission of a liberal arts university.") (last visited Apr. 15, 2010).

trustees is whether they have an obligation, in seeking another steward for the art, to realize maximum value for the university in the process. Some commentators have argued for a compromise in the deaccessioning debate that would favor museum acquisition over private acquisition of deaccessioned works.[155] While that compromise acknowledges the public interest in access to art, it ignores the obligations that the selling institution's trustees have to stewardship of *that* institution's resources. One of the lessons of the lengthy litigation in the Fisk case is that museums will try to acquire art at a discount from financially strapped universities. The proposed settlement, under which Fisk would have sold *Radiator Building* to the O'Keeffe Museum for $7 million, was rejected by the Tennessee Attorney General because Fisk received other offers of up to $25 million for the painting.[156] A rule that favors museum purchasers over sales to the highest bidder will operate as a wealth transfer from universities to museums. Without a compelling reason why museums deserve that transfer from universities, it seems to be a dubious rule. In fiduciary-duty terms, it might be a waste of university assets for the collection to be "cared for" by another institution or sold for significantly less than its fair market value, when it could be a source of significant revenue for the school. Waste of corporate assets is the one foolish action that is not protected by the business judgment rule in the standard corporate law context.[157]

Rather than imposing industry standards on institutions that have not chosen to be in the industry associations, it is better policy to have a variety of standards for deaccessioning decisions. A different—lower—standard for universities allows them to better serve their charitable purposes, but it is also better for donors because it gives donors more specific choices. If the rules are clear, then donors can select the standard they want. The

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155. *See* Dobryzynski, *supra* note 12 (suggesting that museums be allowed to deaccession works for operating funds, subject to the review of an impartial arbitrator, and only if the work were offered to museums before going to public auction); *see also* White, *supra* note 81, at 1063-64 ("Courts should encourage directors to use their best efforts to facilitate a sale that is profitable and keeps the artwork available for public observation.").

156. *See* Jack B. Siegel, *Another Painting, Another Day: Tennessee Attorney General Stops Sale of O'Keeffe Painting by Fisk University, Leaving Controversy Unsolved*, CHARITY GOVERNANCE BLOG, Apr. 6, 2007, http://charitygovernance.blogs.com/charity_governance/2007/04/another_paintin.html (linking to Press Release, Office of Att'y Gen., Attorney General declines to approve Fisk, Museum Settlement Agreement to Sell Prized Paintings (Apr. 5, 2007), *available at*, http://charitygovernance.blogs.com/charity_governance/files/Ten_AG_Press_Release_April_2007.pdf.

157. *See* Fogelson v. Am. Woolen Co., 170 F.2d 660, 662 (2d Cir. 1948) ("Courts are properly reluctant to interfere with the business judgment of corporate directors; they do so only if there has been so clear an abuse of discretion as to amount to legal waste.").

possibility that a university museum may more easily sell paintings forces donors to focus sharply on the nature of their charitable intent and decide whether they are primarily interested in presenting the work in a particular place or primarily interested in supporting the recipient institution.

Consider the Fisk dispute through this lens. If Georgia O'Keeffe were alive, she probably would not oppose Fisk's decision to sell a partial interest in the Stieglitz Collection to the Crystal Bridges Museum. O'Keeffe's correspondence with Fisk indicated that she was concerned that the collection receive proper care,[158] and Crystal Bridges will clearly satisfy that interest, with state of the art facilities, programs, and conservation.[159] As a cultural property, the collection will likely be seen and studied by more people if the proposed sharing with Crystal Bridges is approved since the museum will be a major cultural destination and an active participant in inter-museum loans (it has already loaned its artworks to major museums).[160] More importantly, O'Keeffe gave the collection to Fisk because she cared about Fisk succeeding. Her intent was to improve Fisk's position. Consider the trial court's finding about why O'Keeffe gave the Stieglitz Collection to Fisk:

> As to her reasons for gifting the Collection to Fisk, O'Keeffe wrote "because I think it a good thing to do at this time and that it would please Stieglitz." . . . Given the circumstances of this time, O'Keeffe's statement makes clear that giving the gift to Fisk was a "good thing" because it would send a message to America that African Americans had much to offer and contribute to society, just as whites did. This statement and gesture about race, the Court finds, is Ms. O'Keeffe's motivation for giving the donation to Fisk.[161]

It was clear that O'Keeffe knew how to donate her works for maximum preservation and exposure—the rest of the collection mostly went to major museums.[162] If a donor has valuable art to donate, she can

158. *See* Georgia O'Keeffe Found. (Museum) v. Fisk Univ., No. M2008-00723-COA-R3-VC, 2009 Tenn. App. LEXIS 434, at *32-33 (Tenn. Ct. App. July 14, 2009).

159. *See* Crystal Bridges Museum of Am. Art, About Crystal Bridges, http://www.crystalbridges.org/about/ (last visited Apr. 15, 2010) ("Visitors will be able to enjoy the collection within the state-of-the-art galleries.").

160. *See* Crystal Bridges Museum of Am. Art, The Crystal Bridges Collection, http://www.crystalbridges.org/collection (last visited Apr. 15, 2010) (listing a number of museums Crystal Bridges has loaned works to).

161. *In re* Fisk Univ., No. 05-2994-III, slip op. at 9 (Tenn. Ch. Ct. Feb. 8, 2008), *rev'd sub nom Georgia O'Keeffe Found.*, 2009 Tenn. App. LEXIS 434.

162. *See* Fisk Univ., Collections, http://www.fisk.edu/CampusLife/FiskUniversityGalleries/Collections.aspx (last visited Apr. 15, 2010) (stating that the majority of the over

decide to donate it to a university with a broad mission, or to a museum that is a member of the AAM whose director is a member of the AAMD. If the donor knows that the university is subject to a lower standard than the museum for selling the painting for operating funds, she must decide if her primary interest is enriching the university and improving its programs, or preserving the painting permanently for educational purposes. This is not such a bad choice to impose on donors, but it is important that the choice be clear.

Under current law, gifts of art are privileged, and tax law has encouraged donors to give artworks[163] even where their primary motivation is support of the university and not stewardship of the art. This is on account of the fair market value deduction allowed for gifts of art that are connected to the charitable mission of the recipient organization,[164] a standard that easily applies to museums and universities that have any art-education programs. The donor may have been just as willing to give the university cash, but the charitable deduction for a donation of art is likely to be much more advantageous to the donor than a contribution of the art's value in cash.[165] Although the consequences are substantial for individual institutions involved, the public interest is served, albeit in different ways, as long as one of the institutions receives the gift. If the public interest in access to art is more important than education, the museum gift should be favored compared to the university gift. But tax law reflects neutrality between charitable purposes of universities and charitable purposes of museums. If that is a desirable policy stance, then the cultural property model must be rejected for universities, and art stewardship should not be

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1000 pieces in the Stieglitz Collection went to six institutions: Fisk University, Metropolitan Museum of Art, Art Institute of Chicago, National Gallery of Art, Philadelphia Museum of Art, and the Library of Congress).

163. *See* Joy Gibney Berus, *The Art of Donating Art: The Charitable Contribution of Art, Antiques and Collectibles*, J. PRAC. EST. PLAN., April-May 2008, at 31, 31, *available at* http://www.pgdc.com/pgdc/the-art-donating-art-the-charitable-contribution-art-antiques-and-collectibles ("U.S. tax laws provide an incentive for clients to contribute, during their lifetime or upon their death, works of art to U.S. tax exempt organizations such as qualified museums and universities.").

164. *See* Carolyn M. Osteen, *Special Issues for Cultural Nonprofits*, *in* 2 MASS. NONPROFIT ORGS. § 18.5.1 (MCLE, Inc. rev. ed. 2004) ("A gift to a public charity of tangible personal property . . . is deductible to the extent of the full fair market value of the contributed property, only if it is 'reasonable to anticipate' that the charity will use the property for some . . . exempt purpose.") (citing I.R.C. § 170(e)(1)(B)(i) (2006); Treas. Reg. § 1.170A-4(b)(3)(ii) (2009)).

165. *See* Berus, *supra* note 163, at 31-32 ("Donated property that is appreciated long-term . . . can be deducted at its full fair market value. On the other hand, the amount your client can deduct for a contribution of ordinary income property is generally only the client's basis in the property . . . not the full fair market value.").

privileged compared to other charitable functions. The contextual approach to deaccessioning is consistent with tax law's neutrality among charitable purposes.

3. Liabilities

The final category—liabilities—is the least recognized with respect to art, for good reason. Even when collections impose significant costs on the institutions that own them, art remains primarily an asset, not a liability, so the rules for endowments and program-related assets should control decisions about art collections owned by universities. But if the law recognized the liability aspect of art collections, we might have better rules to accommodate that feature and reduce the burden of maintaining an art collection. In this regard, there is mostly a blank slate on which to create law. So here are a couple of suggestions that might prevent deaccessioning problems from arising.

First, the tax law might recognize the liability problem and encourage gifts that underwrite the costs of upkeeping art by increasing the charitable contribution deduction available for those gifts, at least to the level necessary so that gifts of art do not create greater donor benefits than gifts that underwrite the maintenance of that art. This suggestion attempts to even out the incentive for gift-giving that is currently skewed in favor of gifts of art compared to gifts of money.[166] Second, the state law rules governing *cy pres* or deviation[167] might address the burden that collections place on institutions. As described in the context of the Fisk case above, where gifts of art are subject to restrictions, a court determination is necessary to release the restrictions, except where the donor is willing and able to agree to the modification.[168] The reviewing court must determine that it is impossible or impracticable (or wasteful, in some states)[169] for the organization to comply with the restrictions in order to release them. The kinds of restrictions that attach to gifts of art can be particularly expensive. For example, a gift instrument might require that the collection always be displayed to the public, or that it always be shown intact, or that no work

166. *See supra* notes 163-165 and accompanying text.

167. Black's Law Dictionary defines "deviation doctrine" as "[a] principle allowing variation from a term of a will or trust to avoid defeating the document's purpose." *Id.* at 516.

168. *See* UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § (7)(b) (1972) ("If the court finds that the restriction is obsolete, inappropriate, or impracticable, it may by order release the restriction in whole or in part.").

169. *See* UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(b) (2006) ("The court . . . may modify a restriction contained in a gift instrument . . . if the restriction has become impracticable or wasteful, if it impairs the management or investment of the fund, or if . . . a modification of a restriction will further the purposes of the fund.").

may be sold.[170] The limitations imposed on the Barnes collection were all very costly because they limited the admission price, travel of the collection, and the number of visitors allowed.[171] The law could recognize the liability aspect of art collections by considering these restrictions, along with the ongoing costs and the supporting endowments in *cy pres* and deviation proceedings. Where a donor has given sufficient funds to maintain the works, a court might be more strict in upholding restrictions. But where the art primarily constitutes a liability for the institution, rather than an asset, courts should be more willing to modify donor restrictions.

Another issue connected to the liability aspect of art collections is disclosure. The current treatment of these collections lacks transparency. While disclosure is relevant to the asset side also, the current practice concerning art collections seems to over count the liability and ignore the asset value. The Metropolitan Museum of Art included the following note in its latest financial statement:

> The collections are maintained for public exhibition, education, and research in furtherance of public service, rather than for financial gain. In conformity with accounting policies generally followed by art museums, *the value of the Museum's collections has been excluded from the Balance Sheet, and gifts of art objects are excluded from revenue in the Statement of Activities.* Purchases of art objects by the Museum are recorded as decreases in net assets in the Statement of Activities. Pursuant to state law and Museum policy, proceeds from the sale of art and related insurance settlements are recorded as temporarily restricted net assets for the acquisition of art.[172]

This practice means that the art collection does not show up as an asset at all on the museum's financial statements, and at least some universities with art collections have apparently followed this example.[173] Nevertheless, "gifts and grants" are included in museum revenue,[174] creating an apparent inconsistency between gifts of art and other gifts to the

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170. The Barnes Collection is a good example of a donor putting expensive restrictions on art. *See* Nivala, *supra* note 76, at 485-86 ("He [Barnes] displayed . . . works in a novel, intermingled manner . . . he ordered that his arrangement be maintained without change.").

171. *See id.* at 494-95.

172. THE METROPOLITAN MUSEUM OF ART, ANNUAL REPORT FOR THE YEAR 2007-2008, at 61 (2008), http://www.metmuseum.org/about/pdf/annual_report/Entire-AR08-WEB.pdf [hereinafter ANNUAL REPORT] (emphasis added).

173. The Metropolitan Museum of Art's financial statements do not list their art collections as assets. *See generally id.*

174. *See id.* at 52 (showing twenty-eight percent of The Metropolitian Museum of Art's revenue to come from gifts and grants).

museums. The maintenance costs are also reflected in the financial statements.[175] The Internal Revenue Service's new Form 990, which tax-exempt organizations must file, includes a section that organizations with art collections must complete. However, the disclosure required is derivative of the financial statement reporting of the organization, so fails to provide additional transparency.[176]

In addition, institutions occasionally buy and sell art, and then the costs/proceeds of those sales do appear in the financial statements. Before the Rose Art Museum debacle, Brandeis had quietly sold artwork, the gains from which it reported on its 2007 Form 990—over $5 million.[177] In The Metropolitan Museum of Art's annual report, the cash proceeds from deaccessioning appear in the income statement as revenue from "non-operating assets."[178] Because museums do not treat their art collections as endowment assets in the numbers that they report, though occasionally the artwork does turn into money, it appears as if the proceeds materialize from thin air. Until it is sold, the art is invisible to the public perusing an institution's disclosures (and sometimes literally because hardly anyone visits it before a deaccessioning battle, as in the case of *The Gross Clinic*). When financial information about a work is disclosed on account of a sale or purchase, it can consequently give a misleading picture of the institution's financial condition and management.

CONCLUSION: PROPOSALS TO CLARIFY THE TREATMENT OF UNIVERSITY ART COLLECTIONS

The major contribution of this Article is the taxonomy that it describes to explain the current confusion over university deaccessioning and its argument for a contextual analysis of institutional obligations in the law of nonprofit governance. Nevertheless, it may be helpful to map out the practical consequences of the analysis and how the law might reflect the multi-functional role of art in the lives of organizations other than museums. As I have argued, for universities, the legal standards need to reflect the hybrid nature of art as both cultural property and instrumental

175. *See id.* at 53 (showing seventeen percent of The Museum of Metropolitan Art's operating costs are for maintenance and operating services).

176. *See* IRS Form 990, Schedule D, Part III: Supplemental Financial Statements (OMB No. 1545-0047) (2009).

177. Brandeis University, IRS Form 990: Return of Organization Exempt from Income Tax (OMB No. 1545-0047) (2007).

178. *See* ANNUAL REPORT, *supra* note 172, at 59, 61 (identifying "changes in net assets pertaining to acquisition and deaccession of collection items" as being part of non-operating assets).

property within the university's mission.[179] Within the instrumental, we also need to acknowledge the complex role of the art collection in the life of the institution and its nature as endowment, program asset, and liability.[180] The dominant character of a collection will ebb and flow over time, and vary from one institution to another. Trustees are in the best position to weigh these competing concerns.

To reflect both the cultural property and instrumental property aspects, it would be appropriate for the law to impose some heightened standard for decisions respecting deaccessioning from university art collections for purposes outside the strict museum standards, without privileging art collections too much compared to other assets owned by universities. I would propose that nonprofit law loosely borrow from the jurisprudence of takeover defenses in the business law area and apply an *enhanced* best-judgment rule to decisions to sell art.[181] Applying an enhanced standard to deaccessioning decisions serves to make clear that art collections are special, and trustees should recognize their exceptional nature at every decision they make concerning them.

Enhanced deliberation should apply to acquisitions of art, as well as dispositions, so that gifts of art are accepted by universities with extra care. Universities should consider whether they can afford to maintain and display the art they acquire. They should adopt parameters for endowing the upkeep of their collections, and attempt to raise maintenance funds alongside gifts of art, particularly when the gifts are restricted. The proposal for equalizing the tax treatment of art and cash for underwriting gifts of art suggested above[182] would make it easier for institutions to maintain collections that they own. Universities or other organizations concerned with university-owned collections could design templates for gifts and policies for underwriting art so that universities know what their responsibilities will be in maintaining collections. Without guidance, it may be difficult for institutions to make a realistic assessment of what it takes to keep a university museum operating in perpetuity.

Decisions about deaccessioning should likewise be governed by a rule of enhanced deliberation, without courts usurping the discretion of trustees. Both the endowment rules and the program asset rules, as well as the

179. *See* discussion *supra* Parts I.B-II.B.

180. *See* discussion *supra* Part II.C.

181. In *Unocal Corp. v. Mesa Petroleum*, 493 A.2d 946, 954 (Del. 1985), the Delaware Supreme Court recognized an "enhanced duty" of directors responding to takeover threats, and imposed a requirement that their defensive actions be reasonable in relation to the threat to the corporation. This proposal loosely borrows that approach by requiring extra attention to a particular issue that would be reviewable by a court, but then protecting trustee decisions under the best-judgment rule where procedures were sufficient.

182. *See* discussion *supra* Part II.C.3.

business-law cases, vest ultimate decisionmaking authority in the governing body, though the contours differ somewhat.[183] The law generally recognizes that it's a good idea to let the professionals do their work, and this is good policy for nonprofit organizations as well as business organizations. Unfortunately, the challengers to university deaccessioning decisions misunderstand the law and the obligations that university trustees have to their educational mission. To correct this misconception, courts need to strictly apply standing rules to prevent unwarranted injunctions against sales decisions, such as the one temporarily imposed on Randolph College.[184] Courts also need to make clear that the American Association of Museums' and the Association of Art Museum Directors' policies are not legal rules enforceable against all institutions that hold art collections.

An enhanced best-judgment rule for deaccessioning decisions would impose a higher standard of investigation and transparency to reflect the importance of art to the public interest, but remain procedural, in keeping with the dominant approach of nonprofit governance law. The purpose and effect of enhanced deliberation would be to make it a little bit harder for a university to sell art than securities, but not impossible. Universities with art collections should have deaccessioning policies, along with the other policies that have become standard for good nonprofit governance.[185] We should expect that university deaccessioning policies will differ from museum policies and reflect a greater willingness to deaccession. The key function of such a policy is that it creates necessary frictions to slow down the institutional response and prevent panic-induced selling. Going a step further than simply allowing universities to design their own policies, states may want to require that institutions follow prescribed procedures in reaching decisions about deaccessioning. But in no case should university trustees lose the power to assess the role of the art collection in their charitable mission.

Brandeis should have collected sufficient information, consulted interested parties, and notified the Massachusetts Attorney General's Office when it decided to close its museum and sell $350 million worth of art.[186] Better examples of sufficient deliberation include the University of Iowa and the New York Public Library. After the flood, Iowa's process minimized legal action and kept the Pollock at the University: the state regents requested a report, the University prepared it in consultation with a

183. *See* discussion *supra* Part II.C.1-2.

184. *See supra* notes 28-37 and accompanying text.

185. The new Form 990, which exempt organizations must file with the Internal Revenue Service, requires that organizations state whether they have conflict of interest policies and whistleblower policies, among others. *See* IRS Form 990, Part VI, Section B.

186. *See supra* notes 1-10 and accompanying text.

variety of people, and the regents dropped the subject. The University also has procedures for sales that it would have followed if it determined to sell the Pollock.[187] While good process will often slow things down, encourage fundraising, and prevent sales, it also might support a decision to sell. The New York Public Library's sale of *Kindred Spirits* is also an example of thorough process leading to sale.[188] The library had convened an art committee chaired by trustee Neil Rudenstine, a former Harvard University President,[189] which prepared an exhaustive internal report and deliberated for two years in reaching its decision to sell the painting.[190] The Charities Bureau of the New York Attorney General's Office approved the sale.[191] An enhanced deliberative process should serve as a defense against any legal challenge, and a model for good nonprofit governance.

On the transparency issue, states might want to mandate more clear disclosure concerning art collections than the Form 990 requires so that interested parties are at least aware of how an institution is conceptualizing its art collection, pursuant to the taxonomy described in this Article. The financial statements should not allow universities to create value from nothing, as seems to occur under the current standards.[192] States might also mandate that institutions make public decisions of what they deaccession for operating funds so that donors and others can assess whether an institution is shifting its focus, addressing financial challenges appropriately, or acting recklessly. The Indianapolis Museum of Art offers a model of a searchable database of deaccessioned works on its website.[193] Transparency accompanied by clear trustee power is far preferable to the current regime of little transparency and ambiguous legal standards.

In another project, I will explore more fully the nature of the public's interest that should inform the legal standards for art collections. There is a legitimate fear about art leaving the charitable sector and falling into private hands, never to be seen by the public again. However, the art at issue in the cases of university deaccessioning discussed here have not generally presented that problem. Trustees deciding whether to sell need to consider the effect their decision will have on protection and accessibility

187. *See supra* notes 38-48 and accompanying text.

188. *See* Lee Rosenbaum, *At the New York Public Library, It's Sell First, Raise Money Later*, WALL ST. J., Nov. 1, 2005, at D7, *available at* http://online.wsj.com/article/SB113079900058884594.html ("The art committee's report, produced after two years of deliberation, recommended [a sale] . . . .").

189. *Id.* ("Neil Rudenstine . . . [was] a former Harvard University president . . . .").

190. *Id.*

191. *Id.* ("The Attorney General's Charities Bureau validated the . . . process . . . .").

192. *See* discussion *supra* Part II.C.3.

193. IMA Collections: Deaccessioned Artworks, http://www.imamuseum.org/art/collections/deaccession (last visited Apr. 15, 2010).

of the art at issue, but their fiduciary obligations run to the university. Sale to a museum is generally desirable because museums are good at preservation and presentation of art—better than universities. Fisk's proposed arrangement with Crystal Bridges, which would allow each of them to show the collection for half the year, seems to lose virtually nothing for the Fisk art students and the people of Tennessee, while gaining quite a bit for the people of Arkansas and for the preservation of the collection. Fisk's other educational programs also benefit from the arrangement. Attorneys general should be careful to consider the broader public interest in art and contain their parochial instincts when consulting with universities over their deaccessioning decisions.

Finally, university deaccessioning is a misguided focus for those who fear that the public's access to art may be diminished. Legal encouragement for charitable gifts is a much better approach for maximizing public access to art than a campaign of publicly shaming universities in financial distress. Those who are really concerned about the public's loss of access to art should redirect their energies toward reenactment of the estate tax, which is repealed at the moment.[194] A robust estate tax, with its deduction for gifts to charities, is much more crucial to protecting the public interest in art than a rule that would require that universities go bankrupt before they can sell their art collections.

194. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 15 Stat. 38 (codified in scattered sections of 26 U.S.C.); *cf.* John Schwartz, *This Year, the Tax Code Is My Friend*, N.Y. TIMES, Feb. 14, 2010, at B9.

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UNIVERSITY ENDOWMENTS: A (SURPRISINGLY) ELUSIVE CONCEPT

FRANCES R. HILL*

Abstract: Even as certain policy makers press for mandatory payouts from endowments, the concept of an endowment remains surprisingly elusive. In the absence of either operational concepts of endowments or well-established metrics for identifying and measuring endowments, public policy discussions proceed with an implicit model of an endowment as "money in waiting" that is not currently in use for exempt educational purposes. This Article suggests that endowments, however conceptualized or measured, are better understood as "money in use" even though it is not being distributed. It argues that most endowment money is currently in use for at least two purposes. The earnings on endowments are funding both current operations and long-term commitments. The endowment principle itself is used for various forms of credit enhancement for numerous forms of university borrowing. Because the endowment is in use, its distribution would have a far greater impact than policy makers understand.

The Article also suggests that mandatory distributions would have little impact on the public policy issue of access to education. Very few universities have substantial endowments and even fewer have endowments that could make a difference over the long term. Although Congress has the authority to require mandatory distributions as a condition of continued tax exemption, such a requirement has been used only in cases where there was reason to doubt that various types of exempt entities are using their funds for exempt activities. This is not the case with colleges and universities. Recommendations for mandatory distributions do not address any problem with the operation of colleges and universities for exempt purposes and do not offer any realistic hope for a solution of the very serious problem of financing the education and research mission of universities.

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Universities depend fundamentally on government funding in the form of student loans and grants and contracts for research. Universities are "parastatal" enterprises that are publicly funded but privately operated. Much more research is needed on this aspect of university operations and on the actual uses of the endowment that are inconsistent with distribution. Imposing a mandatory distribution requirement on universities is not a substitute for public policies that offer realistic prospects for addressing the problems of access to education by students and adequate funding for research on which our economy and society depend.

INTRODUCTION

Even before the Great Recession, the cost of a college education meant that families made financial sacrifices and students assumed a debt burden that would continue for much of their lives.[1] Tuition increases outpaced increases in the cost of living.[2] This burden on students and their families did not translate into financial strength for colleges and universities.[3] Colleges and universities of all types faced increased costs that tuition revenue did not and could not defray. These institutions embraced fund-raising and revenue-enhancing projects ranging from affinity merchandising, to what they hoped would be high-yield investment strategies, to increased lobbying for government support from state, federal, and even local governments.

The economic downturn that became undeniably clear in September 2008 exacerbated the already substantial problems of students and their families and created additional problems for universities as institutions. The most obvious result of the economic downturn was the reduced return on investments and the loss of invested principle virtually across the board. Public universities lost state support as state tax revenues declined.[4]

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1. For recent perspectives on concerns and discontent over the cost of higher education for students and their families, see a joint study by PUBLIC AGENDA AND THE NAT'L CTR. FOR PUB. POLICY & HIGHER ED., SQUEEZE PLAY 2010: CONTINUED PUBLIC ANXIETY ON COST, HARSHER JUDGMENTS ON HOW COLLEGES ARE RUN (2010), *available at* http://www.publicagenda.org/pages/squeeze-play-2010. For a discussion of the study and of the issues it addresses, see Tamar Lewin, *Study Finds Public Discontent with Colleges*, N.Y. TIMES, Feb. 17, 2010, at A11, *available at* www.nytimes.com/2010/02/17/education/17college.html.

2. Questions of financing the education mission and the implications for students are analyzed in BURTON A. WEISBROD, JEFFREY P. BALLOU & EVELYN D. ASCH, MISSION AND MONEY: UNDERSTANDING THE UNIVERSITY (2008).

3. *See id.* at 77-86.

4. In addition to quite important reports from particular universities and colleges, NACUBO has made available its annual survey of endowments for the period June 1, 2008 -

Access to both public and private universities was limited as universities faced the need to delay building plans to expand both facilities and faculty. Community colleges reported being unable to serve the needs of current students or to enroll qualified new students. Even elite universities with large endowments announced cutbacks in student aid, including their recently announced programs to offer need-blind admissions.

The Great Recession also meant that research universities, including Harvard, had to scale back plans for new facilities to expand both teaching and research in the sciences. While the government finances much of the research conducted at universities, government financing was not enough in the face of reduced university resources.

Even before the Great Recession, some in Congress raised the possibility of requiring universities to distribute some portion of their endowment earnings to increase financial aid for students. This is an appealing proposal for students, their families, and policy-makers. It holds out the possibility of solving a very serious problem with a policy of redistribution that will not require greater government investment, greater student indebtedness, or greater burdens on American families.

Congress has the authority to require this kind of distribution by tax-exempt universities as one of the requirements for their exempt status. The difficult question is what such a requirement might in fact achieve. This Article does not answer this question. Indeed, the question cannot be satisfactorily answered with current data. This Article focuses on a conceptual framework for thinking about endowments, engaging in research on endowments, and developing policy proposals relating to endowments.

The concept of a university endowment is surprisingly elusive.[5] There are neither concepts of an endowment nor operational definitions of endowments. Further, there are no methods for empirical measurements of endowments using commonly accepted or statutorily defined metrics. In addition, there is a lack of information about which colleges and universities have endowments, however measured, as well as how universities that do have endowments in fact use them. It is not surprising that these empirical and conceptual lacunae are interrelated. These conceptual and empirical lacunae become particularly important in discussions of policy proposals that begin with premises about what is not

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June 30, 2009 at its website, http://www.nacubo.org/documents/research/2009_NCSE_Press_Release.pdf.

5. Henry Hansman, *Why Do Universities Have Endowments?*, 19 J. LEGAL STUD. 3 (1990) expresses skepticism about maintaining substantial endowments for any reason but concludes that too little is known about endowments to make any recommendations.

yet known and proceed to strong recommendations about distributions from endowments.

This Article begins with a discussion of two general models of endowments. These models shape the general discussion of endowments that follows. Part II raises the question of what types of colleges and universities have endowments and what information is available regarding the size of endowments. Part III raises the question of how endowments are used and discusses the need for better data and more empirical research on this issue. Part IV considers whether mandatory distribution requirement would serve as an effective public policy lever. Part V asks whether tax law principles provide a basis for mandatory distributions from university endowments. The Article concludes by asking what we might learn about exempt entities and the larger issues of exempt status by considering the policy debate over endowments. The Article concludes that the policy leverage that various government officials and commentators have sought by addressing endowments is illusory. This does not mean that addressing these issues is beside the point, only that doing so may well-address a different point. Although at first we find that we think we are dealing with exempt entities in the "independent sector," in the end we find that we are dealing with one enterprise dependent on government financing for both student financial aid and grants and contracts for research. No university has an endowment large enough to alter this fact. The only thing that differs is the degree of dependence. Endowments are useful, but tuition and government support for research are fundamental. Universities are parastatal enterprises heavily dependent on government funding, including, but by no means limited to, exemption from taxation and the deduction available to contributors.

I. Endowments: Models and Their Analytical Implications

Various members of Congress have begun and ended their discussions of endowments with various recommendations and prescriptions relating to distributional issues. This is not a useful place to begin—and may not be a useful place to end.[6] The focus here is why distribution is not a useful place to begin. The more logical and useful place to begin is with two questions: What is an endowment? Why does the answer matter?

Two unarticulated models of an endowment seem to pervade discussions. The first is the model of an endowment as a reserve account that is not being used. An endowment is "money in waiting," found money,

6. For an insightful analysis of why time value of money concepts are not analytically useful in the discussion of payout rates from exempt entities' endowments, see Michael Klausner, *When Time Isn't Money*, STAN. SOC. SCI. INNOVATION REV., Spring 2003, at 51.

a pot of gold at the beginning of a rainbow that is expected to end in a new and better day. The second model of an endowment is a sum of money that produces income that is allocated to current uses and, in some cases, very likely to multiple uses in long-term budgeting and in securing university borrowing, including bond indentures and other debt covenants. This is a "money in use" model of endowments.

The first model, "money in waiting," makes discussions about distributions both simple and a pressing moral imperative. An endowment is a simple concept. Under this model one need ask only how much money is in the endowment and then make a case for various uses. The money in waiting model simply assumes all of the relevant facts and treats all of the relevant questions as already answered. This model does not provide an analytical framework or help to define research priorities. This is not a model for inquiry, but a model that assumes the time for inquiry is past, if it ever existed. A slightly more useful variant of this model focuses on when distribution should take place, with a debate over current distribution or some consideration for the future might be appropriate. While these questions are important operationally, they cannot be insightfully addressed based on a distributional framework. The central fallacy in the money in waiting model is to equate the use of the endowment with distribution from the endowment. The second model is based on the premise that an endowment is being used even though money is not being distributed from it.

The second model, "money in use," treats an endowment as working capital even though the principle will not be currently distributed. It takes account of the current use of endowment earnings to fund operations. It calls for research focused on university operations and on the operation of the financial markets in which the university must operate to raise capital. It leads to questions about the role of government in providing direct and indirect financial support for universities. It makes discussions about distributions difficult and contingent. Because the endowment is already in use, the discussion focuses not on distribution but on re-allocation. This model of endowments leads to the kinds of questions that should guide both the management of individual institutions and public policy discussions.

The market downturn that became undeniable in late 2008 has made life more difficult for students, faculty, and administrators. Perversely, it should prove useful in persuading both analysts and public officials to reconsider their certainty about the usefulness of the "money in waiting" model and to take another look at the "money in use" model.

There can be no better case studies than Harvard and Yale, the universities with the largest endowments. Both have candidly announced significant cutbacks in their operating budgets and in major projects and

have issued updates to their alumni and the public.[7] Neither has made any effort to claim that their programs of student aid and building funds and compensation for administrators, staff, and faculty are unaffected. No one claims that either university will cease to fund classroom education and research. But it is noteworthy that Harvard, to the amusement of many, has lent its good name to a line of clothing that no one who has ever attended Harvard is likely to wear.[8] Monetizing reputational capital is not a broadly applicable solution and may be a bad idea even for Harvard.

Senator Grassley, the ranking member of the Senate Finance Committee, set forth his version of the "money in waiting" model of university endowments in the following terms:

> Tuition has gone up, college presidents' salaries have gone up, and endowments continue to go up and up. We need to start seeing tuition relief for families go up just as fast. It's fair to ask whether a college kid should have to wash dishes in the dining hall to pay his tuition when his college has a billion dollars in the bank.[9]

Senator Grassley characterized donor restrictions on use as "an excuse to hoard rather than spend the money."[10] He observed that "[a]s we say in the nation's capital, money is fungible."[11]

In early 2010, Senator Grassley reminded everyone that he regards endowments as a solution to a problem and the mere fact of the loss of value in endowments is no barrier to increased distributions. As he stated in his press release issued at the same time as the most recent report on endowments, "[a] lot of colleges still have plenty of money in the bank."[12] An endowment appears to be a policy lever that will address important

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7. *See, e.g.*, Kathryn Masterson, *Yale Says Budget Cuts Needed After 25-Percent Drop in Endowment*, THE CHRON. OF HIGHER EDUC., Dec. 16, 2008; Kathryn Masterson, *A Sobering Message from Harvard's President*, CHRON. OF HIGHER EDUC., November 21, 2008.

8. Laurie Fendrich, *My Khakis Went to Harvard*, CHRON. OF HIGHER EDUC., August 7, 2009.

9. Press Release, Sen. Charles Grassley, Stanford's Student Aid Spending May Be Latest Trend, Small Iowa College Offers Examples of Commitment to Students (Feb. 20, 2008), *available at* http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=8473.

10. Charles E. Grassley, Commentary, *Wealthy Colleges Must Make Themselves More Affordable*, THE CHRON. OF HIGHER EDUC., May 30, 2008, at A36.

11. *Id.*

12. Press Release, Sen. Charles Grassley, Students, Families Shouldn't Bear Brunt of College Endowment Losses, (Jan. 27, 2010), *available at* http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=24983.

socio-economic-cultural imperatives at no inconvenience to government officials.

Some, including Senator Grassley, have attempted to salvage the primacy of the "money in waiting" model by blaming universities for engaging in risky investment strategies. Senator Grassley said in his January 27, 2010 press release:

> I hope colleges won't rely on double-digit losses as a reason to raise tuition or freeze student aid. Many of them relied on some risky investments, like hedge funds, to get big gains in recent years, and now those strategies are causing losses. Students shouldn't bear the brunt of colleges' easy-come, easy-go investment strategy.[13]

The press release makes no mention of congressional approval of deregulation of financial institutions or Congress's ready agreement with at least two administrations that financial products and purveyors of the more exotic products should not be regulated. There certainly were bad decisions made by universities as well as by all other investors, but these individual failures do not explain the economic crisis and its pervasive effects.

Models are heuristics that highlight elements of a phenomenon and posit relationships among the elements of a phenomenon. Models are elements in building theories and in designing research. Here, the two models of endowments highlight research agendas beginning with the question of how many and what kinds of colleges and universities have endowments, however they are described, measured, or used. The next Part discusses the distribution of endowments, which is analytically prior to any discussion of the distributions from endowments.

II. The Distribution of Endowments

The National Association of College and University Business Officers ("NACUBO") provides an annual survey of college and university endowments.[14] All analyses of endowments rely on these data. NACUBO

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13. *Id.*

14. *See* the NACUBO, Public NCSE Tables, http://www.nacubo.org/Research/NACUBO_Endowment_Study/Public_NCSE_Tables_.html (last visited Apr. 15, 2010). The survey for fiscal year 2009 is the first survey prepared jointly by NACUBO and the Commonfund Institute, which had prepared a separate Commonfund Study of Endowments (NCSE). Press Release, NACUBO-NCSE, NACUBO-Commonfund Press Release on the 2009 Endowment Study Results 1 (Jan. 28, 2010), *available at* http://www.nacubo.org/Research/NACUBO_Endowment_Study/Public_NCSE_Tables_.html. The findings available to the public without charge for fiscal year 2009, which covers July 1, 2008 to June 30, 2009, are available at http://www.nacubo.org/Research/NACUBO_Endowment_Study/Public_NCSE_Tables_.html.

represents over 2100 colleges and universities. Its annual survey of endowments includes 756 colleges and universities. In her important analysis of endowments, Jane Gravelle of the Congressional Research Service concludes that limiting the NACUBO survey to 756 colleges and universities suggests that other colleges and universities have "negligible endowments."[15] This in itself suggests that endowments are heavily concentrated in a relatively small percentage of colleges and universities.

Endowments are largest in the private research universities, lead by Harvard and followed by Yale, Stanford, and Princeton. The largest endowments are measured in billions of dollars. Before the Great Recession, Harvard's endowment was approximately $35 billion, Yale's was $23 billion, Stanford's was $17 billion and Princeton's was $16 billion. The tenth ranked school, Notre Dame, had an endowment of $6 billion, which is certainly a large number, but only seventeen percent of Harvard's endowment.

The smallest endowments before the Great Recession were measured in the millions of dollars, with the ten private colleges with the smallest endowments ranging from approximately $9 million to approximately $6 million.

Jane Gravelle concluded that "[e]ndowment assets are heavily concentrated in a few institutions with large endowments."[16] She found that Harvard alone accounted for 8.5% of the total endowments of the 756 schools included in the NACUBO survey.[17] The top five schools accounted for twenty-five percent of the total endowment of the 756 schools but less than one percent of those schools.[18] The top twenty universities accounted for almost half of the total endowment value but were less than three percent of the 756 colleges and universities surveyed,[19] and less than one percent of the total number of colleges and universities represented by NACUBO. Finally, Gravelle found that the sixty-two colleges and universities with endowments exceeding $1 billion make up eight percent

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15. Memorandum from Jane G. Gravelle, Senior Specialist in Economic Policy, Government and Finance Division, Congressional Research Service, to Honorable Max Baucus, Chairman, Senate Committee on Finance & Honerable Chuck Grassley, Ranking Member, Senate Finance Committee on Finance 3 n.2 (Aug. 20, 2007), *available at* http://grassley.senate.gov/releases/2008/01142008.pdf. The Congressional Research Service does not make its reports available to the public but the Reports are not confidential and are routinely cited.

16. *Id.* at 1. This is based on data from the fiscal year ending on June 30, 2006.

17. *Id.*

18. *Id.*

19. *Id.*

of the 756 colleges and universities in the survey but account for two-thirds of the total endowment value.[20]

Burton Weisbrod and his colleagues studied whether management strategies varied with the size of the endowment. It might be reasonable to hypothesize that universities with the largest endowments took more risks because they could absorb losses, while schools with the smallest endowments would seek to protect their principle or could not afford investment advice that took them into the newer, more exotic and riskier investments.[21] Weisbrod found that even colleges with smaller endowments determined that they needed the larger returns that come with higher risks.

The preliminary results from the fiscal year 2009 NACUBO survey found that colleges and universities experienced substantial losses during the period of June 1, 2008 to June 20, 2009.[22] The overall decline in value was twenty-three percent.[23] At the same time, colleges and universities experienced rising institutional debt, with the universities holding the largest endowments also carrying the highest median long-term debt levels.[24] Colleges and universities with the smallest endowments also carried the smallest median long-term debt.[25] It appears likely that schools with smaller endowments experienced difficulty obtaining credit. Overall, the median debt level increased from $28.3 million in fiscal year 2008 to $44.3 million in fiscal year 2009, which is a fifty-seven percent increase in one year.[26]

The studies of endowments make it clear, if only by negative inference, that community colleges operate outside the world of endowments and controversies over endowments. Any serious effort to address the problem of access to higher education must address the financial challenges of community colleges and the students who attend them.

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20. *Id.* at 1-2.

21. WEISBROD, *supra* note 2, at 132-38.

22. Kenneth E. Redd, *Buffeted by Economic Headwinds*, BUS. OFFICER MAG., Mar. 2010, http://www.nacubo.org/Business_Officer_Magazine/Magazine_Archives/March_2010/Buffeted_by_Economic_Headwinds.html.

23. *Id.*

24. *See id.* The median debt for institutions with the largest endowments was $863.1 million. *Id.*

25. *Id.* The median debt for institutions with the smallest endowments was $15.8 million. *Id.*

26. *Id.* The median debt for institutions with the smallest endowments was $15.8 million. *Id.*

III. Uses of Endowments: Issues in Measurement and Analysis

The model of an endowment as "money-in-waiting," a readily available reserve fund, is inconsistent with analyses of uses of endowments as a regular part of college or university operations. The question would be, what conditions might cause a university to dip into this reserve or what kinds of new initiatives might first be funded by endowment reserves. Research would not focus primarily on the current use of endowments. Policy disputes would center on whether either the earnings or the principal of an endowment should ever be used and, if they are used, what kinds of uses are consistent with both sound management and the university's mission. The very idea of an endowment might be thought to be inconsistent with distribution.

The model of an endowment as money in use with particular restrictions and limitations makes research more insightful and policy, ultimately, more effective. The main problem in determining how endowments are used is the lack of systematic data on any element of endowments. Jane Gravelle highlighted this problem in her report on endowments.[27] She reported that information on how endowments are used "is currently voluntary, not always available, and not available in an accessible form."[28] She further observed, "[n]or are measures in place to assure that data are accurate and consistent."[29]

The concept of the use of an endowment is distinguishable from the issue of distributions from an endowment. The existence of an endowment appears to facilitate borrowing by a university. As discussed at the end of this section, a variety of credit enhancement mechanisms are consistent with current law and these mechanisms appear to be used by the better-endowed universities. In addition, the earning from the endowment are part of the regular budget process of most universities. The former president of George Washington University referred to tenure as a bet made by a university that will require that earnings on a stated amount of capital in the endowment be dedicated to paying for that tenure line for the anticipated professional life of the tenured professor. Distributing that amount of capital from the endowment would require that some other source of earnings be identified to pay for the fixed expense of every tenure line in the university budget. The same is true of maintenance and other fixed costs. The concept of an endowment as money in use and the realization

27. Memorandum from Jane Gravelle to Honorable Max Baucus & Honorable Chuck Grassley, *supra* note 15, at 14-15.

28. *Id.* at 14.

29. *Id.*

that use does not necessarily mean distribution at the very least points to more insightful research about university finance.

Current data on the uses of endowments do not capture much of the reality of endowment use. Form 990 now requires that colleges and universities report the amount of their endowments.[30] These changes to Form 990 were finalized and became effective after Ms. Gravelle had completed her report. Under the new reporting requirements on the revised Form 990, the organization is required to report its beginning of the year balance. It is then required to report contributions, investment earnings or losses, grants or scholarships, other expenditures for facilities and programs, administrative expenses, and the year-end balance. Part 2 of Schedule D, Part V requires information on the estimated percentage and balance held in the following three categories: board designated or quasi-endowment, permanent endowment, and term endowment. Part XIV, Supplemental Information, requires a narrative of the "intended uses of the organization's endowment funds." Part 3a of Schedule D, Part V requires information about the "endowment funds not in the possession of the organization that are held and administered for the organization" by unrelated organizations and related organizations.

These questions are potentially quite useful. They should provide information about the apparently common use by public universities of controlled § 501(c)(3) organizations created and maintained to finance expenditures that state legislatures have proved unwilling or unable to fund. Faculty salary supplements are one common use for the amounts raised through controlled § 501(c)(3) organizations.

These questions might also provide information on such structures as Harvard's Management Company, but it is not clear that any of these management companies in fact hold the funds rather than advise on their investment.

This Schedule should provide information not previously available publicly. Current studies of endowments have been conducted by a nonprofit with a proprietary interest in the material that charges a fee for access to most of the data and its analysis. Public availability in itself should facilitate research and policy analysis.

At the same time, there is no statutory predicate that provides comparability in the reports. The terms used are not statutory terms and there is no development of regulations guiding the reporting. The issue is not that the government does not have the authority to collect this

30. IRS Schedule D (Form 990), Supplemental Financial Statements, Part V, Endowment Funds (OMB No. 1545-0047) (2009), *available at* http://www.irs.gov/pub/irs-pdf/f990.pdf. Filing of this form is required if the organization answers "Yes" to Form 990, Part IV, line 10.

information, nor is the issue that organizations will lie, although the reporting positions of some organizations may come uncomfortably close to a lie and unacceptably far from any concept of an endowment. The issue is that there is no way to tell how organizations are allocating funds to their endowments. It is certainly true that all tax returns are based on self-reporting, but the Internal Revenue Code and the applicable regulations provide constraints on interpretation and a basis for determining the acceptability of responses. There are no such restraints in the reporting of endowments in Schedule D, Part V.

The Instructions to Schedule D provide some guidance that is apparently intended to be consistent with current practice in reporting to the private entities that currently track endowments. The lack of conceptual constraint on these ideas applied to particular cases is widely noted. The Instructions also note that accounting standards may affect what is reported. At first blush this might seem unremarkable. Yet, it is quite interesting as a departure from the tax principle that accounting concepts do not control tax reporting. This raises questions about an information return. There is no analogous concept of deference to other statutes in such areas as political activity of exempt entities. The Instructions contain no reference to federal election law, and the extensive reporting requirements applicable under Federal Election Commission regulations.

As is discussed more fully below in the discussions of policy levers, the anomalies of Schedule D, Part V could have greater operational importance if Congress mandates particular uses of endowments and enforces these legislative requirements through excise taxes. In this case, the malleability of definitions would become a serious problem for a tax regime. Colleges and universities would, quite quickly and, one presumes, quite legally, find ways to exclude money from funds that fall within the definition of a fund subject to the tax.

The Senate Finance Committee Roundtable devoted a panel to the question, "What Is an Endowment?" This panel has received little press coverage but should engage our attention. The bottom line point was made by John Mattie, a partner at PricewaterhouseCoopers, who discussed the use of different definitions for endowments by institutions and regulators and the difficulty this poses for policies relating to endowments.[31] He further remarked that aggregating restricted funds in an endowment makes sense for reporting purposes but does not enhance transparency because it can lead to the mistaken view that restrictions do not matter.

Jeff Mechanick, a Financial Accounting Standards Board project manager, discussed FAS 117-1, which provides guidance on reporting and classifying donor-restricted endowment funds and the requirements that

31. See the summary of the September 8, 2008 roundtable at www.case.org.

apply even if the state has not yet adopted the Uniform Prudent Management of Institutional Funds Act ("UPMIFA"). He, too, emphasized the heterogeneity of college and university concepts of endowments.

To a tax lawyer, this means that the base amount of a five-percent payout rate is not a stable concept and that considerable issues remain to be addressed in making this an operational concept. Jane Gravelle of the Congressional Research Service asked the critical question of the accountants. She asked whether, if Congress enacted the proposed mandatory payout, colleges and universities could shift funds to accounts that are not considered part of the endowment. Both accountants replied that this would be possible. Both also stated that many colleges and universities invest non-endowment funds with endowment funds.

Even if these issues relating to the definition and measurement of an endowment were to be resolved in a way that created a stable, administrable reporting regime, this would not permit an informed decision about mandatory distributions. Any serious effort to develop a proposal for requiring distributions from college and university endowments would require a serious study of how educational institutions are using their endowments. This kind of study would not conflate use with distribution. The possibility of use without distribution is rarely considered and no data are available on this concept of use of an endowment. Critical questions would be whether, to what extent, and in what ways endowments enable in loan documents, and whether mandatory distributions would be inconsistent with these credit enhancement mechanisms.

These questions are not discussed for two main reason. One is that research would require going beyond the NACUBO data and the data that will now be publicly available on Form 990 and actually persuade universities to allow researchers to examine their credit agreements and other relevant documents. This would not be an easy task.[32] It may well call for collaborative research between exempt organization lawyers and lawyers specializing in finance. The second reason is that tax lawyers are inclined to believe that universities and other exempt entities borrow only by issuing bonds and that tax law imposes prohibitive taxes on the use of endowment funds to support bond issues. This is an easier barrier to overcome because it is simply incorrect. An April 2010 report from the Congressional Budget Office supports the broad concept of use without distribution discussed here and helps clarify the law in this area.[33] Colleges

32. Henry Hansmann, *supra* note 5, at 3 n.*, in the introductory note reported that "The Yale University Treasurer's Office gave generous assistance in interpreting the university's financial records." It is unclear precisely what records were involved, but very few researchers have sought such access and very few entities have responded cooperatively.

33. *See generally* CONGRESSIONAL BUDGET OFFICE, TAX ARBITRAGE BY COLLEGES AND

and universities with large endowments also tend to borrow by issuing tax-exempt bonds. This results in "tax arbitrage" when the rate the universities pay on the bonds issued is less than the rate earned on the endowment. Section 148 of the Internal Revenue Code of 1986, as amended, addresses "arbitrage bonds" by imposing yield restrictions through a "replacement proceeds" analysis. However, as the CBO Study notes, this system does not work well and affords numerous opportunities for circumvention. The CBO points out:

> Because financial statements typically do not report the use of particular assets as collateral, the replacement proceeds rule is difficult to enforce. In addition, if assets are not specifically pledged to pay the debt service on a tax-exempt bond or if the assets have no other direct connection to the bonds, the arbitrage restrictions do not apply. However, it is widely recognized that assets and their earnings can be used to pay the interest on debt or to cover other expenses to free up funds for interest payments, regardless of whether they are directly pledged to do so. Such use of higher-yielding assets to finance tax-exempt debt constitutes indirect tax arbitrage.[34]

The CBO also observed that "[i]t is also standard practice for rating agencies to base credit ratings for a particular debt issue on all available assets, not just on those directly pledged to that debt issue."

These uses of the endowment are likely to be widespread. Universities do not borrow only through tax-exempt bonds. Like any other large enterprise, universities have cash management strategies and various lines of credit from a variety of lenders. The uses of the endowment in relation to these credit arrangements have yet to be researched and analyzed and taken into account in public policy discussions.

IV. Would Distribution Requirements Serve as an Effective Public Policy Lever?

Distribution requirements might be considered important from at least two perspectives. First, requiring distributions might rationally be considered evidence that colleges and universities are operating for their exempt purpose of education.[35] Second, a distribution requirement might be

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UNIVERSITIES (2010), *available at* http://www.cbo.gov/ftpdocs/112xx/doc11226/04-30-TaxArbitrage.pdf.

34. *Id.* at 7.

35. For a discussion of the enumerated exempt purposes in § 501(c)(3), including education, see FRANCES R. HILL & DOUGLAS M. MANCINO, TAXATION OF EXEMPT ORGANIZATIONS (2002) at Chapter 3.

targeted to address a broader public policy issue. In this case, the escalating cost of higher education in the global economy depends increasingly on well-educated workers for all sectors of the service economy at the very time that students and families have difficulty paying the costs of education. It should not be necessary to observe that this is a broad and fundamental issue. It is certainly an issue that extends well beyond the question of requiring that colleges and universities distribute a prescribed portion of their endowments annually. In this sense, a minimum distribution requirement for colleges and universities is akin to the community benefit standard for hospitals. In that long-running controversy as well, the issue of whether exempt entities are operating to provide a public benefit has been conflated with the issue of using exempt entities to solve difficult public policy issues. Conflating a public benefit requirement with a public policy response does not produce useful public policy proposals. Indeed, calls for mandatory distributions from endowments may impede, whether intentionally or unintentionally, serious efforts to craft public policies.

The controversy over the community-benefit standard and exempt hospitals differs from the controversy over minimum distribution requirements for colleges and universities in ways that help explain the distinction between the public-benefit concept and the public policy concept. Health care is not an enumerated exempt purpose in section 501(c)(3).[36] This means that hospitals that choose to operate as exempt entities will rely on charity as their exempt purpose. An element within the definition of charity is relief of the poor and distressed. This means that exempt hospitals are initially required to satisfy a charity care standard that, over time, became a more inclusive community benefit standard. In addition to showing that they operate exclusively, which has come to be defined as primarily, for a public benefit, exempt hospitals also have to satisfy a separate community-benefit standard. It is scarcely surprising that confusion and controversy ensues. The community benefit standard is part of the public-benefit requirement for exemption. No one has been willing to argue expressly that the profound issues surrounding health care would be solved if exempt hospitals provided more community care or if a more stringent charity care or community-benefit requirement were imposed as a condition for exemption. In sum, the controversy over exempt hospitals is whether they are exempt and what criteria should be applied to make this determination.

The controversy over proposals for a university endowment distribution requirement is not in response to questions of whether colleges

36. For a discussion of the community benefit standard and exempt status for hospitals, see *id.* at ¶ 3.02[5] and ¶ 29.04[3].

and universities are operating for an exempt purpose. It is instead a controversy over how to increase access to the exempt activity in which colleges and universities are clearly engaged. It is a controversy over the underlying public policy issue of supporting basic research and developing a workforce equipped to contribute to the economy of the twenty-first century. Put in the broadest possible terms, this is a controversy over the relative responsibilities of students and their families, colleges and universities, and the American people acting through their government to ensure that education is broadly available. The question then becomes not whether a distribution requirement for more financial assistance for students would solve the underlying problem, but whether it would contribute meaningfully to it. The other question is whether public officials' focus on the duty of the colleges and universities themselves serves a useful public policy purpose, or whether it simply obscures the insufficiency of the government's contribution to ensuring that universities can operate efficiently to help students gain access to higher education. What might a distribution requirement achieve?

The previous discussion of the limited number of colleges and universities that have endowments of any meaningful size; the idea that endowment funds are not a reserve but are funds already in use to sustain universities' education missions; and the lessons that appear to be emerging from the experience with the Great Recession, all suggest that a mandatory distribution requirement would have a limited impact. The absence of a statutory definition of an endowment for tax purposes also suggests that administering such a requirement might prove challenging in ways that would limit the requirement's effectiveness.

Jane Gravelle's 2007 memorandum has been widely cited and, in some cases, misunderstood.[37] It is important to note that the data used for this study was for the fiscal year ending in June 2006.[38] She concluded, based on her sample, that a fairly minimal increase in endowment payouts by the institutions in her sample would alleviate the pressure of tuition increases, but she was very careful to state that this conclusion applied to the twenty universities and ten liberal arts universities with the largest endowments.[39] She also concluded that the results were "not as pronounced" for the sixty-two institutions with endowments of over $1 billion, but, here too, increased payouts could replace tuition increases and "increase[] student aid significantly."[40] That is the good news. This good

37. *See generally* Memorandum from Jane Gravelle to Honorable Max Baucus & Honorable Chuck Grassley, *supra* note 15.

38. *Id.*

39. *Id.* at 2.

40. *Id.*

news must be put in the context of the heavy concentration of endowment funds.[41]

The news about endowments became decidedly more mixed in subsequent years. As discussed in Part II, the Great Recession resulted in substantial declines in endowment values and increases in debt held by colleges and universities. As discussed in Part III, colleges and universities experienced liquidity crises during the Great Recession. Many universities increased their endowment spending, including public universities that required amendments to state laws permitting them to do so. These developments suggest that the current understanding of the uses of endowments may well be incomplete and, thus, somewhat misleading. Liquidity issues and increased borrowing by universities with large endowments suggest that such universities were acting in response to constraints on current use of their endowments. One possible explanation is that endowments are used not simply for expenditures that can be traced, but also for credit enhancement provisions that support borrowing or that support favorable rates on borrowing by their students. If endowments fall below levels required in these credit enhancement clauses or student loan rate agreements, default clauses or other clauses requiring substitution of collateral may take effect. These possibilities suggest that policy proposals relating to mandatory distributions would benefit from greater information about this kind of use of endowments in sustaining college and university operations.

Proposals for mandatory distributions from endowments do not seem likely to address the high cost of access to higher education or the high costs of operating colleges and universities. At the same time, it is difficult to argue that colleges and universities are not operating for an exempt purpose. Even if one could identify universities with large endowments that are using a smaller percentage for student financial aid than are universities with small endowments, it would be difficult to argue that they are serving educational purposes less effectively than those schools using a slightly larger percentage of their endowment for student aid. In other words, there are well-founded reasons for scepticism that mandatory distributions from endowments are either meaningfully related to serving an exempt educational purpose or to addressing the larger underlying public policy issue. Conflating the public policy issue with the exemption standard serves only to confuse both issues. The most serious result of such confusion is to divert attention from the duty of the public, acting through their government, by holding out a hollow promise offering only an illusory solution to the problem of access to higher education.

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41. *See supra* Part II.

V. Do Tax Concepts Support the Concept of Mandatory Distributions?

Nothing in the Internal Revenue Code[42] compels any particular level of distributions from college and university endowments. However, certain provisions have been invoked in support of current proposals for mandatory distributions from college and university endowments, making brief discussions of these provisions helpful in addressing the issue of whether tax law requires distributions as a condition of exempt status.

The private foundation provisions include a mandatory distribution requirement that has been invoked in the discussion of mandatory distributions from college and university endowments. Section 4942 imposes a tax on undistributed income[43] and defines undistributed income in terms of investment earnings.[44] The minimum distribution requirement does not apply to private operating foundations.[45] The private foundation provisions also include an excise tax on net investment income.[46] This provision, too, contains an exception for private operating foundations.[47]

The private-foundation provisions reflect concerns that private foundations were operating for the benefit of the contributors who control them. The central distinction between private foundations and public charities, like colleges and universities, is the limited number of contributors to private foundations. Because there are no prohibitions on having the contributors serve on the boards of the private foundations, the fear is that the private foundation will serve the interests of the contributors who also control the board of directors. There are similar concerns with other provisions applicable to private foundations but not to public charities.[48] The § 4946 conflict of interest provisions applicable to private foundations prohibit certain transactions rather than focusing on whether the pricing of these transactions between an exempt organization and disqualified persons are conducted on the basis of reasonable prices.

The pricing of these transactions is part of a larger discussion of the relation between private foundations and public charities. This discussion

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42. *See generally* Internal Revenue Code of 1986, as amended (codified at 26 U.S.C. § 1 et seq).

43. I.R.C. § 4942(a)-(b) (2006).

44. § 4942(c)-(d).

45. § 4942(j)(3).

46. § 4940, which is discussed in detail in HILL & MANCINO, *supra* note 35, at ¶ 12.02.

47. § 4940(d).

48. See the excess business holdings of § 4943, which are discussed in HILL & MANCINO, *supra* note 35, at ¶ 12.03; the jeopardizing investment provisions of § 4944, which are discussed in HILL & MANCINO, *supra* note 35, at ¶ 12.04; and the self-dealing provisions of §§ 4941, 4946, which are discussed in HILL & MANCINO, *supra* note 35, at Chapter 10.

has centered on the application of § 4958 excess-benefit transactions to private foundations in place of the restrictive self-dealing concepts.[49] The general trend of the discussion suggests that private foundations should be able to avail themselves of the facts-and-circumstance approach of the excess-benefit-transaction provisions applicable to § 501(c)(3) public charities and § 501(c)(4) social welfare organizations. Whether this suggestion has merit in terms of appropriate requirements for exempt status is beyond the scope of this essay. What is clear is that provisions applicable to private foundations limit conceptual utility when applied to public charities that do not operate in the context of the kind of contributor control that accounts for most of the private foundation provisions.

The Pension Protection Act of 2006[50] directed Treasury to promulgate regulations requiring certain supporting organizations to make mandatory distributions to the supported organization to which they are not functionally related.[51] The proposed regulations are modeled on the private foundation minimum distribution requirements.[52] The purpose of this payout requirement is to ensure that the non-functionally related supporting organization distributes sufficient amounts to sustain its claim to exempt status based on its relationship with the supported organization. This is a very different purpose than the purpose of addressing a public policy issue of access to education. There is no question that colleges and universities are operating for an exempt educational purpose.

Taxable entities are also subject to a limited number of provisions designed to prevent excess accumulation of earnings. The concern here is that corporations will become unregulated mutual funds that operate primarily by investing retained earnings and do not distribute their earnings to their shareholders, thereby avoiding the shareholder-level tax. Section 532(a) imposes a tax on accumulated earnings. Section 533 provides that this accumulated earnings tax applies only to earnings and profits accumulated "beyond the reasonable needs of the business." This standard has provoked a wide range of disputes between corporate taxpayers and the I.R.S., but the I.R.S. has been, in general, quite receptive to arguments establishing a reasonable business purpose for the accumulation of earnings

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49. The private-benefit doctrines, including the § 4958 excess-benefit transaction rules, applicable to public charities are discussed in HILL & MANCINO, *supra* note 35, at Chapter 4.

50. Pension Protection Act of 2006, Pub. L. No. 109-280, § 1241(d)(1), 120 Stat. 789.

51. *See* I.R.C. § 509(a)(3)(B). For a discussion of supporting organizations, *see* HILL & MANCINO, *supra* note 35, at ¶ 8.06.

52. Prop. Treas. Reg. § 1.509(a)-4. The proposed regulations have attracted substantial adverse comment. *See, e.g., ABA Members Comment on Proposed Regs on Type III Supporting Organization Qualifications*, TAX NOTES TODAY, Apr. 29, 2010, 2010 TNT 82-14.

and profits. The second provision is the personal-holding-company tax of § 541, which is more likely to be imposed in the case of small, closely held corporations.

Colleges and universities do not present the same concern that the entity will avoid distributing earnings to shareholders in an effort to avoid taxation at the shareholder level. Exempt organizations do not have shareholders with a right to receive dividend distributions. In addition, these provisions do not seem designed to serve the underlying public policy goal of increasing access to education.

CONCLUSION: ENDOWMENTS AND EXEMPTION

Considering the idea of a mandatory distribution requirement suggests that this proposal is not a viable public policy response to the underlying issue of affordable access to higher education. Whether Congress wishes to make such distributions a condition for exemption in the case of those colleges and universities that have endowments of any size is a different matter and not one that has been the focus of this Article.

It is certainly unusual to introduce new ideas in a conclusion, but that is where the analysis has lead. Any public policy response to a public policy issue will necessarily involve government funding for student financial assistance. The same is true for pursuit of universities' roles in basic and applied research. Tuition cannot support universities, and students should not be expected to pay the full cost of operating a university that provides appropriate public benefits to many sectors of society.

What one learns most clearly by considering endowments is that it is time to reconsider what it means to treat both universities and hospitals as § 501(c)(3) organizations subject to the same legal regime as that applied to all other public charities. Both are highly dependent on government financing. Students could not pay tuition without government programs. Universities could not meet their operating expenses without government grants. Universities lobby actively for government funding.[53] Universities are closer to parastatal enterprises than they are to traditional public charities that receive contributions and provide public benefits to a charitable class. It is time for the exempt status of universities (and hospitals) to reflect this status. It is a far better use of the time and resources of the tax-writing committees of Congress than crafting proposals for mandatory distributions from endowments.

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53. For a detailed account of lobbying by colleges and universities, see generally ROBERT G. KAISER, SO DAMN MUCH MONEY: THE TRIUMPH OF LOBBYING AND THE CORROSION OF AMERICAN GOVERNMENT (2009).

THE BOSTON CITY PILOT TASK FORCE: AN EMERGING BEST PRACTICE?

ERIC A. LUSTIG*

Abstract: This Article considers the recently created Boston City PILOT Task Force and whether it represents an emerging best practice. The Article examines the use of PILOT agreements in Massachusetts generally and in Boston in particular. The current PILOT program is detailed. The Article then tracks the work of the task force from its inception, through its meetings and deliberations, and ending with its proposed recommendations. The Article analyzes these proposed recommendations and considers whether the Boston City PILOT Task Force represents an emerging best practice.

INTRODUCTION

Boston has long enjoyed a robust nonprofit sector.[1] Moreover, the City of Boston has long sought payments in lieu of taxes (PILOTs) from many of its exempt public charities with real estate holdings.[2] Boston's current program has been relatively effective in terms of the number of exempt organizations participating as well as the amount of payments collected.[3]

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* Professor of Law, New England School of Law. The author acknowledges the collegiality and cooperation of Stephen Kidder, Chair of the Boston City PILOT Task Force. The author also acknowledges the input of Evelyn Brody, Daphne Kenyon, Adam Langley, and Mike Wheeler as well as the research support of Barry Stearns and Brian Flaherty.

1. *See* Evelyn Brody, *All Charities Are Property-Tax Exempt, but Some Charities Are More Exempt than Others*, 44 NEW ENG. L. REV. 621 (2010).

2. The Boston program dates back to 1925. *See id.*

3. Janne Gallagher, *The Legal Structure of Property-Tax Exemption in* PROPERTY-TAX EXEMPTION FOR CHARITIES 16 (Evelyn Brody ed., 2002) (citing a report that even "organized programs, such those in Boston . . . 'are piecemeal in nature, unevenly enforced, difficult to administer, and produce very little revenue in relation to the city's overall tax base.'" (citation omitted)). "Relative" is certainly the key term as there is clearly much room for improvement. *See* Brody, *supra* note 1.

Despite its relative success, the City of Boston is re-examining its PILOT program for a number of reasons.[4] The rationale for doing so seems to be two-fold. The first reason concerns the adequacy of the overall financial contribution made by exempt public charities. The second is internal to the exempt sector and goes to the fairness of the contributions of the exempt organizations relative to one another.

This Article will provide a background on the use of PILOTs in the Commonwealth of Massachusetts generally. It will then examine the work-to-date of the Boston PILOT Task Force. The Article concludes that, while it is premature to declare the Task Force a best practice at this point, the work of the Task Force has certainly been valuable and has added a significant amount of data and discourse to the debate over PILOTs.

I. Tax Exemption for Charities in Massachusetts Generally and the Use of PILOTs

Property owned and used by charitable nonprofit organizations is generally exempt from property tax under Massachusetts General Laws.[5] Cities and towns have sought voluntary agreements with certain organizations as a way of recovering general costs for providing municipal services or tax revenues lost when taxable property is acquired by a charitable organization and removed from the tax rolls. These agreements are generally known as PILOTs. A key characteristic of such agreements is that they are voluntary; that is, they are not provided for by statute.

Because there is only general data reported on exempt property, and no required reporting for PILOTs, it was difficult to measure the impact of PILOTs in the Commonwealth until the Department of Revenue conducted a comprehensive survey in 2003.[6] Tax-exempt property is owned

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4. MAYOR'S PILOT TASK FORCE, INTERIM REPORT 4 (2009), *available at* http://www.cityofboston.gov/Images_Documents/PILOT_Interim%20Reporttcm3-8009.pdf [hereinafter INTERIM REPORT]. Mayor Thomas Menino announced the Task Force in January 2009. *Id.*

5. MASS. GEN. LAWS ANN. ch. 59, § 5, cl. 3 (2001 & Supp. 2009); *see* Tad Heurer & Sandra Shapiro, *Property Tax Exemptions*, *in* MASSACHUSETTS NONPROFIT ORGANIZATIONS 12-1 (3d ed. Supp. 2008).

6. *See generally* DIV. OF LOCAL SERVS., MASS. DEPT. OF REVENUE, A STUDY OF CHARITABLE AND EDUCATIONAL PROPERTY TAX EXEMPTIONS (2003). This comprehensive survey covered property class codes 904 and 905. *Id.* at 2. Code 904 applies to exempt property owned and used by private educational institutions, schools, and colleges. *Id.* Code 905 relates to other charitable organizations including hospitals, conservation organizations, and human services organizations. *Id.* Not included were churches, synagogues, and other religious organizations in addition to government-owned property. *See id.* The survey had a strong response with 343 of the Commonwealth's 351 municipalities responding. *Id.* The

throughout the Commonwealth, with approximately ninety percent of reporting municipalities disclosing such ownership.[7] The Department of Revenue Survey reflects that approximately $22 billion worth of property is held by charitable nonprofits.[8] This figure consists of $12.4 billion representing educational institutions, schools, and colleges, and $9.6 billion held by other charitable organizations, including hospitals.[9]

With respect to PILOTs, only 80 out of 308 (26%) reporting communities with educational or other charitable nonprofits disclosed the receipt of PILOTs.[10] Accordingly, seventy-four percent of communities with property owned by nonprofits received no PILOTs. PILOT payments range from a low of $300 in Easthampton to $10,383,022 in Boston.[11]

It is important to note, however, that the PILOT figures may be understated because the reported PILOTs did not include non-contractual payments and payments with services.[12] For example, a gift of a fire engine by a private school to its host community would not be included.

When compared to other large Massachusetts cities such as Springfield and Worcester, Boston's PILOT program seems much more effective. The survey set out the following comparative data for fiscal year 2003:

	Total Value of Education (Code 904) and Other Charitable Orgs. (Code 905)	Total Value of 904 and 905 as a Percentage of Total Value of All Property	PILOTs from 904 and 905	Projected Payments if Exempt Property Were Taxable	PILOT as a Percentage of Amount if Taxable
Boston	$4,816,894,343	6.35%	$10,383,022	$159,728,216	6.5%
Springfield	$499,255,600	8.30%	$134,856	$18,018,135	0.748%
Worcester	$698,022,300	7.17%	$24,904	$23,243,477	0.107%

While the percentage of overall value is relatively similar between educational and other charitable organizations, the amount of PILOT as a percentage of the projected tax levy that is taxable is considerably different.

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values provided, however, are not as well-developed due to charitable organizations generally being unconcerned about assessed value since they do not pay property tax.

7. *Id.* at 3.

8. *Id.* at 5.

9. *Id.*

10. *Id.* at 4.

11. *Id.*

12. DIV. OF LOCAL SERVS., *supra* note 6, at 4.

Although these figures are a bit dated, and Worcester has negotiated additional PILOTs,[13] the comparison clearly reflects the relative effectiveness of the current Boston program.

II. PILOTs in Boston Generally

The current PILOT program appears designed to pick up property either being taken off the tax rolls through acquisition by tax-exempt nonprofits or through redevelopment of property already owned by tax-exempt nonprofits. Thus, the city "initiates" a discussion with nonprofits that are expanding or redeveloping their real estate holdings.[14] The Tax Policy Unit of the assessing department will request a "Pilot Determination Meeting."[15]

The City has long sought PILOTs of twenty-five percent of taxes that the charitable nonprofit would have paid on the property if it was not exempt.[16] The twenty-five percent standard was thought to reflect that portion of the City budget devoted to essential services such as police, fire, and public works.[17] The City acknowledges that PILOT agreements are unique due to the size and usage of the subject property and the following factors represent a sample of what the City may consider in determining the amount of the PILOT agreements:

- if the property was subject to property tax before being acquired by the nonprofit, the City will look to recover some of the lost tax revenue;
- the square footage of the project;
- the use of the property; and,
- the construction costs incurred.[18]

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13. In 2009, Worcester secured PILOTs from Worcester Polytechnic Institute and the Massachusetts College of Pharmacy and Health Sciences. *See, e.g.*, Press Release, City of Worcester, WPI and City Announce New Voluntary PILOT Agreement (May 12, 2009), *available at* http://www.ci.worcester.ma.us/announcements/wpi-and-city-announce-new-voluntary-pilot-agreement. Springfield is exploring a PILOT program. SPRINGFIELD FINANCIAL CONTROL BOARD, PROJECT PLAN: ESTABLISHMENT OF PAYMENT IN LIEU OF TAXES PROGRAM (PILOT) 1 (2005), *available at* http://www.mass.gov/Asfcb/docs/PILOTProject Plan.pdf. *But see generally* THE RESEARCH BUREAU, VOLUNTARY CONTRIBUTIONS TO THE CITY OF SPRINGFIELD BY ITS PRIVATE COLLEGES: FINDINGS AND SUGGESTIONS 2 (2007), *available at* http://www.wrrb.org/documents/Springfield_Final_3.19.07.pdf.

14. INTERIM REPORT, *supra* note 4, at 29.

15. *Id.*

16. *Id.* at 11.

17. *Id.*

18. *Id.* at 29.

A deduction is allowed against PILOTs for "extraordinary community services."[19] This deduction is capped at twenty-five percent of the PILOT.[20] The stated purpose for the deduction is "to encourage non-profit institutions to adopt new community-oriented services or services above and beyond any service or contribution the institution was providing prior to the execution of the PILOT agreement."[21] The Assessor's Office makes clear that allowance of such deductions is "carefully reviewed on an annual basis."[22] Preference is to be given to those programs that support the following initiatives of the Mayor Menino Administration: "promoting education and health, alleviating the fear of crime, expanding jobs and economic development."[23]

Examples of benefits allowed as deductions are academic scholarships, volunteer classes and workshops, and providing a free emergency medical clinic.[24] Specifically excluded are any community benefits negotiated between the Boston Redevelopment Authority ("BRA") and nonprofits.[25]

III. The Boston PILOT Task Force

As discussed in Part I, the current Boston system is relatively effective compared with other large cities in Massachusetts. Moreover, it is generally viewed as a national leader in PILOTs.[26] Proposing change to this system might evoke the old adage, "If it ain't broke don't fix it."[27] On the other hand, fiscal pressures abound. Roughly fifty-two percent of the land area in Boston is held as tax-exempt property.[28] Thus, the property tax burden is borne by the owners of the remaining forty-eight percent of the

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19. *Id.* at 30.

20. INTERIM REPORT, *supra* note 4, at 30.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *See* Gallagher, *supra* note 3; *see also* A2Politico: Ann Arbor Politics Grilled to Perfection, http://www.a2politico.com/?tag=payments-in-lieu-of-taxes (Feb. 5, 2010, 09:16 EST).

27. THE YALE BOOK OF QUOTATIONS 441 (Fred R. Shapiro ed., 2006) (attributing quotation to U.S. politician Bert Lance).

28. INTERIM REPORT, *supra* note 4, at 11. This figure appears to include all exempt property such as government owned property and religious use property. *See id.* at 13. The figure of 26.21% used in the 2003 Department of Revenue survey is the figure of codes 904 and 905 of all exempt property and is based on value. DIV. OF LOCAL SERV., MASS. DEPT. OF REVENUE, A STUDY OF CHARITABLE AND EDUCATIONAL PROPERTY TAX EXEMPTIONS 6 (2003).

land area. From a municipal finance perspective, property taxes represent fifty-six percent of the City's budget.[29] While the aforementioned breakdown of land area is not based on value, a significant portion of the City's real estate by value is not subject to tax, leaving this substantial burden on the owners of less than fifty percent of the land area in the city. Proposition Two and One-half[30] and the Home Rule petition[31] limit the City's ability to raise additional revenues.[32] In addition, state aid to Boston has declined and is expected to continue to do so going forward.[33]

The owners of tax-exempt land include a broad range of governmental bodies (federal, state and city) and public charities (including churches, synagogues, educational institutions, and health care organizations). Of the exempt property owned by charitable nonprofits, a "disproportionate" amount (by value) is owned by educational and medical organizations,[34] which are significant users of basic city services such as police, fire, and public works.[35] The City of Boston has estimated that approximately twenty-five percent of the City's budget goes to providing such safety and public works services.[36]

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29. INTERIM REPORT, *supra* note 4, at 11.

30. MASS. GEN. LAWS ch. 59, § 21C (2008). Proposition Two and One-half restrains the amount of levy that cities and towns can raise in a year as well as how much can be increased from year to year. DIV. OF LOCAL SERVS., MASS. DEPT. OF REVENUE, LEVY LIMITS: A PRIMER ON PROPOSITION 2 ½, at 4 (2007), http://www.mass.gov/Ador/docs/dls/publ/misc/levylimits.pdf.

31. MASS. GEN. LAWS ch. 43B, § 15. A home rule petition is "[l]egislation filed to address the needs of a particular municipality or at the request of, and with the approval of, that municipality and which does not affect generally the laws of Massachusetts." Massachusetts Legislative Glossary http://www.mass.gov/?pageID=aftopic&L=2&L0=Home&L1=Research+%26+Technology&sid=Eoaf (follow "Legal & Legislative Resources" hyperlink; then follow "Massachusetts Lawmaking Process" hyperlink; then follow "Massachusetts Legislative Glossary" hyperlink); *see also* DAVID J. BARRON, GERALD E. FRUG & RICK T. SU, DISPELLING THE MYTH OF HOME RULE 7 (2004), *available at* http://www.hks.harvard.edu/rappaport/downloads/home_rule/chapter_one_legalstructure.pdf.

32. INTERIM REPORT, *supra* note 4, at 11.

33. *Id.*

34. *Id.*; *see also* Email from Stephen Kidder, Chairman, Boston PILOT Task Force, to Eric Lustig, Professor, New England School of Law (Apr. 11, 2010, 20:44 EST) (on file with author). The Assessor's Office is currently undergoing a detailed study of the values of real estate holdings of cultural nonprofits, which is expected by Labor Day 2010. Thomas Grillo, *Museums May Pay Too*, BOSTON HERALD, Apr. 7, 2010, *available at* http://www.bostonherald.com/business/general/view.bg?articleid=1245253.

35. INTERIM REPORT, *supra* note 4, at 11.

36. *Id.*

The second driving force for the re-examination of Boston's program goes to the existing disparities among contributions of the various nonprofits. The following data relating to higher education institutions was generated by the City of Boston Assessor's Office for the Boston PILOT Task Force.[37]

Higher Education Institution	Exempt Value for Fiscal Year 2009 ($)	Tax if Property Was Not Exempt ($)	PILOT for Fiscal Year 2009 ($)	PILOT As a Percentage of Tax Revenue if Not Exempt (%)
Berklee College of Music	161,741,600	4,384,815	361,222	8.24
Boston College	561,952,500	15,234,532	293,251	1.92
Boston University	2,115,919,700	57,362,583	4,892,138	8.53
Emerson College	177,826,400	4,820,874	139,368	2.89
Emmanuel College*	166,162	4,477,542	0	0
Fisher College	16,719,000	453,252	0	0
Harvard University	1,477,225,500	40,047,583	1,996,977	4.99
Mass. College of Pharmacy	106,910,300	2,898,338	227,980	7.87
New England School of Law	15,888,500	430,737	13,125	3.05
Northeastern University	1,351,225,100	36,631,712	320,571	0.08
Showa Institute	54,718,800	1,483,427	120,966	8.15
Simmons College	152,572,500	4,136,240	15,000	0.36
Suffolk University	237,230,300	6,431,313	375,290	5.84
Tufts University	151,760,200	4,114,219	152,159	3.7
Wentworth Institute of Technology	207,977,400	5,638,267	40,747	0.72
Wheelock College*	60,362,200	1,636,419	0	0

* No PILOT agreement in place at the time of the Interim Report.

The above data reflects a fairly wide range of PILOT payments, with a number of institutions not making any payment at all. Of those institutions paying PILOTs, a wide range emerges from a low of 0.08% to a

37. *Id.* at 44.

high of 8.53%. Moreover, the universities at the polar ends of this range, Northeastern and Boston University, respectively, are both large universities that one might reasonably expect to have much more similar payments. Similar data was generated with respect to hospitals located in Boston.

Medical Institutions	Exempt Value for Fiscal Year 2009 ($)	Tax if Property Was Not Exempt ($)	PILOT for Fiscal Year 2009 ($)	PILOT As a Percentage of Tax Revenue if Not Exempt (%)
Beth Israel Deaconess Medical Center	823,114,100	22,314,623	167,000	0.75
Boston Medical Center	300,928,700	8,158,177	221,644	2.72
Brigham and Women's Hospital	815,886,700	22,118,688	1,315,822	5.95
Caritas St. Elizabeth's Medical Center**	252,504,700	6,845,402	0	0
Children's Hospital	691,857,800	18,756,265	250,000	1.33
Dana Farber Cancer Institute	226,522,000	6,141,011	131,475	2.14
Faulkner Hospital*	181,881,400	4,930,805	0	0
Massachusetts Bio-Medical Research Corp.	146,236,500	3,964,472	818,728	20.65
Massachusetts General Hospital	1,457,667,100	39,517,355	1,826,618	4.62
New England Baptist Hospital*	144,781,500	3,925,026	0	0
Spaulding Rehabilitation Hospital	86,751,700	2,351,839	77,534	3.30
Tufts Medical Center	581,770,900	15,771,809	1,015,628	6.44

* No PILOT agreement in effect as of Interim Report.

** PILOT in effect but not to be paid until construction is completed.

With the exception of Massachusetts Bio-Medical Research, the PILOT payments (by percentage) from the hospitals appear to be more

closely bunched than the institutions of higher education. Still, a significant difference appears between the high of 6.44% and low of 0.75%.

Members of the Task Force were appointed to represent various city stakeholders or constituencies.[38] Dr. Robert Brown, President of Boston University, and Dr. Zorica Pantic, President of Wentworth Institute of Technology, represent colleges and universities on the Task Force. Hospitals are represented by Patricia McGovern, General Counsel and Senior VP for Corporate and Community Affairs at Beth Israel Deaconess Medical Center, and Thomas Glynn, Chief Operating Officer of Partners Healthcare.[39] The Executive Director of Codman Square Neighborhood and Development Corporation, Gail Latimore, represents community organizations. James D. Gallagher and Stephen Kidder, Senior VP of Communications, Government and Community Relations for John Hancock Financial Services and Attorney at Hemenway & Barnes, LLP, respectively, represent the Business Community. Stephen Kidder serves as the chair of the Task Force. Labor Organizations are represented by the President of Boston Police Patrolman's Association, Thomas Nee. Finally, the Government is represented by Councilman Stephen Murphy of the Boston City Council.

The process and development of the Task Force has been seemingly collaborative and driven by consensus. But the composition also reflects interesting dynamics. While one could argue that all constituencies are seeking what is best for the City of Boston and the exempt nonprofits, there are clearly diverging interests between the City and the nonprofits. At first glance, the Task Force would seem to be relatively evenly distributed around the divergence. For example, the nonprofit universities and hospitals presumably support relatively smaller PILOT contributions, while the government[40] and labor side (providing basic services) support the opposite. In addition, businesses that represent taxpaying interests also seem to represent interests seeking greater contribution from the exempt sector. The community service organization might also represent the

38. Mayor's PILOT Task Force Members, http://www.cityofboston.gov/Images_Documents/PILOT_Press_1.27.09.pdf (last visited Apr. 23, 2010).

39. Partners is an integrated health care organization founded by Brigham and Women's and Massachusetts General Hospitals. Other hospitals include Dana-Farber Clinic and Faulkner and Spaulding Hospitals. Partners Healthcare, What Is Partners?, http://www.partners.org/about/about_whatis.html (last visited Apr. 15, 2010).

40. Indeed Councilor Murphy has been very active in seeking payments to the City from colleges and universities. For example, he has proposed legislation to impose a $100 fee per semester on nonprofit colleges and universities for each student who is not a Boston resident. Jazmine Ulloa, *Higher College Payments to City Sought*, BOSTON GLOBE, June 20, 2009, at B2, *available at* http://www.boston.com/news/local/massachusetts/articles/2009/06/20/councilor_pushes_for_higher_college_payments_to_boston/.

interests of resident taxpayers and local businesses. In addition, the Task Force chair is an attorney, categorized under the "business category,"[41] yet his background reflects interests on both sides of the divergence.[42] Attorney Kidder is a former senior tax official with the Commonwealth and currently sits on various boards of nonprofits.[43] Even within groups of nonprofits, members represent nonprofits paying very different percentages as PILOTs.

The Task Force initially articulated the following objectives:

- Set a standard level of contributions—in programs and payments—to be met by all major tax-exempt land owners in Boston.
- Develop a methodology for valuing community partnerships made by tax-exempt institutions.
- Propose a structure for a consolidation program and payment negotiation system, which will allow the City and its tax-exempt institutions to structure longer term, sustainable partnerships focused on improving services for Boston's residents.
- Clarify the costs associated with providing City services to tax-exempt institutions.
- If necessary, provide recommendations on legislative changes needed at the City or state level.[44]

The Task Force met regularly during 2009 and into the beginning of 2010. The Task Force began its work with the detailed valuation data on Boston property owned by the higher education and hospital charitable nonprofits.[45] The Task Force also examined the current Boston PILOT program.[46] In addition to reviewing data from higher education and hospitals, the Task Force looked at data from cultural institutions, private secondary schools,[47] and several other institutions of higher education. The Task Force also scheduled a public hearing where a wide range of speakers

41. Mayor's PILOT Task Force Members, *supra* note 38.

42. *See* Hemenway & Barnes LLP, Lawyer Directory, Stephen W. Kidder, http://www.hembar.com/directory/swkidder.html (last visited Apr. 15, 2010).

43. *Id.*

44. INTERIM REPORT, *supra* note 4, at 1-2.

45. *See id.* at 4.

46. *Id.*

47. No private primary or secondary school is presently paying a PILOT. *Id.* at 12.

provided feedback. The attendees included city residents, representatives of neighborhood associations, public service unions, a representative of a large university, a representative of a university trade group, a representative of a hospital trade group, and a representative of a research group.[48]

A great deal of discussion centered on the community benefit deduction.[49] The Task Force decided to focus on the four largest educational institutions and hospitals and sought additional information from the following: Boston University, Boston College, Northeastern University, Harvard University, Massachusetts General Hospital, Brigham and Women's Hospital, Beth Israel Deaconess Hospital, and Children's Hospital.[50]

With respect to community benefits to be considered for credit against the PILOT, the Task Force set forth the following criteria:

- The services need to *directly benefit City of Boston residents.*
- The services should support the City's mission and priorities with the idea in mind that the City would support such an initiative in its budget if the institution did not provide it.
- The services should emphasize ways in which the City and the institution can collaborate to address shared goals.
- The services should be quantifiable.
- The City must be consistent and transparent in its approach so that institutions can plan appropriately.[51]

With respect to the City's priorities and ways to meet the collaboration goals, the Task Force considered:

- Closing the Achievement Gap
- Reducing Violent Crime
- Increasing Workforce Housing
- Improving City Services
- Creating New Jobs

48. *See id.* at 17-19.

49. *Id.* at 5-7.

50. INTERIM REPORT, *supra* note 4, at 5.

51. *Id.* at 7 (emphasis added).

- Narrowing Health Disparities
- Increasing Diversity in Government
- Growing Revenue[52]

In examining the methodology for establishing the base amount for the PILOT, the Task Force considered three different methods: payments based on units such as number of students or hospital beds; payments based on square footage of property; or payments based on value of property.[53] The Task Force concluded that the fair-value method was more fair and equitable, particularly since the nature of the PILOT is to be in lieu of taxes.[54]

At their March 12, 2010 meeting, the Task Force developed the contours of a tentative proposal, which was to set PILOT agreements at twenty-five percent of the amount of tax the nonprofit would pay if the property were subject to tax.[55] A credit against the PILOT would be allowed for taxes paid on property used for institutional purposes and which would otherwise qualify for exemption.[56] A further deduction of up to fifty percent of the PILOT (after the aforementioned credit) would be allowed.[57] At least one Task Force member opposed the use of a fixed or hard fifty percent cap for community-benefit deduction. Boston University President Dr. Robert Brown argued that capping the community-benefit deduction would lead to unintended consequences.[58] Dr. Brown suggested that such will result in changes to programs in Boston by charitable nonprofit institutions that are beneficial to the community.[59]

The Task Force proposal would provide institutions a transition from their existing PILOT to the newly proposed PILOT. This transition is through a "ramp-up" over five years.[60] Under the ramp-up, the difference between the proposed new PILOT and the existing PILOT will be added in equal installments over the five-year period following the establishment of

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52. *Id.* at 7-8.

53. *Id.* at 8.

54. *Id.* at 9.

55. *See* Andrew Ryan, *City Asks Exempt Sector for Help*, BOSTON GLOBE, Apr. 6, 2010, at A1, *available at* http://www.boston.com/news/local/massachusetts/articles/2010/04/06/city_asks_exempt_sector_for_help/.

56. *See id.* Allowing credit for such taxes paid would dramatically increase the current PILOT paid by Northeastern.

57. *See* Ryan, *supra* note 55.

58. Grillo, *supra* note 34.

59. *Id.*

60. Press Release, Office of the Mayor, City of Boston, PILOT Task Force Considers Policy Recommendations (Apr. 6, 2010), *available at* http://www.cityofboston.gov/Images_Documents/PILOT%20Task%20Force%20FINAL%20%204-6-10.pdf.

the new PILOT. The chart below reflects the effect of the proposal on the higher education institutions (assuming full community benefit deduction). Using Berklee College of Music as an example, Berklee's current PILOT agreement (net of any community benefit deduction) is $149,990. The new proposed PILOT (at twenty-five percent of taxes owed if taxable) would be $1,096,204. Assuming allowance for the maximum community benefit deduction of $548,102, Berklee would have a new proposed PILOT of $548,102. The ramp-up would be based on the difference between the proposed new amount of $548,102 and the current amount of $149,990. The difference between these two figures is $398,112, which is then divided by five for the annual ramp-up of $79,622. Thus in the first year under the new PILOT, Berklee would pay the current $149,990 plus the annual ramp-up of $79,622 for a first year total payment of $229,612. In each of the succeeding years the annual payment would again increase by the ramp-up amount of $79,622.

Higher Education Institution	Fiscal 2009 PILOT (net of community benefit deduction) ($)	Proposed PILOT (25% of tax if taxable) ($)	Less Credit for Property Tax Paid* ($)	Less Community Benefit Deduction (max of 50% of proposed PILOT) ($)	Proposed PILOT (net of deductions and credits) ($)	Annual Ramp-Up (Phased in over 5 years) ($)**	Current PILOT Plus Ramp-Up ($)
Berklee College of Music	149,990	1,096,204	0	548,102	548,102	79,622	229,612
Boston College	293,251	3,808,633	383,249	1,712,692	1,712,692	283,888	577,139
Boston University	4,892,138	14,340,646	3,416,497	5,462,074	5,462,074	113,987	5,006,125
Emerson College	139,368	1,205,219	0	602,609	602,609	92,648	232,016
Emmanuel College	0	1,119,386	0	559,693	559,693	111,939	119,939
Fisher College	0	113,313	0	56,657	56,657	11,331	11,331
Harvard University	1,996,976	10,011,896	0	5,005,948	5,005,948	601,794	2,598,771
Mass. College of Pharmacy	170,985	724,585	0	362,292	362,292	38,262	209,246
New England School of Law	13,125	107,684	0	53,842	53,842	8,143	21,268

Northeastern University	30,571	9,157,928	1,947,985	3,604,971	3,604,971	714,889	745,451
Showa Institute	120,966	370,857	0	185,428	185,428	12,892	133,859
Simmons College	15,000	1,034,060	0	517,030	517,030	100,406	115,406
Suffolk University	375,290	1,607,828	0	803,914	803,914	85,725	461,014
Tufts University	152,159	1,028,555	0	514,277	514,277	72,424	224,582
Wentworth Institute of Technology	31,013	1,409,567	0	704,783	704,783	134,754	165,767
Wheelock College	0	409,105	0	204,552	204,552	40,910	40,910

* Credit for property taxes paid on property used for institutional purposes, which would generally qualify for exemption.[61]

** The proposed new PILOT would be ramped up or phased in over five years. The ramp-up would be the difference between the proposed PILOT and the existing PILOT divided by five.[62]

The following illustrates the effect of the proposal on the hospitals (assuming full community benefit deduction):

Medical Institutions	Fiscal 2009 PILOT (net of community benefit deduction) ($)	Proposed PILOT (25% of tax if taxable) ($)	Less Credit for Property Tax Paid* ($)	Less Community Benefit Deduction (max of 50% of Proposed PILOT) ($)	Proposed PILOT (net of deductions and credits) ($)	Annual Ramp-Up (Phased in over 5 years) ($)**	Current PILOT plus Ramp-Up ($)
Beth Israel Deaconess Medical Center	167,000	5,578,656	0	2,789,328	2,789,328	524,466	691,466
Boston Medical Center	128,492	2,039,544	0	1,019,772	1,019,772	178,256	306,748
Caritas St. Elizabeth's Medical Center	0	1,711,351	110,609	800,371	800,371	160,074	160,074

61. *Id.*

62. *Id.*

Children's Hospital	112,004	4,689,066	0	2,344,533	2,344,533	446,506	558,510
Dana Farber Cancer Institute	98,607	1,535,253	0	767,626	767,626	133,804	232,411
New England Baptist Hospital	0	981,527	0	490,628	490,628	98,126	98,126
Tufts Medical Center	885,191	3,942,952	677,411	1,632,771	1,632,771	149,516	1,034,707
Partners Health Care***	3,511,532	18,220,790	3,201,203	7,509,792	7,509,793	799,652	4,311,184

* Credit for property taxes paid on property used for institutional purposes, which would generally qualify for exemption.[63]

** The proposed new PILOT would be ramped up or phased in over five years. The Task Force proposed adding this ramp-up to the current PILOT.[64]

*** The following hospitals are included in the Partners figure: Brigham and Women's, Faulkner, Massachusetts Bio-Medical Research, Massachusetts General, and Spaulding.[65]

At its April 6, 2010 meeting, the Task Force announced that it would extend its scope to the cultural nonprofits and private secondary schools in Boston.[66] Chairman Kidder stated that he would send a letter to those institutions.[67] The Commissioner of the Assessing Department provided that his office hoped to have complete detailed valuation analyses of such institutions later in 2010.[68] The Task Force also expressed support for some basic de minimus standard under which some small charitable nonprofits would not be expected to enter into a PILOT agreement.

The Task Force released an Executive Summary of the Final Report at its April 12 meeting.[69] In this summary, the Task Force emphasized "core principles" of "transparency and consistency" as underlying a "fair and

63. *Id.*

64. *Id.*

65. *See* What Is Partners, *supra* note 39.

66. Grillo, *supra* note 34.

67. *Id.*

68. *Id.*

69. *See generally* PILOT TASK FORCE, EXECUTIVE SUMMARY OF FINAL REPORT (forthcoming 2010).

balanced" PILOT program.[70] The Task Force stated the following elements as reflecting such core principles:

- The PILOT Program Remain Voluntary. The Task Force rejected seeking a statutory requirement as likely to garner strong opposition and to be "counter" to the "partnership between the City and its institutions."[71]
- The Program Should Apply to All Nonprofit Groups. The Task Force specifically extends the program to museums, cultural facilities, and "significant non-profits." There is no mention of social service nonprofits or religious institutions. There is provision for an exception for "smaller non-profits which may lack the resources to fully engage in the PILOT process. Normally, a threshold of fifteen dollars in assessed value would meet this goal."[72]
- Determination of the PILOT Payments. The Task Force kept intact the methodology of basing the amount on the value of the real estate, taking into account size and quality of real estate holdings.[73] In addition, the Task Force recommended continuing to use twenty-five percent of the amount to be paid if fully taxed as the PILOT amount.[74]
- Importance of Community Benefit. The Task Force reiterated the importance of community benefits and embraced the guidelines that it had articulated earlier.[75] Most importantly the Task Force embraced the fifty percent cap for the allowance for community benefit but left the possibility for exceeding the cap "[i]n cases where the City and an institution identify exceptional or extraordinary opportunities to provide services."[76]
- Phase-in Period. The Task Force embraced a transitional phase-in over a period of at least five years,[77] which leaves open the possibility for a phase-in

70. PILOT TASK FORCE, EXECUTIVE SUMMARY OF FINAL REPORT (forthcoming 2010) (draft at 1, on file with author).

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* (draft at 2).

75. *Id.*; *see also supra* text accompanying note 51.

76. PILOT TASK FORCE, *supra* note 70 (draft at 2, on file with author).

77. *Id.*

period longer than the five-year period initially contemplated.[78]

- Property Tax Credit. Finally, the Task Force included the credit proposed for real estate taxes paid on property which would ordinarily qualify for exemption based on its use.[79]

CONCLUSION

"In far too many instances, authors fail to define the term best practices and leave it to the reader to glean the meaning from the context."[80]

Is the Boston PILOT Task Force an Emerging Best Practice? "Best practices" refers to a program which is a significant improvement over the existing program and can be the basis on which other cities and towns model their own programs. While the Task Force has not issued its final report as of the time this Article was written and submitted, the Task Force has generated an extensive body of work worthy of examination.

The Task Force has organized and made available a great deal of useful data. There are very detailed reports on the values, parcel-by-parcel, held by the higher education and hospital nonprofits.[81] Moreover, very detailed comparative data was generated so that relative real estate holdings and PILOT contributions can be compared within categories of exempt organizations, as well as among higher educational institutions and hospitals, respectively. If nothing else, the transparency of this data highlights the apparent disparities among some similarly situated institutions within each category. Perhaps there are good explanations for the differences.[82] Or perhaps they reflect the reality of what is at its heart—a voluntary program. This approach would seem to be of use to other large

78. *Id.*

79. *Id.* (draft at 3).

80. Ira P. Robbins, *Best Practices on "Best Practices": Legal Education and Beyond*, 16 CLINICAL L. REV. 269, 291 (2009).

81. *See generally* CITY OF BOSTON ASSESSING DEPARTMENT, EXEMPT PROPERTY ANALYSIS: EDUCATIONAL & MEDICAL INSTITUTIONS FISCAL YEAR 2009 (2009), http://www.cityofboston.gov/Images_Documents/ExemptRPT_09_WEB_tcm1-3932%5B1%5D.pdf. This detailed report was generated by requesting facility information from the institutions. Moreover, the institutions were given an opportunity to provide feedback, which was taken into account where deemed appropriate. *See generally id.*

82. See for example, the disclosure of the real estate taxes paid by Northeastern University on real estate, which would ordinarily qualify for exemption. *See* INTERIM REPORT, *supra* note 4.

cities in and out of Massachusetts and perhaps in even smaller cities and towns.[83]

From a methodological standpoint, the determination of value, as well as the setting of the proposed PILOT goal of twenty-five percent of value, seem unchanged from the existing program. It is, however, a potentially significant change; the scope of the program would extend to all exempt property owned by charitable nonprofits as opposed to just newly acquired or renovated property. With respect to payment of the proposed PILOTs, the allowance for taxes paid on institutionally used property otherwise qualifying for exemption presents an expansion of the existing program. Moreover, the doubling (from twenty-five to fifty percent) of the amount of allowance for community benefit expenditures represents an important development in recognizing and encouraging partnerships between Boston and its nonprofits. Of course, the close review by the Assessor's Office would still continue, but the criteria are better fleshed out. While particular municipal goals might vary, the methodology of the program should still be a helpful model to other cities and towns.

The real uncertainty with respect to the Task Force's work is whether charitable nonprofits will embrace its findings and recommendations. The amount of proposed PILOTs will be quite significant, particularly with respect to those nonprofits that are currently not paying a PILOT. The proposed minimum five-year ramp-up should help in transition. The bigger question, however, is whether the nonprofit community will accept the proposals in general. The Task Force was established to represent certain stakeholders. While there is nothing to bind the participating institutions to the proposed program, as participants they would presumably be open to considering the new program. But what about the colleges, universities, and hospitals not directly represented? A representative from the Association of Independent Colleges and Universities in Massachusetts stated that the "[nineteen] institutions he represents in Boston were 'stunned and concerned by the [twenty-five] percent number.'"[84] Interestingly, both universities, represented on the Task Force, Boston University and Wentworth Institute of Technology, are members of the Association of Independent Colleges and Universities in Massachusetts.[85]

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83. Towns and cities with relatively few nonprofits might be able to use comparative data from similar communities as well as any statewide data generated. The Lincoln Institute is currently researching a study which might provide such data.

84. Ryan, *supra* note 55.

85. *See generally* Assoc. of Indep. Coll. and Univ. in Mass.: About AICUM, http://www.masscolleges.org/index.php?option=com_content&task=blogcategory&id=47&Itemid=206 (last visited Apr. 15, 2010).

Representation on the Task Force was limited to higher educational and hospital institutions. The Task Force has decided to extend its work to cultural institutions such as museums as well as secondary schools.[86] How will these new institutions respond to the Task Force's recommendations since they did not have a representative from either cultural nonprofits or private secondary schools?

To date, there has been no indication of extending the program to social service nonprofits or religious institutions. Yet these institutions also seem to utilize basic services to some extent. Although the Task Force's Executive Summary of Final Report does not specifically mention social service nonprofits or religious institutions, the report does provide that "the [PILOT] program should apply to *all* nonprofits."[87] Perhaps social service nonprofits and religious institutions would largely fall within the exception for small nonprofits,[88] with any remaining PILOT amount fully offset by an expanded community-benefit deduction.[89]

Notwithstanding the transparency in the Task Force's process and its composition of representative stakeholders, the most significant hurdle remains: PILOT programs are voluntary from a legal standpoint. The City of Boston might have more leverage to influence nonprofits than other cities and towns; indeed, the comparative data in the 2003 Department of Revenue Study reflects this notion.[90] Nevertheless, there still must be limits on how much leverage can be exerted. The Task Force's data and recommendations add the potential for peer pressure from the community, particularly those charitable nonprofits that are paying a PILOT reflecting a relatively high percentage of the tax that would be owed if the property were taxable.[91]

While Boston can preserve its existing PILOT program and still be a national leader, many other cities and towns cannot. It may well be that the last policy objective articulated by the Task Force will be the most effective: to advocate for a state program that would pay a PILOT to communities hosting nonprofits.[92]

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86. Grillo, *supra* note 34.

87. PILOT TASK FORCE, *supra* note 70, at 1 (emphasis added).

88. *See supra* text accompanying note 72.

89. *See supra* text accompanying note 76.

90. *See generally* DIV. OF LOCAL SERVS., MASS. DEPT. OF REVENUE, *supra* note 7.

91. Indeed, information generated by the Task Force appears to have prompted a pointed commentary by a Boston Globe columnist chiding Boston College and urging it to pay a larger PILOT. Brian McGrory, Editorial, *BC=Beter Contribute*, BOSTON GLOBE, Apr. 16, 2010, at A1.

92. *See, e.g.*, Nicholas Carbone & Evelyn Brody, *PILOTs: Hartford and Connecticut*, *in* PROPERTY-TAX EXEMPTION FOR CHARITIES, *supra* note 3, at 233-52.

* * * *

ALL CHARITIES ARE PROPERTY-TAX EXEMPT, BUT SOME CHARITIES ARE MORE EXEMPT THAN OTHERS

EVELYN BRODY*

Abstract: Attention from the media notwithstanding, the nonprofit sector continues to achieve remarkable success in state supreme courts and statehouses in defending property-tax exemptions. But budget pressures remain. While the intermediate use of "payments in lieu of taxes" has not yet become a systematic compromise solution, PILOTs are attracting growing interest from local taxing jurisdictions. This Article highlights three issues—who decides the parameters of exemption, legislatures or courts; what are the specific factors and vulnerable subsectors; and how exemption is granted or withheld in practice—and concludes with several PILOT case studies. The Appendix sets forth a fifty-one-jurisdiction review of state constitutions, statutes, and high-court decisions, and finds that the regimes generally are more similar than not.

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* Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology. I thank Eric Lustig and the *New England Law Review* for inviting me to participate in their conference, and for the suggestions from my fellow presenters and attendees. I presented an earlier version of this article at "Shades of Virtue: Measuring the Comparative Worthiness of Charities," Annual Conference of the National Center on Philanthropy and the Law, New York University School of Law (New York City, Oct. 29-30, 2009). I am grateful to that conference's organizers, Harvey Dale and Jill Manny, for inviting me to write that draft, and to my discussants, Marion Fremont-Smith and Peter Swords, and to other participants for their helpful comments.

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> "The term 'charity' has become magical gibberish to sanctify any socially beneficial use of property that a court deems worthy of subsidy."
>
> *Provena Covenant Medical Center v. Department of Revenue*[1]

INTRODUCTION

In 2002, I edited a volume examining the issue of property-tax exemption for charities from a variety of perspectives and disciplines.[2] My Introduction predicted that "the issues covered in this study will only accelerate in importance in the coming years." In 2007, I published an update that concluded:

> State exemption requirements generally reflect more of a quid-pro-quo rationale [for granting exemption] than does federal exemption. [While it can be difficult to categorize the cases,] [m]any . . . revolve around four basic issues: demonstrating charitable as distinct from private or other nonprofit purposes; satisfying multi-factor tests adopted by state supreme courts under state constitutions; the relevance of government financing and donations; and the relevance of [profit motive,] fee-charging[,] and competition with for-profits. The many recent decisions from state supreme courts—particularly involving hospitals, housing and skilled nursing facilities, and day care—demonstrate the importance of property-tax exemption [to the states]. The solution to many disputes between property-owning charities and the municipalities they inhabit is often more likely to be "political" than legal, such as the agreement to make payments in lieu of taxes.[3]

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1. 894 N.E.2d 452, 481 (Ill. App. 2008), *aff'd*, 2010 Ill. LEXIS 289 (Ill. 2010).

2. PROPERTY-TAX EXEMPTION FOR CHARITIES: MAPPING THE BATTLEFIELD (Evelyn Brody ed., 2002).

3. Evelyn Brody, *The States' Growing Use of a Quid-Pro-Quo Rationale for the Charity Property Tax Exemption*, 56 EXEMPT ORG. TAX REV. 269, 288 (2007) [hereinafter *Quid-Pro-Quo Rationale*].

The last two years—with the economic meltdown of state and local tax revenues at a time of increasing demand for social services—have confirmed my 2002 prediction, along the lines of my 2007 observations. The number of state supreme court decisions and legislative proposals put to rest any assumption that issues of property-tax exemption concern only the narrowly bounded jurisdictions in the Northeast. The current desperate financial situation of many local governments might find sympathetic ears in equally desperate statehouses. Indeed, in an April 29, 2009 email, Tim Delaney, Executive Director of the National Council of Nonprofits, warned:

> With legislation that would have taken away nonprofit property tax exemptions introduced earlier this year in at least [four] . . . states (where fortunately the bills appear to be dead), . . . at least [ten percent] of the states have been actively probing the viability of taxing nonprofits.
>
> . . . We may have just hit the tipping point, because these latest activities pile onto a growing list of other attempts to add new financial burdens on nonprofits . . . .
>
> . . . .
>
> . . . My fear is that state and local governments, with their constitutional mandates to balance budgets, will suddenly attempt to take away the property tax exemptions, sales tax exemptions (in states that provide them to nonprofits), and any other tax exemptions that nonprofits historically have received, thus drastically increasing costs of operating nonprofits at a time when demands for our services are up and our ability to get funds to pay more in new taxes is zero.[4]

Despite frequent pressure from the media,[5] however, the nonprofit sector continues to show remarkable success in state supreme courts and statehouses in defending exemptions against municipal and legislative challenge.[6] The intermediate use of payments in lieu of taxes ("PILOTs")

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4. Email from Tim Delaney, Executive Director, National Council of Nonprofits, to Evelyn Brody, Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology (Apr. 29, 2009, 10:16 EST) (on file with author).

5. *See, e.g.*, Sarah Jane Tribble, *Local Nonprofit Hospitals Say They Write Off About 2 Percent of Revenues on Charity Care*, CLEVELAND PLAIN DEALER, Apr. 6, 2009, http://blog.cleveland.com/medical/2009/04/Local_nonprofit_hospitals_say.html.

6. *See, e.g.*, Wisconsin Nonprofits Association, Success – Property Tax Exemptions Saved, http://www.wisconsinnonprofits.org/content/property-tax-exemption-nonprofits-risk (including a link to AB75 (2009-2010 budget signed by the governor on June 29, 2009),

has not yet become a systematic compromise solution, but it is attracting growing interest at the local level, met with uneasiness from the targeted types of nonprofits and the nonprofit sector in general.

The Appendix to this paper sets forth a fifty-one-jurisdiction review of state constitutions, statutes, and high-court decisions relating to property-tax exemption for charities. As the Appendix demonstrates, while the details of the charity exemption from property tax vary from state to state (and the District of Columbia), the regimes generally are more similar than not. A few themes have emerged in those states that struggle with this issue. This paper addresses the following three:

Issue I: Who Decides?

In about one half of the states, the state constitution mandates exemption for charities; in about twenty others, the constitution grants the legislature the authority to provide exemption.[7] The issue occasionally arises as to which branch of government has the authority to define charity. Some high courts have declared that they are the guardians of the constitution, retaining the authority to strike a legislative exemption regime as unconstitutionally broad. (An overly narrow statute rarely arises.[8])

A separate question is the role of the executive branch—specifically, whether the state agencies speak with one voice. Of course, an entity can be a charity for state registration and reporting purposes without necessarily being property-tax exempt, but anecdotal evidence suggests, unfortunately, that the state department of revenue rarely (if ever) consults with the state attorney general's office about whether a particular entity is a charity.[9]

Issue II: Income-Producing Nonprofit Industries

The answer to the riddle, "when is a property tax not a property tax?," might be, "when it's an income tax." Several subsectors or properties repeatedly find themselves in litigation with municipal governments:

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which contains language protecting property-tax exemptions for nonprofit rental housing) (last visited Apr. 15, 2010); *see infra* Part III.A (discussing the Madison, Wisconsin experience).

7. The terminology varies: Notably, some states use the term "purely public charity" and some others refer to "public charity."

8. *But see* Texas Monthly, Inc. v. Bullock, 489 U.S. 1, 25 (1989) (striking down, on First Amendment Establishment Clause grounds, exemption from sales tax that was limited to religious literature). *See also* cases cited *infra* note 55 (striking down statutes that deny exemption to charities that do not serve in-state residents or that are incorporated in another state).

9. *See also* Part III (discussing the importance of understanding the process for granting or challenging exemption).

hospitals; low-income or elderly housing and nursing homes; daycare centers; and ancillary facilities such as parking structures, dormitories, and administrative space. These industries or uses are typified by positive income streams that attract attention. Particularly—but not only—those states having multifactor tests see litigation concerning property owned by charities that charge fees, rely on government funding, report a relatively low level or percentage of gifts received or gratuitous services provided, or that compete with for-profit providers of similar services.

Issue III: Exemption Regimes "On the Ground"—and PILOTs

More than the income tax, the property-tax regime (and exemption from it) suffers from a lack of consistency and transparency. While the technical apparatus of a state's property-tax regime is generally beyond the scope of this paper, I do highlight a few important points.

First, decisions by local assessors are key. However, different approaches by different assessors and local administrators can lead to variable treatment in the same state. These inconsistencies can occur with respect to the types of charities receiving particular scrutiny or the types of questions asked (e.g., whether government funding is an area of concern).

The process too cautions that we should interpret case law with care. Lower courts within a state can apply various criteria—and are often less sympathetic to exemption than are state high courts. Often, a would-be-exempt charity simply failed to meet its burden of proof for the year at issue and, presumably, will remedy this deficiency in future years. Thus, a legal pronouncement as to exemption of a particular charity might turn out not to be a lasting, substantive impediment to the affected subsector.

In some localities, a percentage of or certain types of charitable property owners provide "voluntary" PILOTs (or services in lieu of taxes—"SILOTs"), at various levels relative to the tax that would otherwise be imposed. No systematic data are available on nonprofit PILOTs and SILOTs. Note that because they are often initiated by municipal governing boards (or mayors or executives), these arrangements also can vary within a particular state.

I. Who Decides the Parameters of Exemption?[10]

A. Courts Versus Legislatures

While state constitutions and exemption statutes can be quite detailed,[11] every state recognizes property-tax exemption for those

10. The discussion in this part draws substantially from Brody, *Quid-Pro-Quo Rationale*, *supra* note 3.

nonprofits that are classified as charities.[12] But being a charity is not enough—states focus not only on the identity of the owner of the property but also the use of the specific property for which exemption is sought. To the surprise of many nonprofits, having federal income-tax exemption under Internal Revenue Code section 501(c)(3) is not enough.[13] Entitlement to exemption, as a threshold matter, requires both a charitable owner and a charitable use of the subject property.

State constitutions sometimes limit property-tax exemption to "institutions of purely public charity" (or some similar term), defined by state legislatures and courts as requiring the applicant to satisfy a variety of factors: notably some level of donative support and gratuitous expenditure, and a reduction of the government's burden. However, the ambiguities and generalities used in these sometimes-overlapping factors to define charity means that resorting to courts is often still required, with differing consequences across the states.

An important aspect of the state-level tax regime flows from the existence of property-tax exemptions granted in or authorized by state constitutions, and the degree of vigilance with which the courts guard their authority over constitutional terminology. Compare, in their construction of similar state constitutional language, the more deferential attitude of the Pennsylvania Supreme Court to the legislature, with the absolutist approach of the Illinois Supreme Court—and a 2009 compromise reached in Minnesota.

Pennsylvania's Constitution provides: "The General Assembly may by law exempt from taxation: . . . (v) Institutions of purely public charity, but in the case of any real property tax exemptions only that portion of real property of such institution which is actually and regularly used for the purposes of the institution."[14] In a 1985 case, the Pennsylvania Supreme Court promulgated a five-part test requiring that an entity claiming classification as a "purely public charity" under the Pennsylvania Constitution must prove that it: "(a) advances a charitable purpose; (b)

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11. *See* Appendix.

12. *See* Brody, *Quid-Pro-Quo Rationale*, *supra* note 3; *see generally* PROPERTY-TAX EXEMPTION FOR CHARITIES: MAPPING THE BATTLEFIELD, *supra* note 2, especially Janne Gallagher, *The Legal Structure of Property-Tax Exemption*, *in* PROPERTY-TAX EXEMPTIONS FOR CHARITIES: MAPPING THE BATTLEFIELD, *supra* note 2, at 3-22.

13. State income-tax exemption often piggybacks on federal income-tax exemption (including, in some states, the tax on unrelated business income). Accordingly, this Article focuses on the more idiosyncratic property-tax regimes. Beyond the scope of this Article are considerations of exemption from sales and use tax, often more similar to property-tax regimes than to income-tax regimes.

14. PA. CONST. art. VIII, § 2(a)(v).

donates or renders gratuitously a substantial portion of its services; (c) benefits a substantial and indefinite class of persons who are legitimate subjects of charity; (d) relieves the government of some of its burden; and (e) operates entirely free from private profit motive."[15] Based on the name of the applicant, the Hospital Utilization Project, Pennsylvania's approach has become known as the "*HUP* test."

In 1997, the Pennsylvania Legislature passed Act 55, "The Institutions of Purely Public Charity Act," in an effort to:

> eliminate inconsistent application of eligibility standards for charitable tax exemptions, reduce confusion and confrontation among traditionally tax-exempt institutions and political subdivisions and ensure that charitable and public funds are not unnecessarily diverted from the public good to litigate eligibility for tax-exempt status by providing standards to be applied uniformly in all proceedings throughout this commonwealth for determining eligibility for exemption from state and local taxation which are consistent with the traditional legislative and judicial applications of the constitutional term. . . .[16]

While the statute is designed around the five-prong *HUP* test, "it greatly expanded those standards well beyond what any appellate court had ever decided."[17] Indeed, both before and after the enactment of Act 55, the Pennsylvania judiciary differed internally on the definition of "purely public charity." Lower courts tend to construe the test strictly, while the Pennsylvania Supreme Court is more accepting of an expanded definition.[18]

Even though the Pennsylvania Supreme Court is the final arbiter of Pennsylvania's constitution, a challenge to the constitutionality of the legislative scheme created by Act 55 has not materialized. Instead, the Pennsylvania Supreme Court has twice side-stepped the issue, reversing decisions of the commonwealth court in 2002 and 2007.[19] The more recent

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15. Hosp. Utilization Project v. Commonwealth, 487 A.2d 1306, 1317 (Pa. 1985) (paragraph breaks and initial capitalization omitted).

16. 10 PA. STAT. ANN. § 372(b) (West 1999).

17. David B. Glancey, *PILOTs: Philadelphia and Pennsylvania*, *in* PROPERTY-TAX EXEMPTION FOR CHARITIES: MAPPING THE BATTLEFIELD, *supra* note 2, at 211, 211-32.

18. *See* Unionville-Chadds Ford Sch. Dist. v. Chester County Bd. of Assessment Appeals, 714 A.2d 397 (Pa. 1998) (upholding the exemption of Longwood Gardens); City of Washington v. Bd. of Assessment Appeals, 704 A.2d 120, 122-26 (Pa. 1997) (upholding the exemption of Washington and Jefferson College).

19. *See* Alliance Home of Carlisle, Pa. v. Bd. of Assessment Appeals, 919 A.2d 206, 227 (Pa. 2007); Cmty. Options, Inc. v. Bd. of Prop. Assessment, 813 A.2d 680, 684 (Pa. 2002). Note that in the two cases cited *supra* footnote 18, the commonwealth court had ruled in favor of exemption, and the years at issue predated Act 55.

decision upheld exemption for an independent living apartment facility in a licensed continuing care retirement community that also included a skilled nursing facility and an assisted living facility. More important than the specific holding is the Pennsylvania Supreme Court's observations about the problems that would be raised by a conflict between the state constitution and the statute:

> If the Act 55 presumption and test would lead to a holding that a taxpayer qualified as "an institution of purely public charity," where the *HUP* test would not, fundamental and foundational questions could arise concerning whether: (1) the *HUP* test, which was adopted in the absence of legislation addressing the constitutional term, occupied the constitutional field concerning the exemption, or instead left room for the General Assembly to address the matter; (2) the legislative scheme as adopted comported with the constitutional command and displaced the *HUP* test; and/or (3) if *HUP* were deemed authoritative and comprehensive, whether the legislative findings and scheme set forth in Act 55 gave reason to reconsider the contours of the test thus distilled from judicial experience with individual cases.[20]

Thus, while the commonwealth court seems to suggest that in a conflict between Act 55 and *HUP*, *HUP* wins, the supreme court seems to believe that the legislation should be given greater weight.[21]

By contrast, consider a 2004 ruling by the Illinois Supreme Court involving Eden Retirement Center.[22] The Illinois Constitution permits the legislature to exempt certain types of property from taxation: "The General Assembly by law may exempt from taxation only the property of the State, units of local government and school districts and property used exclusively for agricultural and horticultural societies, and for school, religious, cemetery and charitable purposes."[23] As to the meaning of "charitable purposes," two years before this constitution was adopted, the Illinois Supreme Court had set forth its own multi-factor test for charitable exemption under the constitution then in effect. *Methodist Old Peoples Home v. Korzen*[24] required that: (1) the benefits extend to an indefinite number of persons for their general welfare or in some way reduce the

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20. *Alliance Home*, 919 A.2d at 223. Footnote 9, after this text, begins: "Of course, this Court is not obliged to defer to the legislative judgment concerning the proper interpretation of constitutional terms." *Id.* at 223 n.9.

21. *See* Joseph C. Bright, *State Supreme Court Overturns Ruling on Charitable Exemptions*, STATE TAX NOTES, Apr. 30, 2007, at 320.

22. Eden Ret. Ctr., Inc. v. Dep't of Revenue, 821 N.E.2d 240 (Ill. 2004).

23. ILL. CONST. art. IX, § 6.

24. 233 N.E.2d 537, 541-42 (Ill. 1968).

burdens on government; (2) the organization have no capital, capital stock, or shareholders, and does not profit from the enterprise; (3) funds derive mainly from private and public charity, and are held in trust for the objects and purposes expressed in the organization's charter; (4) charity is dispensed to all who need and apply for it; (5) no obstacles are placed in the way of those seeking the benefits; and (6) the exclusive (i.e., primary) use of the property is for charitable purposes.

In 1984, the Illinois legislature enacted a detailed property-tax statute that granted exemption to specific categories, including "old people's homes" that are tax-exempt under Internal Revenue Code § 501(c)(3) if

> [E]ither: (i) the bylaws of the home or facility or not-for-profit organization provide for a waiver or reduction, based on an individual's ability to pay, of any entrance fee, assignment of assets, or fee for services, or (ii) the home or facility is qualified, built or financed under Section 202 of the National Housing Act of 1959, as amended.[25]

In *Eden Retirement Center*, the lower courts concluded that the home qualified for the charitable-use property-tax exemption based solely on: (1) its exemption from federal income taxes; and (2) its bylaw provision allowing for the reduction or waiver of charges based on residents' inability to pay. The Illinois Supreme Court reversed:

> The appellate court's analysis is erroneous. The *Methodist Old Peoples Home* criteria are not mere nonstatutory "hurdles" intended to apply only to the pre-1984 version of the charitable-use property tax exemption statute. Rather, this court articulated the criteria in *Methodist Old Peoples Home* to resolve the *constitutional* issue of charitable use. The legislature could not declare that property, which satisfied a *statutory* requirement, was *ipso facto* property used exclusively for a tax-exempt purpose specified in section 6 of article IX of the Illinois Constitution. It is for the courts, and not for the legislature, to determine whether property in a particular case is used for a constitutionally specified purpose.[26]

The Illinois Supreme Court did not explain why only the courts, and not the legislature, may put a gloss on the constitutional term "charitable purposes."[27] Unfortunately, the plurality opinion of the Illinois Supreme Court reiterated this position in its March 2010 ruling in *Provena Covenant*

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25. 35 ILL. COMP. STAT. ANN. 200/15-65 (West 2006).

26. *Eden Ret. Ctr., Inc.*, 821 N.E.2d at 250 (internal citations omitted).

27. *See id.*

Medical Center v. Department of Revenue,[28] discussed in Part II.C below. While not citing *Eden Retirement Center, Inc. v. Department of Revenue* as to this issue, the plurality declared: "The legislature cannot add to or broaden the exemptions specified in section 6 [of the Illinois Constitution]," and cited a case that rejected property-tax exemption for the Chicago Bar Association.[29] In that case, the Illinois Supreme Court ruled: "Whether particular property is used 'exclusively for . . . school . . . purposes' within the meaning of the constitution is a matter for the courts, and not the legislature, to ascertain. The legislature cannot, by its enactment, make that a school purpose which is not in fact a school purpose."[30] The two justices in *Provena* who concurred only in the result, disagreed: "The legislature did not set forth a monetary threshold for evaluating charitable use. We may not annex new provisions or add conditions to the language of a statute."[31]

At the very end of its legislative session in May 2009, Minnesota adopted statutory language to address the concerns of the nonprofit sector following a 2007 state supreme court decision denying exemption to a daycare center claiming to be an institution of purely public charity. Under the state constitution, "institutions of purely public charity" are a separate, catchall category rather than an overarching definition—the full list includes: "public burying grounds, public school houses, public hospitals, academies, colleges, universities, all seminaries of learning, all churches, church property, houses of worship, institutions of purely public charity, and public property used exclusively for any public purpose."[32] A 1975 state supreme court decision set forth what has come to be known as the *North Star* six-factor test for classifying an institution of purely public charity.[33]

In the 2007 decision in *Under the Rainbow Child Care Center v. County of Goodhue*, the Minnesota Supreme Court, applying statutory analysis, ruled that the "factor three inquiry"—"the extent to which the

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28. Provena Covenant Med. Ctr. v. Dep't of Revenue, No. 107328, 2010 Ill. LEXIS 289 (Ill. Mar. 18, 2010).

29. *Id.* at *28 (citing Chicago Bar Ass'n v. Dep't of Revenue, 644 N.E.2d 1166, 1171 (Ill. 1994)).

30. *Chicago Bar Ass'n*, 644 N.E.2d at 1171 (internal citations omitted).

31. *Provena*, 2010 Ill. LEXIS 289, at *65 (Burke, J., concurring and dissenting). Justice Burke explained: "Setting a monetary or quantum standard is a complex decision which should be left to our legislature, should it so choose. The plurality has set a quantum of care requirement and monetary requirement without any guidelines. This can only cause confusion, speculation, and uncertainty for everyone: institutions, taxing bodies, and the courts." *Id.* at *70.

32. MINN. CONST. art. X, § 1; *see* MINN. STAT. § 272.02(7) (2009).

33. N. Star Research Inst. v. County of Hennepin, 236 N.W.2d 754, 757 (Minn. 1975).

recipients of the charity are required to pay for the assistance received"—is not merely to be taken into account, but rather "tests for a value that is fundamental to the concept of charity—that is, whether the organization *gives* anything away."[34] The court rejected the argument that it was enough to have charitable purposes: "*If the legislature had intended* all organizations exempt from payment of federal income taxes under I.R.C. § 501(c)(3) also to be exempt from payment of real property taxes, it could have so provided, as it did with regard to state income taxation."[35] The majority commented: "The second broad consequence of the dissent's interpretation of charity would be that a 'charitable' enterprise could charge the same for its services as a for-profit competitor and nevertheless enjoy exemption from property taxation, as long as no profits inured to the benefit of members of the organization."[36] The court cautioned:

> Moreover, it is not sufficient to provide free or reduced-rate goods or services on such a small scale that they are merely an incidental part of the organization's operations. Nor will free or reduced-rate goods or services that are provided primarily for business purposes be adequate. The organization must demonstrate that its intended purpose is to provide a substantial proportion of its goods or services on a charitable basis. If the organization does not operate on these terms, it is indeed not an institution of purely public charity and cannot qualify for tax exemption on that basis.[37]

In 2008 the Minnesota Legislature adopted a moratorium on *Under the Rainbow*, and required the Department of Revenue to analyze the applicable standards for determining the tax status of these organizations, to survey all county assessors on their practices and policies, and to report the findings to the 2009 legislature.[38] The moratorium allowed for months of deliberations among the Minnesota Council of Nonprofits, the Department of Revenue, and the Association of County Assessors. The consensus, adopted by the legislature in May 2009, codifies the definition of an institution of purely public charity, effective beginning in 2010.

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34. Under the Rainbow Child Care Ctr. v. County of Goodhue, 741 N.W.2d 880, 886 (Minn. 2007).

35. *Id.* at 889 (emphasis added).

36. *Id.*

37. *Id.* at 892.

38. The resulting report, MINN. DEP'T OF REVENUE, ASSESSMENT AND CLASSIFICATION REPORT: INSTITUTIONS OF PURELY PUBLIC CHARITY (2009), as well as an executive summary and survey results by county, are available at http://www.taxes.state.mn.us/property_tax_administrators/other_supporting_content/summary.pdf. See Part III for excerpts from the report.

While "not contract[ing] or expand[ing] the definition," Minnesota Statutes section 272.02(7)(a), as amended, requires charities to meet all six judicially created factors for determining tax exempt status, with factors (1), (4), and (6) being mandatory and factors (2), (3), and (5) allowing a "reasonable justification" exception (rejecting the Senate's "compelling factual reason"). See the Appendix for guidance issued March 1, 2010 by the Minnesota Department of Revenue.

B. Intrastate Inconsistency

In 2001 in Illinois, the Attorney General sought to freeze the assets of a white supremacist group, the World Church of the Creator, for failing to register with his office as a charity under the Charitable Solicitations Act.[39] (The Illinois statute does not exempt churches.) The organization succeeded at the trial level in having the statute voided as unconstitutionally vague. On a direct appeal (because a state statute had been ruled unconstitutional), the Illinois Supreme Court upheld the solicitation statute, in part by invoking property-tax exemption precedent:

> In fact, the terms "charity" and "charitable" have a settled meaning in Illinois case law. For example, in *Congregational Sunday School & Publishing Society v. Board of Review*, 290 Ill. 108, 125 N.E. 7 (1919), the appellant's claimed exemption from personal property taxation for religious books and Sunday school supplies was denied .... This court, in construing the statutory term "beneficent and charitable organizations," noted that charity is a gift to be applied for the benefit of an indefinite number of persons, by bringing their "'minds and hearts under the influence of education or religion, ... by assisting them to establish themselves in life ... or by otherwise lessening the burdens of government.'"[40]

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39. People *ex rel.* Ryan v. World Church of the Creator, 760 N.E.2d 953, 955 (Ill. 2001).

40. *See id.* at 960-61 (quoting Congregational Sunday Sch. & Pub. Soc. v. Bd. of Review, 125 N.E. 7, 9 (Ill. 1919)); *see also id.* at 959. As recognized by the court, this commonly cited definition actually traces to *Jackson v. Phillips*; the court quoted an 1893 Illinois Supreme Court decision that stated:

> A charity, in a legal sense, may be more fully defined as a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education, religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government.

The Illinois Supreme Court's opinion in *People ex rel. Ryan v. World Church of the Creator* quoted an appellate decision that had previously construed the solicitation statute:

> "The courts in this State are in accord in applying a broad legal definition of 'charity' to include almost anything that tends to promote the improvement, well[-]doing and well[-]being of social man. Moreover, charitable organizations may include organizations whose primary purpose is *not* to provide money or services for the poor, the needy or other worthy objects of charity, but *to gather and disseminate information about and to advocate positions on matters of public concern.*"[41]

Because of the different policy goals of the two regimes, it is possible, if not likely, that the solicitation statute uses a broader definition than does the tax-exemption statute. Indeed, a nonprofit organization might have income-tax exemption but not property-tax exemption or sales-tax exemption. Reportedly, the World Church of the Creator had applied for sales-tax exemption, but the Illinois Department of Revenue (which also has the final administrative word on property-tax exemption in Illinois) denied it charity status.[42]

It seems that, at least as a starting point, the state revenue agency might consult with the state attorney general about whether a particular organization is a charity. Anecdotally, however, this sort of communication rarely occurs.[43] The reverse, of course, can be true: As discussed below, a charity as such can exist under state law even when the entity is denied (or, perhaps, has not satisfied the administrative requirements for) property-tax exemption.[44] Indeed, some states require the revenue department to notify the state attorney general of loss of exemption.[45]

Crerar v. Williams, 34 N.E. 467, 470 (Ill. 1893) (quoting Jackson v. Phillips, 96 Mass. (14 Allen) 539, 556 (1867)).

41. *World Church of the Creator*, 760 N.E.2d at 961 (quoting People *ex rel.* Hartigan v. Nat'l Anti-Drug Coal., 464 N.E.2d 690, 694 (Ill. App. Ct. 1984)) (citation omitted).

42. *See* Kirsten Scharnberg, *Smith's Legacy of Hate and Fear Six Months After Benjamin Smith's Spree, the Pain He Inflicted Is Far from over*, CHI. TRIB., Jan. 3, 2000, at N1.

43. In response to an informal query forwarded to a network of charity regulators in state attorneys general offices, one responder told me in a February 13, 2009 email: "If the Department of Finance were to do anything like what you are saying, which I doubt, they would most likely not even think that they should contact our office." Another charity regulator emailed me, on the same date: "The County property tax assessors have never contacted me to ask whether a particular charity is really a charity."

44. *See* John W. Vinson, *The Charity Oversight Authority of the Texas Attorney General*, 35 ST. MARY'S L.J. 243, 251 n.48 (2004).

II. Specific Factors and Vulnerable Subsectors

State property-tax regimes require both that the property owner be charitable (generally the subject of Part A) and that the charitable owner use the property for a charitable purpose (generally the subject of Part B). The division between these two requirements is not always clear or useful.

A. Evolving Definition of Charity

Charitable organizations are defined under a common law tradition that traces back to the Statutes of Elizabeth in the late sixteenth and early seventeenth centuries.[46] The term "charity" has been fleshed out over

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> One critical point . . . is that tax exemption authority and precedents may have little application to the question of whether an entity or specific assets are impressed with a charitable obligation. The presumptions, burdens of proof, and underlying policy assumptions in cases involving a purported charity's entitlement to exemptions and other governmental/legal benefits are often quite distinct. To be so entitled, the purported charity must demonstrate not only that it is organized as a charity, but that it actually operates as a charity. *See* N. Alamo Water Supply Corp. v. Willacy County Appraisal Dist., 804 S.W.2d 894, 899 (Tex. 1991) (holding that "exemptions from taxation are not favored by the law and will not be favorably construed"); *see also* Circle C Child Dev. v. Travis Cent. Appraisal Dist., 981 S.W.2d 483, 486 (Tex. App.–Austin 1998, no writ) (announcing that the party seeking a tax exemption has the burden to clearly show the exemption applies). Also, organizations must affirmatively apply for tax-exempt status, whereas common law charity status, and the obligations imposed by law because of such status, will be applied as a matter of law.
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> *Id.*

45. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 8-1.4(o) (Consol. 2009) ("Every officer, agency, board or commission of this state or political subdivisions of this state or agencies thereof receiving applications for exemption from taxation of any trustee subject to this section shall annually file with the attorney general a list of all applications received during the year and shall notify the attorney general of any suspension or revocation of a tax exempt status previously granted.").

46. In one important sense, however, the definition of charity in the Charities Act 2006 of England and Wales might be narrower than the traditional common law definition—depending on how the Charity Commission for England and Wales resolves the debate about "public benefit." The Charity Commission construes Charities Act 2006 to require that "[p]eople in poverty must not be excluded from the opportunity to benefit" from the activities of a charity. CHAR. COMM'N, FOR ENG. AND WALES, CHARITIES AND PUBLIC BENEFIT § F11 (2008), *available at* http://www.charity-commission.gov.uk/Library/guidance/publicbenefittext.pdf. *See generally* CHAR. COMM'N, FOR ENG. AND WALES, NEW PUBLIC BENEFIT GUIDANCE (2008), *available at* http://www.charity-commission.gov.uk

hundreds of years of Anglo-American jurisprudence; the current U.S. common law meaning appears in Restatement (Third) of Trusts sections 28 and 29. Broader than eleemosynary institutions, the common law term encompasses, among other categories of nonprofit organizations, hospitals, universities, religious organizations, and arts and cultural organizations, as well as social service and grant-making organizations.

The reference in some state constitutions to exemption for "institutions of purely public charity" (or some similar phrase) has been interpreted by their state supreme courts as requiring the satisfaction of a multi-factor test.[47] In a few other states, a multi-factor test appears in the statute. These tests create problems for compliance and application, however. The factors are not quantitative and data—such as level of donations—may vary from year to year, raising the possibility of flipping in and out of exemption. Nor do the courts weigh the factors, some of which overlap. Other uncertainties—such as whether the charity's receipt of government support means the charity is not lessening the burdens of government, or whether the presence of for-profit competitors means the charity should charge lower prices—lead different courts to reach different conclusions. Most importantly, the courts generally describe the factors collectively as suggestive, raising the question of whether any one or more factor is mandatory. In 2008, an Illinois appellate court singled out the "gift" factor as a *sine quo non* for charity exemption; the case is on appeal to the state supreme court.[48] In 2009, the Minnesota Legislature identified which factors are mandatory and which factors may be excused upon a reasonable exception.[49]

The courts recognize that the concept of charity evolves over time to take into account the changing needs of society, new discoveries, and the varying conditions, characters, and needs of different communities. The Restatement (Third) of Trusts provides numerous examples of "purposes that are beneficial to the community" that fall into the residual category,

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/news/pblatest.asp; CHAR. COMM'N, FOR ENG. AND WALES, PUBLIC BENEFIT ASSESSMENT RECORDS: INDEPENDENT SCHOOLS (2009), http://www.charity-commission.gov.uk/Charity_requirements_guidance/Charity_essentials/Public_benefit/default.aspx (follow "the public assessment reports" hyperlink for each school listed) (finding that two of the five private schools examined did not provide enough means-tested tuition abatements to allow poor children to benefit from the school's education). All of the reports are available at http://www.charity-commission.gov.uk/Charity_requirements_guidance/Charity_essentials/Public_benefit/default.aspx. See generally Debra Morris's contribution to the NYU conference, "Shades of Virtue: Measuring the Comparative Worthiness of Charities," described in note *, above.

47. *See supra* Part I.A.

48. *See* discussion *infra* Part II.C.

49. *See supra* Part I.A; *see generally* Appendix for details.

including: "[a] trust to prevent or alleviate the suffering of animals"; a trust to promote national security; and "a trust to beautify a city or preserve the beauties of nature or otherwise add to the aesthetic enjoyment of the community."[50] Moreover, charity might include any purpose recognized as having public benefit as may be provided by statute and administrative guidance.

For example, tax exemption for land set aside for conservation is a hot topic under both federal and state-tax policy. At the federal level, the Internal Revenue Code permits a charitable contribution deduction for the perpetual protection of land for enumerated conservation purposes through a grant of a conservation easement to a government entity or charitable organization. For our purposes, consider the concern expressed by a bill introduced in New Jersey, whose legislative findings included the following statement:

> The Legislature further finds and declares that while the dedication of privately-owned open space to public use and enjoyment is a significant governmental interest, there needs to be a balance between the tax incentives granted to encourage that dedication and the burden placed on municipalities that lose that tax revenue; and that no municipality, without its prior consent, shall be required to grant a tax exemption under this act if the land area of the real property for which the exemption would be granted, when combined with the land area already owned in fee simple for recreation and conservation purposes in the municipality by the State, a local government unit, or a qualifying tax exempt nonprofit organization, would exceed [thirty percent] of the total land area of the municipality.[51]

A new frontier might be nonprofit journalism as a means to save the newspaper trade.[52]

All charitable purposes must be viewed in light of the prohibition on private benefit. Thus, commentary to the Third Restatement recognizes that: "The common element of charitable purposes is that they are designed to accomplish objects that are beneficial to the community—i.e., to the

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50. RESTATEMENT (THIRD) OF TRUSTS § 28, cmt. *l* (2001).

51. A.D. 3065, 212th Leg. (N.J. 2006), *available at* www.njleg.state.nj.us/2006/Bills/A3500/3065_I1.pdf.

52. *See generally* MARION FREMONT-SMITH, JOAN SHORENSTEIN CTR. ON THE PRESS, POL. AND PUB. POL'Y, CAN NONPROFITS SAVE JOURNALISM? LEGAL CONSTRAINTS AND OPPORTUNITIES, (2009), *available at* http://www.hks.harvard.edu/presspol/publications/papers/can_nonprofits_save_journalism_fremont-smith.pdf.

public or indefinite members thereof—*without also serving what amount to private trust purposes*."[53]

The particular segment of the public being served by the charity is one aspect of the charity's purpose. Importantly, the requirement of a public benefit does not imply that all members of the general public or of a particular political jurisdiction are necessarily the beneficiaries. Indeed, the use of the terms "public" or "community" is not necessarily geographic.[54] Rather, the charity's founders, and thereafter those governing the charity and its members (if any), determine whether the charity's operations will have a particular geographic scope, or target a segment of the public within that scope. For example, a charity could provide scholarships for any graduate students in philosophy, regardless of where they study, or for philosophy graduate students at a particular institution or from a particular town or state. The U.S. Supreme Court, and several state supreme courts, struck down exemption regimes that limited exemptions only to charities (or their property) serving state residents.[55]

A focus on the definition of charity risks missing the complexity of most state property-tax exemption regimes. "Charity" is often a catchall, while the state constitution provides an explicit—and sometimes more generous or more limited—exemption for certain types of nonprofit organizations. As Woods Bowman and Marion Fremont-Smith found:

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53. RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. a (emphasis added); *see also id.* § 28 cmt. l.

54. In the context of property-tax exemption, however, see the discussion of complex corporate structures and transfers to affiliated nonprofits out of the taxing jurisdiction. John Colombo, *The Provena Tax Exemption Case: The Demise of Community Benefit?*, 55 EXEMPT ORG. TAX REV. 175 (2007).

55. Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564, 586-88 (1997) (ruling that charitable activity is entitled to protection under the Commerce Clause, which prohibits states from discriminating in interstate commerce). As a matter of statutory interpretation, the Vermont Supreme Court rejected the argument of a town that argued "that implicit in the definition of public use is a requirement that the people served must be primarily citizens of Vermont and the Town because the Legislature would have no reason to make property exempt to benefit residents of other states." Inst. of Prof'l Practice, Inc. v. Town of Berlin, 811 A.2d 1238, 1240 (Vt. 2002) (holding exempt a building used for the administration of a charity operating out-of-state group homes, foster homes, and assisted living programs for those with developmental and other disabilities). Compare these decisions with the commentary in the Restatement (Third) of Trusts addressing the scope of the word "public":

> The mere fact that a trust is created for the benefit of members of a community outside the state . . . does not prevent the trust from being charitable. Thus, a trust for the benefit of impoverished residents of another state, or to establish a hospital in a foreign country, is charitable.

RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. l (2001).

> The most common exemptions are, in descending order, with the number of states indicated in parentheses, religious (35, mostly limited to houses of worship), charitable or benevolent (33), educational (33), and cemeteries (27). Nineteen states exempt all four categories. Other exemptions appearing in the constitutions of at least two states are libraries (12), literary and scientific organizations (8), hospitals (4), cultural organizations and museums (4), agricultural and horticultural organizations (3), and patriotic and veterans' organizations (3). . . .
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> With or without a constitutional mandate, every state exempts charitable property, but only eleven states define charity in the tax statutes.[56]

Moreover, many state statutes set forth separate provisions for certain subsectors of charities within those enumerated in the constitution, including, notably, nonprofit health care and fitness facilities (including YMCAs), housing (for low-income, elderly, or disabled populations), daycare facilities, and conservation property. A state that would prefer a more systemic reform of the property-tax treatment of the catchall category of charities might need to pursue a state constitutional amendment.[57] So far, though, charities have succeeded in fighting fundamental change.[58]

B. Rationales for Exempting Charitable Property

The question of why charities are tax-exempt has been framed in general theoretical terms of whether the exemption is, on the one hand, a subsidy or, on the other, an acknowledgment that charitable activity falls outside the proper tax base.[59] Uniquely, exemption for charitable activity has been justified on both subsidy grounds and base-defining grounds.[60]

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56. Woods Bowman & Marion R. Fremont-Smith, *Nonprofits and State and Local Governments*, *in* NONPROFITS AND GOVERNMENT: COLLABORATION AND CONFLICT 181, 203 (Elizabeth T. Boris & C. Eugene Steuerle eds., 2d ed. 2006) (footnote omitted).

57. See proposals for state constitutional amendments in Richard D. Pomp, *The Collision Between Nonprofits and Cities over the Property Tax: Possible Solutions*, *in* PROPERTY-TAX EXEMPTION FOR CHARITIES: MAPPING THE BATTLEFIELD, *supra* note 2, at 383, 383-91.

58. *See, e.g.*, David Salomone, *Property-Tax Exemption for Charities: The Minnesota Experience*, *in* PROPERTY-TAX EXEMPTION FOR CHARITIES: MAPPING THE BATTLEFIELD, *supra* note 2, at 353, 353-59.

59. For historical studies of tax exemption in the United States, see Stephen Diamond, *Efficiency and Benevolence: Philanthropic Tax Exemptions in 19th-Century America*, *in* PROPERTY-TAX EXEMPTION FOR CHARITIES: MAPPING THE BATTLEFIELD, *supra* note 2, at 115; Richard L. Gabbler & John F. Shannon, *The Exemption of Religious, Educational, and Charitable Institutions from Property Tax Exemption*, *in* IV RESEARCH PAPERS SPONSORED

Viewed as subsidies, property-tax exemption and income-tax exemption function quite differently. In contrast to income-tax exemption, property-tax exemption (like sales tax exemption and the charitable contribution deduction) is an input subsidy: The tax treatment makes it cheaper to conduct charitable activity. But exemption as a form of subsidy has some peculiar features—notably, as described below, the property-tax exemption has the most value to the most real-estate-rich charities. Moreover, subsidies delivered through exemptions lack the public finance virtues of visibility and adjustability. While exemptions do have the administrative advantage of providing a subsidy at a minimal transaction cost, this virtue is undercut when municipalities (as they occasionally do) engage in individualized negotiations with charities for payments in lieu of taxes.[61] Interestingly, no court following a quid-pro-quo rationale for exemption has quantified whether the public gain equaled or exceeded the forgone tax revenue.[62]

BY THE COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS 2535 (1977) [hereinafter FILER COMMISSION]; PETER D. HALL, INVENTING THE NONPROFIT SECTOR (1992). Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 J. CORP. L. 585 (1998) supplies a perspective over the standard subsidy and base-defining theories of exemption that she dubbed the "sovereignty view" of the tax treatment of the nonprofit sector. It compares the tax treatment of charities to a clear sovereignty set of examples: the tax treatment of governments. *Id.* at 587-89. Note that the largest percentages of untaxed property belongs to federal, state, and local governments, and states (and their subdivisions) tax neither federal property nor their own property. *Id.* at 599.

60. The most thorough analysis of the very complicated U.S. tax treatment of charities can be found in John Simon, Harvey Dale & Laura Chisolm, *The Federal Tax Treatment of Charitable Organizations*, *in* THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 267 (Walter F. Powell & Richard Steinberg eds., 2d ed. 2006). These authors group a variety of policy goals under four headings that they call the support function (subsidy), the equity function (notably redistribution), the regulatory function (constraints on managerial behavior), and the border-patrol function (that is, between charities and both the business and public sectors). *See id.*

61. *See infra* Part III.B.

62. *See* Walz v. Tax Comm'n of N.Y., 397 U.S. 664, 676 (1970); Regan v. Taxation With Representation of Wash., 461 U.S. 540, 544 (1983). But see *American Ass'n for Lost Children, Inc. v. Westmoreland County Board of Assessment Appeals*, 977 A.2d 595, 601 (Pa. Commw. Ct. 2009) (Jubelirer, J., dissenting), in which the dissent criticized such an interpretation of the exemption statute:

> The majority and trial court engraft an additional component to the factual analysis that is not required by Section 5(f)(2); in particular, what tangible financial impact the Association's efforts have on the government. Section 5(f)(2) contains no references to finances, but looks only at whether the government has a legal duty to do a particular service, and whether the institution also performs that service.

Conditions on tax exemption can be used to induce charities to undertake specific activities or to engage in certain behavior. The subsidy theory places charities in a position subordinate to the state, which can determine the parameters of its burdens. To the extent the state is unhappy with—or simply uninterested in subsidizing—certain activities, the state can fine-tune the property-tax exemption.[63]

Under the narrowest conception of the quid-pro-quo approach, the state bestows exemption because charities lessen the burdens of government. Some states explicitly require that a charity must relieve the burdens of government, either in all cases or as one factor. However, an absolute "lessening the burdens of government"[64] requirement cannot apply to churches engaged in activity constitutionally prohibited to government; some state property-tax exemption statutes carve out a category for churches in order to exclude them from this requirement. Moreover, a literal application of the requirement can lead to preposterous results. Consider the decision of a divided panel of the Pennsylvania Commonwealth Court to deny property-tax exemption to a group devoted to finding missing children, partly on the trial court's finding that "the law does not favor the delegation of governmental police duties to private entities."[65] More important though, such a grounding for the charity exemption reflects an overly cramped view of the role of the Third Sector. At the associational level, a wide variety of charities focus on competing approaches to social problems and need not reflect governmental or even majority perspectives.[66]

The dissent concluded:

> It is unclear to me what type of evidence the majority would deem sufficient to establish that an institution has *financially* relieved the government of a burden. I would suggest that requiring a reviewing body to look at the exact amounts of money that a taxpayer's efforts saved the government is an approach that few, if any, taxpayers will, or can, ever succeed at, particularly if the government's own spending on that duty is negligible to non-existent.

Id. at 601 n.5.

63. *See* Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me., 520 U.S. 564, 598-600 (1997) (Scalia, J., dissenting) (explaining that states have denied exemptions "to organizations that do not provide substantial public benefits" as outlined by state public policy). For example, Maine denied an exemption to a wildlife sanctuary on the grounds that its deer-hunting prohibition conflicted with the state's game management policy. *Id.* at 599.

64. *Id.*

65. *Am. Ass'n for Lost Children, Inc.*, 977 A.2d at 596-99.

66. *See* Evelyn Brody & John Tyler, *How Public Is Private Philanthropy?: Separating Reality from Myth*, PHILANTHROPY ROUNDTABLE, June 2009, at 21 (forthcoming in 85 CHI.-

At the practical level, the activities of the charity need not necessarily be congruent with services currently provided by government. Separately, charities (such as think tanks) that are seen to take controversial positions on social, economic, and cultural issues sometimes attract hostile attention. Worse, a requirement to lessen the burdens of government raises particular difficulties for those charities that rely on government funding for service delivery. Courts ruling in favor of exemption in such cases emphasize the beneficial form of the services the charity provides.[67] In denying exemption to a government-subsidized low-income housing charity, though, the Indiana Tax Court followed what it found to be the majority position of states around the country.[68]

KENT L. REV.) (challenging the view that charitable assets are public assets subject to democratic will).

67. *See* Steven R. Smith, *Government Financing of Nonprofit Activity*, *in* NONPROFITS AND GOVERNMENT: COLLABORATION AND CONFLICT, *supra* note 56, at 219; STEVEN R. SMITH & MICHAEL LIPSKY, NONPROFITS FOR HIRE: THE WELFARE STATE IN THE AGE OF CONTRACTING 4 (1993); *see generally* Lester M. Salamon, *The Marketization of Welfare: Changing Nonprofit and For-Profit Roles in the American Welfare State*, 67 SOC. SERV. REV. 16, 16, 19 (1993) ("As of 1980 . . . over [forty] percent of the funds spent by federal, state, and local governments in the United States for a broad range of human service activities supported service delivery by nonprofit organizations. Almost [twenty] percent went to support for-profit providers.").

68. Jamestown Homes of Mishawaka, Inc. v. St. Joseph County Assessor, 909 N.E.2d 1138, 1142-43 n.10 (Ind. T.C. 2009). The court looked to the following sources for guidance:

> *See, e.g.*, Waterbury First Church Hous., Inc. v. Brown, 170 Conn. 556, 367 A.2d 1386 (Conn. 1976) (non-profit housing corporation that rented apartments to the elderly at below market rates was not a "charitable organization" because it did not achieve its charitable purpose through use of its own charitable funds, but rather from government subsidies); Housing Sw., Inc. v. Washington County, 128 Idaho 335, 913 P.2d 68 ([Idaho] 1996) (non-profit housing corporation's provision of housing to the elderly and disabled at below market rates did not perform a function which might otherwise be an obligation of government because the housing was supported by federal tax dollars and not private donations); P'ship for Affordable Hous. v. Bd. of Review, 550 N.W.2d 161 (Iowa 1996) (low-income housing was not a charitable use of property because owner provided residents with nothing more than housing partly subsidized by the government and did not make concessions for tenants who were unable to pay their rents); Supervisor of Assessments v. Har Sinai W. Corp., 95 Md. App. 631, 622 A.2d 786 (Md. Ct. Spec. App. 1993) (nonprofit corporation's purpose in providing low income housing was not charitable because it did not provide any services other than housing, and subsidies were provided by federal government rather than taxpayer itself); Better Living Serv., Inc.

Property-tax exemption—in contrast to income-tax exemption—typically focuses not only on the charitable character of the property owner, but also on whether the charity uses *the property* for exempt purposes. It is usually not enough that the charity occupies the premises or is overall engaged in exempt activities. Moreover, some courts reject exemption for property used for administration on the ground that only property used for the direct conduct of charitable activity qualifies.[69] One of the more baffling strands of cases relates to nonprofit housing providers that lease units to low-income, elderly, or disabled tenants, or rentals by educational institutions to students (dorms). Obviously, the nonprofit first has to qualify as a charity independent of merely providing housing,[70] but a few courts have denied exemption on the owner's failure to use the property itself—that is, the fact that the property is rented to tenants defeats use by the nonprofit. (In Michigan, the statute requires "occupancy," which a majority of the state supreme court distinguished from "use."[71]) Other courts view

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v. Bolivar County, 587 So.2d 914 (Miss. 1991) (nonprofit corporation operating low cost apartments was not a "charitable society" entitled to exemption when it received all of its income through government subsidies and tenant rents); Pittman v. Sarpy County Bd. of Equalization, 258 Neb. 390, 603 N.W.2d 447 ([Neb.] 1999) (stating that low-income housing is not a charitable use of property). *But see* Banahan v. Presbyterian Hous. Corp., 553 S.W.2d 48 (Ky. 1977) (housing provided to the elderly and handicapped for below market rates by "institutions of purely public charity" was employed for a purely charitable purpose); *In re* Rio Vista Non-Profit Hous. Corp. v. County of Ramsey, 277 N.W.2d 187 (Minn. 1979) (housing for low and moderate income families furthers a charitable objective and lessens the burdens of government).

Id.

69. *See* ARIZ. REV. STAT. ANN. § 42-11107 (2006) ("Property of charitable institutions for the relief of the indigent or afflicted, appurtenant land and their fixtures, equipment and other reasonably required property including property used for the administration of such relief, are exempt from taxation if the institutions and property are not used or held for profit."). *Compare* Lifespan Corp. v. City of Providence, 776 A.2d 1061, 1062 (R.I. 2001) (denying exemption to property in an administrative building used by an "umbrella entity" to provide services to the hospital and entities: "Lifespan's request that we should equate a corporate office computer to a hospital bed should be directed to the Legislature and not to this Court"), *with* Cmty. Health Prof'ls, Inc. v. Levin, 866 N.E.2d 478, 483 (Ohio 2007) (holding that lease was incidental; administration building exempt).

70. *See* Christine G. Solt & Marion R. Fremont-Smith, *An Argument for Charitable Status and Property Tax Exemptions for Nonprofit Assisted Living Facilities*, 2 ST. & LOC. TAX LAW. 65, 80 (1997) ("If a facility merely provides housing, local assessors or the state tax courts are likely to find that the elderly individual leasing the apartment, rather than the charity, occupies the space, thereby requiring taxation of the property.").

71. *See* Liberty Hill Hous. Corp. v. City of Livonia, 746 N.W.2d 282, 291-92 (Mich.

the rental in this context as charitable use by the nonprofit.[72] A specific statute can clarify the result, perhaps with conditions. For example, the very detailed Texas low-income housing exemption statute allows "a taxing unit any part of which is located in a county with a population of at least 1.4 million" to deny the exemption if "the taxing unit cannot afford the loss of ad valorem tax revenue that would result from approving the exemption."[73] More generally, however justified, tax exemption for charities results in lost tax revenue. Estimating the amount of forgone property-tax revenue cannot be achieved with any precision—not only because of the myriad tax rates that apply at the municipal level throughout the country, but also because few jurisdictions bother appraising property excluded from the tax base. Occasionally cities and other municipalities publish estimates of exempt property, although these usually lump in government-owned real estate, which far exceeds nonprofit-owned property.[74] One national study arrived at a rough "order of magnitude" of

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2008). The court explained:

> Petitioner, a nonprofit organization, leased housing to disabled and low-income individuals during the tax years at issue. In question is whether petitioner was entitled to a property-tax exemption for charitable institutions under MCL 211.7*o*(1), which requires that the charitable institution has "occupied" the property. We affirm the Court of Appeals holding that because petitioner did not occupy the property under the unambiguous language of MCL 211.7*o*, it was not entitled to the property-tax exemption. Petitioner did not maintain a regular physical presence on the property, but instead leased the housing on the property for tenants to use for their own personal purposes.

Id. at 284.

72. *See, e.g.*, Mary Ann Morse Healthcare Corp. v. Bd. of Assessors of Framingham, 910 N.E.2d 394, 398 n.7 (Mass. App. Ct. 2009). The court explained:

> Cases dealing with analogous shared possession have held that, in the absence of exclusive possession by tenants, the owner is considered the "occupant." See *M.I.T. Student House, Inc. v. Assessors of Boston*, 350 Mass. 539, 542 (1966) (occupation of cooperative living arrangement home was by corporation rather than those to whom it afforded home). See also *Franklin Square House v. Boston*, 188 Mass. 409, 410-411 (1905) (holding the same for a "home for working girls").

Id.

73. TEX. TAX CODE ANN. § 11.1825(v), (x)(3)(A) (Vernon 2008). The application of this statute was upheld in *Dallas Independent School District v. Outreach Housing Corp./Desoto I, Ltd.*, 251 S.W.3d 152 (Tex. App. 2008). "[T]he 'loss' referred to . . . is loss *as a result of approving an exemption*, not loss of tax revenue when compared to tax revenues collected before a property is improved." 251 S.W.3d at 155. For a discussion of the significance of government-subsidized housing, see also Part II.C.

74. For a targeted study, see the Cook County Board of Commissioners' requested

between eight and thirteen billion dollars nationally for the annual value of property-tax exemption owned by secular charities, plus an additional one-third for real estate owned by churches.[75] Similarly, another study estimated the value of property-tax exemption for charities other than churches at between nine and fifteen billion dollars.[76]

Of course, the effects of property-tax exemption are not spread uniformly. First, the exemption typically does no good to nonprofits that rent their space; in thirty-nine states, the (same) charity must both own and use the property for charitable purposes, while in only eleven states, use suffices.[77] The distribution of real-estate-owning nonprofits tends to cluster in center cities, although in recent years, this problem of the cities has been migrating to the suburbs. A 2006 report published in the Chronicle of Philanthropy estimated that nonprofit property-tax exemptions annually cost New York City $605 million and Boston $258 million.[78] In contrast, the benefits provided by these nonprofits might be enjoyed by a broader population. Only Connecticut, and to a lesser extent, Rhode Island and Maine, require the state to provide partial compensation to municipalities hosting certain types of exempt nonprofits (hospitals and schools in Connecticut and Rhode Island and newer exempt organizations in Maine).[79]

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report estimating the value of property owned by exempt hospitals in Cook County, Illinois. Assuming that the real estate of fifty-four Illinois licensed general not-for-profit hospitals is fully taxable, the Assessor's Office estimated a value of about $4.5 billion (as of January 2006), which amounts to about 0.75% of total property value in Cook County. This translates into about $240 million in tax savings. COOK COUNTY ASSESSOR'S OFFICE, EXEMPT HOSPITALS: VALUATION ESTIMATES AND APPRAISAL METHODOLOGY 2, 11 (2007), www.cookcountyassessor.com/forms/ExemptHospitalValuationEstimates.pdf.

75. Joseph J. Cordes, Marie Gantz & Thomas Pollak, *What Is the Property-Tax Exemption Worth?*, *in* PROPERTY TAX EXEMPTION FOR CHARITIES: MAPPING THE BATTLEFIELD, *supra* note 2, at 81.

76. Bowman & Fremont-Smith, *supra* note 56, at 181, 202.

77. *See* Jaye A. Calhoun, State and Local Tax Issues for Nonprofits and Charitable Organizations, materials presented at a meeting of the American Bar Association, Section of Taxation, State & Local Tax Committee (Washington, D.C., May 5, 2009), at 4, *available at* http://www.mcglinchey.com/doc/2010/SALTCalhoun.pdf.

78. Harvy Lipman, *The Value of a Tax Break & Cities Take Many Approaches to Valuing Tax-Exempt Property*, CHRON. OF PHILANTHROPY, Nov. 23, 2006, at 13. The online article includes a chart captioned "How Much the Nation's Biggest Cities Lose Because Charities Are Exempt from Property Taxes," along with tables of the ten most valuable properties owned by nonprofits in each of the following twenty-three cities: Baltimore, Boston, Charlotte, Columbus, Dallas, Denver, El Paso, Fort Worth, Houston, Jacksonville, Los Angeles, Memphis, Nashville, New York, Philadelphia, Phoenix, Portland, San Diego, San Francisco, San Jose, Seattle, Tucson, and Washington, D.C. *Id.*, *available at* http://philanthropy.com/article/The-Value-of-a-Tax-Break/54882/.

79. Additionally, Wisconsin has provided for payments for exempt-research property in

Politics often results in the passage of legislation favorable to certain types of nonprofits or nonprofit activity.[80] Nevertheless, regardless of the chosen rationale for tax exemption, charities remain vulnerable to tax reforms,[81] although many proposals fade away or, more rarely, are voted down.[82] At the state level, "lawsuits and legislation (enacted or proposed) asserting tighter definitions for exemption reflect a growing divergence of federal and state policies, and a growing acceptance by the states of a quid pro quo rationale for granting exemption."[83]

C. Mandating Redistribution Versus Avoiding Private Benefit

The issue arises from time-to-time with respect to tax-exemption whether any given charitable purpose additionally includes a special obligation to serve the poor.[84] For example, policy makers hear increasing demands for charities—notably the two largest nonprofit subsectors, hospitals and higher education—to provide greater distributional equity to society as a whole. At the federal level, Congress worries not just about current financial pressures on public finance systems, but also whether to reevaluate the role of nonprofit hospitals following national health care reform.[85] Similarly, congressional calls for universities to increase the

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its 2009-2011 budget. *See* Act of June 29, 2009, 2009 Wis. Act 28 sec. 176 (2009).

80. *See, e.g.*, Tax Analysts, *Texas Final SB 2442 Expands Property Tax Exemption for Charitable Organizations*, STATE TAX TODAY, July 30, 2009, *available at* 2009 LEXIS STT 144-26 ("Texas SB 2442 as signed into law provides a property tax exemption for charitable organizations operating radio stations that broadcast public interest programming, and for real property that is owned by a charitable organization and leased to an institution of higher education.").

81. Evelyn Brody, *Charities in Tax Reform: Threats to Subsidies Overt and Covert*, 66 TENN. L. REV. 687, 689 (1999).

82. *See, e.g.*, North Dakota Association of Nonprofit Organizations, Legislative Update (May 7, 2009), http://archive.constantcontact.com/fs062/1102179965161/archive/1102571299154.html (noting that HB 1200, which "would have allowed cities and counties to impose property tax levies on some nonprofits for the cost of fire, law enforcement and emergency services[,] [f]ailed in the House 36-57").

83. Brody, *Quid-Pro-Quo Rationale*, *supra* note 3, at 270. For individual PILOT agreements between various municipalities and their hosted nonprofits, see Part III.

84. *See, e.g.*, John D. Colombo, The Role of Redistribution to the Poor in Federal Tax Exemption for Charities, paper presented at the NCPL conference, "Shades of Virtue: Measuring the Comparative Worthiness of Charities," *supra* note *; Miranda Perry Fleischer, *Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice*, 87 WASH. U. L. REV. 505 (2010).

85. *See* SENATE FINANCE COMMITTEE, FINANCING COMPREHENSIVE HEALTH CARE REFORM: PROPOSED HEALTH SYSTEM SAVINGS AND REVENUE OPTIONS 33-34 (May 20, 2009), *available at* http://finance.senate.gov/sitepages/leg/LEG%202009/051809%20Health%20Care%20Description%20of%20Policy%20Options.pdf.

draws from their endowments in order to reduce tuition effectively would mandate exempt organizations to meet the needs of consumers (i.e., constituents).

As a general matter, Boris Bittker and George Rahdert[86] shifted the exemption analysis from the charity's to the beneficiaries' "ability to pay" taxes'. To the extent a charity serves low-income persons, any tax rate other than zero could be viewed as the wrong rate. However, the few studies of the distributional effects of charity[87] suggest that most charities do not focus their services on the poor. A disjunction between burdens and benefits is particularly salient in the context of property tax, because exemptions are granted at the state level, but taxing jurisdictions can be more strictly bounded than the reach of the services provided by nonprofits (notably, cultural institutions, hospitals, and universities). As Thomas Heller commented: "Since the bulk of charitable property is located in

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> The Committee could consider a policy option that would codify organizational and operational requirements for determining whether a hospital is a charitable organization for purposes of section 501(c)(3) tax-exempt status.
>
> Such requirements include, among other things, that section 501(c)(3) hospitals regularly conduct a community needs analysis, provide a minimum annual level of charitable patient care, not refuse service based on a patient's inability to pay, and follow certain procedures before instituting collection actions against patients.
>
> Certain hospitals that are critical to the communities they serve or which have an independent basis for tax exemption (e.g., as an educational or scientific research organization) are excluded from the minimum charity care requirement. The proposal includes provisions designed to ensure proper reporting and transparency of operations. In addition, the proposal provides for excise taxes, or "intermediate sanctions," designed to encourage compliance with the operational requirements. These intermediate sanctions could be imposed, for example, in situations where revocation of tax-exempt status is viewed as inappropriate.

Id. But see MAX BAUCUS, SENATE FINANCE COMMITTEE CHAIR, FRAMEWORK FOR COMPREHENSIVE HEALTH REFORM 18 (2009), *available at* http://finance.senate.gov/press/Bpress/2009press/prb090909.pdf ("Non-profit Hospitals Requirements. This proposal would establish new requirements applicable to nonprofit hospitals. The requirements would include a periodic community needs assessment.") (typeface altered).

86. Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 314-16 (1976).

87. See the studies collected in WHO BENEFITS FROM THE NONPROFIT SECTOR? (Charles T. Clotfelter ed., 1995).

urban centers, the overpaying group is likely to be relatively poorer than the proper donor class which benefits from charitable activities."[88]

Most visibly, as states become increasingly concerned about the health needs of the uninsured, legislatures, if not courts, are tempted to equate "charity care" with "charity" as a condition of property-tax exemption for nonprofit hospitals.[89] The most recent case arose in Illinois, but ended with an anticlimactic plurality decision that failed to establish precedent—to the distress or relief of observers, depending on their views of judicial authority[90] and the merits of the debate.[91] Provena Covenant Medical Center, a nonprofit hospital in Urbana, appealed from an appellate court decision upholding the ruling of the Department of Revenue that Provena should lose its $1 million a year exemption because it spent less than one percent of revenue on charity care. The Revenue Department's ruling came on the heels of an unnerving legislative proposal by Illinois Attorney General Lisa Madigan that property-tax exemption for a hospital

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88. Thomas C. Heller, *Is the Charitable Exemption from Property Taxation an Easy Case? General Concerns About Legal Economics and Jurisprudence*, *in* ESSAYS ON THE LAW AND ECONOMICS OF LOCAL GOVERNMENTS 183, 211 (Daniel Rubinfeld ed., 1979).

89. Health care reform could alter this metric. *See* Scott Allen & Marcella Bombardieri, *Much Is Given by Hospitals, More Is Asked*, BOSTON GLOBE, May 31, 2009, *available at* 2009 WLNR 10311580 ("[H]ospital spending on free care is declining because of the state's 2006 healthcare reforms. Today, hospitals typically spend about one percent of expenses on free medical care, as measured by the attorney general, half of what they spent before reform made insurance available to many more low-income people."); *see also* Letter from Douglas M. Mancino to Senate Finance Committee, May 26, 2009, at 2, *available at* http ://www.healthcarelawreform.com/uploads/file/Letter%20re%20policy%20options(2).pdf :

> In its September 2008 report, "Nonprofit Hospitals: Variation in Standards and Guidance Limits Comparison of How Hospitals Meet Community Benefit Requirements," (GAO-08-880, September 2008), the Government Accountability Office (GAO) found that as of March 2008 [fifteen] states required that hospitals provide community benefits in order to receive state tax exempt or nonprofit status, although those requirements "vary substantially in scope and detail." GAO Report at page 16. In addition to these [fifteen] states that have specific community benefit requirements for hospitals seeking tax-exempt or nonprofit status, other states impose such requirements on hospitals as a condition of licensing, real property tax exemptions, or by guidance issued by the state's attorney general. GAO Report at page 16, note 44.

Id. See generally Douglas M. Mancino, *The Charity Care Conundrum for Nonprofit Hospitals*, 20 TAX'N OF EXEMPTS 3 (2008).

90. *See supra* Part I.

91. For an analysis, see John Colombo, Provena Covenant*: The [Sort of] Final Chapter*, EXEMPT ORG. TAX REV. (forthcoming May 2010).

should be conditioned on spending at least eight percent of operating costs on charity care.[92]

The appeals court in *Provena* declared: "[b]y holding medical care to be, in and of itself, charity, we effectively would excuse charitable hospitals from their ongoing mission of giving. . . . That holding not only would create a deafening cognitive dissonance, but it would ignore the supreme court's repeated rationale in cases involving charitable hospitals."[93] The appellate court explained:

> Provena quotes *People v. Young Men's Christian Ass'n of Chicago*, 365 Ill. 118, 122, 6 N.E.2d 166, 169 (1936): "'Charity,' in law, is not confined . . . to mere almsgiving." That is true. But it is confined to giving. Charity is a gift, and one can give a gift to a rich person as well as to a poor person, the object being "the improvement and promotion of the happiness of man." For example, out of kindness and benevolence, one could build a water fountain in a park, and rich and poor alike could come and drink. But the designation of "charity" would be problematic if the water fountain were coin-operated. Regardless of whether the recipient of the goods or services is rich or poor or somewhere in between, it is nonsensical to say one has given a gift to that person, or that one has been charitable, by billing that person for the full cost of the goods or services—whether the goods or services be medical or otherwise. For a gift (and, therefore, charity) to occur, something of value must be given for free.[94]

The appellate court upheld, as not clearly erroneous, the determination by the Illinois Department of Revenue that the nonprofit hospital failed to establish that it was charitable where it spent 0.7% of its revenue on charity care. The court examined the record against the "backdrop of familiar facts" on the large number of uninsured Americans, declaring:

> The Director [of the Department of Revenue] could have drawn either of two inferences from that percentage. He could have inferred that in 2002, medical care in Champaign County was so affordable, and the citizenry so prosperous, that there simply was no occasion for Covenant to spend more than 0.7% of its revenues on charity care; a higher percentage would have required Covenant to "manufacture patients in need," as Provena

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92. Provena Covenant Med. Ctr. v. Dep't of Revenue of Ill., No. 107328, 2010 Ill. LEXIS 289, at *7 (Ill. 2010), *aff'g* 894 N.E.2d 452, 481-82 (Ill. App. Ct. 2008).

93. 894 N.E.2d at 465.

94. *Id.* at 467-68 (citation omitted).

> puts it. Alternatively, the Director could have inferred that Covenant did not dispense charity to all who needed it and that Covenant, therefore, was not used "exclusively" for "charitable purposes." The Director chose the latter inference, and we are not left with a definite and firm conviction that he thereby made a mistake.[95]

Note that the court disregarded evidence of community-benefit activities off-site, because property-tax exemption focuses on the use of the premises for which exemption is sought.[96]

Because two of the seven justices recused themselves, the Illinois Supreme Court's decision was rendered by the five remaining justices. While all five agreed that Provena was not entitled to property-tax exemption for the year at issue, the two concurring justices focused on proof problems and dissented from the plurality's asserted charity-care standard.[97] Accordingly, the opinion creates no legal precedent.[98]

Moreover, the plurality made the assertion—which I've never seen before—that the charity factor of "reducing the burdens of government" requires that the government whose burden is reduced must be the same government that would collect revenue if the property were taxable. Specifically, the plurality declared:

> While Illinois law has never required that there be a direct, dollar-for-dollar correlation between the value of the tax exemption and the value of the goods or services provided by the charity, it is a *sine qua non* of charitable status that those seeking a charitable exemption be able to demonstrate that their activities will help alleviate some financial burden incurred by the affected taxing bodies in performing their governmental functions.[99]

The plurality identified the multiple taxing jurisdictions interested in this case: "Champaign County, Champaign County Forest Preserve District, Community College District 505, Unit School District 116, Urbana Corporation, Cunningham Township, Urbana-Champaign Sanitary

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95. *Id.* at 471.

96. *Id.* at 478 ("In this respect, the Illinois standard for exemption from property taxes is different from the more diffuse 'community benefit' standard for exemption from the federal income tax." (citing Rev. Rul. 69-545, 1969-2 C.B. 117-18)); John D. Colombo, *Hospital Property Tax Exemption in Illinois: Exploring the Policy Gaps*, 37 LOY. U. CHI. L.J. 493, 497-98 (2006).

97. *See* discussion *supra* Part I.

98. *See* Colombo, *supra* note 84.

99. *Provena Covenant Med. Ctr.*, 2010 Ill. LEXIS 289, at *37-38. For the Commerce Clause prohibition on limiting exemption to charities that favor in-state residents, see *supra* note 55 and accompanying text.

District, Urbana Park District, Champaign-Urbana Mass Transit District, and Champaign-Urbana Public Health District."[100] The minority opinion disagreed with the plurality's premise:

> Alleviating some burden on government is the reason underlying the tax exemption on properties, not the test for determining eligibility. Despite acknowledging this (slip op. at 19-20), the plurality converts this rationale into a condition of charitable status. I neither agree with this, nor do I believe that Provena Hospitals failed to show it alleviated some burden on government.[101]

Compare a 2008 decision in which the high court of Massachusetts refused to make free care (in any percentage) a sine qua non of charitability:

> To determine whether an organization is charitable, the court weighs a number of nondeterminative factors. These factors include, but are not limited to, whether the organization provides low-cost or free services to those unable to pay; whether it charges fees for its services and how much those fees are; whether it offers its services to a large or "fluid" group of beneficiaries and how large and fluid that group is; whether the organization provides its services to those from all segments of society and from all walks of life; and whether the organization limits its services to those who fulfil certain qualifications and how those limitations help advance the organization's charitable purposes.[102]

Rather, the court looked at how "traditionally charitable" the "purposes and methods" of the applicant are:

> The closer an organization's dominant purposes and methods are to traditionally charitable purposes and methods, the less

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100. *Id.* at *38-39. The opinion noted:

> In reaching this conclusion, we do not mean to suggest that Provena Hospitals' entitlement to a charitable property tax exemption was dependent on its ability to show that its use of the PCMC parcels reduced the burden on each of the affected taxing districts. It was, however, required to demonstrate that its use of the property helped alleviate the financial burdens faced by the county or at least one of the other entities supported by the county's taxpayers.

Id. at *39 n.10.

101. *Id.* at *70-71 (Burke, J., concurring in part and dissenting in part) (citation omitted).

102. New Habitat, Inc. v. Tax Collector of Cambridge, 889 N.E.2d 414, 418-19 (Mass. 2008) (citations omitted).

> significant these factors will be in our determination of the organization's charitable status under G. L. c. 59, § 5, Third. The farther an organization's dominant purposes and methods are from traditionally charitable purposes and methods, the more significant these factors will be.[103]

The court added: "In weighing this factor, we consider whether the organization's charging of fees helps to advance the organization's charitable purpose."

In finding that New Habitat's purpose and methods are traditionally charitable, the court explained:

> New Habitat provides long-term housing for persons with acquired brain injury and provides its residents with personal assistance programs, educational programs, and programs to improve their physical and psychological health. There is also undisputed evidence that New Habitat's residents cannot live independently or care for themselves and that they need twenty-four-hour support each day.[104]

Moreover, while

> New Habitat charges substantial fees for its services, . . . the tax collector does not contend that those fees are unreasonable for the services provided, and the parties agree that all fees and revenue derived from the property are expended solely for the successful operation of the residence. The fees thus help to advance the organization's charitable purpose.[105]

Fundamentally, one can argue that an anti-poverty requirement for exemption has the normative policy backwards: that charity should *complement* not *supplement* government.[106] Because of its ability to raise taxes and to allocate resources across the population as a whole, government has the comparative advantage in redistributing income or benefits in a fair and cost-effective way.[107] At the same time, charities have the comparative advantage of ascertaining local and specialized needs,

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103. *Id.* at 419 (citations omitted). In adopting this approach, the court dropped a "but see" citation to *Under the Rainbow Child Care Center, Inc. v. County of Goodhue*, 741 N.W.2d 880, 887 (Minn. 2007). *New Habitat, Inc.*, 889 N.E.2d at 419; *see also supra* Part I.A.

104. *New Habitat, Inc.*, 889 N.E.2d at 420.

105. *Id.*

106. *See* Brody & Tyler, *supra* note 66, at 22-23.

107. *Compare generally* BURTON A. WEISBROD, THE NONPROFIT ECONOMY (1988) (explaining that the government responds to the median voter and private philanthropy remedies this government failure).

allowing for service delivery that is flexible and compassionate. In upholding property-tax exemption for Longwood Gardens, a world-renowned arboretum and research facility outside Philadelphia, the Pennsylvania Supreme Court echoed the Illinois Appellate Court decision in *Provena* by focusing not on income redistribution, but rather on whether the overall operations provided a gift:

> [A] facility as large and multi-faceted as Longwood is a unique resource that virtually no individual could afford to maintain on his or her own. It is in this regard comparable to a public library, museum, or art gallery. Such institutions have qualified as purely public charities notwithstanding the fact that many, indeed probably most, of their visitors are not incapacitated or poor.[108]

The desire to deny exemption in cases of private benefit sometimes turns on state statutes or judicial decisions prohibiting the charity from operating the property "for profit." After all, property-tax exemption typically does not extend to real estate held simply for investment or for use in an unrelated business.[109] But the line can be hard to draw. Special focus falls on charities that charge clients a fee for their services. The Massachusetts high court recently disavowed the implication from previous cases "that the charging of a substantial fee, in itself, might render an organization not charitable under G. L. c. 59, § 5, Third."[110]

Indeed, the existence of for-profit competitors is generally not alone enough to render property taxable. The Massachusetts decision just

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108. Unionville-Chadds Ford Sch. Dist. v. Chester County Bd. of Assessment Appeals, 714 A.2d 397, 400 (Pa. 1998).

109. Compare this with the federal unrelated business income tax ("UBIT"), which defines a business activity as unrelated to the organization's exempt purpose if its purpose is merely to generate funds that will be used to support exempt activities. *See* I.R.C. § 513(a) (2006). The federal rules are more forgiving, however, because they exclude from the UBIT many forms of investment income. *See id.* § 513(b).

110. *New Habitat, Inc.*, 889 N.E.2d at 421. The court declined to follow "cases [that] can be read to support such a proposition," while noting "that the results in those cases are fully in line with the result reached here and with the principles articulated in this decision." *Id.* The court gave as one example the decision in *Boston Symphony Orchestra, Inc. v. Assessors*, 1 N.E.2d 6 (Mass. 1936), in which

> the court held that an organization was not charitable for purposes of the real estate tax exemption where the organization charged a fee for its concerts. However, the court expressed doubt whether the dominant purpose of the organization was traditionally charitable and reasoned that its concerts may have been geared more to entertain than to educate.

Id. (Not to worry—the Symphony was able to obtain exemption shortly after that decision. Comments of Marion Fremont-Smith at the NCPL conference, "Shades of Virtue: Measuring the Comparative Worthiness of Charities," *supra* note *.)

discussed rejected a test proposed by the tax collector "whereby the charitable status of an organization depends on the wealth of its beneficiaries and the existence of sufficient alternative organizations that can perform the functions of the organization in question," on the ground that such a test "would set an exceedingly difficult standard to apply as it would require the court to delve into the personal finances of individual beneficiaries, determine the existence of comparable alternative organizations, and compare the quality and services of those organizations with the organization in question."[111]

Nevertheless, courts often do consider competition as a factor in the analysis. (Providing high executive compensation can also trigger questions.) While health clubs remain a focus of municipal challenge, hospitals are also vulnerable, even when charity care (as discussed above) is not the issue. Given their visibility in the community—both in terms of property ownership and economic power as employers—hospitals sometimes find that even an explicit statutory mention does not ensure their exemption. Long-term housing gives rise to frequent litigation, particularly retirement housing offered at market rates—after all, elderly individuals must pay property tax on their homes, even if legislatures often give them a homestead-exemption amount.

Decisions relating to retirement, assisted-living, housing for a special-needs population, and low-income housing facilities vary depending on differences in state law. Separately, exemption might be available for clergy housing (parsonages). Depending on the vagaries in a state's property tax scheme, a nonprofit daycare facility might have to rely on the education category of exemption, which would not be available if the daycare service is merely custodial.

Churches usually fall outside the types of charities from which states or municipalities seek to remove exemption or impose PILOTs.[112] This

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111. *New Habitat, Inc.*, 889 N.E.2d at 422-23.

112. As to the practical difficulties of applying constitutional constraints, see the Kentucky Supreme Court decision "'interpret[ing] the meaning of 'occupied' in the strict context of this constitutional provision":

> In keeping with this endeavor, we recognize that churches are unique. For the most part, they are never "occupied" in the conventional sense. A vast majority of properties owned by "institutions of religion" such as churches, mosques, tabernacles, temples, and the like, are used for places of worship at specified times and may remain vacant for substantial periods during the week. We further recognize that adjacent facilities, such as activity buildings, gymnasiums, even shelters, may be owned by religious institutions, but perhaps utilized irregularly on an as needed basis. School buildings owned by religious institutions may, in fact, sit idle for a great deal of time. This would not preclude these

attitude might be based as much on expediency as on constitutional delicacy—churches do not usually have operating income streams like patient revenue or tuition. However, even a proliferation of churches can rankle.[113]

III. Exemption in Practice

A. Administering and Evaluating Property-Tax Exemption Schemes

The apparatus for administering the property tax, and thus exemptions from property tax, vary among the states. Details might appear in a state's administrative code or agency regulations.[114]

However, inconsistencies in application also exist *within* states. For example, the 2008 legislatively mandated survey of Minnesota assessors found a range of responses by county:

> It is clear that many of the guidelines used are "feeling-based" as opposed to "fact-based." Some criteria are possible to verify through documentation: 501(c)(3) statuses, Articles of Incorporation, amount of donations, fees charged, etc. However, some criteria are less obvious in terms of proving: defining "charity," lessening the burden of government, competition in market, etc.
>
> Of the [eighty-five] respondents, [fifty] said that they did require institutions to provide goods or services for free or at below-market prices (representing approximately [fifty-nine percent] of respondents). However, [twelve] counties do not require this practice. Of the remaining respondents, difficulty ascertaining market prices or lack of similar organizations made this question unanswerable. Other counties said that, while this is a factor that is regarded, it is not the sole determining factor used

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> buildings from being "occupied" under [s]ection 170 of Kentucky's Constitution. It is precisely for these reasons that we find that the trial court's findings were supported substantially by the evidence in this case as to the property not being rented out as residences.

Freeman v. St. Andrew Orthodox Church, Inc., 294 S.W.3d 425, 429 (Ky. 2009); *see* discussion *supra* Part III.B.

113. *See* Lianne Hart, *Churches Putting Town Out of Business: Stafford, Texas, Has 51 Tax-Exempt Religious Institutions and Wants No More: "Somebody's Got to Pay for Police, Fire and Schools,"* L.A. TIMES, July 31, 2006, at A13; *see also supra* Part III.A.

114. *See, e.g.*, PROP. TAX DIV., UTAH STATE TAX COMMISSION PROPERTY TAX EXEMPTIONS: STANDARDS OF PRACTICE 2 (June 2007), *available at* http://propertytax.utah.gov/standards/standard02.pdf. Specific criteria for hospitals, nursing homes, and other health-care related organizations appear in Appendix 2D. *Id.* at 2-36.

> in whether or not an exemption is granted. The determination of "market rates" was discussed as a problem by members of the nonprofit community as well.[115]

Moreover, counties variously answered yes, no, or maybe (as well as "?" or left blank) to two questions: "Do you treat government payments for goods or services as donations?" and "Do you treat government grants as donations?"[116]

For another example of differences in application within a state, charities can claim exemption in New York not only for property used for their charitable purposes, but also for unimproved real estate that is "in good faith contemplated" to be used for charitable purposes.[117] A recent news story provides an example of the back and forth that can occur between assessors and the reviewing body:

> The cursory nature of the forms and the potential for fraud prompted the city of Rochester last fall to begin scrutinizing the 1,095 tax-exempt properties owned by nonprofits, including churches.
>
> Appraisers have examined 306 of the properties to date and revoked [fourteen] exemptions worth nearly $3 million in assessed value. Only $1.3 million of that is taxable today because the Board of Assessment Review reinstated some exemptions or property owners sold to other nonprofits.[118]

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115. MINN. DEP'T OF REVENUE, *supra* note 38, at 9. Of eighty-seven counties, eighty-four (and the city of Minneapolis) returned the survey. *Id.* at 7.

116. *Id.* at 17-147.

117. *See infra* Appendix. The high court of New York describes the squishiness of this test in *Legion of Christ, Inc. v. Town of Mt. Pleasant*, 806 N.E.2d 973, 977 (N.Y. 2004):

> The inquiry necessarily is fact-specific. Moreover, each taxable year is distinct and separate for purposes of RPTL 420-a (3)(a) exemption eligibility. With each application for renewal, the boundaries of good faith take on new dimensions. As years pass, the taxpayer may reasonably be required to show some concrete act toward developing or otherwise improving the property to carry out the tax exempt purpose. Property must not be allowed to lie idle indefinitely at the expense of the locality and its citizens. This "landbanking" has the effect of diminishing the tax base of a locality and increasing the tax burden for schools and other municipal operations.

118. David Andreatta, *Religious Groups Have Wide Latitude for Property Tax Breaks*, ROCHESTER DEMOCRAT AND CHRON., Aug. 23, 2009, *available at* http://rocnow.com/article/local-news/2009908230329.

As a threshold matter to appealing an adverse ruling, a would-be exempt charity usually must pay the tax and sue for a refund: "there are countless tax-exempt groups which do not have the resources to pay a hefty property tax bill, not to mention the funds for a lengthy court battle against a municipality."[119]

Of paramount practical importance is the burden of proof, which is essentially a positive versus a negative requirement regarding public benefit. Even though the putative exempt organization has the burden under both the federal and state tax systems, it is harder for a charity to demonstrate existence of specific requirements for public benefit (as under some state law systems) than generally to show a charitable purpose (public benefit assumed). Compare this to the removal of a presumption of public benefit for charities of all types—reportedly aimed at private schools—in the Charities Act 2006 of England and Wales, mentioned above.

While a nonprofit usually need not apply for exemption every year, state requirements vary on how often the nonprofit must renew its exemption. In the *Provena* case in Illinois, for example, the hospital had to reapply for exemption after a change in ownership, at which time the county board of review scrutinized the level of charity care the hospital provided.[120] Moreover, each tax year stands on its own. In many of the cases described above and in the Appendix, the court emphasized that the charity failed to meet its burden for the year at issue. Presumably, the now-instructed applicant will cure the defects in the record for future years.

Some jurisdictions have undertaken studies to assess and quantify the impact of exempt property.[121] In one statewide study, Pennsylvania issued a detailed report in May 2009 on: (1) the value of tax-exempt property in individual municipalities by property type ("federal, state, or local governments; government designated instrumentalities; churches; hospitals;

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119. Glen Fries, *To Tax, or Not to Tax?* Elder Trust v. Town of Epsom *Answers the Question*, N.H. BAR J., Summer 2007, at 14, *available at* www.nhbar.org/publications/archives/display-journal-issue.asp?id=368.

120. Debra Pressey, *Arguments on Provena's Tax Case in High Court Begin*, THE NEWS-GAZETTE (Urbana/Champaign), Sept. 24, 2009, *available at* http://www.new-gazette.com/news/health-care/2009-09-24/arguments-provenas-tax-case-high-court-begin.html.

> The Provena tax case originated with a 2003 decision by the local board of review after it came to light that a change of ownership for the long tax-exempt Catholic hospital required a new application for a tax exemption. The board of review took a look at how much charity care Covenant offered needy patients during the 2002 tax year and deemed it insufficient to warrant an exemption.

Id.

121. *See* discussion of PILOTs *infra* Part III.B.

private colleges and universities; parks and recreations; museums; and other federal 501(c)(3) entities holding tax-exempt real property"); (2) PILOTs, SILOTs, and other taxes, fees, and grants provided to individual municipalities by tax-exempt property owners, including governments and government affiliates; (3) the "effect of a disproportionate share of tax-exempt properties on the fiscal health of the Commonwealth's municipalities"; (4) Pennsylvania programs addressing the disproportionate impact of tax-exempt real properties on local government; and (5) "[a]pproaches taken by the federal government and other states to address the disproportionate impact of exempt real property on municipal government and their options for replication in the Commonwealth."[122] Portions of the study "capture the value of nonprofit services to their local communities" and "underscore the importance of nonprofit collaboration with the legislature and with each other."[123] The report found, among other things:

1. Governments and religious organizations are the major holders of tax-exempt property;
2. Relatively few Pennsylvania municipalities host non-profit acute-care hospitals and public and private universities;
3. Of the Pennsylvania municipalities that host non-profit acute-care hospitals and public and private higher education institutions, only about twenty-five percent have high fiscal distress scores;
4. Host municipalities, hospitals and public and private colleges and universities have developed a variety of approaches to strengthen their community and, in the words of the state-owned universities' governing board, "minimize, to the extent practicable, the burden of municipal services provided to the university"; and
5. While many hospitals and universities, including those with thin operating margins, seek to assist their municipalities, some are better positioned financially than others.

A bitter dispute over exemption for low-income rental housing in Madison, Wisconsin illustrates the complexities and indeterminacy of

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122. LEGISLATIVE BUDGET AND FIN. COMM.: A JOINT COMM. OF THE PA. GEN. ASSEMBLY, TAX-EXEMPT PROPERTY AND MUNICIPAL FISCAL STATUS 1 (2009), *available at* http://lbfc.legis.state.pa.us/reports/2009/26.PDF [hereinafter PENNSYLVANIA LEGISLATIVE BUDGET & FINANCIAL COMMITTEE].

123. Pano.org, State Releases Report on Impact of Property Tax Exemptions on Municipalities LB&FC Report (Apr. 1, 2009), http://www.pano.org/publicpolicy/publicpolicy-state_taxation.php.

administering a property-tax regime. Madison had prevailed in court in 2008 with its argument:

> [T]hat to qualify for a property tax exemption, nonprofits can only use rental income for maintenance or construction debt. Housing providers say they use rent income for all sorts of management costs and that they cannot afford to pay property taxes. Some say they might have to close their doors if forced to pay—putting hundreds of low-income people out on the streets.[124]

A majority of the city council wanted to grant a two-month grace period for collecting taxes from several organizations that filed appeals, rejecting the advice of the city attorney who asserted that the city lacked discretion to forbear collecting tax.[125] The local newspaper quoted one council member: "[City Attorney] Mike May looked very upset the other night. But I simply don't agree. I'm the policymaker, I'm not the attorney. I have to do the best for the people of the city of Madison, and I think I did."[126] The issue was resolved in favor of exemption in the 2009-2010 budget legislation.[127]

B. Exemption Work-Arounds: User Fees and PILOTs

As the current recession grinds on, municipalities and their educational institutions and other nonprofit organizations increasingly find themselves cast as misunderstood fiscal opponents. The barrage of news stories attests to the degree that tax-exempt real estate can rankle in times when home values are falling, jobs are in jeopardy or hard to find, and pressure for municipal services grows while governments adopt deep cuts to meet shrinking budgets.

Even in good times, the picture is not a simple one of the taxed versus the tax-exempt. Charities are not exempt from user fees for specific services (such as water, sewage, and trash collection) or from special assessments that relate to improvements that benefit specific property.

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124. Joe Tarr, *Low-Income Property Tax Issue Spurs 'Tent City' Protest at Capitol*, ISTHMUS-THE DAILY PAGE (Madison, Wis.), May 12, 2009, http://www.thedaily page.com/daily/article.php?article=25869.

125. Joe Tarr, *Alders Clash with Madison City Attorney over Property Tax Exemption*, ISTHMUS-THE DAILY PAGE (Madison, Wis.), April 30, 2009, http://www.thedailypage. com/daily/article.php?article=25760.

126. *Id.* For discussion of the "rent use restriction" and the political process, see Posting of Kristiin Czubkowski to Madison.com, http://host.madison.com/news/local/govt_and_ politics/city_hall/article_dade90d0-730c-5472-8647-7ea75ce1cf77.html (Apr. 29, 2009, 12:00 EST).

127. *See* Wisconsin Nonprofits Association, *supra* note 6.

Census Bureau data show that only thirty percent of municipalities' revenue is attributable to property tax, while forty percent comes from user fees (the rest is redistributed from the federal and state levels).[128] However, specific charges cannot recoup the general portion of the forgone tax, notably the amount paid for public schools. Nor can taxes legitimately be disguised as fees to cover the costs of imposing essential services such as police and fire protection. The Nelson A. Rockefeller Institute reported in January 2010[129] that property taxes "tend to be relatively stable" and indeed rose by 3.3% in the third quarter of 2009. But this is because property-tax rates are calculated after the jurisdiction determines the value of taxable property—in order to hit a target. Thus, unless the jurisdiction operates under a tax-rate cap—like Proposition 2-1/2 in Massachusetts—only political considerations prevent a town from increasing the rate on taxable property to meet a revenue target. Of course, when property values fall, this means higher rates for those paying tax. What can a revenue-hungry municipality burdened by significant exempt property do?

A few states explicitly authorize or encourage municipalities and exempt charities to enter into "voluntary" PILOT agreements.[130] But the

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128. Penelope Lemov, *Full Interviews with User-Fee Experts*, GOVERNING, May 1, 2009, *available at* www.governing.com/article/full-interviews-user-fee-experts (Mike Pagano, Dean of Urban Planning and Public Affairs at the University of Illinois, Chicago, and a long-time consultant to the National League of Cities on local revenues was quoted: "If you look at municipal revenues, the largest own-source revenue is no longer the property tax. Today, [forty] percent of own-source revenue comes from fees, [thirty] percent from property taxes."). The third category of local-government revenue is made up of intergovernmental (federal and state) transfers. *See* U.S. CENSUS BUREAU, 4 COMPENDIUM OF GOVERNMENT FINANCES: 2002: 2002 CENSUS OF GOVERNMENTS 168, Tbl.48 (2005), *available at* http://www.census.gov/prod/2005pubs/gc024x5.pdf; *see also* FEDERATION OF TAX ADMINISTRATORS, 2007 STATE & LOCAL OWN SOURCE REVENUE (reporting Census Bureau data that local own-source revenue represents 44.8% of total local revenue), http://www.taxadmin.org/fta/rate/slshare.html (last visited Apr. 15, 2010). *Contra* Tax Policy Center, Urban Institute & Brookings Institution, Local Property Taxes as a Percentage of Local Tax Revenue, http://www.taxpolicycenter.org/taxfacts/displayafact.cfm?Docid=518 (last visited Apr. 15, 2010) (reporting that U.S. Census Bureau data found that nationwide property tax represents 71.1% of local government revenue).

129. Lucy Dadayan & Donald J. Boyd, *Recession or No Recession, State Tax Revenues Remain Negative*, ROCKEFELLER INST., Jan. 2010, http://www.rockinst.org/pdf/government_finance/state_revenue_report/2010-01-07-SRR_78.pdf.

130. *See, e.g.*, Institutions of Purely Public Charities Act, Act No. 1997-55, 10 P.S. § 371 et seq. The legislative intent for which included the following declaration:

> It is the intent of this act to encourage financially secure institutions of purely public charity to enter into voluntary agreements or maintain existing or continuing agreements for the purpose of defraying some of the cost of various local

practice is found in many states, albeit with variation within the state. Some arrangements include SILOTs, a term that covers a variety of in-kind transactions. Unfortunately, the data that exist on PILOTs and SILOTs are not systematic or comparable,[131] but apparently a growing number of charities find themselves in this shadowy realm.

The dollar amounts that can be raised by even a modest PILOT program can add up. A January 2009 report by the City of Boston explained:

> The City of Boston began collecting Payment-in-Lieu-of-Tax ("PILOT") contributions from tax-exempt institutions many years ago in an attempt to relieve the strain on residential and commercial taxpayers by diversifying the City's revenue stream. In Fiscal Year 2008, [forty-three] tax-exempt organizations made PILOT contributions totaling $31.1 million [$15.6 million of which came from Massport]. Of that amount, educational and medical institutions contributed $12.7 million. For Fiscal Year 2009, it is estimated that education and medical institutions will contribute $14.5 million.
>
> Tax-exempt institutions are not required by law to make annual PILOT contributions to the City of Boston. These institutions enter into PILOT agreements with the City on a

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> government services. Payments made under such agreements shall be deemed to be in compliance with any fiduciary obligation pertaining to such institutions of purely public charity, its officers or directors.

Id. at § 372(a)(7); see also New Hampshire's authorization of "voluntary" PILOTs, set forth in the Appendix.

131. The Springfield study laments:

> No statistics are kept nationally on the number of PILOTs in local jurisdictions, or on the amounts collected. There are occasional regional studies conducted on the subject, but surprisingly no national municipal or state organizations (International City Managers Association, Government Finance Officers Association, U.S. Conference of Mayors, National League of State Legislators, etc.) or academic institution or association collects the information on a regular basis. However, there is ample evidence that some jurisdictions have been more aggressive in soliciting PILOTs from local nonprofit organizations over the past [twenty] years—particularly as the fiscal plight of many urban communities has worsened.

J.F. RYAN ASSOCIATES, INC., SPRINGFIELD FINANCIAL CONTROL BOARD PROJECT PLAN: ESTABLISHMENT OF A PAYMENT IN LIEU OF TAX (PILOT) PROGRAM 2 (2005), *available at* http://www.mass.gov/Asfcb/docs/PILOTProjectPlan.pdf (last visited Apr. 15, 2010).

> voluntary basis. In so doing, the institutions provide the City with funds to help offset a portion of the cost of providing essential City services to the institutions. PILOT payments are an important measure of civic engagement, but they represent just one category of benefits that colleges and hospitals provide to the City. Many institutions also provide other services and contributions, such as scholarships for Boston Public School students and low-cost medical care, which can directly benefit Boston residents.[132]

PILOTs and SILOTs represent a compromise between the parties using what leverage they have available and negotiating in light of the hazards of litigation.[133] As in any negotiation, either party could be making the concession: in some cases, PILOTs represent an erosion of statutory tax exemption; in other cases, they forestall the imposition of tax, and so are synonymous with giveaways. Municipalities often find their hand to be strongest when a university or other nonprofit is expanding and needs a zoning waiver or other approval, and the agreement might apply only to property being taken off the taxable rolls. The town has to be careful, though, since it cannot use the threat of disapproval to extract PILOTs on account of property entitled to exemption.[134] The case studies from 2009 in the Conclusion illustrate the limits on the legal authority—and thus negotiating leverage—of municipalities and other local taxing jurisdictions. In the battles fought in this realm, it is sometimes difficult to agree even on rhetoric: charity partisans characterize PILOTs as "extortion," while municipality supporters label them "contributions."[135]

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132. CITY OF BOSTON ASSESSING DEPARTMENT, EXEMPT PROPERTY ANALYSIS: EDUCATIONAL AND MEDICAL INSTITUTIONS 6 (Fiscal Year 2009), *available at* http://www.cityofboston.gov/TridionImages/ExemptRPT_09_WEB_tcm1-3932.pdf.

133. *See* David L. Sjoquist, *A Public-Choice Approach to Explaining Exemptions and PILOTs*, *in* PROPERTY-TAX EXEMPTION FOR CHARITIES: MAPPING THE BATTLEFIELD, *supra* note 2, at 361-67.

134. *See, e.g.*, Hosp. Council of W. Pa. v. City of Pittsburgh, 949 F.2d 83, 85 (3d Cir. 1991) (granting standing to the plaintiff Council—"a Pennsylvania nonprofit corporation which functions as a membership organization that represents, assists and speaks for its members in matters where joint action is appropriate"—to pursue a complaint alleging "that the defendant governmental units had attempted and were attempting to 'coerce' or 'force' tax-exempt member hospitals to make payments in lieu of taxes by 'indicat[ing] that those [hospitals] which [did] not agree to such payments and/or agreements "in lieu of taxes" [would] have their tax exempt status challenged, [would] be likely to run into difficulties in obtaining zoning approvals, and [would] not be offered the opportunity to provide services to the taxing authority.'") (alteration in the original).

135. *See generally* PROPERTY-TAX EXEMPTION FOR CHARITIES: MAPPING THE BATTLEFIELD, *supra* note 2, especially the Introduction and the chapters by Pam Leland, Joan Youngman, David Glancey, and Janne Gallagher.

The lack of consistency and transparency in PILOT programs results in uncomfortably ad hoc public-finance regimes. A 2005 Springfield (Mass.) study[136] found "that virtually every successful PILOT program focuses exclusively on only the large, private, tax exempt institutions—primarily hospitals and universities. Churches, social service agencies, social clubs, etc. are generally excluded from these efforts due to social and political opposition."[137] Complicating matters, that report observes:

> Operationally, PILOT programs are not necessarily the typical function of one municipal department. The highly successful Boston program is managed by the Assessor's Office, but requires a great deal of interdepartmental cooperation among several departments. For instance the Inspectional Services Department and the Boston Redevelopment Authority work closely with the Assessor's Office to notify them when an exempt institution intends to remodel or expand. The Law Department typically drafts the formal agreements; the Fire and Police Departments track and provides [sic] information on direct service calls to exempt institutions; the Budget Office provides the data on the costs of services; the Press Office assists with the public relations; and on occasion the Mayor's Office lends its authority. However, one office in the City, the Assessor's Office coordinates, manages and ultimately is responsible for effective implementation of the PILOT program.[138]

Some cities have adopted a variety of town-gown economic development and strategic collaborations—for example, Worcester, Massachusetts's now-disbanded "UniverCity Partnership" (2004-2008) was established following a proposal for a PILOT program.

Separately, tuition proposals were beaten back everywhere in the country they were proposed[139] but remain attractive to revenue-hungry college towns and cities. A proposal by the mayor of Montclair, New Jersey, in December 2009 asking for state legislation allowing towns to impose municipal-service fees—generally, one-hundred dollars annually for full-time students, fifty dollars for part-timers—was supported by almost one-hundred mayors attending the New Jersey League of Municipalities annual convention.[140] A January 2, 2010 editorial in the

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136. *See* J.F. RYAN ASSOCIATES, INC., *supra* note 131.

137. *Id.* at 4.

138. *Id.* at 9.

139. See the Conclusion for discussion of Providence and Pittsburgh.

140. Richard Khavkine, *S. Orange Aims to Collect Cash from Students,* STAR-LEDGER (Newark, N.J.), Dec. 16, 2009, http://www.nj.com/news/ledger/essex/index.ssf?/base/news-

Star-Ledger opposing the proposal reported that on December 21, "South Orange's village council approved its own nonbinding resolution to institute a student fee."[141]

Generally, local governments depend on state legislation for authority to impose not just taxes, as described above, but also charges that look like taxes. The fact that the state grants an exemption makes it fair that states should shoulder some responsibility for the uneven adverse effects of the property-tax exemptions they create. The Pennsylvania report described in Part III.A, above, concludes by analyzing several proposals, including amending Act 55 to require—not just encourage—nonprofits to pay PILOTs. In considering a state-paid PILOT for nonprofit property (along the Connecticut/Rhode Island model), the report observes:

> [A] challenge to successful implementation of such an approach is the absence of standard county assessment data systems. . . . Alternatively, some standard distribution unit could be developed, as occurs with the distribution of earmarked revenues for local municipal pension funds, with units assigned based on the number, size, and type of institutions (e.g., one unit for a small non-profit hospital, two units for a mid-size university, etc.), possibly weighted by other factors such as percent of the municipality living in poverty.[142]

In addition, many municipalities complain that their resident educational institutions and other nonprofits serve out-of-town residents—while leaving behind that much less taxable real estate to support city services. In a model for other states, Connecticut (and to a lesser extent Rhode Island) makes PILOTs to those of its municipalities that host nonprofit hospitals and universities. Under a statute dating back to the 1970s, Connecticut pays municipalities up to seventy-seven percent of the taxes they lose because of exempt property owned by nonprofit hospitals and educational institutions.[143] These state payments are funded by

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6/1260936907128440.xml&coll=1.

141. Editorial, *Local Taxes on Colleges Would Burden Students*, STAR-LEDGER (Newark, N.J.), Jan. 2, 2010, http://blog.nj.com/njv_editorial_page/2010/01/local_taxes_on_colleges_would.html.

142. PENNSLYVANIA LEGISLATIVE BUDGET & FINANCIAL COMMITTEE, *supra* note 122, at S-11.

143. CONN. GEN. STAT. ANN. § 12-20a (West 2008). *But cf.* Town of Stonington v. State of Connecticut, CV064006164, 2009 Conn. Super. LEXIS 2291, at *2 (Conn. Super. Ct. July 2, 2009) (upholding decision of the Office of Policy & Management to deny payments on account of real estate leased indefinitely to Williams College but owned by the Mystic Seaport Museum, which is not a "private nonprofit institution of higher learning" as defined in the statute).

appropriation, however, and the percentage has been declining. The payments made in September 2009 represented 45.7% of lost taxes—but still came to more than $115 million.[144] Connecticut paid $37 million to New Haven alone, in addition to PILOTs and SILOTs that Yale provides.

Charities commonly complain—justifiably—that most exempt property is government owned (including parks and streets). But whether it makes sense for higher levels of government to make PILOTs to municipalities for their real estate, nonprofits are not off the hook. Indeed, if the state makes PILOTs for the public university, why shouldn't the private schools compensate their host towns? If the state does not make PILOTs for its property, this could be viewed as an illustration of the state not requiring payments to itself.

Separately, a charity occasionally declares that its donors did not make gifts so that it could make payments in lieu of taxes.[145] As a legal matter, though, a charity generally has the power to make a contribution to the community in which it operates—as, indeed, businesses can be good corporate citizens.[146] Except perhaps in the case of a charity with an extremely narrow charitable purpose all of whose funding is dedicated to that purpose, charities that enjoy property-tax exemption cannot properly

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144. Telephone interview with Paul LaBella, Intergovernmental Policy Division, Conn. Office of Policy & Mgmt. (Jan. 11, 2010). Data for 2007 and 2008 are available at CONN. OFFICE OF POLICY & MGMT., INTERGOVERNMENTAL POLICY DIV., COLLEGES (PRIVATE) AND GENERAL/FREE STANDING CHRONIC DISEASE HOSPITALS–PAYMENT IN LIEU OF TAXES, http://www.ct.gov/opm/cwp/view.asp?a=2985&q=383134 (last visited Apr. 15, 2010).

145. *See, e.g.*, Press Release, Ruth J. Simmons, President of Brown University, The Success of Colleges and Universities Is Crucial to R.I. Cities and Towns (Mar. 7, 2003), *available at* http://brown.edu/Administration/News_Bureau/2002-03/02-086.html.

> Our donors, whether individuals, corporations or foundations, know their philanthropy will be used entirely for the academic and scholarly activities they wish to support. In fact, Brown's endowment is rightly understood as an historical record of donor intentions, which are stringently protected by Rhode Island law. If a donor has provided specific endowment funding for a lecture series, it would be a breach of faith to use it for another purpose. More than three-quarters of Brown's endowment is restricted as to purpose.

Id. Shortly thereafter, Brown made a slightly different argument: "Ruth J. Simmons, Brown president, said it would be 'wrongheaded' to tax a nonprofit institution such as Brown, which would be forced to raise tuition, already at $29,200 a year." Gina Macris, *Graphic Improvements at Hope*, PROVIDENCE J.-BULL., Mar. 12, 2003, at B1. Within three months, Brown joined with five other Providence area institutions in entering into a PILOT agreement with the city. Scott MacKay, *Colleges to Pay Millions to City*, PROVIDENCE J.-BULL., June 6, 2003, at A1. See case study in the Conclusion below.

146. *Cf.* PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01, cmt. *i* (Am. L. Inst. 1994).

refuse to make PILOTs solely on the argument that such payments would conflict with their charitable purposes.

On the other hand, charities argue that viewing nonprofits as "tax exempt" fails to recognize the many financial contributions they make to the economy, including through tax payments. Not only do they pay the employers' share of payroll taxes, but everyone they deal with—employees and suppliers of goods and services—pays taxes on what they earn. But nonprofits might find touting their economic power to be a risky strategy. After all, if—as is often true—the nonprofit sector is the healthiest in the community, why should those that own real estate be subsidized by the less-well-off?

Colleges and universities also need to worry about the difficulties that property-tax exemption raises in mixed industries. Notably, we find for-profit, nonprofit, and public hospitals. As described above, low-income and assisted housing, administrative facilities, ancillary facilities such as parking structures, "commercial" property, and even large endowments and "high salaries" are pressure points.

Certain charities have a strong argument about unfairness. While the eds and meds garner much of the focus of revenue-starved and geographically bounded municipalities, focusing just on a subsector raises troubling questions. If the property tax is a "benefits tax"—that is, it reflects services provided to the property—then why shouldn't churches, cultural institutions, and even social-service agencies also make PILOTs? Remember that we're talking about nonprofits that own their real estate—the landlord of a social-service-agency tenant already pays tax. Separately, municipalities commonly use tax abatements to lure and keep for-profit businesses, which create jobs and stabilize communities.

Finally, PILOTs—and perhaps even more so SILOTs—raise the potential for "pay to play" or special treatment. Is that agreement to grant scholarships to the children of municipal employees made in return for a zoning waiver?

The lesson of the property-tax exemption for educational institutions and other nonprofits is that all real estate is local—and therefore political. Even if a college or university is only one of many nonprofits in the municipality, the larger the nonprofit exempt footprint, the greater the pressure will be on the ones which look like they have the financial wherewithal to pay.

CONCLUSION: A TALE OF THREE CITIES

To get a sense of how statehouses and municipalities are approaching these issues, this Article concludes with a brief case study of the recent (indeed, ongoing) wrangling taking place in Boston, Providence, and Pittsburgh.

Boston

In January 2009, the mayor of Boston appointed a PILOT task force, charged with reviewing the current PILOT system, as well as the institutions' community benefits, and to recommend ways to standardize the level of contributions and strengthen the partnership between Boston and its tax-exempt institutions, particularly educational and medical nonprofits.[147] It might seem surprising that the municipality with the oldest (since 1925) and most systematic program for collecting PILOTs is back at the drawing board. However, Boston found a wide variety of responses by specific institutions to the city's request for twenty-five percent of the amount a non-exempt property owner would pay—a level calculated to cover the cost of providing the institutions with essential city services such as police, fire, and snow removal.

Needless to say, moreover, these amounts were all below—often far below—the city's desired level. To use everyone's favorite example, Harvard University's real estate in Boston, according to a 2009 city report, is worth nearly $1.5 billion; if the property were taxable, Harvard would pay $40 million a year, compared with the $2 million it makes in PILOTs.[148] "Eds and meds" collectively contributed an estimated $14.5 million for fiscal year 2009—not counting significant SILOTs. In September 2009, the task force published a detailed interim report.[149] If negotiations do not produce satisfactory results, the task force will consider recommending legislative changes.

Separately, one member of Boston's Task Force said he was considering a payroll tax on eds and meds, another common municipal approach that raises state legal issues.[150]

Providence

Rhode Island—unusually—has no state constitutional provision addressing property taxes, much less property-tax exemption for charities. Rhode Island General Laws § 44-3-3(8) provides exemption for:

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147. For background and material (including public meeting minutes) relating to the Task Force, see generally PILOT TASK FORCE: PAYMENT IN LIEU OF TAXES, http://www.cityofboston.gov/assessing/PILOT.asp (last visited Apr. 15, 2010).

148. *See* CITY OF BOSTON ASSESSING DEPARTMENT, *supra* note 132, at 7 tbl.

149. MAYOR'S PILOT TASK FORCE, INTERIM REPORT (2009), *available at* http://www.cityofboston.gov/Images_Documents/PILOT_Interim%20Report_tcm3-8009.pdf.

150. *See generally* Eric A. Lustig, *The Boston City PILOT Task Force: An Emerging Best Practice?*, 44 NEW ENG. L. REV. 601, 611-12 (2010).

> Buildings and personal estate owned by any corporation used for a school, academy, or seminary of learning, and of any incorporated public charitable institution, and the land upon which the buildings stand and immediately surrounding them to an extent not exceeding one acre, so far as they are used exclusively for educational purposes, but no property or estate whatever is hereafter exempt from taxation in any case where any part of its income or profits or of the business carried on there is divided among its owners or stockholders.[151]

Separately—partially following the Connecticut statute—Rhode Island requires the state to make PILOTs to towns in the amount of twenty-seven percent of taxes that would otherwise have been paid by resident nonprofit schools and hospitals.[152] As in Connecticut, this appears to create an incentive for local assessors to overvalue nonprofit real estate!

In Rhode Island, legislative proposals arose in 2009 that initially focused on institutions of higher education and then extended to nonprofit hospitals. February brought a senate bill to tax twenty percent of the assessed value of all real and personal property owned by private colleges and universities—except for institutions with a PILOT agreement with their municipality.[153] In May, the Rhode Island House took a different track, considering an "impact fee" to be imposed on hospitals and private universities and colleges with more than twenty million dollars worth of real estate within the municipality. The impact fee could not exceed twenty-five percent of the municipality's property-tax rate.[154]

Separately, in May 2009 a bill was introduced in the Rhode Island House to impose a $150 per-student, per-semester fee on institutions of higher education to defray the costs of fire and police protection provided to students.[155] This proposal came at the urging of Providence Mayor Cicillene, who initially suggested that the tax apply at the student level.

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151. R.I. GEN. LAWS § 44-3-3(8) (2008).

152. *See id.* § 45-13-5.1.

153. S.0181, Gen. Assem., Jan. Sess. (R.I. 2009) (introduced Feb. 4, 2009, by Senators Tassoni, McBurney, and Ciccone).

154. H.R. 6214, Gen. Assem., Jan. Sess. (R.I. 2009) (introduced May 26, 2009, by Representatives Slater, Costantino, Almeida, and Diaz). As just mentioned, the state already makes partial PILOTs. If the organizations now have to pay a percent of the tax that would otherwise be collected, nonprofits will put pressure on the assessor to hold down the value, thus returning tension to the appraisal process.

155. H.R. 6205, Gen. Assem., Jan. Sess. (R.I. 2009). This bill would have added section 16-57-6.8, to read, in part:

> (a) Notwithstanding any statute, regulation or charter to the contrary, commencing with the fiscal year starting July 1, 2009, every city and town is authorized to assess a fee of one hundred fifty dollars ($150) per semester, or one hundred dollars ($100) per trimester, upon every private college or university for each full-time student at a private

Importantly, though, four Providence educational institutions have already been making millions of dollars in annual PILOTs under a memorandum of understanding relating to property these institutions took off the tax rolls. In 2003, the City of Providence reached an agreement with Brown University, the Rhode Island School of Design ("RISD"), Providence College, and Johnson & Wales University calling for PILOTs totaling $50 million dollars over the next twenty years.[156] While Brown University might seem to be the wealthiest institution, over the first four years RISD was scheduled to make the highest payments because of the amount of then-taxable property it was acquiring.[157]

In 2009, Brown University and RISD, among others, lobbied hard against both the impact fee and head tax, in a strategy that focused on their positive contributions and gratitude to Providence (RISD appropriately produced a lovely design—"RISD Providence"—in a Robert-Indiana style square). Their efforts paid off. In a flurry of hearings and activity before the assembly broke for indefinite recess, a vote on the impact-fee proposal was avoided on the House floor; the head-tax proposal was not voted on by the House Finance Committee. Consideration of these proposals, however, seemed intended to pressure Providence institutions to agree to reopen the 2003 PILOTs agreement.

With the failure of progress in the statehouse, the focus immediately shifted to the Providence City Council. On July 2, 2009, the Council approved the creation of the Commission to Study Tax-Exempt Institutions, which will have 180 days to report its recommendations "to

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> institution of higher education within said city or town for the express purpose of off-setting, in part, the municipality's costs of providing police, fire, rescue, and other municipal services to students. . . .

Id. Subsection (c) provided:

> Any student who is a bona fide resident of the state of Rhode Island who has demonstrated payment of real estate taxes by the student or his or her parent or guardian to a Rhode Island municipality during the relevant semester or trimester shall be exempt from this student assessment fee.

Id.

156. Scott MacKay, *Colleges to Pay Millions to City*, PROVIDENCE J.-BULL., June 6, 2003, at A1.

157. The agreement provides for two types of payments: "annual cash payments, which are based roughly on the size of each institution's budget" and "payments instead of property taxes for [fifteen] years on taxable properties [the colleges] buy in Providence." *Id.* Specifically: "The institutions will pay [one-hundred] percent of the assessed rate for the first five years they own a property. That will drop to [sixty-six] percent for the next five years and [thirty-three] percent for the next five. After [fifteen] years, the properties will become fully tax-exempt . . . ." *Id.*

establish a standard level of contributions by major tax-exempt institutions" to the Council. Similar to the task force created by Boston Mayor Thomas Menino, the Providence Council Commission will include representatives from the business community, tax-exempt and community organizations, labor unions, and two council members and a mayoral appointee.[158]

Pittsburgh

For the three-year period from 2005 to 2007, a coalition of about one-hundred nonprofit organizations known as the Pittsburgh Public Service Fund—following extensive negotiation with the mayor and city council—"voluntarily" transferred $14 million to the city to help ameliorate the ailing city budget.[159] The fund released the names of the 102 contributing organizations, but not the amounts they contributed—although some numbers leaked out.[160] This unique experiment in collective action raised several interesting possibilities. Because this agreement replaced existing PILOT agreements, it seemed to provide an opportunity for those nonprofits making high payments to reduce their contributions. At the same time, one might expect particularly generous nonprofits to want public credit. One press report observed critically: "[S]ome of the organizations that chose not to contribute to the cash-strapped city constitute a Who's Who of prominent charities in Pittsburgh."[161] Eventually, even the amounts given by each participating charity leaked out.[162] "But the agreement with tax-exempt groups that brought the city $14 million from 2005 to 2007 has eroded to a proposed $5.5 million in donations for 2008 through 2010. So far, city council has turned up its nose at that deal."[163]

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158. Philip Marcelo, *Panel to Study City's Nonprofit Tax-Free Entities*, PROVIDENCE J.-BULL., July 3, 2009, at B1.

159. Rich Lord, *2004 Plan Revisited for Nonprofits*, PITTSBURGH POST-GAZETTE, Dec. 9, 2009, *available at* 2009 WLNR 24833084.

160. Rich Lord, *City Asking Nonprofits for Consistent Contributions*, PITTSBURGH POST-GAZETTE, Feb. 20, 2007, *available at* 2007 WLNR 3352078 [hereinafter Lord, *City Asking*].

161. Jeremy Boren, *Some Nonprofits Do Not Chip In*, PITTSBURGH TRIB. REV., Jan. 6, 2006, *available at* 2006 WLNR 355468. For the list of contributing organizations, see *City Gets First Payment from Nonprofit Coalition*, PITTSBURGH POST-GAZETTE, Jan. 5, 2006, *available at* http://www.post-gazette.com/pg/06005/632763.stm.

162. See Lord, *City Asking*, *supra* note 160; *see also* Rich Lord, *City Backs Formula for Taxing of Nonprofit Organizations; Nonprofits' Group Opposes Guidelines for What It Views as Gifts to the City*, PITTSBURGH POST-GAZETTE, Feb. 21, 2007, *available at* http://www.post-gazette.com/pg/07052/76397-53.htm (reporting that for 2005, "according to documents obtained by the Pittsburgh Post-Gazette, donations ranged from $10 by the Pittsburgh Ballet Theater to $1.5 million by the University of Pittsburgh Medical Center").

163. Rich Lord, *Mayor Ravenstahl to Nonprofits: Pay Up or Else; Says He'll Impose*

Instead, the city considered seeking General Assembly approval under its recovery plan to expand the business payroll tax to include nonprofit institutions.[164] A 2009 Pennsylvania report concludes by analyzing several proposals, including amending the state property-tax exemption statute to require—not just encourage, as it currently does—nonprofits to pay PILOTs.[165] The report also considers a state-paid PILOT for nonprofit property, along the Connecticut-Rhode Island model.[166]

At year-end 2009, the mayor of Pittsburgh conceded defeat in his bid for a "Fair Share Tax"—a tax equal to one percent of tuition paid to the City's ten colleges and universities—to raise over $15 million to address shortfalls in the city's pension obligations.[167] Instead, the nonprofits pledged to donate (an unspecified amount) to the City and help lobby the legislature for a long-term solution to the City's fiscal challenges.[168] Separately, in November, the Allegheny County Executive vetoed as illegal a proposal passed by the County Council to impose a "tax-exempt certification and essential services fee" for tax-exempt property owned by nonprofits other than churches, with the resulting funds to be used for homeowner property-tax relief.[169]

In early January 2010, Senator Fontana and Representative Solobay reintroduced their bill (S.B. 1175 and H.B. 2191) for an "essential services fee" that could be imposed, at the option of a municipality, annually on tax-exempt real property owned by resident charities.[170] The fee would be uniformly applied. It does not apply to the first 5000 square feet of

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Surcharges to Hike Revenues if They Aren't Willing, PITTSBURGH POST-GAZETTE, June 20, 2009, *available at* http://www.post-gazette.com/pg/09171/978773-53.stm [hereinafter Lord, *Pay Up or Else*].

164. Editorial, *Time to Deal: Pittsburgh's Budget Needs Should Be Approved Now*, PITTSBURGH POST-GAZETTE, July 22, 2009, *available at* http://www.post-gazette.com/pg/09203/985405-192.stm. "The administration has concluded that it doesn't need the state's OK to charge hospitals $25 per inpatient admission, or colleges and universities $50 per undergraduate student per semester. Those fees would raise $5.4 million and $3 million, respectively." Lord, *Pay Up or Else*, *supra* note 163.

165. *See supra* note 122 and accompanying text.

166. *Id.*

167. Rich Lord & Tom Barnes, *Pittsburgh's Mayor Drops Tuition Tax; Cites an Undefined Promise of Help from Schools, Tax-Exempts and Corporations on Pension Solution*, PITTSBURGH POST-GAZETTE, Dec. 22, 2009, *available at* http://www.post-gazette.com.pg/09356/1022750.stm.

168. *See id.*

169. *See* Karamagi Rujumba, *Onorato Vetoes Fee on Nonprofits*, PITTSBURGH POST-GAZETTE, Nov. 7, 2009, *available at* http://post-gazette.com/pg/09311/1011618-455.stm.

170. Press Release, Fontana and Solobay Introduce Non-Profit Services Fee Bill (Jan. 4, 2010), http://www.senatorfontana.com/media/Releases/2010/Jan4.htm.

structures on the parcel, and could not exceed $100 per every 1000 square feet of these structures. With a phase-in for property acquired in 2009, no fee could exceed fifty percent of the tax that would otherwise apply. The fee would not apply if the town and the charity have a PILOT agreement.[171]

But Allegheny County has not given up, leading to the ominous potential that both the city and the county have their sights on the same nonprofit property owners for PILOTs.[172] It seems that the next generation of the property-tax debate will be even more layered.

Final Thoughts

The three stories in this Conclusion illustrate the limits of legal protection from property tax, and the need for nonprofits to become willing to enter into political negotiations and the possibility of being called upon to make PILOTs or SILOTs. Because PILOT agreements are voluntary, though, both sides can feel unappreciated and slighted. Many nonprofits make monetary and in-kind contributions to their communities, but few arrangements are transparent. It is time for nonprofits to trumpet their agreements.

APPENDIX: FIFTY-ONE-JURISDICTION SURVEY

CONSTRUING CHARITY PROPERTY-TAX EXEMPTION

Caveats: A state-by-state comparison does not allow for easy comparisons even though, with a few exceptions, this Appendix focuses on the general category of charities. Frequently, specific constitutional or statutory provisions apply to such entities as nonprofit schools, hospitals, nursing homes, libraries, assisted or affordable living facilities, art galleries, and open/conservation space. Property-tax statutes are often complex and detailed—some statutes even name specific organizations. Some statutes allow for partial exemption of property used in part for unrelated commercial purposes. Cases (which in different states have gone both ways) typically involve housing (low-income, elderly, and parsonage) and nursing homes, hospitals, medical-office buildings owned by otherwise exempt hospitals, health clubs (YMCA's), and daycare centers. Factors affecting the outcome primarily include market-rate fees, government financing, level of donations, level of charity care (for hospitals), and, of course, inurement or private benefit. Also dependent on state law is the

171. *See* S. 1175, Gen. Assem. Reg. Sess. (Pa. 2010).

172. *See* Rich Lord & Karamagi Rujumba, *City, County Chase Same Dollars: Which Would Have First Dibs on Nonprofit Contributions?*, PITTSBURGH POST-GAZETTE, Feb. 1, 2010, *available at* http://post-gazette.com/pg/10032/1032596-53.stm.

exemption of property used for administration (or other support activities such as parking structures or lots) or property rented from the nonprofit owner to another nonprofit.

Eighteen State Constitutions Mandate Exemption for Charities (variously termed): Alabama, Alaska, Arkansas, Kansas (legislature may broaden), Kentucky, Louisiana, Maine, Michigan, Minnesota (for churches; legislature may exempt others), New Jersey, New Mexico, New York, North Dakota (except for property used for conservation, which legislature may exempt), Oklahoma, South Carolina, South Dakota ("the Legislature shall . . . exempt"), Utah, and Vermont.

Twenty-Five State Constitutions Grant Exemption Authority to the Legislature: Arizona, California, Colorado (shall be exempt unless general law says otherwise), Delaware ("public welfare"), Florida (note: court struck down an unconstitutional limit on low-income housing), Georgia (requires 2/3 vote of each legislative body to repeal charity exemption), Idaho, Illinois (legislature may restrict but not expand charity exemption), Indiana, Massachusetts, Minnesota (mandating exemption for churches), Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, Ohio, Pennsylvania, Tennessee, Texas, Virginia (legislature may repeal or modify—but not extend), Washington, West Virginia, and Wyoming.

Eight State Constitutions (and the U.S. Constitution, with respect to the District of Columbia,) are Silent on Taxes or Exemption: Connecticut, District of Columbia, Hawaii, Iowa, Maryland, New Hampshire, Oregon, Rhode Island, and Wisconsin.

Three States Make Partial PILOTs on Account of Some Nonprofit Property: Connecticut (by statute for hospitals and schools), Maine (by constitution for exemptions granted after April 1, 1978), and Rhode Island (by statute for hospitals and schools).

Alabama

Constitution & Statute(s)

ALA. CONST. art. IV, § 91 prohibits the legislature from taxing property "used exclusively . . . for purposes purely charitable," and Amendment No. 373(k) exempts from all ad valorem taxation "property devoted exclusively to religious, educational or charitable purposes."

ALA. CODE § 40-9-1 (2003), exempts, in part:

> (1) . . . [A]ll property, real and personal, used exclusively for religious worship, for schools or for purposes purely charitable; provided, that property, real or personal, owned by any educational, religious or charitable institution, society or corporation let for rent or hire or for use for business purposes shall not be exempt from taxation, notwithstanding that the income from such property shall be used exclusively for education, religious or charitable purposes; . . . .
>
> (2) All property, real or personal, used exclusively for hospital purposes, to the amount of $75,000, where such hospitals maintain wards for charity patients or give treatment to such patients; provided, that the treatment of charity patients constitutes at least [fifteen] percent of the business of such hospitals. . . .

Case Holding(s)

Mingledorff v. Vaughan Regional Medical Center, Inc., 682 So. 2d 415, 416 (Ala. 1996) implicitly rejected the theory that I.R.C. § 501(c)(3) status automatically entitles a taxpayer to exemption from ad valorem taxation: "The dispositive issue is whether the property sought to be taxed, which is being used exclusively as a hospital, is being used exclusively in charitable pursuits. If it is, then there is no question that [the hospitals] are exempt from ad valorem taxation under the clear wording of Amendment 373(k) and [Ala. Code] § 40-9-1(1)."

Cf. Surtees v. Carlton Cove, Inc., 974 So. 2d 1013, 1022 (Ala. Civ. App. 2007) ("Although a charitable facility, to be considered as such, is not limited . . . to the provision of free or reduced-cost services, there must be an element of gift and of service to the general public. There is at least substantial evidence that this public benefit is not present . . . here, given the luxury accommodations, the high fees, and the limited number of elderly persons who meet the facilities' financial guidelines.") (footnote omitted).

Alaska

Constitution & Statute(s)

ALASKA CONST. art. IX, § 4 exempts from municipal property tax real property exclusively used for "non-profit . . . charitable . . . purposes."

ALASKA STAT. § 29.45.030(a)(3) (2008) requires exemption for: "property used exclusively for nonprofit religious, charitable, cemetery, hospital, or educational purposes."

Case Holding(s)

In absence of constitutional or statutory definition, the courts adopted

> [T]he broad common law definition of "charity" [] and observed that this definition reflects the "humanitarian rationale" of property tax exemptions: they are granted "as an aid or encouragement to individuals, corporations, or businesses, to do something supposedly for the good of the community at large, although such an act is not itself a proper or even permissible function of the government." This definition provides some guidance, but it does not purport to specify prerequisites for eligibility. It provides only a general framework for determining eligibility. Applying this framework, we have concluded that properties used for a youth summer recreational camp, a youth hostel, and a church radio station were being used for charitable purposes.

Fairbanks North Star Borough v. Dena' Nena' Henash, 88 P.3d 124, 132 (Alaska 2004) (internal quotations and footnotes omitted).That case upheld tax exemption of an organization that provides health, social, and economic services to Alaska Natives and villages, despite the borough assessor's factual finding "that TCC is fully, or more than fully, remunerated for its services by federal and state government funding, medical insurance payments, and its investment and rental income." *Id.* at 130. The Alaska Supreme Court explained: "Our constitution and statutes do not mention lessening of a governmental burden as a factor in charitable-purpose analysis, nor do our cases." *Id.* at 137. The court observed: "It may also be significant that some cases in which receipt of government funding rendered property ineligible, federal grant money was used to construct low-income housing and subsidize rent." *Id.* at 134. By contrast, "many of the cases upholding exemptions despite government funding involved corporations that provided services to their beneficiaries." *Id.* (footnotes omitted).

See also McKee v. Evans, 490 P.2d 1226, 1230 (Alaska 1971) (holding that the statutory definition of "educational purposes . . . includes systematic instruction in any and all branches of learning from which a substantial public benefit is derived," and rejecting the argument "that only such school properties as relieve some substantial educational burden from the state should receive rights of tax exemption"). The court noted:

> Nor do we find the *quid pro quo* policy logically compelling. Even if the education given at a private school (*e.g.*, a trade school) were not substantially similar to that provided in publicly supported schools, some lessening of the state educational tax burden probably occurs from election by students to forego general public education in favor of more specialized training. Moreover, where no such tax relief occurs, the public benefit may be most profound since without the private school there would be no such specialized training.

Id. at n.16 (citation omitted).

Arizona

Constitution & Statute(s)

ARIZ. CONST. art. IX, § 2(2): "Property of educational, charitable and religious associations or institutions not used or held for profit may be exempt from taxation by law."

ARIZ. REV. STAT. ANN. § 42-11107 (2006) provides: "Property of charitable institutions for the relief of the indigent or afflicted, appurtenant land and their fixtures, equipment and other reasonably required property including property used for the administration of such relief, are exempt from taxation if the institutions and property are not used or held for profit."

Other special statutes include § 42-11116 ("Property of musical, dramatic, dance and community arts groups, botanical gardens, museums and zoos [if exempt under Internal Revenue Code § 501(c)(3)].") and § 42-11105 (exemption for health care property). ARIZ. REV. STAT. ANN. §§ 42-11105, 42-11116.

Case Holding(s)

No Supreme Court cases.

See University Physicians v. Pima County, 75 P.3d 153 (Ariz. Ct. App. 2003) (ruling that a hospital—which for some reason did not seek exemption under section 42-11105—is not entitled to exemption as an institution for the relief of the afflicted). See definitions in section 42-11101:

> In this article, unless the context otherwise requires:
>
> 1. "Afflicted" means persons who, because of a mental or physical condition, illness or condition of distress, adversity or harassment, or imminent risk of such condition, are unable to reasonably take care of themselves or their families or to properly function in society without periodic or continuous assistance.
>
> 2. "Indigent" means a person who is without sufficient means or ability to provide themselves with adequate food, shelter or social necessaries.

ARIZ. REV. STAT. ANN. § 42-11101.

See also Volunteer Center of Southern Arizona v. Staples, 147 P.3d 1052 (Ariz. Ct. App. 2006) (ruling that the nonprofit was entitled to exemption on the entire building even though it leased a portion to another tax-exempt organization).

Arkansas

Constitution & Statute(s)

ARK. CONST. art. 16, § 5(b) provides: "The following property shall be exempt from taxation: public property used exclusively for public purposes; . . . and buildings and grounds and materials used exclusively for public charity."

ARK. CODE ANN. § 26-3-301(7) (2009) exempts: "All buildings belonging to institutions of purely public charity, together with the land actually occupied by these institutions, not leased or otherwise used with a view to profit . . . ."

Case Holding(s)

See *Crittenden Hosp. Ass'n v. Board of Equalization*, 958 S.W.2d 512, 516 (Ark. 1997) (Corbin, J., dissenting) (denying exemption to nonprofit hospital's medical office building):

> The majority's decision is based on a long-standing precedent that entitlement to a tax exemption has to be proven beyond a reasonable doubt. It gives no consideration to the legislative intent . . . . The burden here is too onerous. Proof beyond a reasonable doubt is a criminal standard and should not be applicable in a civil proceeding because it violates due process guaranteed by the Fifth and Fourteenth Amendments to the

> United States Constitution and Article 2 of our Arkansas Constitution.
>
> . . . .
>
> I am forced to the inescapable conclusion that, historically, it is rare to find a tax that this court does not like.

California

Constitution & Statute(s)

CAL. CONST. art. XIII, § 4 provides in part:

> The Legislature may exempt from property taxation in whole or in part:
>
> . . . .
>
> (b) Property used exclusively for religious, hospital, or charitable purposes and owned or held in trust by corporations or other entities (1) that are organized and operating for those purposes, (2) that are nonprofit, and (3) no part of whose net earnings inures to the benefit of any private shareholder or individual.

CAL. REV. & TAX. CODE, § 214(a)(1) (West 2009) (other subsections include various special provisions for, e.g., affordable housing):

> However, in the case of hospitals, the organization shall not be deemed to be organized or operated for profit if, during the immediately preceding fiscal year, operating revenues, exclusive of gifts, endowments and grants-in-aid, did not exceed operating expenses by an amount equivalent to [ten] percent of those operating expenses. As used herein, operating expenses include depreciation based on cost of replacement and amortization of, and interest on, indebtedness.

Case Holding(s)

71 Ops. Cal. Atty. Gen. 106 (1988):

> [W]e . . . view [the hospital earnings provision] as an additional protection for nonprofit hospitals in the face of the [*Sutter Hospital v. City of Sacramento*, 244 P.2d 390 (Cal. 1952)] decision rather than the exclusive means by which they can qualify for the welfare exemption. In other words the proviso was never meant to prevent a non-profit hospital that did earn surplus revenue in excess of ten percent during the immediate fiscal year from still qualifying for the "welfare exemption" under the general provision of section 214 subsection (a)(1).

Colorado

Constitution & Statute(s)

COLO. CONST. art. X, § 5 provides: "Property, real and personal, that is used solely and exclusively for religious worship, for schools or for strictly charitable purposes, also cemeteries not used or held for private or corporate profit, shall be exempt from taxation, unless otherwise provided by general law."

COLO. REV. STAT. § 39-3-101 (2008) ("Legislative declaration–presumption of charitable purpose."):

> The general assembly recognizes that only the judiciary may make a final decision as to whether or not any given property is used for charitable purposes within the meaning of the Colorado constitution; nevertheless, in order to guide members of the public and public officials alike in the making of their day-to-day decisions and to assist in the avoidance of litigation, the general assembly hereby finds, declares, and determines that the uses of property which are set forth in this part 1 as uses for charitable purposes benefit the people of Colorado and lessen the burdens of government by performing services which government would otherwise be required to perform. Therefore, property used for such purposes shall be presumed to be owned and used solely and exclusively for strictly charitable purposes and not for private gain or corporate profit . . . . This legislative finding, declaration, determination, and presumption shall not be questioned by the administrator and shall be entitled to great weight in any and every court.

Case Holding(s)

> To the extent that *Young Life* [*Campaign v. Board of County Commissioners*, 300 P.2d 535 (Colo. 1956),] established some requirement of benefit to the people of the state of Colorado as a

> condition for the property tax exemption of *religious* organizations, it is hereby overruled. While such 'social benefit' analysis may have continuing validity in the determination of *charitable* exemptions, *see WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117 (1968), it has no place in the state's evaluation of its treatment of bona fide religious groups. This conclusion is self-evident from the rationale for the grant of a tax exemption that was articulated in *Young Life*. There the court concluded that the purpose of the exemption was to relieve taxpayers of obligations that they would otherwise have to perform . . . .

General Conference of Church of God–7th Day v. Carper, 557 P.2d 832, 833 (Colo. 1976) (parallel citations omitted); *cf. Catholic Health Initiatives Colorado v. City of Pueblo*, 207 P.3d 812 (Colo. 2009) (including religious organizations in a municipal sales tax exemption for "*charitable organization*[*s*] . . . which exclusively, . . . and for the benefit of an indefinite number of persons, freely and voluntarily ministers to the physical, mental or spiritual needs of persons, and which thereby lessens the burdens of government").

For the denial of exemption to a (not primarily religious) recreational ranch, see *West Brandt Foundation, Inc. v. Carper*, 652 P.2d 564 (Colo. 1982) ("While not dispositive, it is nevertheless noteworthy that the uses made of the camp during the most desirable times of year involve non-residents and do not benefit the people of Colorado."). Factors applied included: charging "remunerative" fees (although merely earning a surplus is not fatal so long as devoted to charitable purpose); lessening the burdens of government; "showing that the normal fees were ever reduced or waived because of an individual''s inability to pay"; and whether access is limited "based on any criteria of worthiness" or providing "lower rates for [religious and charitable] groups than for any others." *Id.* at 568-70.

Connecticut

Constitution & Statute(s)

No applicable constitutional provision.

CONN. GEN. STAT. ANN. § 12-81 (2009) provides in relevant part:

> The following-described property shall be exempt from taxation:
>
> . . . .
>
> (7)(A) [R]eal property [used] for scientific, educational, literary, historical or charitable purposes . . . and used exclusively for

> carrying out one or more of such purposes . . . provided (i) any officer, member or employee thereof does not receive or at any future time shall not receive any pecuniary profit from the operations thereof, except reasonable compensation for services in effecting one or more of such purposes or as proper beneficiary of its strictly charitable purposes . . . .

The state makes PILOTs to municipalities hosting private hospitals and colleges, but the program still depends on annual legislative appropriation. Notably, the statute allows the state to pay up to seventy-seven percent of the property taxes the nonprofit hospitals and colleges would otherwise pay, but as of 2006, the appropriated rate was sixty-four percent.

Case Holding(s)

Isaiah 61:1, Inc. v. City of Bridgeport, 851 A.2d 277, 287 (Conn. 2004) (exempting a halfway house for prison inmates that received ninety percent of its funding from the state department of correction) (citations omitted):

> We glean from the . . . cases a number of principles to apply in determining whether property is exempt from taxation under § 12-81(7). First, the rental of property does not necessarily prevent the property from qualifying for tax exemption, as long as the property is used exclusively for carrying out the charitable purposes of the organization to which the property belongs. Second, when a charitable organization does nothing to "make it less likely that [the individuals it services] will become burdens on society and more likely that they will become useful citizens," the subject property cannot qualify for a tax exemption. Finally, housing provided for low or moderate income individuals is not tax-exempt.

St. Joseph's Living Center, Inc. v. Town of Windham, 966 A.2d 188, 221 (Conn. 2009):

> Providing short-term rehabilitative care to the general public, although a necessary service and surely helpful to the Center's bottom line, simply cannot be characterized as falling within the Center's charitable purpose. If the Center limited its provision of rehabilitative care to its existing population of elderly, long-term residents, we would be inclined to conclude that such services are within the scope of its charitable purpose as expressed in its corporate charter. Alternatively, the Center could amend its charter to broaden the availability of rehabilitative services for those elderly persons who are not part of its long-term patient population but who are drawn from the community at large.

Delaware

Constitution & Statute(s)

DEL. CONST. art. VIII, § 1 provides in part: "County Councils of New Castle and Sussex Counties and the Levy Court of Kent County are hereby authorized to exempt from county taxation such property in their respective counties as in their opinion will best promote the public welfare."

DEL. CODE ANN. tit. 9, § 8103 (1989) provides:

> Property belonging to . . . any church or religious society, and not held by way of investment, or any college or school and used for educational or school purposes, except as otherwise provided, shall not be liable to taxation and assessment for public purposes by any county or other political subdivision of this State. Nothing in this section shall be construed to apply to ditch taxes, sewer taxes and/or utility fees. Corporations created for charitable purposes and not held by way of investment that are in existence on July 14, 1988, together with existing and future charitable affiliates of such corporations that are also not held by way of investment, shall not be liable to taxation and assessment for public purposes by any county, municipality or other political subdivision of this State.

Case Holding(s)

New Castle County Department of Land Use v. University of Delaware, 842 A.2d 1201, 1212 (Del. 2004) (distinguishing "school purposes" from "educational purposes" in the statute, requiring, for the former, that "the use of the school-owned property must contribute to the legitimate welfare, convenience, and/or safety of the school community or its members," and upholding exemption for space in the student center leased to a bank).

Burris v. Tower Hill School Association, 179 A. 397, 399-400 (Del. Super. Ct. 1935) ("[S]tatutes exempting from taxation property devoted to educational purposes are in general construed more liberally than other tax exempting statutes . . . .").

District of Columbia

Constitution & Statute(s)

D.C. CODE § 47-1002 (2009) exempts from taxation: "(8) Buildings belonging to and operated by institutions which are not organized or operated for private gain, which are used for purposes of public charity principally in the District of Columbia[.]"

Case Holding(s)

District of Columbia v. Cato Institute, 829 A.2d 237, 245-46 (D.C. 2003) (holding that because the Commerce Clause does not bind Congress itself, the property-tax exemption law Congress wrote for the District of Columbia could properly limit exemption to those charities that benefit District residents; on statutory interpretation grounds, reversing the trial court's finding that the Cato Institute provides benefits in the District by focusing its charitable activities on educating Congress).

Florida

Constitution & Statute(s)

FLA. CONST. art. VII, § 3(a): "Such portions of property as are used predominantly for educational, literary, scientific, religious or charitable purposes may be exempted by general law from taxation."

FLA. STAT. § 196.196 (2009) reads, in part:

> (1) In the determination of whether an applicant is actually using all or a portion of its property predominantly for a charitable, religious, scientific, or literary purpose, the following criteria shall be applied:
>
> (a) The nature and extent of the charitable, religious, scientific, or literary activity of the applicant, a comparison of such activities with all other activities of the organization, and the utilization of the property for charitable, religious, scientific, or literary activities as compared with other uses.
>
> (b) The extent to which the property has been made available to groups who perform exempt purposes at a charge that is equal to or less than the cost of providing the facilities for their use. Such rental or service shall be considered as part of the exempt purposes of the applicant.

Case Holding(s)

Presbyterian Homes of the Synod v. Wood, 297 So. 2d 556, 558 (Fla. 1974) (ruling unconstitutional the statutory exemption regime for affordable housing because it contained limits on residents' income: "Inasmuch as an 'income test' is the primary determinant of the eligibility for tax exemption of a home, other factors traditionally used in determining the status of such a home are minimized contrary to the intent of the constitutional limitation.").

Haines v. St. Petersburg Methodist Home, Inc., 173 So. 2d 176, 185 (Fla. Dist. Ct. App. 1965) (noting "Florida's welcome aggregation of elderly citizens," rejecting exemption for nonprofit elderly housing facility that "though altruistically motivated and serving a socially constructive purpose, is nevertheless a financially viable institution . . . .").

Georgia

Constitution & Statute(s)

GA. CONST. art. VII, § 2, para. IV provides:

> [E]xemptions from ad valorem taxation provided for by law on June 30, 1983, are hereby continued . . . until otherwise provided for by law. . . . Any law which reduces or repeals exemptions granted to . . . institutions of purely public charity must be approved by two-thirds of the members elected to each branch of the General Assembly.

GA. CODE ANN. § 48-5-41 (1999 & Supp. 2009), exempts, in part:

> (a)(4) All institutions of purely public charity;
>
> . . . .
>
> [(b) requires colleges, schools, and nonprofit hospitals to be open to the general public.].
>
> (c) The property exempted . . . shall not be used for the purpose of producing private or corporate profit and income distributable to shareholders . . . or to other owners . . . .
>
> (d)(1) Except as . . . provided in paragraph (2) . . . , this Code section . . . shall not apply to real estate or buildings which are rented, leased, or otherwise used for the primary purpose of securing an income thereon . . . .
>
> (2) With respect to paragraph (4) of subsection (a) . . . , a building which is owned by a charitable institution . . . that is exempt from taxation under [IRC] Section 501(c)(3) . . . and which building is used . . . exclusively for the charitable purposes of such charitable institution, and not more than 15 acres of land on which such building is located, may be used for the purpose of securing income so long as such income is used exclusively for the operation of that charitable institution.

Case Holding(s)

York Rite Bodies of Freemasonry v. Board of Equalization, 408 S.E.2d 699, 700 (Ga. 1991) (emphasis in original) (internal quotations omitted) (alteration to the original in the quoted text):

> In determining whether property qualifies as an institution of 'purely public charity' as set forth in OCGA § 48-5-41 (a)(4), three factors must be considered and must coexist. First, the owner must be an institution devoted entirely to charitable pursuits; second, the charitable pursuits of the owner must be for the benefit of the public; and third, the use of the property must be exclusively devoted to those charitable pursuits.
>
> . . . .
>
> . . . However, "'[n]o matter how high the ideals of an institution, nor how lofty its purposes, in order for it to qualify as a charitable institution for tax exemption under [OCGA § 48-5-41 (a)(4)], it must have the sole purpose and activity of dispensing *public* charity."

Board of Tax Assessors of Ware County v. Baptist Village, Inc., 605 S.E.2d 436, 438, 440 (Ga. Ct. App. 2004) (granting exemption under a specific statute for nonprofit homes for the aged—the court rejected the argument that the independent-living units located on a property that also included assisted-living and nursing-care facilities were held for investment purposes, which under the statute would have resulted in taxability).

GA. CODE ANN. § 48-5-41(d)(2), added pursuant to statewide referendum in 2006, was construed in *Athens-Clarke County Board of Tax Assessors v. Nuci Phillips Memorial Foundation, Inc.*, Case No. SU-08-CV-2067-S (Ga. Super. Ct. Dec. 12, 2008), *rev'd* 686 S.E.2d 371 (2009), *available at* www.gaappeals.us/docket/results_one_record.php?docr_case_num=A09A1480.

Hawaii

Constitution & Statute(s)

No applicable constitutional provision.

At the municipal level, *see, e.g.*, HONOLULU, HAW., REV. ORDINANCES § 8-10.10, *available at* http://www.honolulu.gov/refs/roh/8a1_4.htm, reading as follows: "(a) There shall be exempt from real property taxes real property . . . designated in subsection (b) or (c) . . . and meeting the

requirements stated therein, actually and (except as otherwise specifically provided) exclusively used for nonprofit purposes."

However, a general excise tax, originally enacted in 1935, is the state's principal source of governmental revenue; exemptions are available for entities, among other things, "organized and operated exclusively for religious, charitable, scientific, or educational purposes . . . ." HAW. REV. STAT. § 237-23(a)(4) (2001 & Supp. 2007).

Case Holding(s)

Matter of Tax Appeal of Queen's Medical Center, 715 P.2d 349, 353 (Haw. Ct. App. 1985) ("The physicians are providing a service to their patients, not all of whom are the hospital's patients. Additionally, the parking structure is serving not only the hospital's parking needs, but those of the physicians and their patients.").

Under the general excise tax, *see, e.g.*, *Matter of Tax Appeal of Central Union Church-Arcadia Retirement Residence*, 624 P.2d 1346, 1352 (Haw. 1981):

> Proverbially, charity should know no bounds; practically, it must often be tempered by available means. . . . However, . . . not . . . all enterprises providing residential accommodations and other services for the elderly, even when conducted by religious organizations, are charitable activities. Exempt status still turns on the absence of a profit motive and the presence of an altruistic goal.

Cf. Matter of Tax Appeal Queen's Medical Center, reconsideration denied, 661 P.2d 1201, 1205 (Haw. 1983) ("While we do not doubt the construction and operation of an office building and parking garage can be related to 'better, more efficient, and cost effective medical care,' we do not think the activities constitute hospital activities in themselves.").

Idaho

Constitution & Statute(s)

IDAHO CONST. art. VII, § 5 states: "All taxes shall be uniform . . . : provided, that the legislature may allow such exemptions from taxation from time to time as shall seem necessary and just, and all existing exemptions provided by the laws of the territory, shall continue until changed by the legislature of the state . . . ."

IDAHO CODE ANN. § 63-602C (2010): "The following property is exempt from taxation: property belonging to any fraternal, benevolent, or charitable [limited liability company,] corporation or society, . . . used exclusively for the purposes for which such [limited liability company,] corporation or society is organized . . . ."

Case Holding(s)

Matter of the Appeal of Sunny Ridge Manor, Inc., 675 P.2d 813, 815 (Idaho 1984) (citation omitted):

> A number of factors must be considered: (1) the stated purposes of its undertaking, (2) whether its functions are charitable . . . , (3) whether it is supported by donations, (4) whether the recipients of its services are required to pay for the assistance they receive, (5) whether there is general public benefit, (6) whether the income received produces a profit, (7) to whom the assets would go upon dissolution of the corporation, and (8) whether the 'charity' provided is based on need. . . . Determination of an institution's charitable status is necessarily . . . to be decided on a case-by-case basis. There may be factors listed above which have no application to particular cases, and factors not listed which would need to be considered.

Housing Southwest, Inc. v. Washington County, 913 P.2d 68, 72 (Idaho 1996) (holding that because Housing Southwest was funded by government loans and grants, rather than private donations, it did not lessen the burdens of government); *see also Community Action Agency, Inc. v. Board of Equalization of Nez Perce County*, 57 P.3d 793, 795-96 (Idaho 2002) (noting that to make up the shortfall from rental income, CAA received in one year private donations of only $760,575 compared with $3,563,810 in government grants).

Illinois

Constitution & Statute(s)

ILL. CONST., art. IX, § 6 begins: "The General Assembly by law may exempt from taxation only the property of the State, units of local government and school districts and property used exclusively for agricultural and horticultural societies, and for school, religious, cemetery and charitable purposes."

35 ILL. COMP. STAT. 200/15-65 (2009) begins: "All property of the following is exempt when actually and exclusively used for charitable or beneficent purposes, and not leased or otherwise used with a view to profit: (a) Institutions of public charity."

Case Holding(s)

Methodist Old Peoples Home v. Korzen, 233 N.E.2d 537, 541-42 (Ill. 1968), required that: (1) the benefits extend to an indefinite number of persons for their general welfare or in some way reduce the burdens on government; (2) the organization has no capital, capital stock, or shareholders, and does not profit from the enterprise; (3) funds derive mainly from private and public charity, and are held in trust for the objects and purposes expressed in the organization's charter; (4) charity is dispensed to all who need and apply for it; (5) no obstacles are placed in the way of those seeking the benefits; and (6) the exclusive (i.e. primary) use of the property is for charitable purposes. See the discussion of the inconclusive decision in *Provena Covenant Medical Center v. Department of Revenue*, No. 107328, 2010 Ill. LEXIS 289 (Ill. March 18, 2010), in Parts I and II, above.

Indiana

Constitution & Statute(s)

IND. CONST. art. 10, § 1 begins:

> (a) The General Assembly shall provide, by law, for a uniform and equal rate of property assessment and taxation and shall prescribe regulations to secure a just valuation for taxation of all property, both real and personal. The General Assembly may exempt from property taxation any property in any of the following classes:
>
> (1) Property being used for municipal, educational, literary, scientific, religious, or charitable purposes.

IND. CODE § 6-1.1-10-16(a) (2009).

Case Holding(s)

No recent supreme court case.

Indianapolis Osteopathic Hospital, Inc. v. Department of Local Government Finance, 818 N.E.2d 1009, 1014 (Ind. Tax Ct. 2004) (citation omitted) ("A charitable purposes exemption is granted when there is an expectation of a benefit that will inure to the public by reason of the exemption. 'The rationale justifying a tax exemption is that there is a present benefit to the general public from the operation of the charitable institution sufficient to justify the loss of tax revenue.'"); *see also College Corner, L.P. v. Department of Local Government Finance*, 840 N.E.2d 905, 911 (Ind. Tax Ct. 2006) (noting that the legislation "does not

differentiate between entities that are not-for-profit and entities that operate for profit").

Iowa

Constitution & Statute(s)
No relevant constitutional provision.

IOWA CODE § 427.1 (2009) reads, in part:

> The following classes of property shall not be taxed:
>
> . . . .
>
> 8. . . . All grounds and buildings used or under construction by literary, scientific, charitable, benevolent, agricultural, and religious institutions and societies solely for their appropriate objects, not exceeding three hundred twenty acres in extent and not leased or otherwise used or under construction with a view to pecuniary profit.

Case Holding(s)
Carroll Area Child Care Center, Inc. v. Carroll County Board of Review, 613 N.W.2d 252, 257 (Iowa 2000) ("[C]harity—gratuitous or partly gratuitous care—can be provided in two different ways. One manner . . . is to subsidize the care of those who are unable to pay. Another . . . is to use charitable contributions to cover the costs of establishing the facility and some portion of the ongoing operating expenses, thereby subsidizing the cost of the facility for all persons who use it, regardless of their ability to pay."), cited in *Deerfield Retirement Community, Inc. v. Board of Review of Polk County*, No. 08-0115, 2009 WL 1491902, at *1-3 (Iowa App. May 29, 2009) (denying exemption to a retirement and life-care facility that did not accept Medicaid: "Deerfield has not established charitable or volunteer subsidies to underwrite indigent patients").

Kansas

Constitution & Statute(s)
KAN. CONST. art. 11, § 1: "(b) All property used exclusively for state, county, municipal, literary, educational, scientific, religious, benevolent and charitable purposes, . . . and all household goods and personal effects not used for the production of income, shall be exempted from property taxation."

Paragraph Second of the detailed KAN. STAT. ANN. § 79-201 (2009) exempts:

> All real property, and all tangible personal property, actually and regularly used exclusively for literary, educational, scientific, religious, benevolent or charitable purposes . . . . Except with regard to real property which is owned by a religious organization, . . . this exemption shall not apply to such property, not actually used or occupied for the purposes set forth herein, nor to such property held or used as an investment. . . . . .

Paragraph Fourth of § 79-201b is a more specific statute addressed to various charitable housing purposes.

Case Holding(s)

In the Matter of the Appeal of University of Kansas School of Medicine-Wichita Medicine Practice Ass'n, 973 P.2d 176 (Kan. 1999) (detailing the history of narrow Supreme Court decisions followed by liberalizing legislation of the exemption regime for housing and for humanitarian purpose, and the differences in the statutory regimes for different types of nonprofit activities—notably, whether leasing to another jeopardizes exemption); cf. *Matter of Application of KSU Foundation*, 114 P.3d 176, 182 (Kan. App. 2005), held that a foundation formed to support Kansas State University was not entitled to a property-tax exemption on a building that it acquired at the university's request to lease at cost for the university's printing operations: "Under this lease arrangement, we conclude the Foundation's only use of the property is a financial one."

Appeals courts have ruled that section 79-201b applies for exemption of elderly, low-income, or other housing. *Cf. In the Matter of the Application of KSU. SE Agricultural Research Center for Exemption*, 157 P.3d 1, 5 (Kan. Ct. App. 2007) (stating that Paragraph Second exempts property owned and operated by a state educational institution for the caretaker of its research farm: "occupancy was clearly for the benefit of KSU rather than the occupant; it was part of the machinery by which the education and research affairs of KSU were administered"). In December 2009, however, the state supreme court recognized the "plain-language requirements of K.S.A. 2008 Supp. 79-201 *Second and Ninth*" to the nonprofit owner of property used, without profit, "to provide both living quarters and counseling for severely mentally ill citizens. . . . [N]o cost or reduced cost to individuals who would otherwise likely be homeless and without access to public assistance programs." *Matter of Mental Health Ass'n of the Heartland*, 211 P.3d 580, 586 (Kan. 2009). The court held that the two

statutes were not in conflict; moreover, "The analysis by the Court of Appeals reaches an incongruous contrary result—that the legislature enacted three statutes with the intention each would expand the scope of tax-exempt charitable-use property beyond the restrictive constitutional language, but that these statutes operate to cancel each other out."

Kentucky

Constitution & Statute(s)

KY. CONST. § 170:

> There shall be exempt from taxation public property used for public purposes; . . . real property owned and occupied by, and personal property both tangible and intangible owned by, institutions of religion; institutions of purely public charity, and institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education, public libraries, their endowments, and the income of such property as is used exclusively for their maintenance . . . .

KY. REV. STAT. ANN. § 132.190 (West 2005) begins: "(1) All property shall be subject to taxation, unless it is exempted by the Constitution or in the case of personal property unless it is exempted by the Constitution or by statute."

Note: In 1992, the legislature repealed KY. REV. STAT. § 132.011 ("Public charity" defined); no reported case cited that statute.

Case Holding(s)

Department of Revenue ex rel. Luckett v. Isaac W. Bernheim Foundation, Inc., 505 S.W.2d 762, 763 (Ky. Ct. App. 1974) (citation omitted):

> No case has been called to our attention which requires that a charity have as its objective the fulfillment of basic human needs for food, clothing and shelter to qualify as a charity for purposes of tax exemption under Section 170 of the Constitution.
>
> We are mindful that tax exemption deprives the treasury of revenue which must be replenished from other sources and consequently all claims for tax exemptions should be carefully scrutinized. We do not propose to allow the perpetuation of individual idiosyncrasies in a tax-exempt status under the guise of charity. Nevertheless, we feel that charity is broader than

> relief to the needy poor and includes activities which reasonably better the condition of mankind.

Banahan v. Presbyterian Housing Corp., 553 S.W.2d 48 (Ky. 1977) (recognizing exemption for housing and related facilities provided by a nonprofit to low-income senior citizens and disabled persons).

Louisiana

Constitution & Statute(s)

LA. CONST. art. VII, § 21 provides, in part:

> [T]he following property and no other shall be exempt from ad valorem taxation:
>
> . . . .
>
> (B)(1)(a)(i) Property owned by a nonprofit corporation or association organized and operated exclusively for religious, dedicated places of burial, charitable, health, welfare, fraternal, or educational purposes, no part of the net earnings of which inure to the benefit of any private shareholder or member thereof and which is declared to be exempt from federal or state income tax; and
>
> . . . .
>
> (2) property of a bona fide labor organization representing its members or affiliates in collective bargaining efforts; and
>
> (3) property of an organization such as a lodge or club organized for charitable and fraternal purposes . . . , and property of a nonprofit corporation devoted to promoting trade, travel, and commerce, and also property of a trade, business, industry or professional society or association . . . .
>
> None of the property . . . shall be exempt if owned, operated, leased, or used for commercial purposes unrelated to the exempt purposes of the corporation or association.

Case Holding(s)

Sherwood Forest Country Club v. Litchfield, 998 So. 2d 56, 61 (La. 2008), *remanded on rehearing*, 6 So. 3d 141 (La. 2009): "The people of our state are called upon to sustain the burdens of taxation as a requisite of civil government. Historically, exemptions were allowed based upon the theory

that the concessions are due as *quid pro quo* for the performance of services essentially public."

See also id. at 62 (citations omitted):

> [A]ll property shall pay its just portion of public burdens. Historically, when property is put to some use calculated to minimize the expenses of government are exemptions justified. Although the word 'fraternal' can be defined broadly,—and in one sense neighbors who get together for back-yard barbeques are gathering for fraternal purposes—it is only on the theory that fraternal acts alleviate the burdens of government that tax exemptions of property devoted to fraternal purposes can be justified. The predominate rule is to deny a property tax exemption for property used primarily for social or recreational purposes, even if that property is owned by a fraternal organization.

See also id. at 67:

> Of the four activities cited by sociologists that formed the basis for the establishment of the large contingency of fraternal orders that exists in the United States today, three obviously conferred public benefits—social integration, through education, into a democratic society; economic security with insurance and/or welfare benefits; and religious and morality practices and/or education. The fourth attribute of fraternal associations—social prestige—is more personal than public, but can be said to contribute to a cohesive community.

Maine

Constitution & Statute(s)

ME. CONST. art. IV, pt. 3, § 23 begins:

> The Legislature shall annually reimburse each municipality from state tax sources for not less than [fifty percent] of the property tax revenue loss suffered by that municipality during the previous calendar year because of the statutory property tax exemptions or credits enacted after April 1, 1978. The Legislature shall enact appropriate legislation to carry out the intent of this section.

ME. REV. STAT. ANN. tit. 36, § 652(1)(A) (2009) begins:

> The real estate and personal property owned and occupied or used solely for their own purposes by benevolent and charitable institutions incorporated by this State are exempt from taxation.

> Such an institution may not be deprived of the right of exemption by reason of the source from which its funds are derived or by reason of limitation in the classes of persons for whose benefit the funds are applied.

Case Holding(s)

Christian Fellowship & Renewal Center v. Town of Limington, 896 A.2d 287, 295 (Me. 2006) (4-3 decision) (citations omitted), granted exemption for facilities rented out to houses of worship or other religious societies at a low rate. The dissent emphasized the ambiguous record that could support either a recreational, charitable, or religious use. The majority stated:

> The charitable exemption was created in an age when government provided few services and religious institutions and charities provided many services that government neither provided nor subsidized. Then and now, organizations need not displace government programs in order to serve the common good and qualify for the charitable exemption by providing charitable services to defined groups or to the public at large. One legislative study indicated that the original purposes of the charitable exemption were to promote not only providing services in lieu of government services, but also "providing a service in which the state has a genuine interest."

Maryland

Constitution & Statute(s)

No constitutional provision exists on tax exemption. *Murray v. Comptroller of Treasury*, 216 A.2d 897, 902 (Md. 1966) (upholding tax exemption of churches, noting that: "This Court has consistently recognized the power of the legislature to grant full exemptions from taxation when reasonable and for a public purposee").

MD. CODE ANN., TAX-PROP. § 7-202(b)(1) (LexisNexis 2007) reads, in part:

> Property is not subject to property tax if the property:
>
> (i) is necessary for and actually used exclusively for a charitable or educational purpose to promote the general welfare of the people of the State, including an activity or an athletic program of an educational institution; and
>
> (ii) is owned by:

> 1. a nonprofit hospital;
>
> 2. a nonprofit charitable, fraternal, educational, or literary organization . . . .

Case Holding(s)

Supervisor of Assessments v. Group Health Ass'n, 517 A.2d 1076, 1079 (Md. 1986) (citations omitted):

> We do not at this time attempt to establish a hard-and-fast rule as to the meaning of 'charitable' for purposes of [the statutes]. Indeed, we doubt whether such a rule can be formulated. Clearly, however, a determination of whether an institution is charitable must include a careful examination of the stated purposes of the organization, the actual work performed, the extent to which the work performed benefits the community and the public welfare in general, and the support provided by donations.

Baltimore Science Fiction Society, Inc. v. State Department of Assessment & Taxation, 863 A.2d 969, 971, 975 (Md. 2004). Rejecting the tax department's argument that "the property did not qualify for the tax exemption because it was used primarily as a social or hobby club," the court ruled that "educational" cannot be limited to formal instruction, noting the Society's use of the property for the following educational purposes: a library's writing workshops, readings and presentations by authors; and encouraging high school students to compose literature.

Massachusetts

Constitution & Statute(s)

MASS. CONST. pt. 2, ch. 1, § 1, art. IV reads, in part:

> And further, full power and authority are hereby given and granted to the said general court [the legislature], from time to time, . . . to impose and levy proportional and reasonable assessments, rates, and taxes, upon all the inhabitants of, and persons resident, and estates lying, within the said commonwealth, except that . . . reasonable exemptions may be granted. . . .

MASS. GEN. LAWS ch. 59, § 5 (2009) provides, in part:

> The following property shall be exempt from taxation . . .

. . . .

> Third, Personal property of a charitable organization, which term, as used in this clause, shall mean (1) a literary, benevolent, charitable or scientific institution or temperance society . . . and . . . real estate owned by or held in trust for a charitable organization and occupied by it or its officers for the purposes for which it is organized or by another charitable organization or organizations or its or their officers for the purposes of such other charitable organization or organizations. . . .

Case Holding(s)

Massachusetts (and many other states) adopted the following definition (in other states, sometimes without attribution or by citing Black's Law Dictionary):

> "A charity, in the legal sense, may be more fully defined as a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government."

Boston Symphony Orchestra, Inc. v. Board of Assessors, 1 N.E.2d 6, 9 (Mass. 1936) (quoting *Jackson v. Phillips*, 96 Mass. (14 Allen) 539, 556 (1867)). As discussed above in footnote 109, the court denied exemption to the Symphony, explaining: "The way in which the appellant carried out its purpose by means of concerts in Symphony Hall has features which differentiate it from other corporations whose profits have been held to be exempt under the statute." *Id.* at 10.

New Habitat, Inc. v. Tax Collector, 889 N.E.2d 414, 418-19 (Mass. 2008) (citations omitted):

> To determine whether an organization is charitable, the court weighs a number of nondeterminative factors. These factors include, but are not limited to, whether the organization provides low-cost or free services to those unable to pay, whether it charges fees for its services and how much those fees are, whether it offers its services to a large or 'fluid' group of beneficiaries and how large and fluid that group is, whether the organization provides its services to those from all segments of society and from all walks of life, and whether the organization

> limits its services to those who fulfill certain qualifications and how those limitations help advance the organization's charitable purposes.
>
> The significance of these factors depends in no small part on the dominant purposes and methods of the organization. The closer an organization's dominant purposes and methods are to traditionally charitable purposes and methods, the less significant these factors will be in our determination of the organization's charitable status under G. L. c. 59, § 5, Third.

Michigan

Constitution & Statute(s)

MICH. CONST. art. IX, § 3 begins: "The legislature shall provide for the uniform general ad valorem taxation of real and tangible personal property not exempt by law except for taxes levied for school operating purposes."

MICH. CONST. art. IX, § 4: "Property owned and occupied by nonprofit religious or educational organizations and used exclusively for religious or educational purposes, as defined by law, shall be exempt from real and personal property taxes."

MICH. COMP. LAWS ANN. § 211.7*o* (West 2009) begins: "(1) Real or personal property owned and occupied by a nonprofit charitable institution while occupied by that nonprofit charitable institution solely for the purposes for which that nonprofit charitable institution was incorporated is exempt from the collection of taxes under this act."

Case Holding(s)

Wexford Medical Group v. City of Cadillac, 713 N.W.2d 734, 737 (Mich. 2006) (finding no particular monetary level of charity care required by the exemption statute; the total amount of pure charity care in one year was $2400 out of a total budget of $10 million). On the difficulty of determining what forgone revenue to count as charity care, the court concluded: "Clearly, courts are unequipped to handle these and many other unanswered questions. Simply put, these are matters for the legislature." *Id.* at 746. Defining factors include:

> (1) A "charitable institution" must be a nonprofit institution.
>
> (2) A "charitable institution" is one that is organized chiefly, if not solely, for charity.

> (3) A "charitable institution" does not offer its charity on a discriminatory basis by choosing who, among the group it purports to serve, deserves the services. Rather, a "charitable institution" serves any person who needs the particular type of charity being offered.
>
> (4) A "charitable institution" brings people's minds or hearts under the influence of education or religion; relieves people's bodies from disease, suffering, or constraint; assists people to establish themselves for life; erects or maintains public buildings or works; or otherwise lessens the burdens of government.
>
> (5) A "charitable institution" can charge for its services as long as the charges are not more than what is needed for its successful maintenance.
>
> (6) A "charitable institution" need not meet any monetary threshold of charity to merit the charitable institution exemption; rather, if the overall nature of the institution is charitable, it is a "charitable institution" regardless of how much money it devotes to charitable activities in a particular year.

See id. at 746.

Minnesota

Constitution & Statute(s)

MINN. CONST., art. X, § 1 reads, in part:

> Taxes shall be uniform upon the same class of subjects . . . , but . . . academies, colleges, universities, all seminaries of learning, all churches, church property, houses of worship, [and] institutions of purely public charity . . . shall be exempt from taxation except as provided in this section. . . . The legislature may authorize municipal corporations to levy and collect assessments for local improvements upon property benefited thereby without regard to cash valuation. The legislature by law may define or limit the property exempt under this section other than churches, houses of worship, and property solely used for educational purposes by academies, colleges, universities and seminaries of learning.

See the legislative change described below.

Case Holding(s)

North Star Research Institute v. County of Hennepin, 236 N.W.2d 754, 757 (Minn. 1975), adopted a six-factor test to qualify an institution as a purely public charity:

> (1) whether the stated purpose of the undertaking is to be helpful to others without immediate expectation of material reward; (2) whether the entity involved is supported by donations and gifts . . . ; (3) whether the recipients of the 'charity' are required to pay for the assistance received . . . ; (4) whether the income received from gifts and donations and charges to users produces a profit to the charitable institution; (5) whether the beneficiaries of the 'charity' are restricted or unrestricted and, if restricted, whether the class of persons to whom the charity is made available is one having a reasonable relationship to the charitable objectives; (6) whether dividends, in form or substance, or assets upon dissolution are available to private interests.

Under the Rainbow Child Care Center, Inc. v. County of Goodhue, 741 N.W.2d 880 (Minn. 2007), found that a daycare center was not an institution of purely public charity. The "factor three inquiry"—"the extent to which the recipients of the charity are required to pay"—"tests for a value that is fundamental to the concept of charity—that is, whether the organization *gives* anything away." *Id.* at 886. "If the legislature had intended all organizations exempt . . . under I.R.C. § 501(c)(3) also to be exempt from payment of real property taxes, it could have so provided, as it did with regard to state income taxation." *Id.* at 889. Under "the dissent's interpretation of charity[,] . . . a 'charitable' enterprise could charge the same for its services as a for-profit competitor and nevertheless enjoy exemption from property taxation, as long as no profits inured to the benefit of members of the organization." *Id.*

> [I]t is not sufficient to provide free or reduced-rate goods or services on such a small scale that they are merely an incidental part of the organization's operations. Nor will free or reduced-rate goods or services that are provided primarily for business purposes be adequate. The organization must demonstrate that its intended purpose is to provide a substantial proportion of its goods or services on a charitable basis.

Id. at 892.

After *Under the Rainbow*, months of deliberations among the Minn. Council of Nonprofits, the Department of Revenue, and the Association of County Assessors reached a consensus, adopted by the legislature in May

2009, to codify the definition of an institution of purely public charity. While "not contract[ing] or expand[ing] the definition," MINN. STAT. § 272.02(7)(a) (2009) requires charities to meet all six judicially created factors for determining tax exempt status; factors (1), (4), and (6) are mandatory and factors (2), (3), and (5) allow a "reasonable justification" exception (rejecting the Senate's proposed "compelling factual reason").

Guidance published by the Minnesota Department of Revenue explains that the three mandatory factors are automatically satisfied by Internal Revenue Code § 501(c)(3) status, and provides examples for satisfying (or not) the three other factors. *See* Letter from Minn. Rev. Dept., Property Tax Division, Bulletin to All City and County Assessors, Property Tax Exemptions for Institutions of Purely Public Charity, at 7-12 (Mar 1, 2010) *available* at http://www.mncn.org/charitable_tax_exemption/final%20 Revenue%20Bulletin.pdf.

HealthEast v. County of Ramsey, 770 N.W.2d 153 (Minn. 2009), denied exemption to nonprofit health system parent that not only leased property to charitable affiliate but also performed services for non-affiliated, albeit charitable, organizations.

Mississippi

Constitution & Statute(s)

MISS. CONST. art. 4, § 112 reads, in relevant part: "The Legislature may, by general laws, exempt particular species of property from taxation, in whole or in part."

MISS. CODE ANN. § 27-31-1 (1972) exempts, in part: "(d) All property, real or personal, belonging to any religious society, or ecclesiastical body, or any congregation thereof, or to any charitable society, or to any historical or patriotic association or society . . . and used exclusively for such society or association and not for profit. . . ." It also exempts property of nonprofit schools and property owned and occupied by fraternal and benevolent organizations. *Id.* Also there is an exemption for nonprofit hospitals. *Id.* § 27-31-1(f).

Case Holding(s)

Hattiesburg Area Senior Services v. Lamar County, 633 So. 2d 440, 444-45 (Miss. 1994), while denying exemption to a retirement home, footnote 5 notes: "Since the inception of this litigation the legislature has provided that properties such as the properties here in question shall be [prospectively] exempt. Miss. Code Ann. 1972 § 27-31-1(dd) (Supp.

1992)." The court cited *Better Living Services, Inc. v. Bolivar County*, 587 So. 2d 914 (Miss. 1991), which denied exemption to a corporation which operated federally-subsidized apartments for the elderly, destitute, handicapped, and disabled. That court noted: "We see no reason why an institution, merely because it caters to the needs of the aged and infirm, should be exempt from taxation if someone other than that institution is furnishing the cost of the care and maintenance provided by the institution." *Id.* at 917 (quoting *Oea Senior Citizens, Inc. v. Douglas County*, 185 N.W.2d 464, 470 (Neb. 1971)).

Missouri

Constitution & Statute(s)

MO. CONST. art. X, § 6(1) provides: "All property . . . not held for private or corporate profit and used exclusively for religious worship, for schools and colleges, for purposes purely charitable, or for agricultural and horticultural societies, or for veterans' organizations may be exempted from taxation by general law."

MO. ANN. STAT. § 137.100(5) (2009) exempts:

> All property . . . actually and regularly used exclusively for religious worship, for schools and colleges, or for purposes purely charitable and not held for private or corporate profit, . . . [but not] real property not actually used or occupied for the purpose of the organization but held or used as investment even though the income or rentals received therefrom is used wholly for religious, educational or charitable purposes[.]

Case Holding(s)

Franciscan Tertiary Province, Inc. v. State Tax Commission, 566 S.W.2d 213, 218-19, 223-24, 226 (Mo. 1978), found that:

> An analysis of the cases relied on to support those respective positions has led us to the conclusion that the cases considering a charitable exemption for housing for the elderly and those considering such an exemption with reference to property used for other purposes have interpreted the words "used exclusively . . . for purposes purely charitable" differently and have established different requirements for granting an exemption under such language. It is beyond question that the language enacted may have but one meaning to be consistently applied in all areas.

The court continued:

> We hold that the words 'used exclusively . . . for purposes purely charitable, and not held for private or corporate profit' which appear in § 137.100 should and do have the same meaning whether applied to property used for a hospital, for training handicapped workers, for operating a YMCA type of program or for providing housing for the aged.

Applying a three-factor test, the court concluded:

> Franciscan is a not-for-profit corporation whose clearly stated purpose was to operate a rental facility for the aged on a non-profit basis. It did not operate at a profit. It contributed some of its own funds to supplement rentals received in order to meet expenses of operating Chariton. No profit to any individual or corporation may result even if the full subsidy contemplated is eventually realized.

Montana

Constitution & Statute(s)

MONT. CONST. art. VIII, § 5 reads, in part: "(1) The legislature may exempt from taxation: . . . (b) Institutions of purely public charity, hospitals and places of burial not used or held for private or corporate profit, places for actual religious worship, and property used exclusively for educational purposes."

MONT. CODE ANN. § 15-6-201 (2009).

Case Holding(s)

Steer, Inc. v. Department of Revenue, 803 P.2d 601, 605 (Mont. 1990) notes that:

> Steer, through its innovative stewardship program, provides a valuable service by raising funds which, in turn, are donated to needy people world-wide. However, the fact that Steer's unique fund-raising method produces worthwhile results through its member evangelical organizations does not negate its tax obligations under Montana constitutional and statutory mandate. We have already held that Steer's use of its cattle as a capital investment was determinative in deciding that it did not qualify for a tax-exemption based on being an "institution of purely public charity." We feel, however, that this case requires us to further clarify "institutions for purely public charity."
>
> . . . .

> . . . Taken together, the Montana Constitution and the Montana legislative acts intend "institutions" to mean property or place employed for purely public charitable purposes or activities rather than an entity. The cattle are property and tax is imposed on property. If it is charitable property in its purpose and employment and not for profit or gain of income, taxes are not imposed. Here, the cattle's employment was for the gain of income, and therefore, the cattle are taxable.
>
> Mont. Const. art. VIII, § 5(1) provides that the legislature *may* exempt property from taxation. The exemptions of property from taxation is clearly left to the discretion of the legislature and as noted, are to be strictly construed. The history and provisions of § 15-6-201, MCA, reflect the many times when this section of the code has been amended to add property to the list of exempted items, which includes such items as residences of the clergy to a bicycle used for personal transportation of the owner. The judiciary may not add livestock to the list of exemptions.

Nebraska

Constitution & Statute(s)

NEB. CONST. art. VIII, § 2(2) reads: "[T]he Legislature by general law may classify and exempt from taxation property owned by and used exclusively for . . . educational, religious, charitable, or cemetery purposes, when such property is not owned or used for financial gain or profit to either the owner or user . . . ."

NEB. REV. STAT. § 77-202(1)(d) (2003) reads:

> Property owned by educational, religious, charitable, or cemetery organizations, or any organization for the exclusive benefit of any such educational, religious, charitable, or cemetery organization, and used exclusively for . . . [such] purposes, when such property is not (i) owned or used for financial gain or profit to either the owner or user, (ii) used for the sale of alcoholic liquors for more than twenty hours per week, or (iii) owned or used by an organization which discriminates in membership or employment based on race, color, or national origin. . . . [E]ducational organization means (A) an institution operated exclusively for the purpose of offering regular courses with systematic instruction . . . or (B) a museum or historical society operated exclusively for the benefit and education of the public. . . . [C]haritable organization means an organization

> operated exclusively for the purpose of the mental, social, or physical benefit of the public or an indefinite number of persons . . . .

Case Holding(s)

Bethesda Foundation v. Buffalo County Board of Equalization, 640 N.W.2d 398, 404-05 (Neb. 2002). In granting an exemption to an assisted living facility, the court stated:

> The residents . . . are admitted without regard to race, color, or national origin and without regard to the ability of the residents to pay. The criteria for admission is the need for care. No resident has ever been discharged for failure to pay, nor has Bethesda ever filed a suit to collect delinquent accounts. . . . In the event a facility needs improvements or is unable to pay for them, Bethesda uses excess receipts from other facilities to pay the deficit or cover expenses.

Cf. Pittman v. Sarpy County Board of Equalization, 603 N.W.2d 447, 455 (Neb. 1999) ("It is well established that low-income housing is not a charitable use of property.").

Nebraska State Bar Foundation v. Lancaster County Board of Equalization, 465 N.W.2d 111, 124 (Neb. 1991) (ruling that the Nebraska Bar Foundation is not a charitable or educational organization).

> [Section] 77-202(1)(c) contains a two-tier approach to tax exemption for property. At the first tier is the particular nature, character, or status of a property owner as an organization which is one of the types designated in § 77-202(1)(c). At the second tier is use of the property, that is, the specific kinds and degrees of use which qualify or disqualify property concerning the charitable or educational tax exemptions available under § 77-202(1)(c). At the first tier, if an owner is not an organization of a type entitled to property tax exemption pursuant to § 77-202(1)(c), continuation to the second tier, namely, consideration of the property's use, is unnecessary, since the property owner has failed to qualify as an organization entitled to tax exemption for its property.

See also Fort Calhoun Baptist Church v. Washington County Board of Equalization, 759 N.W.2d 475, 481-82 (Neb. 2009) (holding that church property leased to a school during the week, except when school use would interfere with a church function, "was used exclusively for religious and/or educational purposes"). "The Constitution and the statutes do not require that the ownership and use must be by the same entity." *Id.*

Nevada

Constitution & Statute(s)

NEV. CONST. art. 8, § 2: "All real property, and possessory rights to the same . . . belonging to corporations . . . shall be subject to taxation . . . ; Provided, that the property of corporations formed for Municipal, Charitable, Religious, or Educational purposes may be exempted by law."

NEV. CONST. art. 10, § 1, cl. 8 reads, in part: "The legislature may exempt by law property used for municipal, educational, literary, scientific or other charitable purposes. . . ."

NEV. REV. STAT. § 361.140(2) (2009): "All buildings belonging to a corporation defined in subsection 1, together with the land actually occupied by the corporation for the purposes described and the personal property actually used in connection therewith, are exempt from taxation when used solely for the purpose of the charitable corporation."

See also § 361.105 (exemptions of nonprofit private schools); § 361.125 (exemption of churches and chapels); § 361.135 (exemptions of certain lodges, societies and similar charitable or benevolent organizations).

NEV. REV. STAT. § 361.140(1):

> In addition to the corporations defined by law to be charitable corporations there are hereby included:
>
> (a) Any corporation whose objects and purposes are religious, educational or for public charity and whose funds have been derived in whole or substantial part from grants or other donations from governmental entities or donations from the general public, or both, not including donations from any officer or trustee of the corporation; and
>
> (b) Any corporation prohibited by its articles of incorporation from declaring or paying dividends, and where the money received by it is devoted to the general purpose of charity and no portion of the money is permitted to inure to the benefit of any private person engaged in managing the charity, except reasonable compensation for necessary services actually rendered to the charity, and where indigent persons without regard to race or color may receive medical care and attention without charge or cost.

Case Holding(s)

Simpson v. International Community of Christ, 796 P.2d 217, 219 (Nev. 1990) ("[Not all of the] two square miles of vacant land should be tax exempt because a religious group conducts open-air religious ceremonies a few times a week at different locations on the land."); *see also id.* at 221 (Mowbray, J., concurring):

> While I certainly favor and support the tax exemptions granted religious and charitable organizations by the legislature, enough is enough!
>
> As in all cases, reasonableness and honesty must be applied in granting those exemptions. To do otherwise, is not only unfair to all religious and charitable organizations, but also to our citizens who must bear and pay their individual share of the overall tax burden.

New Hampshire

Constitution & Statute(s)

No constitutional provision.

N.H. REV. STAT. ANN. § 72:23(V) (LexisNexis 2009), exempts: "The buildings, lands and personal property of charitable organizations and societies . . . used and occupied by them directly for the purposes for which they are established. . . ."

Section 72:23-*l* reads:

> The term 'charitable' . . . shall mean a corporation, society or organization established and administered for the purpose of performing, and obligated, by its charter or otherwise, to perform some service of public good or welfare advancing the spiritual, physical, intellectual, social or economic well-being of the general public or a substantial and indefinite segment of the general public that includes residents of the state of New Hampshire, with no pecuniary profit or benefit to its officers or members, or any restrictions which confine its benefits or services to such officers or members, or those of any related organization. The fact that an organization's activities are not conducted for profit shall not in itself be sufficient to render the organization 'charitable' . . . , nor shall the organization's treatment under the United States Internal Revenue Code . . . . This section is not intended to abrogate the meaning of 'charitable' under the common law of New Hampshire.

Section 72:23-n provides: "The governing body of any municipality may enter into negotiations for a voluntary payment in lieu of taxes from otherwise fully or partially tax exempt properties. . . ."

While the legislature may create exemptions, there is no constitutional right to exemption. *See Franklin Street Society v. Manchester*, 60 N.H. 342, 350-51 (1880) ("Whether any exemption of the plaintiff's property is constitutional is a question we do not decide. . . . The plaintiff [church] . . . cannot claim that it shall not pay any tax because $10,000 of its property is not taxed.").

Case Holding(s)

St. Paul's School v. City of Concord, 372 A.2d 269, 271-72 (N.H. 1977) (answering detailed questions as to use of specific types of educational property).

There are several cases regarding assisted living centers which go both ways. See the "close" case of *ElderTrust of Florida, Inc. v. Town of Epsom*, 919 A.2d 776, 780 (N.H. 2007), where the New Hampshire Supreme Court took "the opportunity to join a number of other courts," and set out a four-part test to clarify the statutory requirements, asking whether the organization: (1) was established and is administered for a charitable purpose; (2) has an obligation to perform its stated purpose to the public rather than simply to its members; (3) occupies and uses its property directly for the stated charitable purposes; and (4) uses income or profits for any purpose other than the purpose for which it was established (which prohibits the organization's officers and members from deriving any pecuniary profit or benefit).

Town of Peterborough v. MacDowell Colony, Inc., 943 A.2d 768, 770-71 (N.H. 2008) (upholding exemption for 450 acres "on which are located thirty-two art studios and various common buildings . . . . MacDowell operates an artist-in-residence program on the property. Each artist admitted to the program . . . may spend up to eight weeks at the Colony, where he or she is provided a studio in which to create art. The studios . . . provide, in the trial court's words, 'a secluded, natural environment in which to work.'"). "The provision of that service benefits a far greater segment of society than the artists who actually use MacDowell's property and, in so doing, serves the 'general public' as that term is used in RSA 72:23-*l*." *Id.* at 773. While the artists may sell or do what they please with the art, the statute's "prohibition against private inurement applies to it, not the Colony Fellows." *Id.* at 775.

New Jersey

Constitution & Statute(s)

N.J. CONST. art. VIII, § 1, ¶ 2, ends:

> Exemptions from taxation may be altered or repealed, except those exempting real and personal property used exclusively for religious, educational, charitable or cemetery purposes, as defined by law, and owned by any corporation or association organized and conducted exclusively for one or more of such purposes and not operating for profit.

N.J. STAT. ANN. § 54:4-3.6 (West 2002), exempts, in part:

> [A]ll buildings actually used for colleges, schools, academies or seminaries . . . ; all buildings actually used for historical societies, associations or exhibitions, when . . . located on land owned by an educational institution which derives its primary support from State revenue; all buildings actually and exclusively used for public libraries . . . ; all buildings actually used in the work of associations and corporations organized exclusively for religious purposes . . . ; all buildings actually used in the work of associations and corporations organized exclusively for hospital purposes . . . ; [and] all buildings owned by a corporation . . . subject to the provisions of Title 15 . . . or Title 15A of the New Jersey Statutes and actually and exclusively used in the work of one or more associations or corporations organized exclusively for charitable or religious purposes. . . .

Case Holding(s)

See *Hunterdon Medical Center v. Township of Readington*, 951 A.2d 931, 945 (N.J. 2008) for a discussion of the factors to be considered when an entity claims an exemption, including: (1) "the core aspects of a hospital's purposes are to address the needs of all of the types of patients that a hospital is expected to serve. Therefore, we hold that any medical service that a hospital patient may require pre-admission, during a hospital stay . . . or post-admission, constitutes a presumptive core 'hospital purpose'"; (2) "whether the hospital delivers such services in the hospital's main facility . . . or in a hospital-owned building adjoining or adjacent to the main hospital campus, makes no difference"; (3) "as the hospital-used property is situated away from the main hospital campus and adjacent or adjoining property, concerns about hospital integration and supervision become more pronounced, even when the use is for a core hospital purpose."

> [I]n the analysis under factor three above when the hospital's off-site activity is not one for which the hospital has been licensed to perform off site by regulatory authorities . . . [we also consider]: (1) whether the facility competes with like commercial or privately owned facilities; and, even if the answer to (1) is in the affirmative, (2) whether the facility, or the particular disputed part, is actually used predominantly by patients and hospital employees or by commercial members. . . . [T]his part to the analysis does not replace the separate consideration . . . that an endeavor not be established or run as a profit-making operation.

See also id. at 946

Unlike for hospitals, the legislature does not require assisted living facilities to provide charity care. *See Presbyterian Home at Pennington, Inc. v. Borough of Pennington*, 976 A.2d 413, 415 (N.J. Super. Ct. App. Div. 2009).

Cf. University Cottage Club of Princeton New Jersey Corp. v. New Jersey Department of Environmental Protection, 921 A.2d 1122, 1131 (N.J. 2007) (upholding agency requirement (now codified in specific statute) that "public access is a fundamental element of an historic site tax exemption," and that this Princeton private eating club satisfied the requirement). The court commented: "important is the fact that tax exemptions drain the public coffers just as expenditures do, and could not be justified in the absence of public access." *Id.*

New Mexico

Constitution & Statute(s)

N.M. CONST. art. VIII, § 3 begins: "[A]ll church property not used for commercial purposes, [and] all property used for educational or charitable purposes . . . shall be exempt from taxation."

N.M. STAT. § 7-38-8.1 (2009) reads:

> The [tax] division shall adopt regulations to insure that all real property owned by any nongovernmental entity and claimed to be exempt from property taxation . . . shall be reported for valuation purposes to the appropriate valuation authority. These regulations shall include provisions for initial reporting of the property and claiming of the exempt status pursuant . . . .

Case Holding(s)

Georgia O'Keeffe Museum v. County of Santa Fe, 62 P.3d 754, 758 (N.M. Ct. App. 2002) ("We hold the phrase 'used for educational purposes' to mean 'the direct, immediate, primary and substantial use of property that embraces systematic instruction in any and all branches of learning from which a substantial public benefit is derived.'" (citing *NRA Special Contribution Fund v. Board of County Commissioners*, 591 P.2d 672, 679 (N.M. Ct. App. 1978)). *NRA* ruled that lobbying on legislation is inconsistent with education. Concerned about the burden to other taxpayers of exempting the NRA's 36,300 acres, the court observed:

> We note also that the necessary expenses of government are becoming greater and the necessity for better utilization of the existent property tax is urgent. Tax exemption has a direct effect on the size of the tax base. The scope of tax exemption has broadened so that exempt organizations tend to grow wealthier and often increase the percentage of exempt property within the state . . . . Such increased exemptions may create a serious problem because a diminished tax base lessens the amount available to meet governmental costs. This factor also requires an organization that seeks a tax exemption to give the public a "substantial public benefit."

NRA Special Contribution Fund, 591 P.2d at 679.

Georgia O'Keeffe Museum declared:

> [F]or us now to read *NRA* to allow an exemption only for a formal, structured, teacher-student instructional school environment would be too restrictive a reading of *NRA*. Application of too narrow a standard can easily defeat the obvious purpose of the exemption, which is to encourage private citizens to engage in educational pursuits from which the public derives a substantial benefit. To adhere to *NRA* as narrowly as the County suggests in order to defeat an exemption, with respect to a private museum that provides a substantial educational benefit to the community, is too restrictive . . . .

Georgia O'Keeffe Museum, 62 P.3d at 765. The court adds: "Museums, whether private or public, must integrate themselves into the community and have subjects of public interest in order to survive. . . . [T]hey depend primarily on donations (including grants and legislative funding), admission fees, and retail sales in gift shops." *Id.* at 766.

New York

Constitution & Statute(s)

N.Y. CONST. art. XVI, § 1 ends:

> Exemptions from taxation . . . may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profit.

N.Y. REAL PROP. TAX LAW § 420-a (McKinney 2008) begins:

> 1. (a) Real property owned by a corporation or association organized or conducted exclusively for religious, charitable, hospital, educational, or moral or mental improvement of men, women or children purposes, . . . and used exclusively for carrying out . . . such purposes . . . shall be exempt from taxation . . . .
>
> (b) Real property . . . shall not be exempt if any officer, member or employee . . . receive[s or is entitled to] any pecuniary profit from the operations thereof, except reasonable compensation for services in effecting one or more of such purposes, or as proper beneficiaries of its strictly charitable purposes; or if the organization thereof for any such avowed purposes be a guise or pretense for directly or indirectly making any other pecuniary profit . . . ; or if it be not in good faith organized or conducted exclusively for one or more of such purposes.

Subsection 3 exempts, in part, nonrevenue-producing property whose "improvement[] is in progress or is in good faith contemplated . . . ." *Id.* § 420-a(3).

N.Y. REAL PROP. TAX. § 420-b contains a local option to revoke exemption, adopted in 1971 out of concern over lost tax base:

> 1. (a) Real property owned by a corporation or association which is organized exclusively for bible, tract, benevolent, missionary, infirmary, public playground, scientific, literary, bar association, medical society, library, patriotic or historical purposes, for the development of good sportsmanship for persons under the age of eighteen years through the conduct of supervised athletic games, for the enforcement of laws relating to children or animals, or for

> two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes either by the owning corporation or association, or by another such corporation or association as hereinafter provided, shall . . . be taxable by any municipal corporation within which it is located if the governing board of such municipal corporation, after public hearing, adopts a local law, ordinance or resolution so providing.

This statute was upheld by *Ass'n of the Bar of the City of New York v. Lewisohn*, 313 N.E.2d 30, 32 (N.Y. 1974).

Case Holding(s)

Adult Home at Erie Station, Inc. v. Assessor of Middleton, 886 N.E.2d 137, 142 (N.Y. 2008) (upholding exemption for housing rented to participants in the nonprofit's programs to combat homelessness, substance abuse, and other social ills):

> [A]partments in commercial complexes are not provided solely to people struggling against alcoholism, drug addiction and the like on condition that they participate in programs designed to help them. That these people (or the government agencies that support them) pay market rents, and that RECAP may even benefit economically from its rental income, does not change the result. The issue is not whether RECAP benefits, but whether the property is "used exclusively" for RECAP's charitable purposes. RECAP could lose its exemption under RPTL 420-a (1) (b) if the economic benefit went to its officers or employees personally, but an economic benefit to a charitable organization does not by itself extinguish a tax exemption. The question is how the property is used, not whether it is profitable.

North Carolina

Constitution & Statute(s)

N.C. CONST. art. V, § 2(3) reads, in part: "The General Assembly may exempt cemeteries and property held for educational, scientific, literary, cultural, charitable, or religious purposes . . . . No taxing authority other than the General Assembly may grant exemptions, and the General Assembly shall not delegate the powers accorded to it . . . ."

N.C. GEN. STAT. § 105-278.7 (2009) exempts buildings and land owned by a "charitable association or institution" if "[w]holly and exclusively used by its owner for nonprofit educational, scientific, literary, or charitable purposes . . . ." Subsection (f)(4) states: "A charitable purpose is one that

has humane and philanthropic objectives; it is an activity that benefits humanity or a significant rather than limited segment of the community without expectation of pecuniary profit or reward. The humane treatment of animals is also a charitable purpose." *Id.* § 105-278.7(f)(4).

Case Holding(s)
No recent North Carolina high court decision.

See, e.g., *In re Appeal of Chapel Hill Residential Retirement Center*, 299 S.E.2d 782, 788-89 (N.C. Ct. App. 1983):

> [M]erely supplying care and attention to elderly persons cannot, alone, constitute charity. Petitioner does not rely on outside funding in order to operate. The contributions it has received are not a primary source of its financing. The Center is more in the nature of a cooperative operated for the mutual benefit of its residents who collectively pay for their care; it is not an institution providing for the special needs of individuals who are in need of charity, the aid of whom benefits society as a whole in addition to the residents.

The court observed:

> To allow petitioner's property to qualify for exemption because its residents are elderly would be to give such persons clearly preferential treatment over those persons over 65 years of age who continue to live in their own discretely owned residences. While we recognize and applaud efforts similar to Carol Woods as being a progressive and desirable approach to the residential and health care and personal security of elderly persons, these laudable aspects of petitioner's operation do not suffice to bring it within the statutory classification of a charitable purpose.

In response, in 1987 the legislature enacted "An Act to Classify Property Owned by Certain Non Profit Homes for the Aged, Sick or Infirm and Exclude this Property from Taxation," codified at section N.C. GEN. STAT. § 105-275(32) (2009) and upheld by *In Matter of the Appeal of Barbour*, 436 S.E.2d 169, 177 (N.C. Ct. App. 1993).

North Dakota

Constitution & Statute(s)
N.D. CONST. art. X, § 5 reads, in part: "[P]roperty used exclusively for schools, religious, cemetery, charitable or other public purposes shall be exempt from taxation. Real property used for conservation or wildlife

purposes is not exempt from taxation unless an exemption is provided by the legislative assembly."

The lengthy and detailed N.D. CENT. CODE § 57-02-08 (2009) exempts, among other things, "buildings belonging to institutions of public charity." *See also* § 57-02-08.4 (conditional property-tax exemption for owners of wetlands).

See also section 57-02.3-02: "The board of [state-owned] university and school lands shall annually make payments, subject to legislative appropriations, to any county in which property subject to valuation is located. The payments are in lieu of ad valorem taxes that would be payable to the county if the real property for which the payments are made were not owned by the state. . . ."

Case Holding(s)

Riverview Place, Inc. v. Cass County, 448 N.W.2d 635, 642 (N.D. 1989) ("[A] facility for the elderly must supply some type of care for their residents in order to constitute a charitable use.").

Ohio

Constitution & Statute(s)

OHIO CONST. art. XII, § 2 ends:

> [G]eneral laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose, but all such laws shall be subject to alteration or repeal; and the value of all property so exempted shall, from time to time, be ascertained and published as may be directed by law.

Exemption for charities is provided in OHIO REV. CODE § 5709.12 as defined in § 5709.121 (2010), which, among other things, exempts property leased from one charity to another for charitable purposes.

American Committee of Rabbinical College of Telshe, Inc. v. Board of Tax Appeals, 102 N.E.2d 589, 590 (Ohio 1951):

> In both Section 2 of Article XII of the Constitution and Section 5353, General Code, the words "institutions of purely public

> charity" have now been replaced by the words "institutions used exclusively for charitable purposes." It follows that it is no longer necessary that an institution used exclusively for the lawful advancement of education and of religion be open generally to the public in order to have tax exemption of property owned and used by it exclusively for lawful educational or religious purposes.

Case Holding(s)

Northeast Ohio Psychiatric Institute v. Levin, 903 N.E.2d 1188, 1193 (Ohio 2009) (denying exemption to charitable property owner leasing to charitable affiliate because the rental income is more than incidental). The dissent commented:

> Funding for social services such as mental-health care for the underprivileged is scarce enough and is increasingly being cut during these tough economic times. Permitting the taxation of the property herein further deprives a charitable-care provider of funding to continue treatment, much of which is provided by the state . . . in the first place. Peter is being robbed to pay Paul instead.

Id. at 1196 (Lundberg Stratton, J., dissenting); *cf. Community Health Professionals, Inc. v. Levin*, 866 N.E.2d 478, 483 (Ohio 2007) (noting that the lease was incidental and the administration building was exempt).

Oklahoma

Constitution & Statute(s)

OKLA. CONST. art. X, § 6(A): "[A]ll property used for free public libraries, free museums, public cemeteries, property used exclusively for nonprofit schools and colleges, and all property used exclusively for religious and charitable purposes . . . shall be exempt from taxation . . . ."

OKLA. STAT. tit. 68, § 68-2887(9) (2000) adds: "All property used exclusively and directly for charitable purposes within this state, provided the charity using said property does not pay any rent . . . unless the owner is a charitable institution described in Section 501(c)(3) of the Internal Revenue Code. . . ."

Case Holding(s)

Integris Realty Corp. v. Oklahoma County Board of Tax Roll Corrections (In re Assessment of Real Property), 58 P.3d 200, 206 (Okla. 2002) (ruling

that property leased by nonprofit tenants from a for-profit owner was exempt):

> In recognition of the burden on state government which is lifted by the charitable acts of others, the framers allow an exemption from taxation for property which is "used exclusively"—i.e., property which is physically dedicated and devoted—for charitable purposes. . . . 68 O.S. 2001 § 2887(9) to the extent that it creates a burden on entitlement to an art. 10, § 6 exemption in a way inconsistent with the constitutional provision's language is disapproved.

A dissenting opinion expressed skepticism that the use by the nonprofit tenants was charitable:

> There is documentary evidence establishing the general identities of the tenants as engineering, education and training, facility planning, physician services, foundation, legal, plaza hotel, managed care, CVI lab, diabetes center, heart center, surgery center, and fertility institute. However, there is no evidence that these tenants are care centers providing services to the public or that these tenants' doors are open to the public, poor persons and paying persons alike.

Id. at 207 (Boudreau, J., dissenting).

Oregon

Constitution & Statute(s)
No exemptions referenced in Constitution.

OR. REV. STAT. § 307.130(2) (2000) reads, in part: "property owned . . . by . . . incorporated literary, benevolent, charitable and scientific institutions shall be exempt from taxation . . . [but] only such real or personal property, or proportion thereof, as is actually and exclusively occupied or used in the literary, benevolent, charitable or scientific work carried on by such institutions." And in (3) and (4), an "institution shall not be deprived of an exemption . . . solely because its primary source of funding is from one or more governmental entities" or "because its purpose or the use of its property is not limited to relieving pain, alleviating disease or removing constraints." *Id.* at § 307.130(3)-(4).

Case Holding(s)
Southwestern Oregon Public Defender Services, Inc. v. Department of Revenue, 817 P.2d 1292, 1298 (Or. 1991) ("[T]he fact that taxpayer contracts with the state to perform indigent defense in Coos County does

not disqualify it from receiving an exemption . . . ."). The Court explained that the statute has three requirements: "(1) the organization must have charity as its primary, if not sole, object; (2) the organization must be performing in a manner that furthers its charitable object; and (3) the organization's performance must involve a gift or giving." *Id.* at 1296. As to the last, "the question becomes, not whether taxpayer gains some kind of remuneration from some source, but whether, *so far as the recipient is concerned*, the taxpayer's services are given to the recipients with strings attached." *Id.* at 1297.

The Oregon Tax Court recently denied exemption for a college bookstore. *Portland State University Bookstore v. Multnomah County Assessor*, No. TC-MD 060824C, 2009 Ore. Tax LEXIS 27, at *19 (Or. T.C. January 29, 2009) ("There is no allegation or evidence that the relatively few college students benefiting from Plaintiff's nominal giving fall into the category of 'poor and needy.'").

Pennsylvania

Constitution & Statute(s)

PA. CONST. art. 8, § 2(a) permits the General Assembly to exempt from taxation, among other property, "(v) Institutions of purely public charity, but . . . only that portion of real property of such institution which is actually and regularly used for the purposes of the institution."

The 1997 Institutions of Purely Public Charity Act set forth statutory factors in response to *Hospitalization Utilization Project v. Commonwealth*, 487 A.2d 1306, 1317 (Pa. 1985), which set forth five requirements: "(a) Advances a charitable purpose; (b) Donates or renders gratuitously a substantial portion of its services; (c) Benefits a substantial and indefinite class of persons who are legitimate subjects of charity; (d) Relieves the government of some of its burden; and (e) Operates entirely free from profit motive." The very detailed provisions of 10 PA. STAT. ANN. § 375 (West 1999) explicate and expand on these criteria, and provide safe harbors and rebuttable presumptions. The statute encourages nonprofits to make PILOTs by offering an exemption safe harbor and gives standing to aggrieved for-profit competitors.

Case Holding(s)

The Commonwealth Court repeatedly asserts that only the courts can interpret the constitutional term "institution of purely public charity" despite reversals by the State Supreme Court, which seems to suggest more deference to the legislature. *See, e.g.*, *Alliance Home of Carlisle v. Board of*

Assessment Appeals, 919 A.2d 206, 223 (Pa. 2007) (footnote omitted):

> If the Act 55 presumption and test would lead to a holding that a taxpayer qualified as "an institution of purely public charity," where the *HUP* test would not, fundamental and foundational questions could arise concerning whether: (1) the *HUP* test, which was adopted in the absence of legislation addressing the constitutional term, occupied the constitutional field concerning the exemption, or instead left room for the General Assembly to address the matter; (2) the legislative scheme as adopted comported with the constitutional command and displaced the *HUP* test; and/or (3) if *HUP* were deemed authoritative and comprehensive, whether the legislative findings and scheme set forth in Act 55 gave reason to reconsider the contours of the test thus distilled from judicial experience with individual cases.

Government-funded nonprofits (e.g., prisons, low-income and elderly housing) are a particular area of dispute, leading one commentator to call on the Pennsylvania Supreme Court to clarify the question. "Otherwise, well-meaning charitable social service organizations will continue to waste money pursuing lengthy litigation with frustrating results." Joseph C. Bright, *Pennsylvania Charities Suffer String of Defeats from Commonwealth Court*, STATE TAX TODAY, July 6, 2007, *available at* 2007 STT 130-21. Nonprofit health clubs (e.g., YMCAs) are another pressure point.

Rhode Island

Constitution & Statute(s)

No tax provision in Constitution.

R.I. GEN. LAWS § 44-3-3(8) (2005) exempts:

> Buildings and personal estate owned by any corporation used for a school, academy, or seminary of learning, and of any incorporated public charitable institution, and the land upon which the buildings stand and immediately surrounding them to an extent not exceeding one acre, so far as they are used exclusively for educational purposes, but no property or estate whatever is hereafter exempt from taxation in any case where any part of its income or profits or of the business carried on there is divided among its owners or stockholders. . . .

Note: R.I. GEN. LAWS § 45-13-5.1 (1999) requires state PILOTs to towns of twenty-seven percent of taxes that would otherwise have been paid by nonprofit schools and hospitals. [Update for 2009 proposed "impact fee"].

Case Holding(s)

Few cases. *See, e.g.*, *Order of St. Benedict v. Gordon*, 417 A.2d 881 (R.I. 1980) (granting exemption to faculty housing in dorms at boarding school); *Roger Williams General Hospital v. Littler*, 566 A.2d 948 (R.I. 1989) (denying exemption to equipment leased from business vendor). Old charters set forth a tax exemption that is not affected by the statute.

See also Lifespan Corp. v. City of Providence, 776 A.2d 1061, 1061-62 (R.I. 2001) (denying exemption to property in an administrative building used by an "umbrella entity" to provide services to the hospital and entities): "Lifespan's request that we should equate a corporate office computer to a hospital bed should be directed to the Legislature and not to this Court."

South Carolina

Constitution & Statute(s)

S.C. CONST. art. X, § 3 reads, in part:

> There shall be exempt from ad valorem taxation:
>
> . . . .
>
> (b) all property of all schools, colleges and other institutions of learning and all charitable institutions in the nature of hospitals and institutions caring for the infirmed, the handicapped, the aged, children and indigent persons, except where the profits of such institutions are applied to private use;
>
> (c) all property of all public libraries, churches, parsonages and burying grounds;
>
> (d) all property of all charitable trusts and foundations used exclusively for charitable and public purposes;
>
> . . . .
>
> . . . In addition . . . the General Assembly may provide for exemptions from the property tax, by general laws applicable uniformly to property throughout the State . . . , but only with the approval of two-thirds of . . . each House.

Lengthy and detailed S.C. CODE ANN. § 12-37-220(B) (2009) adds exemptions for specific types of nonprofits (e.g., Boy Scouts, YMCA's,

museums, theaters and symphonies, and certain housing for low-income, disabled, or elderly persons). Subsection (B)(16)(a) covers:

> The property of any religious, charitable, eleemosynary, educational, or literary society, corporation, or other association, when the property is used by it primarily for the holding of its meetings and the conduct of the business of the society, corporation, or association and no profit or benefit therefrom inures to the benefit of any private stockholder or individual.

S.C. CODE ANN. § 12-37-220(B)(16)(a).

Case Holding(s)

No recent state supreme court cases, and few appeals court cases. *See, e.g., Citadel Development Foundation v. County of Greenville*, 308 S.E.2d 797, 800 (S.C. Ct. App. 1983) ("It is one thing to say the Foundation benefits The Citadel, but quite another to claim The Citadel is the beneficial owner of Foundation property.").

South Dakota

Constitution & Statute(s)

S.D. CONST. art. XI, § 6 reads: "The Legislature shall, by general law, exempt from taxation, property used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes. . . ."

S.D. CODIFIED LAWS § 10-4-9.1 (1996) reads:

> Property owned by a public charity and used for charitable purposes is exempt from taxation. A public charity is any organization or society which devotes its resources to the relief of the poor, distressed or underprivileged. A public charity must receive a majority of its revenue from donations, public funds, membership fees or program fees generated solely to cover operating expenses; it must lessen a governmental burden by providing its services to people who would otherwise use governmental services; it must offer its services to people regardless of their ability to pay for such services; it must be nonprofit and recognized as an exempt organization under section 501(c)(3) of the United States Internal Revenue Code of 1954, as amended, and in effect on January 1, 1986; and it may not have any of its assets available to any private interest.

Separately, S.D. CODIFIED LAWS § 10-4-9.3 (1996) exempts property used for human health care.

Case Holding(s)

See Sioux Valley Hospital Ass'n v. South Dakota State Board of Equalization, 513 N.W.2d 562 (S.D. 1994) (rejecting exemption for fitness center run by hospital). The court considered both exemption statutes, beginning with section 10-4-9.3:

> When the Legislature provided a tax exemption for human health care and human health care related purposes, it did not intend to give a tax exemption for "Splashbash Parties." Despite the Center's mandate on health over physique, we find it contrary to . . . associate these fitness activities with human health care per SDCL 10-4-9.3.

Id. at 565.

On the separate question of exemption under section 10-4-9.1, the court concluded:

> Although Minnehaha County does provide swimming and some fitness activities, the Center does not alleviate a governmental burden merely by providing some similar services. Federal Express delivers letters and packages, but does not achieve charitable status by competing with the United States Postal Service.
>
> A charitable exemption "is granted as a concession by government in return for unselfish ministrations to human welfare," and is "accorded as a matter of legislative grace and not as a matter of tax payer right." We do not impugn the Center for its good acts; however, the Center does not primarily devote its resources to the poor, distressed or underprivileged. We find that the facts do not support the conclusion that the Center is a charitable organization per SDCL 10-4-9.1.

Id. at 566 (citations omitted).

Cf. Freeman Community Hospital & Nursing Home v. Hutchinson County, 633 N.W.2d 179, 184 (S.D. 2001) (ruling exempt a congregate living facility owned and operated by a community hospital), explaining that section 9.1:

> [R]equires its subject entity to relieve a governmental burden . . . . Section 9.3 governs tax-exempt status for nonprofit corporations, such as Hospital. Importantly, section 9.3 does not require a nonprofit corporation to relieve a governmental burden. Had the legislature intended to place that requirement on nonprofit corporations it would have done so, but it did not.

Tennessee

Constitution & Statute(s)

TENN. CONST. art. II, § 28 begins: "[A]ll property real, personal or mixed shall be subject to taxation, but the Legislature may except . . . such as may be held and used for purposes purely religious, charitable, scientific, literary or educational. . . ."

TENN. CODE ANN. § 67-5-212(a)(1) (2006) begins:

> There shall be exempt from property taxation the real and personal property, or any part . . . owned by any religious, charitable, scientific or nonprofit educational institution that is occupied and actually used by the institution or its officers purely and exclusively for carrying out one (1) or more of the exempt purposes for which the institution was created or exists . . . [As well as] property . . . owned by an exempt institution that is occupied and actually used by another . . . [for] which the owning institution receives no more rent than a reasonably allocated share of the cost of use, excluding the cost of capital improvements, debt service, depreciation and interest, as determined by the board of equalization.

Subsection (c) provides: "As used in this section, 'charitable institution' includes any nonprofit organization or association devoting its efforts and property, or any portion thereof, exclusively to the improvement of human rights and/or conditions in the community." *Id.* § 67-5-212(c).

Case Holding(s)

Shared Hospital Services Corp. v. Ferguson, 673 S.W.2d 135, 137 (Tenn. 1984) (exempting a nonprofit organization that supplies laundry services to its charitable hospital members on a cooperative basis):

> It is insisted by appellee that the furnishing of laundry services is an essential and integral part of the operation of a hospital. Most cases which have considered this subject support that contention, and we agree. There is no question but that if each member hospital operated its own laundry, the laundry facilities would be exempt.

See also *Youth Programs, Inc. v. Tennessee State Board of Equalization*, 170 S.W.3d 92, 97 (Tenn. Ct. App. 2004) where the court affirmed exemption for a golf tournament, observing: "In Tennessee, unlike many other states, tax exemption statutes are construed liberally in favor of religious, charitable, scientific, and educational institutions." The court continued:

> The fact that a charitable institution's activities may be similar to or in competition with tax-paying businesses does not by itself render the property on which it conducts those activities taxable. For-profit entities may exist to provide the same services as non-profit, charitable entities. We recognize, moreover, that the tournament in this case includes a substantial purse or profit to the tournament winner. However, the fact that a profit is generated by an organization's activities is not determinative. Section 67-5-212 disallows the exemption only where stockholders, officers, members, or other employees receive or are entitled to receive profits other than reasonable compensation for services.

Id. at 104-05 (citations omitted). Furthermore:

> The State vehemently asserts that the statutes were not intended to encompass charities which exist to raise funds for other charities. We note, as Youth Programs submits, that this argument has broad implications for a number of charitable institutions such as, for example, the United Way. In light of the ambiguity of the statutes and the historically liberal construction in favor of charitable institutions, we are loathe to disturb that construction here. Without so suggesting, if such institutions should not be recognized as charitable, it is within the province of the legislature to disturb the construction of the statutes historically afforded in Tennessee.

Id. at 106 (citations omitted).

Texas

Constitution & Statute(s)

TEX. CONST. art. VIII, § 2(a) reads:

> [T]he legislature may, by general laws, exempt from taxation . . . places of religious worship [and a parsonage]; . . . all buildings used exclusively and owned . . . for school purposes . . . and property used . . . [by] any association engaged in promoting the religious, educational and physical development of boys, girls, young men or young women operating under a State or National organization of like character; also the endowment funds of such institutions of learning and religion not used with a view to profit[;] . . . and institutions engaged primarily in public charitable functions, which may conduct auxiliary activities to support those charitable functions.

TEX. TAX CODE ANN. § 11.18 (2010) describes specific requirements for charities generally and for certain types of charities. Subsection (d) begins: "A charitable organization must be organized exclusively to perform religious, charitable, scientific, literary, or educational purposes" *and* "engage exclusively in performing one or more of the following charitable functions"—and as long as that list is, it does not contain a catchall category. (The first item requires "providing medical care without regard to the beneficiaries' ability to pay, which in the case of a nonprofit hospital or hospital system means providing charity care and community benefits in accordance with Section 11.1801").

Moreover, subsection (f) requires assets to be committed, on dissolution, for transfer to a *similar* charity or to the government. *Id.* § 11.18(f).

Case Holding(s)

City of McAllen v. Evangelical Lutheran Good Samaritan Society, 530 S.W.2d 806, 810 (Tex. 1975):

> With the advent of present day social security and welfare programs, the traditional concept of charity, involving the extension of free services to the poor and alms-giving, will be rarely found since wide ranging assistance is available to the poor under such programs. Furthermore, the courts have defined charity to be something more than mere alms-giving or the relief of poverty and distress. The ultimate consideration then, should be based upon an evaluation of the total operation of the institution engaged in humanitarian activities whose services are rendered at cost or less and which are maintained to care for the physical and mental well-being of the recipients. By that total operation the institution must assume "to a material extent, that which otherwise might become the obligation or duty of the community or the state."

North Alamo Water Supply Corp. v. Willacy County Appraisal District, 804 S.W.2d 894, 898-99 (Tex. 1991) (denying exemption to nonprofit organizations that supply water "to individual water district 'members' who are able to pay for those benefits"):

> Any organization, whether classified as almsgiving or non-almsgiving, which seeks to be classified as a 'purely public charity' must make no gain or profit and be organized to accomplish ends wholly benevolent by engaging in humanitarian services maintained to care for the physical or mental well-being of its recipients. The total operation of the charity must affect all

> the people of a community or state by assuming, to a material extent, services which otherwise might devolve to and become the obligations of the community or state.

Rejecting the argument that the plaintiff satisfies the statute, the court added: "Before an organization can be considered for qualification for tax exempt status under section 11.18 of the Texas Tax Code, that organization must first meet the applicable constitutional requirements which entitle those organizations to seek the exemption." *Id.* at 899.

Utah

Constitution & Statute(s)

UTAH CONST. art. XIII, § 3(1)(f) exempts "property owned by a nonprofit entity used exclusively for religious, charitable, or educational purposes."

UTAH CODE ANN. § 59-2-1101 (2008).

Case Holding(s)

Utah County by County Board of Equalization v. Intermountain Health Care, 709 P.2d 265 (Utah 1985), ruled unconstitutional a statute automatically exempting nonprofit hospitals, and denied exemption to two hospitals that failed to prove they made a substantial gift of services—payments from the government, insurers, and patients basically covered the hospitals' operating expenses for the years at issue (the court ignored $4 million donated for construction) (citing Mark Pauley & Michael Redisch, *The Not-For-Profit Hospital as a Physicians' Co-operative*, 63 AM. ECON. REV. 87 (1973) and Robert Charles Clark, *Does the Nonprofit Form Fit the Hospital Industry?*, 93 HARV. L. REV. 1416 (1980)):

> It may very well be . . . that *all* hospitals, for-profit and nonprofit, should be granted a tax exemption because of the great public need they serve. But it is beyond the power of the Legislature to grant such a public policy-based exemption under the language of the Utah Constitution as it now reads. This Court has clearly and recently affirmed the necessity of identifying the element of "gift," a nonreciprocal contribution to the community.

Intermountain Health Care, 709 P.2d at 277. "Furthermore, nonprofit hospitals that generate a surplus from their operations ought not to be tax exempt under the 'burden' theory because they are not passing along the benefit of the exemption to the public unless they are charging less for services than would be required absent the tax exemption[.]" *Id.* at 278; *see also Howell v. County Board ex rel. IHC Hospitals, Inc.*, 881 P.2d 880, 882 (Utah 1994) (upholding State Tax Commission's standards for

exempting nonprofit hospitals and nursing homes, and Intermountain's satisfaction of them).

Intermountain Health Care's factors for charitable use are:

> (1) whether the stated purpose of the entity is to provide a significant service to others without immediate expectation of material reward; (2) whether the entity is supported, and to what extent, by donations and gifts; (3) whether the recipients of the "charity" are required to pay for the assistance received, in whole or in part; (4) whether the income received from all sources (gifts, donations, and payment from recipients) produces a "profit" to the entity in the sense that the income exceeds operating and long-term maintenance expenses; (5) whether the beneficiaries of the "charity" are restricted or unrestricted and, if restricted, whether the restriction bears a reasonable relationship to the entity's charitable objectives; and (6) whether dividends or some other form of financial benefit, or assets upon dissolution, are available to private interests, and whether the entity is organized and operated so that any commercial activities are subordinate or incidental to charitable ones.

Intermountain Health Care, 709 P.2d at 269-70. Note six adds: "adapted from the test articulated by the Minnesota Supreme Court in *North Star Research Institute v. County of Hennepin*, 236 N.W.2d 754, 757 (Minn. 1975)." *Id.* at 270 n.6.

Cf. Yorgason v. County Board of Equalization, 714 P.2d 653, 654 (Utah 1986) (exempting a nonprofit apartment building leased under HUD regs to the needy, elderly and handicapped). The dissent was skeptical:

> [W]hat happens here is simply shifting the burden for providing housing for the elderly and handicapped from local and state government to the federal government . . . . Shifting the financial burden from local and state government to the federal government does not relieve the taxpayers of Salt Lake County [who also pay federal taxes] from any burden.

Id. at 665-66 (Howe, J., dissenting).

Vermont

Constitution & Statute(s)

VT. STAT. ANN. tit. 32, § 3802(4) (2009) exempts:

> Real and personal estate granted, sequestered or used for public, pious or charitable uses; real property owned by churches

> or church societies or conferences and used as parsonages . . .; real and personal estate set apart for library uses . . . ; and lands owned or leased by colleges, academies or other public schools . . . ; but private buildings on such lands shall be set in the list . . . and shall not be exempt. The exemption of lands owned or leased by colleges, academies or other public schools, shall not apply to lands or buildings rented for general commercial purposes . . . .

In my favorite case, *American Museum of Fly Fishing, Inc. v. Town of Manchester*, 557 A.2d 900, 905 (Vt. 1989), the dissent complained that by the majority's overruling of its governmental function test, "[t]he door has been opened wide for every fly-by-night enterprise to acquire property and forthwith remove it as a source of revenue for the town in which it is located." *Id.* at 907.

Case Holding(s)

Medical Center Hospital v. Burlington, 566 A.2d 1352, 1355 (Vt. 1989) (citations omitted):

> [T]his state has never required a certain percentage of free care to be rendered before finding an organization to be a tax-exempt charity, unlike other jurisdictions which have imposed such restrictions. In our opinion, pegging charitability to a stated amount of free care rendered would not be workable in determinating an organization's taxable status. Instead, uncertainty would reign, with taxability determined on a yearly basis depending on economic factors not within the control of any one person or organization.

Rather, an "'open-door' policy . . . reflects settled Vermont law regarding the characteristics of charitable trusts, an area of law closely connected to the inquiry at hand." *Id.*

> [I]t is unreasonable to suggest that because modern medical institutions no longer operate in precisely the same manner as they did many years ago, they should lose their traditional tax-exempt status. We recognize, as have other jurisdictions, that the definition of "charitable organization" need not be locked into the past.

Id. at 1356. "Our case law supports the proposition that not-for-profit institutions may generate revenues in excess of their expenses in order to maintain the organization, the criteria being only that such revenues not be passed through to shareholders as profits but put back into operating expenses." *Id.* at 1357. "We have found no case, and defendant has directed

us to none, requiring employees of not-for-profit institutions to work for less than market rate in order for that institution to be deemed 'charitable' for tax purposes. " *Id.*

Virginia

Constitution & Statute(s)

VA. CONST. art. X, § 6(a) exempts churches and parsonages, nonprofit libraries and educational institutions, and, on or after January 1, 2003, "[p]roperty used by its owner for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes, as may be provided by classification or designation by an ordinance adopted by the local governing body and subject to such restrictions and conditions as provided by general law." *Id.* § 6(a)(6). However, "the General Assembly by general law may restrict or condition, in whole or in part, but not extend, any or all of the above exemptions." *Id.* § 6(c). Existing exemptions are either grandfathered or revocable only by the General Assembly.

VA. CODE ANN. § 58.1-3606 (2009) exempts specified classes of property (e.g., property occupied and used by the YMCA).

VA. CODE ANN. § 58.1-3651(B) sets forth the process for exemption by classification or designation by ordinance adopted by a local governing body; factors to consider include: (1) I.R.C. § 501(c) status; (3) payment of unreasonable compensation; (4) whether a significant portion of the org is funded by donations (including volunteer time), or local, state or federal grants; (5) "Whether the organization provides services for the common good of the public" or (6) is involved in political campaigns or lobbying; (7) "The revenue impact to the locality and its taxpayers of exempting the property"; and (8) any other relevant criteria. *Id.*§ 58.1-3651(B)(1), (3)-(8).

Case Holding(s)

Virginia Baptist Homes, Inc. v. Botetourt County, 668 S.E.2d 119, 125 (Va. 2008) (recognizing the exemption of "The Glebe," a continuing-care-retirement community owned by Virginia Baptist Homes ("VBH"), under Virginia Code § 58.1-3650.33, the successor statute to the statute enacted by the General Assembly designating VBH exempt for religious or benevolent purposes).

Cf. City of Richmond v. Virginia United Methodist Homes, Inc., 509 S.E.2d 504 (Va. 1999) (involving the effect on exemption of a change in purpose in the articles of incorporation). United Methodist Homes had initially defined its corporate purpose as providing "a home or homes for the aged

and infirm and needy persons." *Id.* at 505. A change to the articles of incorporation replaced the reference to "the aged and infirm and needy persons" with the term "aging persons." *Id.* The court held that this new language was a "significant change" requiring further examination to determine if United Methodist Homes' property still qualified for tax-exempt status as an "asylum" under the classification statute it relied on. *Id.* at 509. The *Virginia Baptist Homes* case observed: "It is significant that the *Richmond* case was a classification case rather than a designation case; because we noted that upon the same facts presented, 'Nothing in this opinion should be interpreted as restricting Methodist Homes from obtaining a legislative exemption from local taxes by designation under Code § 58.1-3607.'" *Virginia Baptist Homes*, 668 S.E.2d at 124 (quoting *Virginia United Methodist Homes*, 509 S.E.2d at 509 n.5).

The *Virginia Baptist Homes* court commented:

> While there may have been some changes made to the corporate structure of VBH since the designation in order to limit tort liability, adjust to changes in federal tax law, and allow for greater flexibility when making capital improvements, the record . . . reflects that its dominant purposes and that of The Glebe have not changed since the General Assembly granted its tax-exempt designation.

Id. at 124. The concluding footnote reads: "The General Assembly may revoke VBH's tax-exempt designation pursuant to Code § 58.1-3605." *Id.* at 124 n.*.

Washington

Constitution & Statute(s)

WASH. CONST. art. VII, § 1 reads, in relevant part: "Such property as the legislature may by general laws provide shall be exempt from taxation."

WASH. REV. CODE ANN. § 84.36.040(1) (West 2010) exempts nonprofit day care centers, libraries, orphanages, homes or hospitals for the sick or infirm, and outpatient dialysis facilities as long as "the benefit of the exemption inures to the user."

The general exemption statute seems to be section 84.36.030(1)(a), which exempts: "Property owned by nonprofit organizations or associations, organized and conducted for nonsectarian purposes, which shall be used for character-building, benevolent, protective or rehabilitative social services directed at persons of all ages." WASH. REV. CODE ANN. § 84.36.030(1)(a).

Case Holding(s)

The anti-inurement quoted statutory language used to read "when such institutions are supported in whole or in part by public donations or private charity, and all of the income and profits thereof are devoted, after paying the expenses thereof, to the purposes of such institutions. . . ." *Yakima First Baptist Homes, Inc. v. Gray*, 510 P.2d 243, 245 (Wash. 1973). Construing the donation language, the state supreme court ruled that federal rent subsidies paid under a contract between an institution and the federal government do not count as public donations. *Id.* at 246.

Adult Student Housing, Inc. v. Department of Revenue, 705 P.2d 793 (Wash. App. 1985), ruled that in Washington, "benevolent" and "charitable" are interchangeable terms. The court turned to a supreme court decision on charitable immunity: "[A] charitable corporation to be such must not only engage in works tending to the betterment of mankind, but it must do so as a charity. If it renders no services except those for which it receives an adequate reward it is a business, not a charitable, concern, and cannot claim the immunities of the latter." *Adult Student Housing*, 705 P.2d at 798 (quoting *Susmann v. Young Men's Christian Ass'n of Seattle*, 172 P. 554, 556 (Wash. 1918)).

West Virginia

Constitution & Statute(s)

W. VA. CONST. art. X, § 1: "[P]roperty used for educational, literary, scientific, religious or charitable purposes . . . may by law be exempted from taxation . . . ."

W. VA. CODE ANN. § 11-3-9 (West 2010) reads, in part: "(12) Property used for charitable purposes and not held or leased out for profit.. . . ." Compare the sales-tax exemption statute, applicable to a "corporation or organization which annually receives more than one half of its support from any combination of gifts, grants, direct or indirect charitable contributions or membership fees[.]" W. VA. CODE § 11-15-9(a)(6)(C).

Case Holding(s)

In re Tax Assessment of Foster Foundation's Woodlands Retirement Community, 672 S.E.2d 150, 170-71 (W. Va. 2008) ("[T]he Foundation asks that we reduce the assessment further in light of its § 501(c)(3) status, but, in order to prevail, the Foundation must present clear and convincing evidence that the assessment is erroneous. Upon a review of the record in this case, we conclude that the Foundation has not sustained its burden of

proof."). Evidently the retirement facility is taxable because the property is leased out for profit.

Cf. Davis Memorial Hospital v. West Virginia State Commissioner, 671 S.E.2d 682 (W. Va. 2008) (denying sales tax exemption to a hospital earning $64 million in exempt-purpose income, which is to be included in support); *cf. Apollo Civic Theatre, Inc. v. State Tax Commissioner*, 672 S.E.2d 215 (W. Va. 2008) (construing support—and donations—to include contribution of services).

Wisconsin

Constitution & Statute(s)
No specific constitutional provision.

WIS. STAT. § 70.11(4) (2010) exempts, among other property: "Property owned and used exclusively by educational institutions offering regular courses [six] months in the year; or by churches or religious, educational or benevolent associations, including benevolent nursing homes and retirement homes for the aged but not including . . . a health maintenance organization. . . ." *Id.* The exemption for hospitals in (4)(m)(a) "does not apply to property used for commercial purposes, as a health and fitness center or as a doctor's office." *Id.* § 70.11(4)(m)(a).

Note extensive debate culminating in 2009 legislation for exemption of "Benevolent Low-Income Housing" in Wis. Stat. § 70.11(4a), as described in Legislative Fiscal Bureau, Comparative Summary of Recommendations: Assembly, Senate, and Conference Committee Changes to Joint Committee on Finance, 2009-11 Wisconsin State Budget 125-26 (Property Tax Exemption for Certain Types of Housing) (June 25, 2009), at http://www.legis.state.wi.us/lfb/2009-11Budget/2009_06_25Conf%20Comm.pdf.
Under the budget bill signed June 29, 2009, "the state compensates the taxing jurisdictions in which tax-exempt research property is located for the property taxes that the jurisdictions would otherwise have collected." Assem. 75, 2009-2010 Leg., Reg. Sess. (Wis. 2009).

Case Holding(s)
Milwaukee Regional Medical Center, Inc. v. City of Wauwatosa, 735 N.W.2d 156, 173 (Wis. 2007) (ruling that a daycare center for nonprofit hospitals' employees and the public is not exempt because Milwaukee Regional Medical Center ("MRMC") is not an educational association):

> [U]nder the five-part statutory test, both the organization (MRMC) and the property (day care facility) must qualify for exemption under Wis. Stat. § 70.11(4). Hence, (1) the organization must qualify as an educational association; and (2) the property of the organization must be owned and used exclusively for the purposes of the association. If only the organization's activities at the property were relevant in determining whether an organization is an educational association, the second part of the statutory test would become superfluous because the use of the property would already be determined.

Id. at 172 (citations omitted).

> Education of young children is incidental to MRMC's primary goal of "aid[ing] and support[ing] the development and provision of health services in the Milwaukee region" and "facilitat[ing] the efficient development and functioning of the Medical Center campus."
>
> . . . .
>
> [I]n addition, . . . Campus Day Care is not MRMC's primary business activity, as it is not MRMC's primary source of revenue.

Id. at 173.

Ridge Side Cooperative v. City of Madison, No. 2006AP1100, 2007 Wis. App. LEXIS 172, at *4 (Wis. Ct. App. Mar. 1, 2007) (unreported) (footnote omitted) ("We agree with the circuit court that, under the no-profit-to-members interpretation of WIS. STAT. § 70.11(4) in Milwaukee Protestant Home for the Aged [v. City of Milwaukee, 164 N.W.2d 289 (Wis. 1969)], Ridge Side is not a 'benevolent association' because its members are eligible for up to a [five-percent] annual gain on their transfer fees.").

Wyoming

Constitution & Statute(s)

WYO. CONST. art. 15, § 12: "The property of . . . public libraries, lots with the buildings thereon used exclusively for religious worship, church parsonages, church schools and public cemeteries, shall be exempt from taxation, and such other property as the legislature may by general law provide."

WYO. STAT. ANN. § 39-11-105(a) (2009) exempts, in part: "(xvi) Property of a museum or hospital district"; "(xix) Property of charitable trusts"; and "(xxv) Property used for schools, orphan asylums or hospitals to the extent they are not used for private profit . . . ."

Case Holding(s)

I could find no cases construing exemption for private nonprofits of any sort (except for a case denying exemption for property leased to a nonprofit). Several cases construe exemption for government-owned property, including *Deromedi v. Town of Thermopolis*, 45 P.3d 1150, 1154 (Wyo. 2002) ("[A] public museum serves a governmental purpose similar to that served by a library, park, golf course, art gallery or other public recreational facility, and we hold that the [County Board of Equalization]'s finding that the museum had a governmental purpose is supported by substantial evidence.").

NOTES

MEGACHURCHES AND PRIVATE INUREMENT: ARE SOME FAITHS TAXABLE?

*Gerrit V. Betz**

Abstract: This Note investigates enforcement options for modern Prosperity Gospel churches referring to past enforcement of mail-order ministries, recent developments in the tax code in the form of intermediate sanctions, and two controversial cases: the *Unification Church* case and the *Hernandez* case. In the *Unification Church* case, the fact that violative behavior was strongly linked to religious belief insulated the church from attack. In the *Hernandez* case, these arguments failed.

Modern Prosperity-Gospel-preaching megachurches will present a very similar problem for the IRS and Congress as they take action against these groups and their leaders. This Note weighs the competing interests in the Establishment Clause, the Free Exercise Clause, and consistent application of the tax code, and concludes that the courts and the IRS ought to proportionally tax egregious actors per the intermediate sanctions to prevent inconsistencies and perverse incentives.

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INTRODUCTION

The Internal Revenue Code ("I.R.C.") chooses not to tax "religious organizations,"[1] nor the donations they receive,[2] because religious organizations are presumed to be charitable nonprofit organizations because of their religiosity.[3] But given the wide possibilities of religious belief, could there be such a thing as a *profitable* religious organization?[4] According to the I.R.C., such a religious for-profit organization would plainly not qualify for tax exemption.[5] A natural element of a nonprofit organization is the requirement that its income must benefit the public at large, rather than a small number of persons.[6] Yet, profitable religious organizations may already exist.[7]

Currently, about 1200 churches in America each host more than 2000 people each week and take in average revenues of $6.5 million annually.[8]

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1. I.R.C. § 501(a), (c)(3) (2006).

2. § 170(c)(2).

3. *See* Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970).

4. See *infra* Part V.A for a discussion of megachurches preaching the Prosperity Gospel.

5. *See* § 501(c)(3) ("[N]o part of the net earnings of [the organization] inures to the benefit of any private shareholder or individual.").

6. *See Walz*, 397 U.S. at 673 (agreeing with the Tax Commission of New York's argument that tax-exempt classification serves groups that work towards the public interest).

7. *See infra* Part V.

8. SCOTT THUMMA & WARREN BIRD, HARTFORD INST. FOR RELIGION RESEARCH, CHANGES IN AMERICAN MEGACHURCHES: TRACING EIGHT YEARS OF GROWTH AND

Their parking lots are vast;[9] they often require satellite locations to accommodate their parishioners;[10] some even host businesses inside their own walls.[11] These are "megachurches"; none belong to a larger religious hierarchy, and each is typically led by one charismatic preacher who dominates the organization.[12] All of these congregations are Protestant.[13] Some preach a special brand of Protestantism that outsiders have dubbed the "Prosperity Gospel."[14] The Prosperity Gospel's message is that God wants to reward faithful people spiritually in heaven *and materially* on earth.[15]

Unfortunately, this interpretation is at odds with what the I.R.C. says about material rewards and charitable organizations.[16] Section 501(c)(3) grants charitable status on the condition that "no part of the net earnings of [the organization] inures to the benefit of any private shareholder or

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INNOVATION IN THE NATION'S LARGEST-ATTENDANCE CONGREGATIONS 4 (2008), *available at* http://hirr.hartsem.edu/megachurch/Changes%20in%20American%20Megachurches%20Sept%2012%202008.pdf.

9. Joel Osteen's church website provides directions to navigate the several blocks worth of parking necessary to accommodate the large crowds. *See* Lakewood Church Parking Map, http://www.lakewood.cc/downloads/pdf/Pathwy_Guide_ParkingMap_01.pdf (last visited Apr. 15, 2010). Ed Young's Fellowship Church leaves nothing to chance: "Our terrific parking team will direct you as you enter the campus." Fellowship Church, Welcome, http://www.fellowshipchurch.com/welcome (last visited Apr. 15, 2010).

10. THUMMA & BIRD, *supra* note 8, at 7.

11. *See* Rolling Hills Community Church, Atrium Café, http://www.rollinghills.org/atrium-cafe (last visited Apr. 15, 2010); Healing Place Church, Annex, http://www.healingplacechurch.org/annex.php (last visited Apr. 15, 2010) (offering "CC's coffee"); Llyod Gite, *McDonald's Goes to Church*, BLACK ENTERPRISE, Sept. 1, 2001, http://www.blackenterprise.com/magazine/2001/09/01/mcdonalds-goes-to-church/ (hosting a McDonald's restaurant in order to promote employment in the community).

12. THUMMA & BIRD, *supra* note 8, at 1. These preachers also often earn large sums of money by selling religious books, CDs, DVDs, and other materials. *See* David Van Biema & Jeff Chu, *Does God Want You to Be Rich?*, TIME, Sept. 10, 2006, http://www.time.com/time/magazine/article/0,9171,1533448,00.html (noting Joel Osteen has sold four million copies of *Your Best Life Now*, and Rick Warren has sold over thirty million copies of *The Purpose Driven Life*). However, selling religious media for extra income is nothing new. *See* United States v. Ballard, 322 U.S. 78, 84 n.1 (1944) (regarding a defendant religious organization that sold "phonograph records . . . on representations that they would bestow on purchasers 'great blessings and rewards in their aim to achieve salvation'").

13. THUMMA & BIRD, *supra* note 8, at 1.

14. JEREMY MORRIS, THE CHURCH IN THE MODERN AGE 128 (2007).

15. *See* Van Biema & Chu, *supra* note 12. See also *infra* Part V for a more in-depth discussion of megachurches and the Prosperity Gospel.

16. *See* I.R.C. § 501(c)(3) (2006).

individual."[17] Typically, a violation of this prohibition takes the form of a shareholder-type payment scheme for a religious leader,[18] use of church accounts as a funnel for funds that would otherwise be taxed,[19] or the misappropriation of church activities to the great material benefit of a single person.[20] The Internal Revenue Service ("IRS") used this rule effectively to shut down mail-order ministries in the 1970s and 1980s.[21] The IRS prefers to regulate religious organizations with this rule because it catches sham churches—disingenuously created only to take advantage of a tax break—without ever making a judgment about the religious beliefs of alleged adherents.[22]

The IRS avoids questioning the sincerity of adherents' religious beliefs because this inquiry, however straightforward it might seem, raises constitutional problems under either the Free Exercise Clause or the Establishment Clause.[23] The Constitution demands,[24] and the IRS requires, that enforcement must not be based on a subjective judgment of what is and is not a true religion.[25] By focusing only on whether the financial practices of an institution conform to the inurement requirements, enforcers hope to avoid faith issues entirely.[26]

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17. *Id.* This Note refers generally to this proposition as the restriction or prohibition against private inurement and benefit.

18. *See, e.g.*, Founding Church of Scientology v. United States, 412 F.2d 1197, 1200-01 (Ct. Cl. 1969) (explaining that L. Ron Hubbard's ten-percent fee from all branches of the Church of Scientology was inurement to a private shareholder).

19. *See, e.g.*, Freedom Church of Revelation v. United States, 588 F. Supp. 693, 696-97 (D.D.C. 1984).

20. *See, e.g.*, *Founding Church of Scientology*, 412 F.2d at 1199.

21. *See* Kamron Keele, *A Plea for the Repeal of Section 107: No More Tax-Free Mansions for Dubious "Ministers of the Gospel,"* 56 TAX LAW. 73, 90 (2002).

22. *See, e.g.*, *Freedom Church of Revelation*, 588 F. Supp. at 696-97 (holding the church was not operated exclusively for charitable purposes because its chief activity was to sell access to the church bank account to people in exchange for a one-time cash donation of $3600-4100 and a one-percent fee of all money sheltered from tax in this way); Ecclesiastical Order of the Ism of Am, Inc. v. Comm'r, 80 T.C. 833, 843 (1983) (holding, on private inurement grounds, that the religious organization in question was "nothing more than a commercial tax service").

23. *See* Bruce J. Casino, Note, *"I Know It When I See It": Mail-Order Ministry Tax Fraud and the Problem of a Constitutionally Acceptable Definition of Religion*, 25 AM. CRIM. L. REV. 113, 139-40 (1987).

24. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

25. *See* Casino, *supra* note 23, at 139 (quoting INTERNAL REVENUE SERVICE, EXEMPT ORGANIZATIONS HANDBOOK § 344.2, *reprinted in* 4 INTERNAL REVENUE MANUAL (CCH) 20,525, 20,564 (1977)).

26. *See Ecclesiastical Order of the Ism of Am.*, 80 T.C. at 843.

New Prosperity Gospel churches may complicate this normally innocuous process. If there is a religion centered around generally accepted religious ideas, but also controversial material ideas, the conclusion that the church's money inures to the benefit of private individuals is suddenly fraught with implications for the religious belief systems of many people. The very presence of the prohibition against private inurement in the tax code may expose a cultural, statutorily encoded bias favoring familiar religions with modestly compensated priest-figures.[27]

This Note opens with a description of the basic statutes and precedent surrounding the requirements of I.R.C. § 501(c)(3). Then, it gives some examples of tax enforcement involving Establishment Clause and Free Exercise Clause issues. It also describes some of the IRS's intermediate sanctions as helpful logical analogies. This Note then gives an overview of the background law on Establishment and Free Exercise Clause issues, focusing on tensions that have already surfaced when separating religious beliefs from supposedly neutral statutory requirements. Part V introduces megachurches as well as the controversy surrounding their legitimacy as a part of Christianity. Part VI attempts to reconcile the analytical tension between the *Church of Scientology* and *Unification Church* cases and applies the two competing strands of reasoning to megachurches. Next, those topics converge on a discussion of the pros and cons of the religious tax exemption. Finally, this Note concludes that the courts and the IRS face the unavoidable decision to favor one of two extremes: loyalty to the tax code or deference to a financial definition of religious belief; and that the former is the better course.

I. The Requirements of Internal Revenue Code § 501(c)(3)

A nonprofit organization is exempt from federal income tax if it meets the requirements of I.R.C. § 501(c)(3).[28] Individual donations to nonprofit organizations are also tax deductible if they fall within the requirements of I.R.C. § 170, which are almost identical to those of § 501(c)(3).[29] Churches are presumed to meet the requirement that they be "organized and operated exclusively for religious . . . purposes" by virtue of their self-identification as religious organizations.[30] These rules are

27. By allowing exemption because an organization is organized and operated *exclusively* for religious purposes, disallowing the exemption sends a message that the prohibited activity is not religious; if it were, then the organization's activities would have been completely and only religious. *Cf.* Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 857 (10th Cir. 1973).

28. *See generally* I.R.C. § 501(c)(3) (2006).

29. *Compare* § 170(a)(1), *with* § 501(c)(3).

30. § 501(c)(3); § 170(b)(1)(A)(i). In other words, a new religious organization need not

generous to religious organizations: the presumption of meeting the requirements means that to become religious organizations under the tax code, these organizations need only exist.[31] Revenues and donations are tax-free immediately.[32] This treatment is enviable compared to that given to all other charitable nonprofit organizations, which must file an IRS form 990 annually to maintain their nonprofit status.[33]

To be a charitable nonprofit organization, a religious organization must also meet the requirement that "no part of the net earnings of [the organization] inures to the benefit of any private shareholder or individual."[34] For these purposes, "no part" is interpreted very strictly in order to remain harmonious with the requirement that a church is operated exclusively for charitable (i.e., religious) purposes.[35] If any part of its earnings is diverted from that purpose, then the organization cannot be said to operate "exclusively" for that purpose.[36]

A violation of the restriction against private benefit refers to a benefit to an outsider usually involving a consulting firm, parent organization, or unrelated association.[37] This is both because of explicit language in § 501(c)(3) and as a necessary inference from the requirement that religious charitable organizations be "organized and operated exclusively for religious . . . purposes."[38] In contrast, violations of the restriction against

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provide any evidence other than the assertion that it is a religious organization to qualify initially for federal nonprofit status. § 501(c)(3).

31. *See* § 508(a)-(b), (c)(1)(A) (exempting "churches" from the otherwise required initial application for tax-exemption).

32. *See* § 508(a)-(b), (c)(1)(A). However, many churches choose to apply for charitable status anyway as an assurance to donors that their contributions will be tax-deductible. *See* JAMES J. FISHMAN & STEPHEN SCHWARZ, NONPROFIT ORGANIZATIONS: CASES AND MATERIALS 458 (3d ed. 2006).

33. *See* § 6033(a)(1), (a)(3)(A)(i) (exempting "churches" from the annual filing requirement of all other § 501(c)(3) organizations). The form 990 is the form the IRS requires each nonprofit organization to file annually, giving details on income, assets, expenditures, membership, etc. *See* Treas. Reg. § 1.6033-1(a)(1), (a)(2)(i) (2009). Organizations affiliated with religious organizations, some schools, and some animal cruelty organizations also enjoy the privilege of not having to file the form 990 annually. *See* Treas. Reg. § 1.6033-1(g)(1)(i)(a)-(d).

34. I.R.C. § 501(c)(3).

35. *See* Unitary Mission Church v. Comm'r, 74 T.C. 507, 512 n.7 (1980).

36. *See id.*

37. *Compare* Ginsberg v. Comm'r, 46 T.C. 47, 55-56 (1966) (dredging of waterways to prevent odor was done only near the residents who paid for the service and any public benefit was incidental), *with* Rev. Rul. 70-186, 1970-1 C.B. 129 (ruling that a private benefit from maintenance of nearby lake to nearby landowners was incidental and therefore permissible).

38. I.R.C. § 501(c)(3); Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (as amended in 2008) ("An

private inurement refer to benefits to a single private individual, usually an insider of a particular organization who receives something like a dividend.[39]

II. Enforcement Examples

A. Loss of Exemption from Outright Fraud

The Freedom Church was investigated by the IRS for setting up a tax shelter poorly disguised as a church.[40] The Freedom Church attracted newcomers with an advertisement that they could legally lower their taxes by seventy to one-hundred percent.[41] In a seminar, potential parishioners learned that they could join with a donation of $4100 ($3600 if they "donated" within ten days of the seminar), granting them access to the Freedom Church's bank account.[42] Using the account, individuals would funnel their money through the Freedom Church to avoid federal taxes on the condition that they pay a one percent fee on all money moving through the church's bank accounts to the Freedom Church.[43]

Here, the federal court had no problem affirming the final determination of the IRS.[44] It found that the Freedom Church "was actively promoting tax-avoidance methods" and that it violated the private inurement prohibition.[45] Clearly, the organization was a ruse to avoid

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organization is not organized or operated exclusively for one or more of the [charitable] purposes specified . . . unless it serves a public rather than a private interest." Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) (2009)). "The requirement that there be no private inurement overlaps the requirement that an organization must operate exclusively for exempt purposes. Clearly, if part of an organization's earnings inure to the benefit of private individuals, the organization cannot be operating exclusively for exempt purposes." Freedom Church of Revelation v. United States, 588 F. Supp. 693, 698 (D.D.C. 1984). However, the requirement is not as strict as the *Freedom Church* court makes it sound:

> An organization will be regarded as operated exclusively for one or more exempt purposes only if it engages *primarily* in activities which accomplish one or more of such exempt purposes . . . . An organization will not be so regarded if more than an *insubstantial part* of its activities is not in furtherance of an exempt purpose.

Treas. Reg. § 1.501(c)(3)-1(c)(1) (emphasis added) (setting out the operational test).

39. *See, e.g.*, People of God Cmty. v. Comm'r, 75 T.C. 127, 132 (1980).

40. *See Freedom Church of Revelation*, 588 F. Supp. at 699.

41. *See id.* at 696.

42. *Id.*

43. *Id.* at 696-97.

44. *See id.* at 697.

45. *Id.* at 699.

taxation by diverting funds through the church.[46] Also, the IRS cracked down on a number of tax-evasion schemes in the 1970s and 1980s where a church would encourage new members to join solely to take advantage of the parsonage deduction.[47] These abuses differ from Prosperity Gospel practices in that the Prosperity Gospel's focus on money flows from its beliefs and structure, whereas this type of violation begins with the idea to avoid taxes and merely uses religion as a pretense to achieve that goal.[48]

B. Loss of Exemption from Salary Violations

There are two typical violations of the prohibition against private inurement where an individual with substantial control receives an impermissible benefit: either a shareholder-type pay scheme or arrangements that feature high wages but little accountability.[49] The first is exemplified in *People of God Community v. Commissioner*, where the private individual in question was the lead preacher of the church.[50] His pay was a percentage of the gross income of the church—in other words, a cut of the donations.[51] He and the People of God Community Church argued before the court that the scheme was supported by scripture: "[I]f one member suffer, all suffer. That if one member rejoices, we all are to rejoice."[52]

The Tax Court held that the "method by which ministers' compensation was determined shows clearly that a part of [the church's] net earnings was paid to private shareholders or individuals."[53] It also observed that ministerial salaries were approximately seventy-five percent of the church's total outlays.[54] The Tax Court emphasized that the *method* was faulty: paying employees in a shareholder-like fashion is almost conclusive evidence that net earnings of the religious organization inure to a private individual.[55] It is unknown whether megachurches pay ministers according to the success of the church because they are not required to file

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46. *See Freedom Church of Revelation*, 588 F. Supp. at 697.

47. *See* Keele, *supra* note 21. The parsonage deduction provides for expenses related to a pastor's home, which can be very lucrative. *See id.* at 85-86.

48. *See infra* Part V.

49. *Compare* People of God Cmty. v. Comm'r, 75 T.C. 127, 129 (1980), *with* Bubbling Well Church of Universal Love, Inc. v. Comm'r, 670 F.2d 104, 105 (9th Cir. 1981).

50. *See People of God Cmty.*, 75 T.C. at 129.

51. *Id.*

52. *Id.* at 130. See also *infra* Part V.B for a discussion of biblical support for the Prosperity Gospel.

53. *People of God Cmty.*, 75 T.C. at 132.

54. *Id.* at 130.

55. *See id.* at 132.

annual reports with the IRS.[56] Assuming that they did, the IRS would probably not seek a revocation of the organization's tax-exempt status but would instead find this scenario to be an excellent candidate for intermediate sanctions, which punish only the amount of pay that is in excess of a reasonable payment.[57]

In an example of the second kind of violation, the Bubbling Well Church employed the Harberts family as its sole directors *and* employees.[58] The church alleged that the family members spent one-hundred percent of their time working for the church but could provide no specifics on each person's duties.[59] The only services the church could show actually took place were some holiday services, one marriage, and a few burials.[60]

The circuit court affirmed the revocation of exemption because the church (run by the Harberts) could not corroborate its payments (to the Harberts), and because the Tax Court was entitled to draw an inference of unreasonableness from the lack of evidence of the employees' duties.[61] In affirming, the circuit court emphasized that "the potential for abuse created by the Harberts' control of the church required open and candid disclosure of facts bearing on the exemption application."[62]

In both of the above cases, one problem was that substantial wages were being given to individuals who also exercised substantial control over the religious organizations.[63] Where such suspicious circumstances exist, courts are comfortable asking for comprehensive explanations and drawing adverse inferences when such explanations are lacking.[64] These factors resurface in the intermediate sanctions context.[65]

C. Exemption Upheld Despite Apparent Non-Exempt Activity

Presbyterian & Reformed Publishing Co. v. Commissioner is distinct from the cases discussed above because it involves a publishing company

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56. *See supra* notes 30-33 and accompanying text.

57. See *infra* Part III for more information on intermediate sanctions.

58. Bubbling Well Church of Universal Love, Inc. v. Comm'r, 670 F.2d 104, 105 (9th Cir. 1981).

59. *Id.*

60. *Id.*

61. *Id.* at 105-06.

62. *Id.* at 105.

63. *See id.*; People of God Cmty. v. Comm'r, 75 T.C. 127, 129 (1980); *see also infra* Part V.

64. *See Bubbling Well Church of Universal Love*, 670 F.2d at 105; *People of God Cmty.*, 75 T.C. at 129.

65. *See infra* Part III.

specializing in Presbyterian books, rather than an actual church.[66] The Tax Court revoked the exemption because the organization's practices began to closely resemble those of a for-profit organization.[67] Some important factors for the Tax Court were the accumulation of capital (for the construction of a warehouse), and the fact that the publishing company was not affiliated with any particular subdivision of Presbyterianism, unlike other similar nonprofit-religious publishing companies.[68] The lack of a link to a specific church led the Tax Court to agree with the IRS that the nature of the business competed with for-profits because it was less limited in its subject matter than the other nonprofit publishers.[69] Put differently, the company could not claim to operate exclusively for the public benefit because its highly competitive practices were too similar to the practices of an organization that is operated for private benefit.[70]

However, the circuit court reversed based on the particular facts and several policy grounds.[71] It held that the accumulation of capital in the face of increasing profits was certainly suspicious, but excusable in this case because the publishing company expressly notified the IRS of its intention to expand its business within its original charitable purpose.[72] Also, upholding the revocation would mean that nonprofits would have to either do business inefficiently with an exemption or be effective managers without the benefit of the exemption, even if they remain committed to their original charitable purpose.[73]

Presbyterian & Reformed Publishing provides a good argument for megachurches: that their recent, rapid growth does not suggest that they have left their charitable purpose behind, but rather that they are expanding within that charitable purpose and meeting a real societal need.[74] Also, if ministers are able to show that as their responsibilities increased in concert with their congregations, they may even have a defense to intermediate sanctions.[75]

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66. 743 F.2d 148, 150-51 (3d Cir. 1984).

67. *Id.* at 151-52.

68. *Id.* at 152 & n.2.

69. *Id.* at 152 n.2.

70. *Id.* at 152.

71. *See id.* at 158.

72. *Presbyterian & Reformed Publ'g Co.*, 743 F.2d at 157-58.

73. *Id.* at 158-59; *see also* Trevor A. Brown, Note, *Religious Nonprofits and the Commercial Manner Test*, 99 YALE L.J. 1631, 1645 (1990) (noting that scrutinizing fast-growing organizations discriminates against new successes and favors established players).

74. *Cf.* Brown, *supra* note 73.

75. *See infra* Part III.

III. Intermediate Sanctions

The I.R.C. also provides for intermediate sanctions.[76] Intermediate sanctions apply to excess economic benefits that flow to an "insider" and are instructive of how the IRS approaches private inurement violations.[77] These sanctions focus on excess benefit transactions or deals where the services an insider gives to the organization are worth substantially less than the compensation that the individual receives from the organization.[78] The regulation defines insiders as "disqualified persons," which includes any person who exercises "substantial influence" over the organization.[79] Substantial influence is presumed to be held by voting members on an organization's board and organization presidents.[80] Additionally, someone can be shown to have substantial influence over an organization based on a facts-and-circumstances analysis, including whether the individual's compensation is "primarily based on revenues derived from activities of the organization."[81] The intermediate sanctions law also looks to industry norms for a comparison of services rendered to compensation received; for example, one could find out how much all CEOs of hospitals receive, and then compare one CEO to that average to determine whether his compensation is unreasonably high.[82] It may be easy to compare the salaries of two employees in a non-religious nonprofit industry to see whether one is being over-compensated, but placing a value on spiritual services is more difficult.[83]

These rules articulate a policy principle: they ensure that tax-exempt religious organizations are truly religious and operated exclusively for the public benefit, either because of public services performed or by virtue of being a legitimate religious organization.[84] The tax code seeks to confer the benefit of exemption only on those groups that meet its statutory

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76. I.R.C. § 4958(c)(1)(A) (2006). Prior to intermediate sanctions, the only punishment options available to the IRS were complete revocation of tax-exempt status (effectively the death penalty for any nonprofit organization) or a levying of an arbitrary sum of taxes. Treas. Reg. § 301.6104(c)-1(c) (2009).

77. *See* I.R.C. § 4958(f)(1)(A).

78. *See id.* § 4958(c)(1)(A).

79. *See* Treas. Reg. § 53.4958-3(a)(1).

80. *Id.* § 53.4958-3(c)(1)-(2).

81. *Id.* § 53.4958-3(e)(2)(iii).

82. *See* I.R.C. § 4958 (c)(1)(A).

83. *See* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 12-13 n.2 (1989).

84. *See* Keele, *supra* note 21, at 100 (arguing that certain exemptions for ministers should only apply to "clergy who sincerely devote their lives to spiritual matters and who actually want to aid and comfort the poor and unfortunate").

requirements.[85] In so doing, it risks excluding some organizations that are operated exclusively for religious purposes but may violate to a greater or lesser degree the prohibitions against certain practices, insofar as they conduct activity that is both religious and, for example, political.[86] How can the IRS know that the prohibited activities are not religious in a given case?[87] The government was able to skirt this issue in the above cases, but this Note will point out instances where, when confronted with the issue head-on, § 501(c)(3)'s built-in objectivity floundered.[88]

IV. The Requirements of the Establishment Clause and the Free Exercise Clause

The Supreme Court has described the freedom of religion clauses in the Constitution as a Scylla-and-Charybdis[89] problem because no matter what the government does, it risks violating one of the Constitution's demands.[90] If the government lessens burdens on religions in an effort to encourage free exercise, it may come too close to establishing religion.[91] Conversely, if the government coldly ignores all issues bearing on religion for fear of favoring any, the government may inhibit the free exercise of religion by passively stifling it.[92]

For the purposes of this Note, it is not necessary to delve too deeply into First Amendment jurisprudence.[93] The focus of this Note is whether

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85. *See* Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970) ("Qualification for tax exemption is not perpetual or immutable; some tax-exempt groups lose that status when their activities take them outside the classification and new entities can come into being and qualify for exemption.").

86. *See* I.R.C. § 501(c)(3); Holy Spirit Ass'n for the Unification of World Christianity v. Tax Comm'n, 435 N.E.2d 662, 667 (N.Y. 1982).

87. *See infra* notes 192-204 and accompanying discussion of *Holy Spirit Ass'n for Unification of World Christianity v. Tax Comm'n.*

88. *See infra* Parts IV.A-B.

89. Scylla and Charybdis were two of the many deadly obstacles Odysseus faced on his voyage home from the Trojan War. *See* THE ODYSSEY OF HOMER 194-95 (S.H. Butcher & A. Lang, trans., 2d ed. 1879) [hereinafter THE ODYSSEY]. The unique threat of Scylla and Charybdis was that each was positioned on either side of a narrow sea passage. *Id.* If Odysseus sailed too close to one cliff, the monster Charybdis might suck the water from underneath his boat—too close to the other, and the six-headed monster Scylla would gradually devour his crew. *Id.*

90. *See* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 42 (1989) (Scalia, J., dissenting) (quoting Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 721 (1981) (Rehnquist, J., dissenting)).

91. *See id.*

92. *See id.*

93. This Note does not argue whether the exemption for religious organizations is

tax exemptions for religious organizations constitute establishment,[94] and if not, whether denying tax exemptions to *some* religious organizations is an impermissible preference to others that interferes with free exercise.[95]

A. Separation of Church and State Tax Issues

Sometimes, Congress funds its priorities not with outlays but with tax forgiveness for desired activities.[96] Because forgoing income is the same as spending that income for budget purposes, Congress views "tax expenditures" similarly to regular outlays.[97] The United States Supreme Court has itself acknowledged this phenomenon in various contexts.[98] The

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proper, as other articles have forcefully done, but accepts the current law as the framework for further issues. *See generally* STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES 133-35 (1985); Reka Potgieter Hoff, *The Financial Accountability of Churches for Federal Income Tax Purposes: Establishment or Free Exercise?*, 11 VA. TAX REV. 71, 135-36 (1991).

94. *See infra* Part IV.A.

95. *See infra* Part IV.A.

96. *See* MICHAEL A. LIVINGSTON, TAXATION: LAW, PLANNING, AND POLICY 832 (2003) ("[T]he tax system is really two systems in one: a system for raising revenue, and a hidden spending system that forces everyone else to pay more in taxes [to cover the cost of providing exemptions] in order to achieve the same net result."); *see, e.g.*, I.R.C. § 163 (2006) (allowing deduction of mortgage interest payments); § 164 (allowing deduction of other taxes paid); § 195 (allowing deduction of start-up business costs).

97. *See* SURREY & MCDANIEL, *supra* note 93, at 2-3. As an example, the federal government gives a child-care tax credit to help workers pay for child-care while they work. § 21(b)(2)(C). The federal government could provide child-care services or subsidize them directly with collected money but chooses to leave that sum with the taxpayer on the condition that it is used for the congressionally desired purpose. *Id.* Congress can exercise an equal amount of control over either method of subsidy. *See* SURREY & MCDANIEL, *supra* note 93, at 101 ("Either a tax expenditure or a direct spending program can have as few or as many controls as are desired.").

98. "Both tax exemptions and tax deductibility are *a form of subsidy* that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income." Regan v. Taxation With Representation, 461 U.S. 540, 544 (1983) (denying an exemption to a charitable organization that violated the political speech restriction in I.R.C. § 501(c)(3)) (emphasis added); *see also* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 14-15 (1989) ("*Every tax exemption constitutes a subsidy* that affects nonqualifying taxpayers, forcing them to become 'indirect and vicarious donors.'") (quoting Bob Jones Univ. v. United States, 461 U.S. 574, 591 (1983) (denying tax exemption to Bob Jones University because its racially discriminatory policies were illegal and therefore not charitable)) (emphasis added) (internal quotations omitted); Christian Echoes Nat. Ministry, Inc. v. United States, 470 F.2d 849, 857 (10th Cir. 1972) (holding the restriction against political speech in I.R.C. § 501(c)(3) was a legitimate congressional policy choice that "government shall not *subsidize, directly or indirectly*, those organizations whose substantial activities are directed toward the

problem is that, theoretically, "[n]o tax in any amount . . . can be levied to support any religious activities."[99] However, the Supreme Court has held that religious groups may benefit from general government programs, as opposed to ones specifically targeting religious organizations.[100]

Along those lines, in *Walz v. Tax Commissioner*, the Supreme Court approved "benevolent neutrality"[101] that would encourage religious diversity without establishing a church through "active involvement" with religious organizations.[102] In *Walz*, New York's property tax exemption for religious organizations survived constitutional challenge because religious organizations were included in a broad statutory class of nonprofit organizations that New York believed benefited the public.[103] Additionally, the Court found that taxing religious organizations' property would mean greater involvement with religion than exemption because of the conflicts inherent between a taxpayer and the government.[104] Generally, however, it is forbidden for the government to systematically burden certain religious organizations[105] or to favor any one denomination over another.[106]

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accomplishment of legislative goals or the election or defeat of particular candidates") (emphasis added).

99. Torcaso v. Watkins, 367 U.S. 488, 493 (1961) (quoting Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947); *see also* SURREY & MCDANIEL, *supra* note 93, at 100 ("Whether government places funds in private hands through a direct program or through a tax expenditure, the fact remains that the funds come from government.").

100. *See Everson*, 330 U.S. at 18 (allowing religious schools to share public buses was permissible because buses were unrelated to religion and because neutrality does not require government to become the "adversary" of religious activity).

101. Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970); *see also Taxation with Representation*, 461 U.S. at 544 n.5 ("In stating that exemptions and deductions, on the one hand, are like cash subsidies, on the other, we of course do not mean to assert that they are in all respects identical." (citing *Walz*, 397 U.S. at 674-76)).

102. *See Walz*, 397 U.S. at 668.

103. *Id.* at 672-73.

104. *But see* Joseph M. Kuznicki, Comment, *Section 170, Tax Expenditures, and the First Amendment: The Failure of Charitable Religious Contributions for the Return of a Religious Benefit*, 61 TEMP. L. REV. 443, 485 (1988) (arguing that offering no exemption at all results in less government involvement than a conditional exemption because the government cannot threaten to add extra tax liabilities); SURREY & MCDANIEL, *supra* note 93 (noting that several Supreme Court Justices have argued that exemptions are constitutionally equivalent to direct outlays of government funds and agreeing with their analysis as consistent with tax logic and economic reality).

105. Larson v. Valente, 456 U.S. 228, 254-55 (1982) (invalidating a state licensing law that would have targeted certain disfavored religions). One state senator commented, "I'm not sure why we're so hot to regulate the Moonies anyway." *Id.* at 255.

106. *See* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 9, 20 (1989) (holding that the Establishment Clause is violated whenever the government puts its "prestige" behind a particular faith); *Larson*, 456 U.S. at 244; *Walz*, 397 U.S. at 669-70, 673; Torcaso v.

The government has been able to navigate the Scylla-and-Charybdis problem with broad-based programs like a tax exemption for all nonprofit organizations[107] or public buses available to all schools regardless of their religious affiliation.[108] The result is "permissible governmental preference" for religious organizations; the programs are justifiable because they promote free exercise more than they impermissibly establish.[109]

However, while the majority view is that some level of state accommodation of religion is acceptable, this stance has vocal critics.[110] One is Supreme Court Justice Jackson who dissented in *Everson v. Board of Education* on the grounds that if a parochial school benefits from a state program, it should not matter whether the benefit was conferred directly or indirectly.[111] The dispositive issue for him was the mere fact that public money benefited a religious organization, regardless of the benefit's characterization as a "bonus" or "reimbursement of expense."[112]

There is also a strong logical argument that exemption results in more interference between church and state than simply having religious organizations pay taxes.[113] For one, the Supreme Court has acknowledged that government funding and government control go hand in hand.[114] Both government grants and tax breaks come with conditions.[115] Therefore, if a tax exemption is a tax expenditure, and a tax expenditure is like a direct grant, which violates the Establishment and Free Exercise Clauses, how

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Watkins, 367 U.S. 488, 495 n.11 (1961) (noting that a requirement of belief in a supreme being to hold public office would impermissibly disfavor religions like "Buddhism, Taoism, Ethical Culture, Secular Humanism and others").

107. *See Walz*, 397 U.S. at 672-73.

108. *See* Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).

109. *See* Hoff, *supra* note 93, at 126-27.

110. *See, e.g., id.* at 135-36.

111. *Everson*, 330 U.S. at 24 (Jackson, J., dissenting).

112. *Id.*

113. *See* Hoff, *supra* note 93 ("The exemption is aimed specifically at organizations that qualify as churches or nonprofit-religious organizations under definitional standards that are concededly vague and that raise issues of doctrinal entanglement by the [Internal Revenue] Service.").

114. *See* Lemon v. Kurtzman, 403 U.S. 602, 621 (1971) ("The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance."). It is also instructive that almost all of the tax-exempt organizations listed in I.R.C. § 501(c)(3) are required to file annual forms with the IRS detailing their finances in order to keep their exemptions. *See supra* notes 30-33 and accompanying text for details on filing requirements for charitable status.

115. *Cf.* SURREY & MCDANIEL, *supra* note 93, at 101.

can the exemptions constitute less governmental involvement than treating all organizations and property the same?[116]

Another problem arises because of the Court's reasoning in *Walz*, where it agreed that New York was reasonable in believing that all churches, like other nonprofit organizations, provide desirable public benefits.[117] The problem with this analysis is that most other types of nonprofit organizations provide services that the state might otherwise have to provide: education, cultural preservation and healthcare, to name a few.[118] However, some modern churches provide little or no public welfare support to their communities.[119] Even when they do, deciding whether a given church deserves its exemption involves an uncomfortable evaluation of their finances to see what the value of the public benefit is compared to the value of the exemption, and what the state could have provided in its place.[120] The question is then, which is worse—allowing extremely profitable organizations to use on average less than one-sixth of their income for public services or subjecting a church's affairs to additional governmental scrutiny?[121] The best answer is to use intermediate sanctions to pass governmental judgment on the pay arrangements only (because those rules apply to all tax-exempt organizations, not merely religious ones), ignoring the organization's beliefs as much as possible.[122]

B. Efforts to Avoid Violating Separation of Church and State Principles in Tax Situations

The IRS has long-standing internal practices that systematically avoid unnecessary entanglement with religious groups.[123] Courts are also extremely careful to avoid delving into particular beliefs of religious organizations.[124] The Court of Appeals of New York forcefully articulated

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116. *See* Brown, *supra* note 73, at 1639.

117. *See* Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 12 n.2 (1989) ("[T]he State might reasonably have determined that religious groups generally contribute to the cultural and moral improvement of the community [and] perform useful social services . . . just as do the host of other nonprofit organizations that qualified for the exemption.") (discussing Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

118. *See id.*

119. The average megachurch spends only thirteen percent of its income on "missions and benevolence." THUMMA & BIRD, *supra* note 8, at 5.

120. *See supra* notes 82-83 and accompanying text.

121. *See supra* notes 117-120 and accompanying text; *also infra* Part IV.B.

122. *See supra* Part III.

123. *See* I.R.S. Gen. Couns. Mem. 36,993 (Feb. 3, 1977) (discussing whether a witch's coven is a religious organization per I.R.C. § 501(c)(3) and a church per I.R.C. § 170(b)(1)(A)(i)); *see also* Casino, *supra* note 23, at 140.

124. *See, e.g.*, Christian Echoes Nat. Ministry, Inc. v. United States, 470 F.2d 849, 856

this policy in *Holy Spirit Ass'n for Unification of World Christianity v. Tax Commissioner*:

> In determining whether a particular ecclesiastical body has been organized and is conducted exclusively for religious purposes, the courts may not inquire into or classify the content of the doctrine, dogmas, and teachings held by that body to be integral to its religion but *must accept that body's characterization of its own beliefs* and activities and those of its adherents, so long as that characterization is made in good faith and is not [a] sham.[125]

The United States Supreme Court said in *United States v. Ballard* that "[m]an's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views."[126] In that case, the issue was whether a man who claimed he was a divine messenger with the power to cure diseases had defrauded others through these representations.[127] The Court felt that allowing a jury to decide whether the disease-curing representations were fraudulent was too invasive[128] and accordingly remanded the case to have the appeal resolved on its remaining grounds.[129]

Looking at another example, the courts in the mail-order church cases focused on the financial structure of the churches to find they operated for a private benefit, rather than the churches' tenets.[130] In *People of God Community v. Commissioner*, the determination of private inurement was based solely on the percentage-of-income payment scheme.[131]

In the *Christian Echoes* case, the circuit court described how to balance the interest in tax enforcement with Free Exercise Clause requirements.[132] It was possible to declare certain statements "political,"

(10th Cir. 1972) (describing how the district court erred by being *too* avoidant of religious issues).

125. Holy Spirit Ass'n for Unification of World Christianity v. Tax Comm'n, 435 N.E.2d 662, 663 (N.Y. 1982) (holding ultimately that the politically and economically charged beliefs of the Unification Church were religious nonetheless) (emphasis added).

126. 322 U.S. 78, 87 (1944).

127. *See id.* at 80.

128. *See id.* at 87. "When the triers of fact undertake that task [of deciding the truth of a religion], they enter a forbidden domain." *Id.*

129. *See id.* at 88.

130. FISHMAN & SCHWARZ, *supra* note 32, at 459 ("The cases [where courts deny exemption based on methods rather than beliefs] have become far too numerous even to cite . . . .").

131. *See* 75 T.C. 127, 132-33 (1980).

132. Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 857 (10th Cir. 1972).

and others "religious," without making any determinative judgments about the beliefs themselves.[133] The trial court's approach, which was reversed, was much more hesitant to shift one from the other.[134] When courts address megachurches and the Prosperity Gospel, they will have to adopt either the trial court or the circuit court's reasoning, though their preference might change given how closely tied the Prosperity Gospel's violative activity is to its beliefs.[135]

V. Modern Megachurches

Modern megachurches are distinguished from other churches based on the size of their average weekly congregations.[136] The Hartford Institute for Religion Research defines a megachurch as one whose weekend congregation comprises 2000 or more persons (children included).[137] In 2005, 1210 churches fit this description, double the number from the year 2000.[138] These churches are predominately located in new suburban areas and accommodate their large congregations by holding multiple services, often in satellite locations.[139]

The average megachurch saw income of $6,524,070 in 2008.[140] Adjusted for inflation, this level of income was stagnant from 2005 but was an increase of approximately one-half million from 2000.[141] On average,

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133. *See id.*

134. *See id.* at 856. However, the New York court in the *Unification Church* case would have agreed with the lower courts in *Christian Echoes*:

> The error of the [lower courts] is that each asserted the right of civil authorities to examine the creed and theology of the Church and to factor out what in its . . . considered judgment are the peripheral political and economic aspects, in contradistinction to what was acknowledged to be the essentially religious component. Each then took the view that beliefs and activities which could be objectively accurately described by knowledgeable outsiders as "political" and "economic" were by that fact precluded from being classified as "religious."

Holy Spirit Ass'n for Unification of World Christianity v. Tax Comm'n, 435 N.E.2d 662, 668 (N.Y. 1982) (citations omitted).

135. *See infra* Part VI.

136. *See* THUMMA & BIRD, *supra* note 8, at 1.

137. *Id.*

138. Scott Thumma, Dave Travis & Warren Bird, Megachurches Today 2005: Summary of Research Findings, http://hirr.hartsem.edu/megachurch/megastoday2005summaryreport.pdf.

139. Fifty percent of megachurches are located in "new suburbs" and thirty percent in "old suburbs." THUMMA & BIRD, *supra* note 8, at 2.

140. *Id.* at 4.

141. *Id.* The summary report does not address how the addition of about 600 new

megachurches spend forty-seven percent of their income on personnel compensation and about thirty-four percent on everyday operations.[142] The remaining nineteen percent is classified as mission work and other expenditures.[143]

Megachurches self-identify along various Protestant Christian denominations.[144] The most common is simply "Evangelical," with sixty-five percent of megachurches, up from forty-eight percent in 2000.[145] However, other labels such as "Charismatic," "Pentecostal," or "Traditional" are subsumed under the broader Evangelical label because there is no overarching organization for these congregations like there is for the Catholic or Episcopalian churches.[146]

To complicate matters, most megachurches are led by one highly visible and charismatic pastor.[147] This position of control presumably places these individuals within the authority of the intermediate sanctions rules for excess-benefit transactions.[148] Some of the religious services more closely resemble a rock concert than the traditional notion of a gathering of solemn worshippers.[149] In these congregations, the head pastor is the superstar, who may also distribute audio, video, and written media in order to spread the church's message even further.[150] Because the megachurches

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churches to the category of "megachurch" affected the validity of comparisons from 2000 and 2005 data. *See id.*

142. *See id.* at 5.

143. *See id.*

144. *Id.* at 12.

145. THUMMA & BIRD, *supra* note 8, at 12

146. *Id.*

147. Some megachurches even name their ministries after their lead pastors. *See, e.g.*, Kenneth Copeland Ministries, http://www.kcm.org/ (last Apr. 15, 2010); About Creflo Dollar Ministries, http://www.creflodollarministries.org/About/AboutUS.aspx (last visited Apr. 15, 2010).

148. *See supra* Part III.

149. *See* Karl Taro Greenfeld, *God Wants Me to Be Rich*, PORTFOLIO.COM, July 16, 2008, http://www.portfolio.com/executives/features/2008/07/16/Megachurch-Preacher-Joel-Osteen (comparing a service by Osteen to an "N.B.A. game or a rock concert" because of the "[b]eefy security guards," buffet-fed crew members with walkie-talkies, private suites in the church for pastors and performers, "state-of-the-art visual effects," and Grammy Award winning singers among the choir); *see also 60 Minutes: Joel Osteen Answers His Critics* (CBS television broadcast Oct. 14, 2007), *available at* http://www.cbsnews.com/stories/2007/10/11/60minutes/main3358652.shtml [hereinafter *Osteen's Critics*] ("Osteen's service is an uninhibited celebration that's part rock concert, part spectacular. There are no crosses, no religious symbols whatsoever.").

150. *See Osteen's Critics*, *supra* note 149 ("Osteen's service is . . . all taped and broadcast around the world. His service is seen in 100 foreign countries and is the most watched religious broadcast in America."). For information on book sales, see Greenfeld,

are almost exclusively a subset of the broad Evangelical category of Protestants, this kind of proactive proselytizing is unsurprising and even familiar.[151]

A. A Sampling of (Mega)Pastors

Some of the more visible megachurch leaders include Joel Osteen, Rick Warren, and Mac Hammond.[152] Each has achieved significant wealth as a direct result of religious leadership.[153]

Mac Hammond's ministry believes that "God wants you to be a winner in every area of life."[154] Some members of the church feel disillusioned when their efforts (read: donations) at religious prosperity don't pay off—raising the specter of a scam.[155] Joel Osteen says, "[m]y message is a message of hope that God is a good God, and that no matter what we've done, where we've been, God has a great plan for our lives. And when we walk in his ways they can take us places we've never dreamed of."[156]

Rick Warren is one megachurch pastor who criticizes the Prosperity Gospel: After earning just over one hundred thousand dollars annually for twenty years, he gave back all of his salary and additionally pays what he calls a "reverse-tithe"—he gives ninety percent of his current income to charitable groups and keeps only ten percent for himself.[157] One problem

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supra note 149.

151. Famous televangelist Jimmy Bakker was ultimately convicted of mail fraud, wire fraud, and conspiracy in connection with his televangelism and religious organization, the PTL. United States v. Bakker, 925 F.2d 728, 731-32 (4th Cir. 1991). Bakker later renounced his belief in the Prosperity Gospel. *See* JIM BAKKER WITH KEN ABRAHAM, I WAS WRONG 533 (Nashville, T. Nelson 1996) ("The more I studied the Bible, however, I had to admit that the prosperity message did not line up with the tenor of Scripture.").

152. *See generally* Greenfeld, *supra* note 149 (discussing Joel Osteen's leadership of Lakewood Church). Rick Warren spoke at President Obama's inauguration. Jon Cohen, *61% in Poll Back Rick Warren as Invocation Pick*, WASH. POST, Jan. 20, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/01/19/AR2009011902725.html. Mac Hammond is currently under IRS investigation. Andy Birkey, *Mac Hammond's Living Word Facing IRS Investigation*, MINN. INDEP., Aug. 23, 2008, http://www.tcdailyplanet.net/article/2008/08/23/mac-hammond-s-living-word-facing-irs-investigation.html.

153. *See* Van Biema & Chu, *supra* note 12; Birkey, *supra* note 152 (describing how Hammond received two planes and a good deal of favorable credit from his church).

154. Mac Hammond Ministries, Our Vision, http://www.mac-hammond.org/MAIN/mainPage.cfm?pgdID=2097 (last visited Apr. 15, 2010) (internal quotations omitted).

155. *See* Jon Tevlin, *Dealing with Less Prosperity, Mac Hammond's Church Cuts Back*, STAR TRIB. (Minneapolis, Minn.), Feb. 17, 2008, *available at* http://www.startribune.com/templates/Print_This_Story?sid=15724587.

156. *Osteen's Critics*, *supra* note 149.

157. This is a feat achievable in part because of the sale of nearly thirty-million copies of

for enforcement is that all three preach to mega-sized congregations, but only Warren appears to be behaving in the way that the tax code expects a minister to behave.[158] So when megapastors earn megawages, can they rely on *Presbyterian Publishing*, arguing that their conspicuous accommodations are incident to their large and growing congregations,[159] or should they make pleas based on the subjectivity of their faith?[160]

B. Controversy Surrounding the Legitimacy of the Prosperity Gospel Generally

The IRS and the courts may not inquire whether religious beliefs are genuinely held—but in practice this probably happens when enforcement takes place.[161] It is therefore worth taking a brief look into the debate within Christianity over the legitimacy of the Prosperity Gospel.

Supporters and detractors can both cite Bible verses that support their view of the Prosperity Gospel controversy: Supporters of the Prosperity Gospel point to verses like "Beloved, I pray that in all respects you may prosper and be in good health, just as your soul prospers";[162] "'Bring the whole tithe into the storehouse, so that there may be food in My house, and test Me now in this,' says the LORD of hosts, 'if I will not open for you the windows of heaven and pour out for you a blessing until it overflows'";[163] and "I came that they may have life, and have it abundantly."[164] When Kenneth Copeland Ministries[165] solicits donations, the theological

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his book, *The Purpose Driven Life: What on Earth Am I Here For?*, and from organizations that help create so-called "purpose-driven churches," emulating the kinds of practices that Warren's Saddle Back Church employs. *See* Van Biema & Chu, *supra* note 12; Suzanne Sataline, *Strategy for Church Growth Splits Congregants*, PITT. POST-GAZETTE, Sept. 5, 2006, http://www.post-gazette.com/pg/06248/719178-84.stm.

158. *See supra* note 27 and accompanying text.

159. *See supra* notes 66-73 and accompanying text.

160. *See supra* Part IV.B.

161. Televangelist Jimmy Bakker had his initial sentence of forty-five years for mail and wire fraud reduced because of comments by the sentencing judge that evinced an improper personal religious judgment. *See* United States v. Bakker, 925 F.2d 728, 740 (4th Cir. 1991) ("During sentencing, the judge stated of Bakker: 'He had no thought whatever about his victims and *those of us who do have a religion are ridiculed as being saps from money-grubbing preachers or priests.*'"); *see also infra* Part IV.A.

162. 3 *John* 1:2 (New American Standard Bible).

163. *Malachi* 3:10 (New American Standard Bible).

164. *John* 10:10 (New American Standard Bible).

165. Kenneth Copeland is one of the pastors under investigation by Iowa Senator Chuck Grassley. *See* Memorandum from U.S. Senate Comm. on Fin., Sen. Chuck Grassley to Reporters and Editors (July 7, 2008) [hereinafter Grassley Memo], *available at* http://finance.senate.gov/press/Gpress/2008/prg070708.pdf.

proposition is printed plainly on the circulating envelopes: "I am sowing $____ and believing for a hundredfold return."[166]

Many of the strongest critics of the Prosperity Gospel are other Christians, and sometimes even other megachurch pastors, like Rick Warren.[167] Some critics take a statistical approach,[168] while others rely on equally clear, contradicting verses like "it is easier for a camel to go through the eye of a needle than for a rich man to enter the kingdom of God";[169] "where your treasure is, there your heart will be also";[170] "No one can serve two masters. . . . You cannot serve both God and Money";[171] and, the especially damning,

> If anyone advocates a different doctrine and does not agree with sound words, those of our Lord Jesus Christ, and with the doctrine conforming to godliness, he is conceited and understands nothing; but he has a morbid interest in . . . constant friction between men . . . [who are] deprived of the truth, who suppose that godliness is a means of gain.[172]

VI. Balancing Priorities: Tax Enforcement vs. Free Exercise & Establishment

At this point, the basic tensions are clear: Neither the IRS nor the courts may inquire too deeply into the sincerity of religious organizations'

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166. Suzy Jagger, *Televangelist Kenneth Copeland Refuses to Render unto Taxman*, TIMES ONLINE (London), July 7, 2008, http://www.timesonline.co.uk/tol/comment/faith/article4281949.ece. Compare the envelope's text with another verse: "Give, and it will be given to you. . . . For by your standard of measure it will be measured to you in return." *Luke* 6:38 (New American Standard Bible).

167.

> [M]egapastor Rick Warren . . . finds the very basis of Prosperity laughable. "This idea that God wants everybody to be wealthy?"[] he snorts. "There is a word for that: baloney . . . . I can show you millions of faithful followers of Christ who live in poverty. Why isn't everyone in the church a millionaire?"

Van Biema & Chu, *supra* note 12.

168. *See* JIM WALLIS, GOD'S POLITICS: WHY THE RIGHT GETS IT WRONG AND THE LEFT DOESN'T GET IT 212-14 (2005). As a visual aid on speaking tours, the reverend Jim Wallis took an old Bible and painstakingly removed all of the verses that in one way or another addressed poverty. *Id.* at 212, 214. He stated that what remained was a very thin book, but nevertheless the book that most churches preach each Sunday. *See id.* at 214.

169. *Luke* 18:25 (New American Standard Bible).

170. *Matthew* 6:21 (New American Standard Bible).

171. *Matthew* 6:24 (New American Standard Bible).

172. 1 *Timothy* 6:3-5 (New American Standard Bible).

beliefs, despite the fact that § 501(c)(3) grants nonprofit status to religious organizations by virtue of being religious.[173] On top of that, no matter how government approaches the issue, it will entangle itself with religious affairs either by taxing or by exempting religious organizations (recall Scylla and Charybdis).[174] The murky question is how to reconcile these requirements when faced with lavish Prosperity Gospel congregations. If the belief in personal, individual, material accession to wealth is "inextricably interwoven" into a belief system, can exemption ever be revoked without the government making a tacit judgment that the given belief is nonreligious?[175] On the other hand, can the government in good faith allow Prosperity Gospels to continue to enjoy the exemption for religious organizations if it is clear that "its net earnings inure in whole or in part to the benefit of private shareholders or individuals?"[176] Which priority should win? In *Hernandez v. Commissioner*, the tax system took priority over the religious deference, but in *Holy Spirit Ass'n for Unification of World Christianity v. Tax Commission* religious deference won out.[177] The megachurch issue is a chance to prioritize policies: either stricter enforcement of the tax code's prohibitions or stronger support of the Free Exercise Clause.

A. The Church of Scientology Cases: Tax Enforcement Prevails

In *Hernandez*, the Church of Scientology's members lost their deduction for charitable contributions because the Supreme Court held five to four that "contributions" paid for "auditing" sessions were a quid pro quo and lacked the required elements of a gift.[178]

Another strong argument that Church of Scientology audits are a quid pro quo is based on the fact that the particular beliefs of the Church of

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173. *See supra* Part IV.

174. In *The Odyssey*, Scylla represented a guarantee that only some sailors would die, whereas Charybdis posed an uncertain threat of death to all of the sailors by sinking the entire ship. THE ODYSSEY, *supra* note 89, at 194-95. This Note does not take a position as to which of the monsters is the closer analog to liberal tax exemption or strict tax enforcement, and so Odysseus' eventual choice of Scylla is not to be read as an endorsement of one or the other. *Id.* at 199-200.

175. *Cf.* Holy Spirit Ass'n for Unification of World Christianity v. Tax Comm'n, 435 N.E.2d 662, 664 (N.Y. 1982).

176. Treas. Reg. § 1.501(c)(3)-1(c)(2) (2009).

177. *Compare* Hernandez v. Comm'r, 490 U.S. 680, 684 (1989), *with Holy Spirit Ass'n*, 435 N.E.2d at 663.

178. *See Hernandez*, 490 U.S. at 684; I.R.C. § 170(c) (2006). Later the IRS reached a deal with the Church of Scientology to allow deductions for audits in exchange for a settlement and annual filing of reports akin to those filed by other nonprofit organizations. *See* FISHMAN & SCHWARZ, *supra* note 32, at 934.

Scientology are trade secrets.[179] The Church of Scientology regularly enforces its rights to keep high-level dogma a secret except from those who have reached the highest levels within the church.[180] Naturally, the only way to reach the higher levels is to spend a great deal of time—and money—on audits.[181] This seems like valid reasoning, but there are plenty of exchanges between believers and religious organizations that look like a quid pro quo but do not defeat exemption, which makes one wonder whether the distinction is improperly drawn.[182]

The treatment in *Hernandez* is distinguishable from other Church of Scientology enforcement cases because it was never argued that the inurement violations were part of a belief structure.[183] In *Church of Scientology v. Commissioner*, the private individual (L. Ron Hubbard) set a policy to "MAKE MONEY" and required franchise fees to be paid to him.[184] L. Ron Hubbard arranged the church in such a way as to guarantee a steady stream of income to himself and his family, without apparently doing anything for the Church of Scientology.[185] He even required that all intellectual property rights to books authored by others be given to him so that he could receive their economic benefit.[186] The courts had no trouble

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179. *See generally* Wendy M. Grossman, *The Mills of Xenu Grind Exceedingly Slow*, THE INQUIRER, Sept. 12, 2003, http://www.theinquirer.net/inquirer/news/912/1040912/the-mills-of-xenu-grind-exceeding-slow; Declan McCullagh, *A Thorn in Hollywood's Side*, WIRED, Mar. 20, 2001, http://www.wired.com/politics/law/news/2001/03/42475.

180. *See* Grossman, *supra* note 179. "[C]hurch officials relentlessly pursu[e] its critics in legal actions that some charge are designed as much to harass as to achieve legal victory." Lucy Morgan, *When Scientology Goes to Court, it Likes to Play Rough—Very Rough*, SAINT PETERSBURG TIMES (Tampa Bay, Fla.), Jan. 28, 1998.

181. *Hernandez*, 490 U.S. at 685-86.

182. *See id.* at 708-09 (O'Connor, J., dissenting). The following have been upheld as charitable contributions: pew rents for better seats during special Christian services, tickets for attending high holiday services in synagogues, and tithes as a condition for admittance into Mormon temples. *Id.* All have been upheld against the challenge that they are quid pro quo transactions rather than charitable donations. *See id.* at 712.

183. *See* Church of Scientology v. Comm'r, 823 F.2d 1310, 1319 (9th Cir. 1987).

184. *See id.* at 1314. *But see* Graeme Wearden, *Weak Dollar Sends Vatican into the Red*, THE GUARDIAN (London), July 11, 2008, at 28 (describing how donations from America's weakened dollar caused a fifteen million dollar loss in 2008 for the Catholic Church, which relies on donations for its wealth (estimated at four billion dollars)). Given that Catholic Church revenues dropped when donations dropped, how is the Vatican's method of receiving income different from L. Ron Hubbard's?

185. Founding Church of Scientology v. United States, 412 F.2d 1197, 1200-01 (Ct. Cl. 1969). The fact that he received income for performing very little work is the kind of behavior contemplated by the intermediate sanctions, which did not exist at the time of this case. *See supra* Part III.

186. *Church of Scientology*, 823 F.2d at 1314.

finding that the prohibition against private inurement was violated in that case because it so closely resembled a pyramid scheme.[187]

However, the IRS and the courts may have harbored an inward bias against the Church of Scientology because of how strange they perceived its belief system to be.[188] The *Founding Church of Scientology* opinion needlessly notes some of the church's beliefs before reaching its decision on completely unrelated grounds.[189] Perhaps the court and the IRS took some pleasure in taxing what they viewed as a fraudulent organization—not an unusual sentiment in other cases where pyramid schemes hide behind a church's façade.[190] Now that the spotlight is focusing on megachurches, some similar motives could be at work.[191]

B. *Holy Spirit Ass'n for Unification of World Christianity v. Tax Commission*: Principles of Religious Freedom Prevail

In *Holy Spirit Ass'n for Unification of World Christianity v. Tax Commission*, the Court of Appeals of New York reached the opposite result than the United States Supreme Court reached in *Hernandez* when faced with a conceptually similar problem.[192] The Holy Spirit Association for Unification of World Christianity Church ("Unification Church") is a tax-exempt religious organization, and the issue before the Court of Appeals of New York was whether their political activity ought to disqualify their tax-exemption under a New York statute nearly identical to I.R.C. § 501(c)(3).[193] The Unification Church believes that certain political and

187. *See id.* at 1319.

188. *Cf.* Larson v. Valente, 456 U.S. 228, 255 (1982) (quoting a state senator who was curious why his peers were eager to single out the "Moonies" of the Unification Church).

189. *Founding Church of Scientology*, 412 F.2d at 1198 (describing E-meters and the fact that the Church of Scientology first announced its inception as a new science in a "1950 issue of ASTOUNDING SCIENCE FICTION magazine").

190. *See supra* Part II.A on mail-order scams.

191. Senator Grassley's characterization of nonprofit abuses contains an implied negative judgment about those practices: "Charities shouldn't be funding their executives' gold-plated lifestyles," "I cannot explain to my constituents why they need to pay more taxes so that . . . the [Smithsonian] Secretary and his direct reports can enjoy . . . a dinner for $1,368." Grassley Memo, *supra* note 166, at 6.

192. *Compare* Hernandez v. Comm'r, 490 U.S. 680, 684 (1989), *with* Holy Spirit Ass'n for Unification of World Christianity v. Tax Comm'n, 435 N.E.2d 662, 667-68 (N.Y. 1982).

193. *Compare* I.R.C. § 501(c)(3) (2006), *with* N.Y. REAL PROP. TAX LAW § 420-a(1)(a) (McKinney 2008) ("Real property owned by a corporation or association organized or conducted exclusively for religious . . . purposes . . . shall be exempt from taxation . . . .").

economic changes must take place worldwide before the second coming of Jesus Christ can occur.[194]

Initially, the lower courts and enforcement agencies had no trouble deciding that the Unification Church violated the statutory requirement that the church be conducted exclusively for religious purposes.[195] They looked closely at what the Unification Church stood for and the messages it put out and isolated religious content from political and economic content.[196]

The Court of Appeals of New York found this to be an error for two reasons; one statutory and the other constitutional.[197] The court pointed out that the relevant statute had been refined by case law to mean "primarily" and not "exclusively."[198] The constitutional problem arose because the Unification Church is not a religious organization whose beliefs coincide with political views, but rather one whose religious beliefs *are* political views.[199] The special referee that initially reviewed the case noted these political views were "inextricably interwoven" with the religious aspects of the Unification Church.[200] Because the political was essentially the same as the religious, the judgments of the lower courts and enforcement agencies were improper from a logical standpoint.[201] To say that certain parts of the Unification Church's belief system were political, and therefore could not be religious, forecloses the possibility that a religion could exist whose beliefs are political.[202] This goes against the principle of promoting diversity in American religious life.[203] Accordingly, the Court of Appeals

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194. *Holy Spirit Ass'n.*, 435 N.E.2d at 667 (advocating for or against various forms of government and for the need to reunite North and South Korea).

195. *Id.* at 664.

196. *Id.* at 668.

197. *See id.* at 664-65, 667-68.

198. *Compare id.* at 664 n.2 ("The statute uses the adverb 'exclusively[,'] but we have held that it connotes 'principally' or 'primarily.'") (citation omitted), *with* Treas. Reg. § 1.501(c)(3)-1(c) (2009) (defining exclusively as primarily).

199. *Holy Spirit Ass'n*, 435 N.E.2d at 667-68.

> [I]t is petitioner's religious tenet that the republican form of government with separate or coequal powers held by the legislative, judicial and executive branches of government is a Satanic principle and that these three governmental branches under the present political system must be brought under a single controlling force as a condition for the second coming of the Messiah.

Id. (quoting the Special Referee from the lower decision) (internal quotations omitted).

200. *Id.* at 664.

201. *See id.*

202. *Id.* at 668.

203. *Cf.* Walz v. Tax Comm'n, 397 U.S. 664, 689 (1970) (Brennan, J., concurring)

of New York reversed the lower decisions, preserving the Unification Church's New York property-tax exemption.[204]

The analysis of both of these examples is fraught with judgments about the beliefs of each organization and long debates about whether to inquire into those beliefs[205]—much of which can be spared by applying the excess-benefit rationale of intermediate sanctions.[206]

VII. Problems with the Prosperity Gospel Megachurches

Taking aggressive action against megachurches, even if permissible and moderate through intermediate sanctions, is still problematic because these particular churches are singled out for extra scrutiny.[207] "Scrutiny of religious organizations on the basis of rapid expansion creates the danger of encouraging a stagnant society where various ideas and creeds preserve a hold on a fixed proportion of the population."[208] Senator Chuck Grassley used tips from citizens, whistleblowers, and news reports to generate his list of six churches for investigation, raising concerns that the methodology might be biased against less-accepted religious organizations.[209]

The alternative to aggressive tax action against megachurches is simply to continue to exempt them from taxation. But this could raise an inconsistency within some megachurches. The reason is that *all* Prosperity Gospel churches that violate the prohibition against private inurement are probably megachurches. However, there may be many other megachurches that do not preach the Prosperity Gospel, but might nevertheless violate the prohibition against private inurement because of lavish megapastor pay arrangements.[210] Superficially, the two groups are the same: they are megachurches with wealthy, prominent pastors.[211] Theologically though, only the Prosperity Gospel churches could make a similar claim as the Unification Church did in New York—that their prohibited acts are

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(explaining that religious organizations are exempt from property taxes because they encourage pluralism through their religious activities).

204. *Holy Spirit Ass'n*, 435 N.E.2d at 668.

205. *See supra* notes 174-203 and accompanying text.

206. *See supra* Part III. Note however that in the *Unification Church* case the issue was political speech rather than private inurement, and therefore the intermediate sanctions would not have been applicable to the Unification Church's particular violation. *See generally Holy Spirit Ass'n*, 435 N.E.2d at 662-68.

207. *See* Brown, *supra* note 73.

208. *Id.* Trevor Brown does acknowledge, however, that a quickly growing organization is a more rational target for scrutiny because it is harder for members to monitor the use of funds in a growing organization. *See id.*

209. *See* Grassley Memo, *supra* note 166.

210. *Cf. id.*

211. *See* THUMMA & BIRD, *supra* note 8.

excusable because they are inextricably intertwined with their religious beliefs.[212] The absurd result would be that a religious organization can only get away with violating the prohibition against private inurement by dedicating its beliefs substantially to that violation, so that the violation becomes part of the "operation" of the religious organization per the requirement that religious organizations be operated "exclusively for religious . . . purposes."[213] This is why it is important to use the existing intermediate sanctions to root out any excess compensation within tax-exempt organizations—without regard to whether the activity is rooted in the particular beliefs of a given organization.[214]

CONCLUSION

Megachurches present Congress and the IRS with a unique challenge. Section 501(c)(3) may be built on certain value judgments and assumptions about what a religious organization should be. If so, the precise range of those judgments will be tested and revised very soon. The heart of the problem is whether religiosity or a legal notion of charity is the true test for religious organization tax exemption. If religiosity wins, then being "organized and operated exclusively for religious . . . purposes" should include activities that, at first glance, would violate the rest of the requirements of § 501(c)(3) as long as those activities are also religious.[215] If not, then the principle that tax exemption is a privilege and a subsidy from the government should defeat exemption for religious organizations who violate § 501(c)(3)'s explicit restrictions, including those whose prohibited activities are "inextricably intertwined" with their beliefs.[216] Congress and the IRS should adopt the latter because it is more consistent

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212. Reverend Price of the Crenshaw Christian Center explains:

> I am one of the very few ministers that are very open, very, very open, because I don't have anything to hide. And I do it —I tell my people here all the time, "I'm only doing it so that you can see that there's somebody the same color that you are, breathing the same contaminated air, paying the same outrageous prices for everything else, and I'm prospering because of the Book."

See Feature: Prosperity Gospel (PBS television broadcast Aug. 17, 2007) (summarizing both critics and believers of the Prosperity Gospel), *available at* http://www.pbs.org/wnet/religionandethics/week1051/feature.html.

213. I.R.C. § 501(c)(3) (2006).

214. *See supra* Part III.

215. *See* § 501(c)(3); *supra* Part III.

216. *Cf.* Holy Spirit Ass'n for Unification of World Christianity v. Tax Comm'n, 435 N.E.2d 662, 668 (N.Y. 1982).

with the purposes and theories of the tax code.[217] It also safely navigates the narrow waters of the First Amendment by going no further than existing accommodation and neutrality principles, without inhibiting free exercise, because Prosperity Gospel churches will be limited only in their internal financial arrangements, not in what they preach as religious organizations.[218]

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217. *See supra* Part II. "Not all burdens on religion are unconstitutional. The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." United States v. Lee, 455 U.S. 252, 257-58 (1982) (internal citations omitted).

218. *See supra* text accompanying notes 215-216. *Cf.* Regan v. Taxation with Representation, 461 U.S. 540, 549 (1983) ("[A]ppropriations are comparable to tax exemptions and deductions, which are also 'a matter of grace [that] Congress can, of course, disallow . . . as it chooses.'"); Christian Echoes Nat'l Ministry, Inc. v. United States, 470 F.2d 849, 857 (10th Cir. 1972) ("In light of the fact that tax exemption is a privilege . . . rather than [a] right . . . withholding exemption from nonprofit corporations do[es] not deprive Christian Echoes of its constitutionally guaranteed right of free speech.").

* * * *

INSTEAD OF ASKING "WHEN," ASK "HOW": WHY THE RULE AGAINST PERPETUITIES SHOULD NOT APPLY TO RIGHTS OF FIRST REFUSAL

Heather M. Marshall[*]

Abstract: In May 2007, the Supreme Judicial Court of Massachusetts held, as a matter of first impression, that the Rule Against Perpetuities did not bar the right of first refusal contained in a deed. Although this decision goes against the holdings of a majority of jurisdictions, there is a notable minority. This Note analyzes why the Supreme Judicial Court of Massachusetts reached a different decision than the higher courts of other states and suggests that future courts should follow the minority approach as Massachusetts has done.

This Note takes the position that a right of first refusal should not be subject to the Rule Against Perpetuities. In determining whether a right-of-first-refusal provision is valid, the Rule Against Perpetuities should not be applied. Because a right of first refusal creates a contractual right and not a property interest, it is illogical to inquire into whether an interest created by a right of first refusal vests too remotely. Further, rights of first refusal do not necessarily render property inalienable. If a right-of-first-refusal provision contains language that may affect the alienability of the property, the right of first refusal should not be analyzed under the Rule Against Perpetuities. Instead, the Rule Against Restraints on Alienation should be applied. Rather than focusing on when the right of first refusal may vest, courts should focus on whether a right of first refusal acts as an unreasonable restraint on alienation.

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The Rule Against Restraints on Alienation is better suited for analysis of contract provisions than is the Rule Against Perpetuities, as the time restrictions connected with the Rule Against Perpetuities are not relevant in business affairs. Due to its inflexibility, the application of the Rule Against Perpetuities in business transactions would defeat the underlying policy goals of the Rule. Courts have justified other exceptions to the Rule Against Perpetuities regarding real estate transactions and should except business transactions from the Rule as well. Rights of first refusal should not be subject to the Rule Against Perpetuities and instead should be analyzed under the Rule Against Restraints on Alienation.

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INTRODUCTION

Throughout history, courts have placed great importance on the ability to freely transfer property from one owner to another.[1] This ability to freely transfer, or to alienate, property has been favored by the common law for centuries.[2] Typically, courts have held that restraints on the alienation of property are void as contrary to public policy.[3] To ensure the free alienability of property, rules such as the Rule Against Perpetuities were developed.[4] Specifically, the Rule Against Perpetuities limits the amount of time that property can be suspended out of commerce and rendered inalienable.[5]

In May 2007, the Supreme Judicial Court of Massachusetts held, as a matter of first impression, that the Rule Against Perpetuities did not bar the right of first refusal contained in a deed.[6] This decision goes against the holdings of a majority of jurisdictions.[7] There is, however, a notable minority.[8] This Note analyzes why the Supreme Judicial Court of Massachusetts reached a different decision than the higher courts of other states and suggests that future courts should follow the minority approach as Massachusetts has done.

This Note will take the position that a right of first refusal should not be subject to the Rule Against Perpetuities. Part I of this Note will explore the history and purpose of the Rule Against Perpetuities and the related Rule Against Restraints on Alienation, and will provide an overview of the right of first refusal, which is also known as a pre-emptive right. Part II will examine the application of the Rule Against Perpetuities in cases involving a right-of-first-refusal provision, providing a comparison of the majority and minority approaches. Part II will also explore the view that the minority approach is the modern trend in property law and will highlight the decision of the Supreme Judicial Court of Massachusetts in *Bortolotti v. Hayden*.[9] Part III of this Note will address why the right of first refusal should not be subject to the Rule Against Perpetuities. Specifically, this

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1. *See* J.H.C. MORRIS & W. BARTON LEACH, THE RULE AGAINST PERPETUITIES 3 (photo. reprint 1986) (2d ed. 1962).

2. *Id.*

3. 61 AM. JUR. 2D *Perpetuities and Restraints on Alienation to Plant and Job Safety—OSHA and State Laws* § 90 (2002).

4. Frederick R. Schneider, *A Rule Against Perpetuities for the Twenty-First Century*, 41 REAL PROP. PROB. & TR. J. 743, 744-45 (2007).

5. BLACK'S LAW DICTIONARY 1447 (9th ed. 2009).

6. Bortolotti v. Hayden, 866 N.E.2d 882, 886, 891 (Mass. 2007).

7. *See infra* Part II.A.

8. *See infra* Part II.B.

9. 866 N.E.2d 882 (Mass. 2007).

Note will argue that rather than focusing on whether the interest created by a right of first refusal vests too remotely, courts should focus on whether a right of first refusal acts as an unreasonable restraint on alienation.

I. Background Information Regarding Prohibitions Against Restraints on Property Rights and the Right of First Refusal

A. Prohibitions Against Restraints on Property Rights

Historically, the common law has favored the free alienability of property.[10] To be alienable, property must be capable of being freely transferred from one owner to another, either during the owner's lifetime or at her death.[11] Traditionally, restraints on the alienation of property have been void as contrary to public policy.[12] In general, there are four objections to restraints on alienation.[13] First, restraints on alienation make property unmarketable, which may prevent a particular piece of land from being used for its "highest and best use."[14] Second, restraints have a tendency "to perpetuate the concentration of wealth by making it impossible for the owner to sell property and consume the proceeds of [the] sale."[15] Third, restraints discourage owners from making improvements to their property; a property owner is not likely to spend money on improvements to property he cannot sell.[16] Fourth, restraints on alienation prevent creditors, who have extended credit in reliance on the owner's free enjoyment of the property, from reaching the property in order to settle claims.[17] In light of these policy concerns, the common law Rule Against Perpetuities and the Rule Against Restraint on Alienation were developed to ensure the free alienability of property.[18]

1. The Rule Against Perpetuities

The Rule Against Perpetuities is a rule that strikes down property interests that vest[19] too remotely.[20] It was created to prevent unreasonable

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10. MORRIS & LEACH, *supra* note 1. Common law judges established rules prohibiting restraints on alienability as early as the thirteenth century. *Id.*

11. *See* BLACK'S LAW DICTIONARY, *supra* note 5, at 84.

12. 61 AM. JUR. 2D, *supra* note 3.

13. JESSE DUKEMINIER ET AL., PROPERTY 195 (6th ed. 2006).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *See* Schneider, *supra* note 4.

19. Morris and Leach provide the following definition of "vest":

restraints on the alienation of property.[21] To quote the Restatement Third of Property, the purpose of the Rule Against Perpetuities is to prevent "excessive dead-hand control of property . . . through intergenerational transfers" that might render property unmarketable for decades, or longer.[22] The Rule Against Perpetuities does not invalidate interests that *last* too long.[23] Rather, the Rule Against Perpetuities invalidates interests that are inalienable because their ownership *vests* too remotely.[24] When an interest in property vests too remotely, the property is inalienable because there is no owner who has title to the property who could sell it or otherwise exercise aspects of ownership.[25] The Rule Against Perpetuities serves to limit the amount of time that title to property can be suspended out of commerce and rendered inalienable.[26]

> (a) A remainder is "vested" when the persons to take it are ascertained and there is no condition precedent attached to the remainder other than the termination of the prior estates.
>
> (b) An executory interest (that is, an interest which cuts off a previous interest instead of following it when it has terminated) is not "vested" until the time comes for taking possession.
>
> (c) Most important of all, a class gift is not "vested" until the exact membership of the class has been determined; or, to put it differently, a class gift is still contingent if any more persons can become members of the class or if any present members can drop out of the class.

MORRIS & LEACH, *supra* note 1, at 1.

20. *Id.*

21. *See* DUKEMINIER ET AL., *supra* note 13, at 245.

22. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.3 cmt. b (2000). Dead-hand control is exerted when a decedent influences the conduct of a living beneficiary through control of his or her wealth from beyond the grave. *See* BLACK'S LAW DICTIONARY, *supra* note 5, at 456.

23. MORRIS & LEACH, *supra* note 1, at 2.

24. *Id.*; Fitzpatrick v. Mercantile-Safe Deposit & Trust Co., 155 A.2d 702, 705 (Md. 1959) (stating that the Rule Against Perpetuities does not invalidate "interests which last too long, but interests which vest too remotely; in other words, the Rule is not concerned with the duration of estates, but the time of their vesting").

25. *See* BLACK'S LAW DICTIONARY, *supra* note 5.

26. *Id.* The policy considerations behind the Rule Against Perpetuities are clear:

> The [R]ule [A]gainst [P]erpetuities springs from considerations of public policy. The underlying reason for and purpose of the rule is to avoid fettering real property with future interests dependent upon contingencies unduly remote which isolate the property and exclude it from commerce and development for long periods of time, thus working an indirect restraint upon alienation, which is regarded at common law as a public evil.

First Nat'l Bank & Trust Co. v. Sidwell Corp., 678 P.2d 118, 127 (Kan. 1984).

The classic statement of the Rule Against Perpetuities is that "[n]o interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[27] In other words, for an interest to be valid, it must be certain to vest or to terminate no later than twenty-one years after the death of some person alive at the creation of the interest.[28] The person alive at the creation of the interest by which the period is measured is considered the validating life.[29] The existence of this person will enable it to be proven that the contingent interest[30] will vest or fail within the life of that person, or within twenty-one years after his or her death.[31] There must be a validating life for an interest to be valid.[32]

To understand how the validating life is used to determine whether an interest is valid under the Rule Against Perpetuities, consider the following two examples:

> Example [One]. *O* transfers a sum in trust "for *A* for life, then to *A*'s first child to reach 21." *A* is the validating life. You can prove that any child of *A* who reaches 21 will necessarily reach 21 within 21 years of *A*'s death. The remainder must vest or fail within this period; it cannot possibly vest more than 21 years after *A* dies. The remainder is valid.
>
> Example [Two]. *O* transfers a sum in trust "for *A* for life, then to *A*'s first child to reach 25." *A* has no child age 25 or older. There is no validating life; the contingent remainder is void. You cannot prove that *A*'s first child to reach 25 will do so within 21 years after *A*'s death.[33]

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27. Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097, 2098-99 (2003) (quoting JOHN CHIPMAN GRAY, RULE AGAINST PERPETUITIES 191 (4th ed. 1942)). John Chipman Gray, a Harvard Law professor from 1869 to 1913 and co-founder of the distinguished law firm Ropes & Gray, "was fabled because he reduced centuries of cases to this one sentence." DUKEMINIER ET AL., *supra* note 13, at 245 n.15. For more on Gray, see Stephen A. Siegel, *John Chipman Gray, Legal Formalism, and the Transformation of Perpetuities Law*, 36 U. MIAMI L. REV. 439 (1982).

28. DUKEMINIER ET AL., *supra* note 13, at 246.

29. *Id.*

30. A contingent interest is "[a]n interest that the holder may enjoy only upon the occurrence of a condition precedent." BLACK'S LAW DICTIONARY, *supra* note 5, at 885.

31. DUKEMINIER ET AL., *supra* note 13, at 246. "Sometimes a validating life will be a person who is not mentioned in the instrument. The key is that to be a validating life, a person must be someone who can affect vesting or termination of the interest." *Id.* at 247.

32. *Id.* at 246 n.17.

33. *Id.* at 246.

Example Two demonstrates an important point in the search for a person to be the validating life: in looking at persons who are causally connected with whether the interest in question will vest or terminate, one must consider whether there is a possible chain of events that may occur after the creation of the interest that would cause it to be invalid.[34] Note that the test looks at what *might* happen.[35] If what might happen is that the interest has not yet vested during the validating person's life plus twenty-one years after their death, then that person cannot be the validating life.[36] Example Two illustrates a situation in which there is a possible chain of events that would invalidate the interest.[37] Assume that *A*'s presently living children, who are all under the age of twenty-five, die. *A* has another child, *B*, a year later. *A* then dies, leaving her only child *B*, age three, alive. *B* will not reach age twenty-five within twenty-one years of *A*'s death. If the gift vests in *B*, it will vest twenty-two years after *A*'s death, and this is too remote. Here, *A* cannot be the validating life and there is no other life that creates the proof required to determine whether the interest is valid. Thus, this interest is void under the Rule Against Perpetuities.[38]

2. The Rule Against Restraints on Alienation

Like the Rule Against Perpetuities, the Rule Against Restraints on Alienation prohibits restraints on property rights.[39] Both rules serve to prevent "the withdrawal of property from commerce."[40] Despite their similar purpose, it is crucial to note the distinction between the Rule Against Perpetuities and the Rule Against Restraints on Alienation.[41] Namely, these two rules are based on different principles.[42] While the Rule Against Perpetuities was intended to prevent interests from vesting too far in the future, the Rule Against Restraints on Alienation was designed to prevent the taking of a property owner's power to alienate his property.[43]

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34. *Id.*

35. *See id.*

36. *Id.*

37. DUKEMINIER ET AL., *supra* note 13, at 246-47.

38. *Id.* at 247.

39. 61 AM. JUR. 2D, *supra* note 3, § 2.

40. MORRIS & LEACH, *supra* note 1, at 2. The Rule Against Perpetuities and the Rule Against Restraints on Alienation are based on the "desirability of avoiding the retardation of the natural development of a community by removing property from the ordinary channels of trade and commerce." Kershner v. Hurlburt, 277 S.W.2d 619, 624 (Mo. 1955), *quoted in* Cole v. Peters, 3 S.W.3d 846, 850 (Mo. Ct. App. 1999).

41. *See* 61 AM. JUR. 2D, *supra* note 3, § 2; MORRIS & LEACH, *supra* note 1, at 2.

42. 61 AM. JUR. 2D, *supra* note 3, § 2.

43. *Id.* "[T]he rule against restraints is a rule against direct restraints on alienation, whereas the [R]ule [A]gainst [P]erpetuities prohibits restraining the alienation indirectly by

To be alienable, property must be capable of being freely transferred from one owner to another.[44] A restraint on alienation is any provision that prevents the owner of an interest in property "from disposing of [the interest] at all or from disposing of it in particular ways or to particular persons."[45]

Another difference between the two rules is the criteria used by each to determine the validity of an interest.[46] While the Rule Against Perpetuities measures the validity of an interest based on the passage of time,[47] the Rule Against Restraints on Alienation determines the reasonableness of a restraint[48] based on three factors: (1) the purpose of the restraint; (2) the duration of the restraint; and, in the case of a provision providing a purchaser with the right to purchase property, (3) the method of determining the price to be paid for the interest.[49] Although the Rule Against Restraints on Alienation is intended "to prevent the inalienability of present or future vested interests," not every restraint will be considered a violation.[50]

B. The Right of First Refusal

A right of first refusal, also known as a pre-emptive right, is an example of a type of restraint on alienation that is not automatically considered a violation of the Rule Against Restraints on Alienation.[51] So long as it does not prevent a current transfer of property, a right of first refusal is not per se invalid.[52] In general terms, a right of first refusal is a right to purchase property before it is offered to others.[53] A right of first refusal contained in a deed obligates the owner of that property to offer to sell that property to the holder of the right before the property may be sold

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creating nonvested interests." Caudle v. Smither, 427 S.W.2d 227, 230 (Ky. 1968).

44. BLACK'S LAW DICTIONARY, *supra* note 5, at 84.

45. MORRIS & LEACH, *supra* note 1, at 2.

46. *See* 61 AM. JUR. 2D, *supra* note 3, § 2; MORRIS & LEACH, *supra* note 1, at 2.

47. 61 AM. JUR. 2D, *supra* note 3, § 2.

48. An option restraint, for example, is generally considered to be reasonable "if the option price is at market or appraised value, irrespective of the duration of the option." Iglehart v. Phillips, 383 So. 2d 610, 614 (Fla. 1980).

49. Cole v. Peters, 3 S.W.3d 846, 850 (Mo. Ct. App. 1999).

50. *Id.* (internal quotations omitted).

51. *See* RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 4.4 cmt. d (1983); *see also supra* Part I.A.2.

52. RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 4.4 cmt. d.

53. J.A. Bryant, Jr., Annotation, *Pre-Emptive Rights to Realty as Violation of Rule Against Perpetuities or Rule Concerning Restraints on Alienation*, 40 A.L.R. 3D 920, 924 (1971). A right of first refusal is "[a] potential buyer's contractual right to meet the terms of a third party's higher offer." BLACK'S LAW DICTIONARY, *supra* note 5, at 1439.

to a third party.[54] The person who holds a right of first refusal "is entitled to 'be given an option to purchase *before* [the grantor] makes a contract to sell to another.'"[55] For example, if *A* has a right of first refusal on the purchase of *B*'s house, and if *C* offers to buy the house for $100,000, then *A* can match this offer and prevent *C* from buying it. The primary justification behind the right of first refusal is the argument that the holder of the right "will likely value the encumbered property more highly than any third party bidder."[56] This higher value subjectively placed upon the property by the holder of the right could be due to improvements or investments made in the property or sentimental attachment to the property.[57]

While the holder of a right of first refusal has the right to buy before others, it is important to note that the holder of the right may only exercise that right if the owner of the property *decides* to sell.[58] Holding a right of first refusal does not confer on the holder "the power to compel an unwilling owner to sell."[59] In contrast, an option to purchase real property is a unilateral contract that gives the holder of the option the right to purchase property at a specified time or for a specified price.[60] The holder of an option to purchase real property has the power to compel the owner of the property to sell, if the holder of the option so chooses.[61] For this reason, a right of first refusal, or a pre-emptive right, is distinguishable from an option to purchase real property.[62]

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54. *See* Bryant, *supra* note 53.

55. Mamo v. Skvirsky, 960 A.2d 595, 600 (D.C. 2008) (quoting 3 ERIC MILLS HOLMES, CORBIN ON CONTRACTS § 11.3, at 479 (rev. ed. 1996)).

56. Jonathan F. Mitchell, Comment, *Can a Right of First Refusal Be Assigned?*, 68 U. CHI. L. REV. 985, 987 (2001).

57. *Id.* at 987-88; *see, e.g.*, Bortolotti v. Hayden, 866 N.E.2d 882, 885 (Mass. 2007) (stating that the right of first refusal contained in the deed was created "to preserve the economic and sentimental value of the remaining land owned by the . . . family").

58. Bryant, *supra* note 53.

59. *Id.*

60. Old Port Cove Holdings, Inc. v. Old Port Condo. Ass'n One, 986 So. 2d 1279, 1285 (Fla. 2008). An option to purchase real property is:

> A contract by which an owner of realty enters an agreement with another allowing the latter to buy the property at a specified price within a specified time, or within a reasonable time in the future, but without imposing an obligation to purchase upon the person to whom it is given.

BLACK'S LAW DICTIONARY, *supra* note 5, at 1204.

61. *Cf. Old Port Cove Holdings*, 986 So. 2d at 1285.

62. Bryant, *supra* note 53.

II. Application of the Rule Against Perpetuities and the Rule Against Restraints on Alienation in Cases Involving a Right of First Refusal

In determining the validity of a right of first refusal contained in a deed, the provision is first considered under the Rule Against Restraints on Alienation.[63] Under the Rule Against Restraints on Alienation, the purpose of the restraint, the duration of the restraint, and the method of determining the price to be paid for the property are taken into consideration to determine the reasonableness of the restraint.[64] In addition to consideration under the Rule Against Restraints on Alienation, a majority of jurisdictions hold that a right of first refusal is subject to the Rule Against Perpetuities as well.[65] The Restatement of Property takes the position that a restraint in the form of a provision that the owner of a parcel of property cannot sell it without first giving a designated person the opportunity to meet any offer received does not constitute an unlawful restraint on alienation, so long as such provision does not violate the Rule Against Perpetuities.[66] While there has been some contention that the Rule Against Perpetuities is not a "satisfactory" method of determining the validity of pre-emptive rights, it has been applied in most of the right-of-first-refusal cases in which it has been discussed.[67]

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63. *See, e.g.*, Cole v. Peters, 3 S.W.3d 846, 850 (Mo. Ct. App. 1999).

64. *Id.*

65. Bryant, *supra* note 53. As the court in *Stuart Kingston, Inc. v. Robinson* stated:

> Although the [R]ule [Against Perpetuities] is most often applied in the construction of testamentary devices, it applies equally to rights of first refusal, also known as preemptive rights, to acquire interests in land. Despite the view of some courts that preemptive rights are merely contract rights and not direct interests in property, a vast majority of courts and commentators view such rights as equitable claims sufficient to support an action for specific performance if the property owner attempts to sell to someone other than the owner of the right of first refusal. Because the holder of the right of first refusal acquires merely an equitable interest, it remains inchoate until the owner decides to sell thus triggering the right of first refusal.

Stuart Kingston, Inc. v. Robinson, 596 A.2d 1378, 1384 (Del. 1991) (citations omitted).

66. Bryant, *supra* note 53, at 928.

67. *Id.* at 925.

> Although several commentators have indicated that even if perpetual in duration, a pre-emption at the offeror's price is unobjectionable since free alienation is not restrained, or have indicated that the [R]ule [A]gainst [P]erpetuities is not a satisfactory device by which the validity of pre-emptions should be determined in implementing public policy,

A. The Majority Approach

A majority of jurisdictions hold that a right of first refusal is subject to the Rule Against Perpetuities.[68] The courts adopting the majority approach have generally done so based on the conclusion that a right of first refusal creates an interest in property.[69] For example, the court in *Ferrero Construction Co. v. Dennis Rourke Corp.* reasoned that rights of first refusal create interests in property and not merely contract rights because "if the property owner attempts to sell to someone other than the [holder] of the right of first refusal . . . , the [holder of the right] may have a court of equity enter a decree of specific performance ordering that the property be conveyed to him."[70] Thus, the holder of a right of first refusal has an interest that will only vest if the owner of the property decides to sell.[71] Similarly, the court in *Stuart Kingston, Inc. v. Robinson* held that "[b]ecause the holder of the right of first refusal acquires merely an equitable interest, it remains inchoate until the owner decides to sell."[72] According to the majority position, a right of first refusal creates an unvested property interest in the holder of the right.[73] The purpose of the Rule Against Perpetuities is to prevent unreasonable restraints on the alienation of property by striking down interests in property that vest too

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> the common-law [R]ule [A]gainst [P]erpetuities has been applied in most of the pre-emption cases in which it has been discussed.

Id.

68. *See, e.g.*, HSL Linda Gardens Props., Ltd. v. Seymour, 788 P.2d 129, 130 (Ariz. Ct. App. 1990); Estate of L.W. Johnson v. Carr, 691 S.W.2d 161, 161 (Ark. 1985); Strong v. Theis, 232 Cal. Rptr. 272, 276 (Cal. Ct. App. 1986); Neustadt v. Pearce, 143 A.2d 437, 438 (Conn. 1958); *Stuart Kingston*, 596 A.2d at 1384; Martin v. Prairie Rod & Gun Club, 348 N.E.2d 306, 309 (Ill. App. Ct. 1976); Buck v. Banks, 668 N.E.2d 1259, 1261 (Ind. Ct. App. 1996); Trecker v. Langel, 298 N.W.2d 289, 291 (Iowa 1980); Gore v. Beren, 867 P.2d 330, 338 (Kan. 1994); Low v. Spellman, 629 A.2d 57, 58 (Me. 1993); Ferrero Constr. Co. v. Dennis Rourke Corp., 536 A.2d 1137, 1144 (Md. 1988); Pace v. Culpepper, 347 So. 2d 1313, 1317 (Miss. 1977); Nickels v. Cohn, 764 S.W.2d 124, 132 (Mo. Ct. App. 1989); Mazzeo v. Kartman, 560 A.2d 733, 737 (N.J. Super. Ct. App. Div. 1989); Vill. of Pinehurst v. Reg'l Invs. of Moore, Inc., 412 S.E.2d 645, 646 (N.C. 1992); Schafer v. Deszcz, 698 N.E.2d 60, 63 (Ohio Ct. App. 1997); Webb v. Reames, 485 S.E.2d 384, 385 (S.C. Ct. App. 1997); Clark v. Shelton, 584 P.2d 875, 877 (Utah 1978); Lake of the Woods Ass'n v. McHugh, 380 S.E.2d 872, 874 (Va. 1989); Smith v. VanVoorhis, 296 S.E.2d 851, 854 (W. Va. 1982); Anderson v. Riegel, 281 N.W. 915, 917 (Wis. 1938).

69. *See, e.g.*, *Ferrero*, 536 A.2d at 1139 ("As rights of first refusal are interests in property, the great majority of American jurisdictions have applied the Rule Against Perpetuities to such rights.").

70. *Id.*

71. *Id.*

72. *Stuart Kingston*, 596 A.2d at 1384.

73. *See Ferrero*, 536 A.2d at 1139.

remotely.[74] Because the majority of jurisdictions conclude that rights of first refusal are interests in property that have not yet vested, the majority of jurisdictions apply the Rule Against Perpetuities to such rights.[75]

In determining whether a right of first refusal violates the Rule Against Perpetuities, courts adopting the majority approach look at whether the right is limited to a term of years or if it is of unlimited duration.[76] In *Ferrero*, for example, the right of first refusal in question was part of a conveyance "between two corporations, which theoretically have a perpetual existence."[77] The *Ferrero* court reasoned that this right of first refusal violated the Rule Against Perpetuities because "under the conveyance as drafted, the right of first refusal might vest well beyond the period of some life in being plus twenty-one years that is prescribed in the Rule."[78] Courts adopting the majority approach find that a right of first refusal that is unlimited in duration automatically violates the Rule Against Perpetuities.[79]

B. The Minority Approach

While a majority of jurisdictions hold that a right of first refusal is subject to the Rule Against Perpetuities,[80] there is a notable minority.[81] The

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74. DUKEMINIER ET AL., *supra* note 13, at 245; MORRIS & LEACH, *supra* note 1, at 1; *see supra* Part I.A.1.

75. *Ferrero*, 536 A.2d at 1139; *see also Stuart Kingston*, 596 A.2d at 1384; Gore v. Beren, 867 P.2d 330, 338 (Kan. 1994) (holding that agreements creating a pre-emptive right to purchase real estate constitute property interests which are subject to the Rule Against Perpetuities); Martin v. Prairie Rod & Gun Club, 348 N.E.2d 306, 309 (Ill. App. Ct. 1976); Pace v. Culpepper, 347 So. 2d 1313, 1317 (Miss. 1977); Melcher v. Camp, 435 P.2d 107, 113-14 (Okla. 1967); Lake of the Woods Ass'n v. McHugh, 380 S.E.2d 872, 874 (Va. 1989); Smith v. VanVoorhis, 296 S.E.2d 851, 854 (W. Va. 1982); LEWIS M. SIMES & ALLAN F. SMITH, THE LAW OF FUTURE INTERESTS § 1154, at 61 (2d ed. 1956) (stating that rights of first refusal are "normally subject to the [R]ule [A]gainst [P]erpetuities").

76. *See Ferrero*, 536 A.2d at 1144.

77. *Id.*

78. *Id.*

79. *See id.*

80. *See supra* Part II.A.

81. *See, e.g.*, Robertson v. Murphy, 510 So. 2d 180, 183 (Ala. 1987); Cambridge Co. v. E. Slope Inv. Corp., 700 P.2d 537, 542 (Colo. 1985); Shiver v. Benton, 304 S.E.2d 903, 906 (Ga. 1983); Bortolotti v. Hayden, 866 N.E.2d 882, 891 (Mass. 2007); Randolph v. Reisig, 727 N.W.2d 388, 393 (Mich. Ct. App. 2006); Metro. Transp. Auth. v. Bruken Realty Corp., 492 N.E.2d 379, 385 (N.Y. 1986); Cherokee Water Co. v. Forderhause, 641 S.W.2d 522, 526 (Tex. 1982); Hartnett v. Jones, 629 P.2d 1357, 1362-63 (Wyo. 1981); Robroy Land Co. v. Prather, 622 P.2d 367, 371 (Wash. 1980); *see also* Weber v. Texas Co., 83 F.2d 807, 808 (5th Cir. 1936) ("The option under consideration is within neither the purpose of nor the reason for the rule."); *cf.* Great Bay Sch. & Training Ctr. v. Simplex Wire & Cable Co., 559

courts adopting the minority position hold that the Rule Against Perpetuities does not invalidate a right-of-first-refusal provision contained in a deed.[82] Generally, these courts have reached this conclusion by relying on the presumption that the sole policy underlying the Rule Against Perpetuities is the elimination of restraints on alienation.[83] The minority position maintains that, unlike options to purchase real property, rights of first refusal do not restrain alienation.[84] The minority position distinguishes rights of first refusal, also called pre-emptive rights, from options to purchase real property.[85] The American Law of Property explains the difference between the two:

> An option creates in the optionee a power to compel the owner of property to sell it at a stipulated price whether or not he be willing to part with ownership. A pre-emption does not give to the pre-emptioner the power to compel an unwilling owner to sell; it merely requires the owner, when and if he decides to sell, to offer the property first to the person entitled to the pre-emption, at the stipulated price. Upon receiving such an offer, the pre-emptioner may elect whether he will buy. If he decides not to buy, then the owner of the property may sell to anyone.[86]

Unlike an option to purchase real property, a right of first refusal does not give the holder of the right the power to compel the property owner to

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A.2d 1329, 1331 (N.H. 1989) (stating that the Rule Against Perpetuities does not apply to all pre-emptive rights, just those that "pose a substantial restraint on alienation"); Power Gas Mktg. & Transmission, Inc. v. Cabot Oil & Gas Corp., 948 A.2d 807, 808, 814-15 (Pa. Super. Ct. 2008) (holding that a right of first refusal in an oil and gas lease agreement is not subject to the Rule Against Perpetuities and stating "we also question whether, in the first instance, rights of first refusal . . . ever concern propertied estates such that they should be brought within the [R]ule [A]gainst [P]erpetuities").

82. *See, e.g.*, *Bortolotti*, 866 N.E.2d at 891; Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, 986 So. 2d 1279, 1285 (Fla. 2008).

83. *See, e.g.*, Forderhause v. Cherokee Water Co., 623 S.W.2d 435, 438-39 (Tex. App. 1981). The Rule Against Perpetuities serves to limit the amount of time that title to property can be suspended out of commerce and rendered inalienable. BLACK'S LAW DICTIONARY, *supra* note 5.

84. *See Great Bay Sch.*, 559 A.2d at 1331 (stating that the Rule Against Perpetuities does not apply to all pre-emptive rights, just those that "pose a substantial restraint on alienation").

85. *See, e.g.*, Uno Restaurants, Inc. v. Boston Kenmore Realty Corp., 805 N.E.2d 957, 962 (Mass. 2004) ("A right of first refusal is not an option to purchase property at a certain price, but a limitation on the owner's ability to dispose of property without first offering the property to the holder of the right at the third party's offering price."). *But see* Ferrero Constr. Co. v. Dennis Rourke Corp., 536 A.2d 1137, 1140 (Md. 1988) (declining to distinguish between an option to purchase real property and a right of first refusal).

86. 6 AMERICAN LAW OF PROPERTY § 26.64, at 507 (1952).

sell.[87] Nor does the holder of a right of first refusal have the power to prevent the property owner from selling the property.[88] So long as "[t]here is no casting of a cloud of uncertainty on the title to the property, and no potential to forestall a sale," the minority position concludes that a right-of-first-refusal provision should not be subject to the Rule Against Perpetuities.[89]

Courts adopting the minority position further argue, contrary to the majority approach, that the Rule Against Perpetuities should not be applied to rights of first refusal because a right to purchase property before others does not create a property interest.[90] Florida courts, for example, have consistently held that an option to purchase real property does not create a valid property interest.[91] If an option does not create an interest in property, "a right of first refusal—which may or may not ripen into an option depending on whether the owner decides to sell—cannot create an interest in land, either."[92] Courts in a number of jurisdictions adopting the minority approach have reached this conclusion.[93]

Courts adopting the minority position treat a right of first refusal as a contract rather than as an interest in property.[94] As a contract, a right of first refusal is not subject to the Rule Against Perpetuities.[95] If a right of first refusal is treated as a contract, and not a property interest, logically the Rule Against Perpetuities would not apply.[96] As the Fifth Circuit held in *Weber v. Texas Co.*, contract rights are "within neither the purpose of nor the reason for" the Rule Against Perpetuities.[97] Based on the foregoing,

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87. *Bortolotti*, 866 N.E.2d at 889.

88. *Id.*

89. *Id.*

90. *See* Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, 986 So. 2d 1279, 1287 (Fla. 2008).

91. *Id.*

92. *Id.* (internal citation omitted).

93. *See, e.g.*, Randolph v. Reisig, 727 N.W.2d 388, 392 (Mich. Ct. App. 2006) ("Because the right of first refusal gives the holder fewer rights than an option, we conclude that if the latter does not create an interest in land, neither does the former."); Robroy Land Co. v. Prather, 622 P.2d 367, 370 (Wash. 1980) ("The holder of a right of first refusal has far less of an interest in land than the holder of an ordinary option.").

94. *See, e.g.*, *Randolph*, 727 N.W.2d at 392 ("Michigan courts have generally treated . . . agreements containing first-refusal rights as contracts, not property interests . . . .").

95. The Rule Against Perpetuities deals with the vesting of interests in property, not with contractual rights. *See* MORRIS & LEACH, *supra* note 1, at 1.

96. *See Randolph*, 727 N.W.2d at 392.

97. Weber v. Texas Co., 83 F.2d 807, 808 (5th Cir. 1936); *see also* Power Gas Mktg. & Transmission, Inc. v. Cabot Oil & Gas Corp., 948 A.2d 807, 814-15, 818 (Pa. Super. Ct. 2008) (holding that a right of first refusal in an oil and gas lease agreement is not subject to the Rule Against Perpetuities, stating, "we also question whether . . . rights of first refusal . .

courts adopting the minority position hold that the Rule Against Perpetuities does not invalidate, nor should it be applied to, a right-of-first-refusal provision contained in a deed.[98]

1. The Minority Position as the Modern Trend in Property Law

The minority position adopted by a number of American jurisdictions appears to be the modern trend in property law.[99] As observed by Professor Jesse Dukeminier, "[t]he modern trend . . . has been to free preemptive [rights] from the Rule [Against Perpetuities] and to subject them instead to the rule against unreasonable restraints on alienation."[100] In 1944, the Restatement First of Property recognized that an option or right of first refusal is subject to the Rule Against Perpetuities.[101] The Restatement Third of Property reversed the Restatement First's position, however, and now states that the Rule Against Perpetuities does *not* apply to pre-emptive rights.[102] Comment b to section 3.3 of the Restatement Third of Property provides an overview of the historical development of the application of the Rule Against Perpetuities to pre-emptive rights.[103] It notes that courts first began to apply the Rule Against Perpetuities to commercial land transactions, including options and rights of first refusal, in the late

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. ever concern propertied estates such that they should be brought within the [R]ule [A]gainst [P]erpetuities").

98. *See, e.g.*, Greenshields v. Warren Petrol. Corp., 248 F.2d 61, 71 (10th Cir. 1957) (holding right to purchase oil and gas restricts land use in perpetuity but is presently vested); *Weber*, 83 F.2d at 808 (holding rights to purchase oil not within traditional purpose of Rule Against Perpetuities); Robertson v. Murphy, 510 So. 2d 180, 183 (Ala. 1987) (holding that right to repurchase created conditional fee that vested from outset and, thus, was exempt from the Rule Against Perpetuities); Cambridge Co. v. E. Slope Inv. Corp., 700 P.2d 537, 542-43 (Colo. 1985) (en banc) (holding technical application of Rule Against Perpetuities to right of first refusal of condominium units inappropriate); Gartley v. Ricketts, 760 P.2d 143, 145 (N.M. 1988) (holding that a right of first refusal is not a future interest and not subject to Rule Against Perpetuities); *Robroy Land Co.*, 622 P.2d at 369 (holding Rule Against Perpetuities not applicable to pre-emptive rights); Hartnett v. Jones, 629 P.2d 1357, 1363 (Wyo. 1981) (stating that the right of first refusal is not within the policy that the Rule Against Perpetuities was designed to uphold).

99. *See* Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, 986 So. 2d 1279, 1288 (Fla. 2008).

100. Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 CAL. L. REV. 1867, 1908 (1986); *see infra* Part III.B.

101. *See* RESTATEMENT (FIRST) OF PROP.: SOCIAL RESTRICTIONS IMPOSED ON THE CREATION OF PROP. INTERESTS § 413(1) cmt. e (1944) ("Preemptive provisions, being analogous to options upon a condition precedent, must comply with the [R]ule [A]gainst [P]erpetuities in so far as their maximum duration is concerned.").

102. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.3 cmt. b (2000).

103. *Id.*

nineteenth century.[104] Applying the Rule Against Perpetuities to commercial land transactions had both its virtues and its vices; "[t]he virtue of the rule was that it invalidated all interests that lacked a durational limit, thus clearing titles without any need to inquire into the utility of the arrangement. Its vice was that it operated arbitrarily, applying a time period totally unsuited to commercial transactions."[105]

Despite years of complaints that the Rule Against Perpetuities should not apply to pre-emptive rights, it was not until the 1980s that courts began to adopt the minority position.[106] Comment b to section 3.3 of the Restatement Third points out that "[w]hile some courts continue to adhere to the old view, there is authority to support using restraints-on-alienation doctrine rather than the [R]ule [A]gainst [P]erpetuities, which blindly invalidates transactions without regard to merit."[107] In a recent case involving pre-emptive rights, the highest court of Massachusetts adopted the minority approach and declined to apply the Rule Against Perpetuities to rights of first refusal.[108]

2. The Supreme Judicial Court of Massachusetts's Decision in *Bortolotti v. Hayden*

In *Bortolotti v. Hayden*, a case of first impression,[109] the Supreme Judicial Court of Massachusetts held that a restriction in a deed that gave a grantor's heirs the right of first refusal to purchase a parcel of land in the future did not violate the Rule Against Perpetuities, even though the restriction had an unlimited duration.[110] This decision is in conflict with the majority of jurisdictions, which hold that a right of first refusal is subject to the Rule Against Perpetuities.[111] Many of the cases that adopt "the minority view involve rights of first refusal in connection with unique interests in

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104. *Id.*

105. *Id.*

106. *See id.*

107. *Id.*

108. Bortolotti v. Hayden, 866 N.E.2d 882, 891 (Mass. 2007).

109. *Id.* at 886.

> There are no Massachusetts cases directly addressing whether a right of first refusal contained in a deed, which grants the right to purchase property on the same terms as any bona fide offer that may be acceptable to the grantee in the future, falls within the scope of the [R]ule [A]gainst [P]erpetuities.

Id.

110. *Id.* at 883, 891.

111. *See* Ferrero Constr. Co. v. Dennis Rourke Corp., 536 A.2d 1137, 1139 (Md. 1988).

land, such as oil, gas and mineral leases."[112] In contrast, the interest in *Bortolotti v. Hayden* was a parcel of commercial property.[113]

Bortolotti v. Hayden involved a parcel of land with a right of first refusal contained in the deed.[114] The property at issue, located in Marstons Mills, Massachusetts, was originally part of a larger tract of land owned by Mr. Hayden's father ("Hayden Sr.").[115] In 1976, Hayden Sr. had transferred his ownership in the parcel of land to Hayden Land Development Company ("HLD"), which was a joint venture between Hayden Sr. and partners Albert Mattson and Robert G. Kesten.[116] The purpose of HLD was to develop, manage, and operate a shopping center on a portion of the larger tract of land that included the parcel at issue in this case.[117]

At the time of Hayden Sr.'s death in 1980, he held 565 shares of HLD stock.[118] For tax purposes, the executors of Hayden Sr.'s estate participated in a stock redemption plan with HLD, in which HLD conveyed four parcels of the larger tract of subdivided land to Hayden Sr.'s estate in exchange for 150 shares of HLD stock.[119] The executors of Hayden Sr.'s estate then sold the four parcels of land to Mattson, "subject to a restrictive covenant giving Hayden [Sr.]'s heirs, executors, administrators and assigns the right of first refusal of any offer on the land that Mattson or his successors might receive."[120] The restrictions contained in the deed were imposed both to protect the value of the larger tract of land owned by HLD and "to preserve

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112. Eric T. Berkman, *Court Ok's 'Unlimited' First-Refusal Right in Deed*, MASS. LAW. WKLY., May 28, 2007, at 1. For examples of cases involving unique interests in land, see *Weber v. Texas Co.*, 83 F.2d 807 (5th Cir. 1936), *cert. denied*, 299 U.S. 561 (1936); *Producers Oil Co. v. Gore*, 610 P.2d 772 (Okla. 1980); *Perritt Co. v. Mitchell*, 663 S.W.2d 696, 697 (Tex. App. 1983); and *Forderhause v. Cherokee Water Co.*, 623 S.W.2d 435 (Tex. Civ. App. 1981), *rev'd on other grounds*, 641 S.W.2d 522 (Tex. 1982). These cases all involve rights of first refusal in connection with oil, gas, and mineral leases.

113. Berkman, *supra* note 112, at 36.

114. *Bortolotti*, 866 N.E.2d at 883.

115. *Id.* at 883-84.

116. *Id.* at 884.

117. *Id.*

118. *Id.*

119. *Id.*

120. Berkman, *supra* note 112, at 36. In part, the restrictions contained in the deed read:

> The grantee of these premises and his heirs, executors, administrators, and assigns shall not sell or otherwise dispose of said premises except after first offering the same for sale to the grantors, their heirs and assigns upon the same terms and conditions as those contained in a bona fide offer received by and acceptable to the grantee.

Bortolotti v. Kesten, No. 05152, 2005 WL 3670420, at *1 (Mass. Super. Ct. Dec. 6, 2005).

the economic and sentimental value of the remaining land owned by the Hayden family."[121] The deed was recorded at the Barnstable County Registry of Deeds on August 4, 1981 as Document Number 284,458.[122]

In 1983, Mattson conveyed the four lots to Kesten, with the recorded deed explicitly stating that the property is "subject to the restrictions as set forth in Document No. 284,458."[123] In 1996, Kesten sold two of the lots to Robert Bortolotti.[124] At this time Hayden Sr.'s heirs, Robert F. Hayden IV and his sisters, signed two documents that were titled "Assent to Sale," and these documents were recorded at the Registry of Deeds in Barnstable County.[125] By signing the "Assent to Sale" documents, Hayden Sr.'s heirs expressly waived their right of first refusal, pursuant to Document Number 284,458, regarding the two lots.[126]

Eight years later, in December 2004, Bortolotti agreed to buy another lot from Kesten and entered into a purchase and sale agreement for the parcel at issue in this case.[127] Kesten and Bortolotti scheduled the closing date for March 18, 2005.[128] On February 14, Bortolotti's attorney, on Bortolotti's behalf, sent a letter to Hayden notifying him of the purchase and sale agreement and of the fact that there was a twenty-day period when Hayden could respond and match what was written in the agreement.[129] If Hayden did not choose to match the offer, the letter requested that he sign and return the enclosed "Assent to Sale" document to Bortolotti.[130] On approximately March 7, 2005, Hayden's attorney hand delivered a letter to Kesten's attorney that contained Hayden's intention to purchase the property and a check for the deposit in the amount required by the purchase and sale agreement.[131] Kesten accepted the check and the letter, but the closing scheduled for March 18 never took place.[132] On March 17, 2005, Bortolotti sued Hayden and Kesten seeking a declaratory judgment voiding Hayden's first refusal rights and ordering Kesten to convey the parcel at issue.[133] Bortolotti argued that the right of first refusal contained in the deed

121. *Bortolotti*, 866 N.E.2d at 885.

122. *Id.* at 884.

123. *Id.* at 885.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Bortolotti*, 866 N.E.2d at 885.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. Bortolotti v. Kesten, No. 05152, 2005 WL 3670420, at *1 (Mass. Super. Ct. Dec. 6, 2005); *Bortolotti*, 866 N.E.2d at 885.

was void and unenforceable under the Rule Against Perpetuities.[134] The lower court granted partial summary judgment in favor of Bortolotti, declaring Hayden's right of first refusal void and unenforceable.[135]

Hayden appealed the judgment, and the appeal was transferred to the Supreme Judicial Court of Massachusetts on its own motion.[136] The Supreme Judicial Court reversed the lower court's decision and directed entry of judgment for Defendant Hayden,[137] holding that a restriction in a deed that gave a grantor's heirs the right of first refusal to purchase a parcel of land in the future did not violate the Rule Against Perpetuities, even though the restriction had an unlimited duration.[138] The court found that the restriction in the deed did not violate the Rule Against Perpetuities because the Rule did not, in fact, apply.[139] Relying on its decision in *Uno Restaurants, Inc. v. Boston Kenmore Realty Corp.*,[140] the court distinguished an option to purchase property at a certain price, which has been held by the court to violate the Rule Against Perpetuities, from a right of first refusal.[141] The purpose of the Rule Against Perpetuities is to prevent property from being unmarketable for excessively long periods of time.[142] The court reasoned that a right of first refusal, unlike an option to purchase real estate, does not prevent property from being marketable.[143] The court stated:

> Because the holder of a right of first refusal may only choose to purchase property on the same terms as a bona fide offer, if and when the owner decides to sell, there is no power . . . to encumber an owner's ability to sell the property for a lengthy period of time.[144]

In the instant case, the court reasoned that because "[t]here is no . . . cloud of uncertainty on the title to the property, and no potential to forestall a

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134. *Kesten*, 2005 WL 3670420, at *1.

135. *Id.* at *5.

136. *Bortolotti*, 866 N.E.2d at 884.

137. *Id.*

138. *See id.* at 891.

139. *Id.* at 889.

140. 805 N.E.2d 957 (Mass. 2004).

141. *Bortolotti*, 866 N.E.2d at 888 ("[A] right of first refusal is not an option to purchase property at a certain price, but a limitation on the owner's ability to dispose of property without first offering the property to the holder of the right at the third party's offering price.") (quoting *Uno Rests.*, 805 N.E.2d at 962).

142. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.3 cmt. b (2000); *see also supra* Part I.A.1.

143. *See Bortolotti*, 866 N.E.2d at 889; *see also supra* Parts I.B, II.B.

144. *Bortolotti*, 866 N.E.2d at 889.

sale," there is no threat to the alienability of property.[145] Where there is no risk of rendering property unmarketable, "the [R]ule [A]gainst [P]erpetuities logically should not apply."[146]

III. A Right of First Refusal Should Not Be Subject to the Rule Against Perpetuities.

A. The Rule Against Perpetuities Should Not Apply to Rights of First Refusal.

1. A Right of First Refusal Is Not a Property Interest.

The Rule Against Perpetuities should not be applied to rights of first refusal because a right of first refusal is not a property interest.[147] Merely holding the right to purchase property before others does not create a property interest.[148] Until the holder of a right of first refusal exercises their right to purchase, he has no legal interest in the property.[149]

It is recognized that an option to purchase real property does not create a legal property interest.[150] An option merely creates a contractual right.[151] If an option does not create a property interest, it logically follows that a right of first refusal cannot create a property interest either.[152] The holder of an option has the power to compel a sale of the property at will.[153] In contrast, the holder of a right of first refusal has no power to exercise their right to purchase the property until the owner of the property decides to sell.[154] The holder of a right of first refusal thus has fewer rights than the holder of an option.[155] Because the right of first refusal creates fewer rights in the holder than an option, if an option does not create an interest in property, neither can a right of first refusal.[156] As a contractual right, a right of first refusal is not subject to the Rule Against Perpetuities.[157] The Rule

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145. *Id.*

146. *Id.*

147. *See, e.g.*, Old Port Cove Holdings, Inc. v. Old Port Cove Condo. Ass'n One, 986 So. 2d 1279, 1286-88 (Fla. 2008).

148. *See, e.g., id.* at 1286-87.

149. *Id.*

150. *See* JOHN W. REILLY, THE LANGUAGE OF REAL ESTATE 287 (5th ed. 2000) (stating that an option "does not give the optionee any estate in the property").

151. *See id.*

152. *Old Port Cove Holdings*, 986 So. 2d at 1287.

153. *See* Randolph v. Reisig, 727 N.W.2d 388, 392 (Mich. Ct. App. 2006).

154. *Id.*

155. *Id.*

156. *See id.*

157. *See, e.g., id.* ("Michigan courts have generally treated . . . agreements containing

Against Perpetuities deals with the vesting of interests in property, not with contractual rights.[158] Because a right of first refusal is a contractual right, and not a property interest, logically the Rule Against Perpetuities should not apply.[159]

2. A Right of First Refusal Does Not Necessarily Render Property Inalienable.

The Rule Against Perpetuities should not apply to rights of first refusal because a right of first refusal does not necessarily render property inalienable.[160] A right of first refusal that merely gives the holder of the right the power to purchase property on the same terms as a bona fide offer does not prohibit the alienation of property, and thus should not be subject to the Rule Against Perpetuities.[161] The Rule Against Perpetuities is concerned with property interests that have not yet vested; its purpose is to limit the amount of time that title to property can be suspended out of commerce and caused to be inalienable.[162] In the case of most right-of-first-refusal provisions, however, the title to the property is never suspended out of commerce.[163] The owner of the property may choose to sell the property at any time and may accept any offer for the sale of the property that he chooses.[164] Unlike an option to purchase real property, a right of first refusal does not give the holder of the right the power to compel the property owner to sell.[165] Nor does the holder of a right of first refusal have the power to prevent the property owner from selling the property.[166] In most cases, a right of first refusal merely gives the holder of the right the power to match the terms of a bona fide offer.[167]

In *Bortolotti v. Hayden*, for example, Hayden, the holder of the right of first refusal, had no power to exercise his right until Kesten, the owner of the property, decided to sell.[168] At the time when Kesten did decide to sell the property and entered into an agreement with Bortolotti, Hayden

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first-refusal rights as contracts, not property interests . . . .").

158. *See* MORRIS & LEACH, *supra* note 1, at 1.

159. *See, e.g.*, *Randolph*, 727 N.W.2d at 392.

160. *See* 6 AMERICAN LAW OF PROPERTY § 26.67, at 511 (1952) (stating that the Rule Against Perpetuities "ought not to be applied, since the future interest of the pre-emptioner constitutes no impediment to transfer of the property").

161. Bortolotti v. Hayden, 866 N.E.2d 882, 889 (Mass. 2007).

162. *See* BLACK'S LAW DICTIONARY, *supra* note 5.

163. *See Bortolotti*, 866 N.E.2d at 889.

164. *See id.*

165. *See id.*

166. *Id.*

167. *See* Bryant, *supra* note 53.

168. *See Bortolotti*, 866 N.E.2d at 885; *supra* Part II.B.2.

merely had the right to purchase the property on the same terms as set forth in the agreement.[169] Hayden had no power to compel Kesten to sell the property, nor did he have any power to specify the sale price.[170] Because Hayden only had the right to match the terms of a bona fide offer on the property and had no additional power, the right of first refusal contained in the deed did not prohibit the free alienation of the property.[171]

Because a right of first refusal does not necessarily render property inalienable, the Rule Against Perpetuities should not be blindly applied to all right-of-first-refusal provisions.[172] Where a right of first refusal merely gives the holder of the right the power to purchase property on the same terms as a bona fide offer, there is no threat to the alienability of the property, and the Rule Against Perpetuities should not apply.[173]

B. Rights of First Refusal Should Be Analyzed Under the Rule Against Restraints on Alienation.

Rather than blindly applying the Rule Against Perpetuities to all right-of-first-refusal provisions, rights of first refusal should be analyzed under the Rule Against Restraints on Alienation on a case-by-case basis. The purpose of the Rule Against Restraints on Alienation is to prevent direct restraints on alienation.[174] In contrast, the Rule Against Perpetuities prevents indirect restraints on alienability created by interests that have not yet vested.[175] When considering the validity of a pre-emptive right, the inquiry should not be when the right vests, but whether the right directly prevents free alienation of the property involved.[176] A standard right-of-first-refusal provision, which merely gives the holder of the right the power to match a bona fide offer, does not prohibit the free alienation of property.[177] It is possible, however, for a right-of-first-refusal provision to contain language that may affect the alienability of the property.[178] In these

169. *See Bortolotti*, 866 N.E.2d at 885.

170. *See id.*

171. *Id.* at 889.

172. *See, e.g.*, Randolph v. Reisig, 727 N.W.2d 388, 392 (Mich. Ct. App. 2006).

173. *See, e.g.*, *Bortolotti*, 866 N.E.2d at 889.

174. Caudle v. Smither, 427 S.W.2d 227, 230 (Ky. 1968).

175. *Id.*

176. *See* 6 AMERICAN LAW OF PROPERTY § 26.66, at 509-10 (1952) (arguing that courts should have analyzed options and pre-emptive rights under the Rule Against Restraints on Alienation rather than the Rule Against Perpetuities because "[e]verything of value in the option device could have been preserved, and its evils combated more effectively than can be done through the [R]ule [A]gainst [P]erpetuities").

177. *See* Bryant, *supra* note 53.

178. *See, e.g.*, *Bortolotti*, 866 N.E.2d at 889.

situations, the reasonableness of the right-of-first-refusal provision is best determined under the Rule Against Restraints on Alienation.

A deed might contain, for example, a right-of-first-refusal provision with a duration of one hundred years permitting the holder of the right to purchase the property at a fixed price if the property owner decides to sell.[179] Although the holder of this right does not have power to compel a sale, the right to purchase at a fixed price may restrict alienability if, for example, the passage of time has caused the fixed price to bear no relation to the actual market value of the property.[180] Because the holder of the right may have the right to purchase the property at an artificially low price if the owner decides to sell, the owner may be deterred from selling the property or from making improvements to it.[181] Conversely, a deed might contain a right-of-first-refusal provision with a duration of one hundred years permitting the holder of the right to purchase the property at a fixed price as determined by an appraisal of the property at the time it is to be sold.[182] Here, the owner should not be deterred from selling the property or making improvements to it because he can rest assured that the property would sell for its appraised value.[183]

In the above examples, the reasonableness of the right-of-first-refusal provisions is best analyzed under the Rule Against Restraints on Alienation.[184] If the Rule Against Perpetuities were applied instead, the provisions would automatically be void based solely on their duration; application of the Rule Against Perpetuities allows for no consideration of whether the provision even serves as a restraint on alienation. In analyzing the above examples under the Rule Against Restraints on Alienation, it would first need to be determined whether the provisions permitting the

179. Selig v. State Highway Admin., 861 A.2d 710, 718-19 (Md. 2004).

180. *Id.* at 719; *see, e.g.*, Peele v. Wilson County Bd. of Educ., 289 S.E.2d 890, 892-93 (N.C. Ct. App. 1982). This is known as an "independent" fixed-price option. *See* Iglehart v. Phillips, 383 So. 2d 610, 615 (Fla. 1980).

181. *Selig*, 861 A.2d at 719.

182. *See Iglehart*, 383 So. 2d at 615-16. This example describes a "dependent" fixed-price option. *See id.* at 615.

183. *See id.* at 615-16.

184. *See* Cambridge Co. v. E. Slope Inv. Corp., 700 P.2d 537, 542 (Colo. 1985) (en banc) ("Because the preemptive right . . . poses no threat to . . . free alienability . . . we perceive no reason to invalidate the right under the [R]ule [A]gainst [P]erpetuities."); Bortolotti v. Hayden, 866 N.E.2d 882, 889 (Mass. 2007) ("Because the holder of a right of first refusal may only choose to purchase property on the same terms as a bona fide offer . . . . the [R]ule [A]gainst [P]erpetuities logically should not apply. In our view, this position is better suited for business transactions, such as the one here, in which the right of first refusal was created."); Metro. Transp. Auth. v. Bruken Realty Corp., 492 N.E.2d 379, 385 (N.Y. 1986) (recognizing that, at least in commercial settings, rights of first refusal are "best regulated by the [R]ule [A]gainst [U]nreasonable [R]estraints on [A]lienation").

purchase of the property at a fixed price are truly restraints on alienation.[185] A restraint on alienation is any provision that prevents the owner of an interest in property "from disposing of [the interest] at all or from disposing of it in particular ways or to particular persons."[186] In the first example above, the owner of the property is not *absolutely* prevented from disposing of the property, although he may be discouraged from doing so. In the second example, it seems unlikely that the owner of the property would be prevented from selling, unless market conditions in the area show that he should be able to sell for a much higher amount than at which the property was appraised.

If, for some reason, these provisions were considered to be restraints on alienation, courts applying the Rule Against Restraints on Alienation would then determine whether the restraints are reasonable by considering the method provided for determining the price to be paid for the property.[187] Whether a restraint is reasonable "depends upon its long-term effect on the improvement and marketability of the property. Once that effect is determined, common sense should dictate whether it is reasonable or unreasonable."[188] In the above examples, there are a number of elements to consider in determining the reasonableness of the provision, including the purpose and use of the property, the appraised or fair market value of the property, the amount of the fixed price, and whether the fixed price is independent or is dependent on other factors for determination.[189] It is clear that due to the individualistic nature of each situation and the level of analysis needed to determine whether a restraint is reasonable, it would be illogical to blindly apply the Rule Against Perpetuities to all rights of first refusal.[190] Whether a right-of-first-refusal provision should be upheld hinges on whether it acts as an unreasonable restraint on alienation, not whether it vests too remotely.[191] To ensure the fairest results, rights of first refusal should be analyzed under the Rule Against Restraints on Alienation on a case-by-case basis.

C. The Rule Against Perpetuities Should Not Be Applied in Business Transactions.

The Rule Against Perpetuities should not be applied in business transactions, as its application would defeat the underlying goals of the

185. *See* MORRIS & LEACH, *supra* note 1, at 2.

186. *Id.*

187. *See* Cole v. Peters, 3 S.W.3d 846, 850 (Mo. Ct. App. 1999).

188. *Iglehart*, 383 So. 2d at 614.

189. *Id.* at 614-15; *see also supra* notes 180, 182 and accompanying text.

190. *See, e.g.*, 6 AMERICAN LAW OF PROPERTY § 26.66, at 510 (1952).

191. *See id.*

Rule.[192] Theoretically, corporations have a perpetual existence.[193] The time periods connected with the Rule Against Perpetuities, "lives in being" and "twenty one years," are not relevant in business affairs.[194] While the duration of right-of-first-refusal provisions may offend the basic policy of the Rule Against Perpetuities, "the offense is properly offset by their utility in modern legal transactions."[195] Right-of-first-refusal agreements between two corporations promote the use and development of the property involved, while imposing at most a minor impediment to alienability.[196] The usefulness of right-of-first-refusal provisions in business transactions is sufficient to justify excepting these provisions from the Rule Against Perpetuities.[197]

Bortolotti v. Hayden provides an example of a right of first refusal contained in a deed as part of a business transaction.[198] In this case, the purpose of the right of first refusal giving Hayden the power to match a bona fide offer on the property was to protect the economic and sentimental value of other commercial land owned by the Hayden family.[199] Although Hayden's right of first refusal was of unlimited duration, at no point was alienability of the property restricted, as Hayden had no power to prevent or to compel a sale or to dictate the sale price.[200] Here, not only is the property freely alienable, but the owner of the property is encouraged to develop and make improvements to it. Due to the Hayden family's sentimental attachment to the property and their commercial use of the surrounding land, any improvements to the property at issue would only make the property more valuable. Improvement of property and development for its best use would encourage competitive bidding on the open market for any parcel. Here, the fact that the Hayden family had an economic and sentimental attachment to the surrounding parcels only made the property at issue more valuable. When property is highly valued, it is more likely to be put to its best use.[201]

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192. *See* Metro. Transp. Auth. v. Bruken Realty Corp., 492 N.E.2d 379, 384 (N.Y. 1986); *see, e.g.*, Wong v. DiGrazia, 386 P.2d 817, 823 (Cal. 1963) (stating that the Rule Against Perpetuities should not be applied to commercial agreements "in [a] rigid or remorseless manner").

193. Ferrero Constr. Co. v. Dennis Rourke Corp., 536 A.2d 1137, 1144 (Md. 1988).

194. *Metro. Transp. Auth.*, 492 N.E.2d at 384.

195. *Id.* at 383.

196. *Id.* at 384.

197. *Id.* at 383.

198. *See generally* Bortolotti v. Hayden, 866 N.E.2d 882 (Mass. 2007).

199. *Id.* at 885.

200. *See* Bortolotti v. Kesten, No. 05152, 2005 WL 3670420, at *1 (Mass. Super. Ct. Dec. 6, 2005).

201. *See Metro. Transp. Auth.*, 492 N.E.2d at 384-85.

So long as they do not serve as restraints on alienation, right-of-first-refusal provisions in business transactions may encourage improvement and development of property. Application of the Rule Against Perpetuities to such business transactions would invalidate otherwise legitimate transactions, simply because of the inflexibility of the Rule.[202] Due to its inflexibility, the Rule Against Perpetuities should not be applied in business transactions.

D. Courts Have Justified Other Exceptions to the Rule Against Perpetuities Regarding Options to Purchase Real Estate.

It would not be unreasonable for courts to permit an exception to the Rule Against Perpetuities for rights of first refusal in business transactions. Over the years, courts have carved out three other exceptions to the Rule Against Perpetuities' application to options to purchase real estate.[203] Courts have held that the Rule Against Perpetuities does not apply to a lessee's option to renew a lease or to a lessee's option to purchase all or part of the leased premises.[204] Courts have also held the Rule Against Perpetuities inapplicable to an option to extend the scope of an easement or profit held by the holder of the easement.[205] Although options generally may violate the Rule Against Perpetuities if they vest too remotely, courts have nevertheless justified these three narrow exceptions because these three types of options "yield social benefits that offset the consequences of that violation."[206] Similarly, the usefulness of right-of-first-refusal provisions in business transactions justifies their exception from the Rule Against Perpetuities.[207] The social benefit of promoting the development of property for its best use far outweighs any public interest that may be served by automatically invalidating rights of first refusal that vest remotely.[208] Courts have justified other exceptions to the Rule Against Perpetuities regarding real estate transactions and should exempt business transactions from the Rule as well.

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202. *See id.* at 384.

203. Ferrero Constr. Co. v. Dennis Rourke Corp., 536 A.2d 1137, 1140 (Md. 1988).

204. *Id.*

205. *Id.*

206. *Id.* at 1141; *see, e.g.*, Cambridge Co. v. E. Slope Inv. Corp., 700 P.2d 537, 542 (Colo. 1985) (en banc) (holding that the Rule Against Perpetuities did not apply to rights of first refusal contained in condominium declaration, as condominium ownership was a form of property interest unknown to earlier common law; thus, an exception for rights of first refusal to purchase this specialized type of property interest has little bearing on whether rights of first refusal in general should be exempt from the Rule Against Perpetuities).

207. *Metro. Transp. Auth.*, 492 N.E.2d at 383.

208. *Id.* at 384-85.

CONCLUSION

In determining whether a right-of-first-refusal provision is valid, the Rule Against Perpetuities should not be applied. Because a right of first refusal creates a contractual right and not a property interest, it is illogical to inquire into whether an interest created by a right of first refusal vests too remotely. Further, rights of first refusal do not necessarily render property inalienable. If a right-of-first-refusal provision contains language that may affect the alienability of the property, the right of first refusal should not be analyzed under the Rule Against Perpetuities. Instead, the Rule Against Restraints on Alienation should be applied. Rather than focusing on when the interest may vest, courts should focus on whether a right of first refusal acts as an unreasonable restraint on alienation. The Rule Against Restraints on Alienation is better suited for analysis of contract provisions than is the Rule Against Perpetuities, as the time restrictions connected with the Rule Against Perpetuities are not relevant in business affairs. Due to its inflexibility, the application of the Rule Against Perpetuities in business transactions would defeat the underlying policy goals of the Rule. Courts have justified other exceptions to the Rule Against Perpetuities regarding real estate transactions and should except business transactions from the Rule as well. Rights of first refusal should not be subject to the Rule Against Perpetuities and instead should be analyzed under the Rule Against Restraints on Alienation.

* * * *

PROTECTING INVESTORS FROM THEIR INVESTMENTS: ENCOURAGING STATES TO MAKE ASSETS IN DOMESTIC ASSET PROTECTION TRUSTS AVAILABLE TO CREDITORS WHO HAVE SUCCESSFULLY PIERCED THE CORPORATE VEIL

Patrick M. Wilson[*]

Abstract: In December 2008, Bernard Madoff was arrested in connection with his operation of one of history's costliest Ponzi schemes. Bernard Madoff's scheme defrauded investors, including charities and Nobel Prize winners, out of more than $50 billion dollars. Madoff's victims are unlikely to recover all of their investments. Unfortunately, Ponzi schemes and other forms of corporate irresponsibility abound in society and cause significant financial losses for investors. Measures must be taken in order to restore investors' faith and protect their investments from being lost to corporate irresponsibility.

One measure to protect investors' investments is to amend state legislation that authorizes Domestic Asset Protection Trusts ("DAPT"). DAPTs enable individuals to self-settle trusts in which they are their own beneficiary. These trusts resemble spendthrift trusts in that they prevent the beneficiary's creditors from reaching the DAPT assets to settle their claim against the

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beneficiary. These trusts hold the potential to protect a corporate officer's assets from claims of corporate irresponsibility or fraud by investors. This Note proposes that those states that statutorily authorize DAPTs should amend their laws to allow for the assets contained within a corporate officer's DAPT to be accessible to victims of corporate irresponsibility who successfully pierce the corporate veil of the officer's corporation.

This proposal is necessitated by the lack of access victims have to the assets of a corporate officer's DAPT. Involuntary bankruptcy, fraudulent-transfer laws, and contempt-of-court orders are all insufficient remedies in attempting to access DAPT assets. Also, public policy reasons, including both the prevention of individuals from becoming dependent on the state and the collection of tax revenues, support the proposal to hold DAPTs' spendthrift clauses unenforceable. Moreover, the interests of justice—protecting innocent investors—calls for these trust assets to be accessible to victims of corporate irresponsibility. Finally, the ease of amending legislation supports the proposal of this Note.

Amending DAPT legislation should not deter corporate officers from establishing DAPTs. The goal of this Note is simply to deter corporate officers from establishing DAPTs in order to protect assets gained through corporate irresponsibility or fraud. Victims will still face an uphill challenge of accessing DAPT assets because they will have to first pierce the corporate veil of the beneficiary's corporation, which is an arduous task. Thus, this proposed amendment would protect innocent investors and only punish people who are truly guilty of corporate irresponsibility.

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INTRODUCTION

The phone rings. You pick it up and hear your financial consultant's voice on the other end of the line. Your expectation is that he is calling to check in and inform you about the quarterly performance of your investments. However, this call is different. This time, your investment professional is calling you to let you know that all of your assets have been wiped out in connection with a Ponzi[1] scheme.[2] You and your family are financially ruined. At first you do not panic because you keep telling yourself that your losses will be returned; your loss will be vindicated. As time goes by, you learn that you will never be fully compensated for your loss because the company you are suing has no assets to satisfy your claims. You have just learned an expensive lesson about the corporate irresponsibility[3] problem in America. Unfortunately, Americans like Robert Chew, a Time.com columnist who lost $1.2 million to a Ponzi scheme,

1. Although named after Charles Ponzi, Ponzi schemes have been around long before Charles Ponzi's stamp arbitrage scam during the 1920s. Eduardo Porter, Editorial, *Ponzi Schemes: The Haul Gets Bigger, but the Fraud Never Changes*, N.Y. TIMES, Dec. 27, 2008, at A24, *available at* http://www.nytimes.com/2008/12/27/opinion/27sat4.html?ref=opinion.

2. A Ponzi scheme is "[a] fraudulent investment scheme in which money contributed by later investors generates artificially high dividends or returns for the original investors, whose example attracts even larger investments." BLACK'S LAW DICTIONARY 1278 (9th ed. 2009).

3. The phrases corporate fraud and corporate irresponsibility will be used interchangeably throughout this Note. Although corporate fraud always equates to corporate irresponsibility, the opposite is not inherently true. For the purposes of this Note, corporate irresponsibility will refer to any corporate activity that could provide the basis for the successful piercing of a corporate veil. *See infra* Part I.C. Essentially, corporate fraud and corporate irresponsibility refer to corporate actions that will expose corporate officers or directors to individual liability.

learned this lesson first hand.[4] Although the corporate irresponsibility problem in America is large,[5] simple and practical solutions do exist to mitigate the problem. This Note will propose one such solution.

Corporate irresponsibility, in countless shapes and forms, has caused numerous Americans to suffer devastating financial losses.[6] A recent example of corporate irresponsibility involved a domestic Ponzi scheme that resulted in investor losses in excess of $50 billion.[7] Bernard Madoff, a prominent securities trader, was arrested in early December 2008 for operating "a multibillion-dollar fraud [Ponzi] scheme—perhaps the largest in Wall Street's history."[8] It is estimated that the victims of Madoff's fraud will likely only have access to approximately $1 billion worth of Madoff's assets for their recoveries.[9] Unfortunately, it is common that the investors affected by corporate fraud incur large losses.[10] Madoff's victims will have to take solace in the fact that Madoff will be in prison for the rest of his life.[11] However, for victims[12] like Robert Chew, the criminal penalty Madoff received is unlikely to heal any financial wounds.[13]

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4. *See* Robert Chew, *How I Got Screwed by Bernie Madoff*, TIME.COM, Dec. 15, 2008, http://www.time.com/time/business/article/0,8599,1866398,00.html.

5. *See* LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT 19-20, 60-61 (2001); *see also infra* Part II.

6. *See* John W. Schoen, *Corporate Fraud Alive and Well in U.S.*, MSNBC, May 25, 2006, http://www.msnbc.msn.com/id/12762573/ ("U.S. losses from [corporate] fraud rose to an estimated $638 billion in 2005—up from $600 billion in 2002 and $400 billion in 1996 . . . .").

7. *See* Porter, *supra* note 1 (referencing Bernard Madoff's Ponzi scheme). The most recent tally of fraud claims by Madoff's victims totaled over 15,400. Diana B. Henriques, *Claims Total Over 15,400 in Fraud by Madoff*, N.Y. TIMES, July 10, 2009, at B3, *available at* http://www.nytimes.com/2009/07/10/business/10madoff.html.

8. Diana B. Henriques & Zachery Kouwe, *U.S. Arrests a Top Trader in Vast Fraud*, N.Y. TIMES, Dec. 12, 2008, at A1, *available at* 2008 WLNR 23844269.

9. Linda Sandler, *Madoff Brokerage, Homes, Boats Valued at $1 Billion*, BLOOMBERG, Jan. 9, 2009, http://www.bloombergnews.com/apps/news?pid=20601110&sid=aEXnt7M6c9C0. One source estimates that "'[d]epending on the solvency of the persons sued, recoveries will probably be in the range of [ten] percent to [fifty] percent of the amounts for which the persons are liable.'" *Id.*

10. *Id.* ("Creditors of bankrupt Enron Corp., which hid billions of dollars in debt in off-the-books entities, received [thirty-six] cents on the dollar as of January 2008.").

11. Diana B. Henriques, *Madoff, Apologizing, Is Given 150 Years*, N.Y. TIMES, June 30, 2009, at A1, *available at* 2009 WLNR 12446925. On June 29, 2009, Bernard Madoff was sentenced to 150 years in prison, the maximum sentence he could receive for his financial crimes. *Id.*

12. Throughout this Note, the term "victim" will refer to those individuals who have lost money due to corporate irresponsibility.

13. *See* Chew, *supra* note 4.

In some instances of corporate irresponsibility, corporate officers may sufficiently protect their assets from judgments against them by placing their assets into a domestic asset protection trust ("DAPT").[14] This Note recommends that jurisdictions that permit DAPTs amend their laws to allow access to those trust assets to satisfy victims' judgments against corporate officers when said victims have successfully pierced the corporate veil and demonstrated the irresponsible, if not illegal, behavior of corporate officers. As the Madoff scheme demonstrated, corporate fraud can result in significant financial losses for victims. Furthermore, victims may not always have access to assets that will sufficiently compensate them for their losses. Perhaps by allowing victims to access corporate officers' assets located within DAPTs, officers will be less likely to engage in fraudulent behavior.

Part I will discuss the background information of asset protection trusts and piercing the corporate veil. Part II of this Note will discuss the corporate fraud problem in America. Part III will recommend amending state legislation to promote the accessibility of corporate officers' assets placed in DAPTs to satisfy the judgments of creditors who have successfully pierced the veil of the officer's corporation, thereby exposing the officer to individual liability.

I. Domestic Asset Protection Trusts and Piercing the Corporate Veil

Before delving into asset protection trusts, it is important to set the scene with a brief discussion of trust law. The following section will provide a general background of trust law by describing trust purposes, trust creation, trust types, and rights of trust beneficiary's creditors. Additionally, this section will acquaint the reader with the legal concept of piercing the corporate veil. The following sections are brief; readers interested in a more in-depth discussion of trust law should seek out trust-law treatises.

14. *Cf.* JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 627 (8th ed. 2009) (explaining that doctors may drop malpractice insurance and shift their assets into self-settled trusts to prevent those assets from being accessible to satisfy liability claims of their patients; corporate officers could also protect their assets by using these trusts against claimants who successfully pierce the corporate veil of the officer's corporation).

A. Trusts

1. Purpose

Trusts are property management arrangements that are commonly utilized tools in estate planning.[15] In trusts, title to trust property is bifurcated "between two parties, a fiduciary—the trustee—which holds legal title to the trust property for the benefit of one or more others—the beneficiaries—who hold the equitable or beneficial title to the trust property."[16] Trusts are generally used for several reasons including tax advantage purposes and maximizing the enjoyment of trust property for several generations.[17]

2. Trust Creation

Creating trusts requires several elements. First, trusts require the following three parties: settlor, trustee, and beneficiary.[18] The settlor is the person who creates the trust.[19] The trustee may be anyone who is able to hold legal title, including the settlor.[20] A beneficiary is able to serve as trustee, as long as the beneficiary is not the sole beneficiary.[21] The beneficiaries are "persons or entities for whose benefit property is held in trust."[22] Second, the settlor must have capacity and intent to create a trust.[23] Third, the trust must contain trust property, which is often referred to as the *res*.[24] The definition of trust property is quite broad and encompasses items ranging from interests in property to a single penny; any item referred to as

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15. JEFFREY N. PENNELL & ALAN NEWMAN, ESTATE AND TRUST PLANNING 219 (2005).

16. *Id.*

17. *Id.* at 224-25.

18. DUKEMINIER ET AL., *supra* note 14, at 547. It is important to note that "three different persons are not necessary for a trust. One person can wear two hats, or sometimes even all three." *Id.*

19. *Id.*

20. PENNELL & NEWMAN, *supra* note 15, at 233. The required capacity for someone to serve as trustee is simply the capacity that is required to hold legal title. *Id.*

21. *Id.* If the sole beneficiary served as the trustee, the legal and beneficial title to the trust property would merge and the trust would terminate. *Id.* at 233-34.

22. *Id.* at 240. Beneficiaries include anyone with the requisite capacity to hold title such as incompetents, minors, and corporations; however, the trust must have at least one ascertainable beneficiary. *Id.*

23. *Id.* at 230. Essentially, "[n]o particular form of words is necessary to create a trust. Not even the word *trust* or *trustee* is required. The sole question is whether the grantor manifested an intention to create a trust relationship." DUKEMINIER ET AL., *supra* note 14, at 557.

24. DUKEMINIER ET AL., *supra* note 14, at 569.

property may be placed into a trust.[25] However, determining what constitutes property can be problematic.[26]

3. Trust Types

Generally speaking, trusts can be divided into two categories: mandatory trusts and discretionary trusts.[27] The trustee of a mandatory trust has no discretion in her distributions of the trust income or principal; trustees must distribute all of the trust income.[28] Discretionary trusts permit the trustee to exercise discretion in disbursing payment of the trust income or principal or both to the beneficiaries.[29] Several variations of discretionary trusts exist, such as support trusts and discretionary support trusts.[30] Support trusts are usually created for the purpose of distributions "to the beneficiary for health, education, maintenance, and support."[31]

4. Creditors' Rights

Most trusts contain a provision that eliminates the right of a beneficiary's creditor to access the beneficiary's interest in the trust principal or income in order to satisfy the creditor's claims.[32] That provision is called a spendthrift provision or clause.[33] A trust is not "spendthrift unless the settlor expressly inserts a spendthrift clause [in the trust]."[34] The "beneficiary of a spendthrift trust cannot voluntarily alienate

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25. *Id.*

26. *Compare* Brainard v. Comm'r, 91 F.2d 880, 881-83 (7th Cir. 1937) (holding that the settlor's trust, consisting of anticipated profits from the settlor's securities, failed for want of trust property at the time of the declaration of trust because the trust cannot form unless there is actual, not anticipated, trust property at the time of declaration of trust), *with* Speelman v. Pascal, 178 N.E.2d 723, 724-26 (N.Y. 1961) (enforcing a trust that contained *res* consisting of an assignment of contractual rights to royalties for the production of a musical and film).

27. DUKEMINIER ET AL., *supra* note 14, at 597.

28. *Id.* at 598.

29. *Id.* The trustee's "discretion of whatever latitude must be exercised in good faith for the trust purposes and courts generally will review a trustee's exercise of discretion under a reasonableness standard." PENNELL & NEWMAN, *supra* note 15, at 252.

30. DUKEMINIER ET AL., *supra* note 14, at 598. Support trusts limit the trustee's discretion by describing support standards for the beneficiaries; discretionary support trusts combine express statements of discretion with a standard of support. *Id.*

31. PENNELL & NEWMAN, *supra* note 15, at 256 (internal quotations omitted) ("These standards are said to be 'ascertainable,' meaning that the trustee's duty to make distributions to the beneficiary for these purposes can be objectively reviewed and enforced.").

32. *Id.* at 257.

33. *See* DUKEMINIER ET AL., *supra* note 14, at 614.

34. *Id.*

her interest. Nor can her creditors reach her interest in the trust. This is true even if the trust provides for mandatory payments to the beneficiary."[35] Spendthrift trusts are recognized in jurisdictions throughout the United States.[36] The "rationale for enforcing spendthrift trusts has been that the trust property belongs not to the trust beneficiary, but to the trust settlor."[37] Therefore, because the trust settlor is under no obligation to transfer assets to the beneficiary, the settlor is able to subject the transfer to conditions, including the condition that the trust assets be protected from creditors of the beneficiary.[38]

Most jurisdictions that recognize spendthrift trusts allow creditors to reach the assets in some circumstances.[39] First, states do not allow beneficiaries to rely on the spendthrift clause to preclude the government from collecting on its claims.[40] Also, some jurisdictions allow individuals to access a beneficiary's spendthrift trust in order to satisfy claims for child support from the beneficiary.[41]

B. Domestic Asset Protection Trusts

1. What Are Domestic Asset Protection Trusts?

DAPTs[42] "are trusts that protect assets from creditors yet allow the settlor to name him or herself as a potential beneficiary."[43] What makes DAPTs unique is their value in allowing settlors to shield their assets from their creditors; DAPTs seemingly function as spendthrift trusts and benefit the settlor, who is also the beneficiary.[44] This ability to shield a settlor's assets runs contrary to a chief tenet of trust law providing that individuals cannot protect their assets from their creditors by stowing them away in a

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35. *Id.*

36. *Id.* at 616.

37. Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1042 (2000).

38. *Id.*

39. *See* PENNELL & NEWMAN, *supra* note 15, at 262-63.

40. *Id.* at 262. A beneficiary's interest in a trust will be considered when a government agency is determining whether an individual is eligible for public assistance. *Id.* Also, a beneficiary's interest is not protected against claims of government taxing agencies that have claims against the beneficiary. *Id.* at 263.

41. *See id.* ("The majority rule probably is that claims for child support may be successfully asserted while alimony claims often cannot.").

42. For the purposes of this Note, DAPTs are synonymous with self-settled trusts.

43. Kalimah Z. White, *Domestic Asset Protection Trusts*, *in* ASSET PROTECTION STRATEGIES 83, 83 (2008).

44. *See* DUKEMINIER ET AL., *supra* note 14, at 624.

trust for their own benefit.[45] Although "courts and legislatures have had some sympathy for property owners seeking to protect their [own] profligate children, the notion that property owners ought to be able to protect themselves against their own profligacy, at the expense of their creditors, has been much harder to swallow."[46] While DAPTs seemingly run contrary to trust law, a number of states have enacted statutes that provide for the validation of DAPTs.[47] States with DAPT laws include: Alaska, Delaware, Nevada, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, and Wyoming.[48] One incentive for states to enact DAPT legislation is to compete with foreign trusts for investment money.[49]

2. Characteristics of Domestic Asset Protection Trusts

There are a number of common traits among the currently enacted DAPT statutes throughout the United States.[50] First, nearly every statute requires that DAPTs be irrevocable.[51] Second, generally speaking, the spendthrift clause is enforceable against the trust settlor's creditors, subject to a few limitations, such as claims by a settlor's creditors of fraudulent transfers made by the settlor and claims by the settlor's existing creditors at the time of trust creation.[52] Several states hold spendthrift clauses unenforceable against claims arising from court orders providing for child support or alimony.[53] Third, every state mandates that the trustee of the DAPT have a connection with the state that hosts the trust.[54]

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45. *See id.*

46. Sterk, *supra* note 37, at 1044 (stating that, traditionally, settlors can utilize spendthrift trusts for the benefit of their beneficiaries but not for themselves).

47. DUKEMINIER ET AL., *supra* note 14, at 624; White, *supra* note 43, at 85.

48. White, *supra* note 43, at 85; *see* ALASKA STAT. § 34.40.110 (2008); DEL. CODE ANN. tit. 12, §§ 3570-76 (2007); NEV. REV. STAT. ANN. §§ 166.010-.170 (LexisNexis 2009); OKLA. STAT. ANN. tit. 31, §§ 10-17 (West 2008); R.I. GEN. LAWS §§ 18-9.2-1 to 9.2-7 (2003 & 2008 Supp.); S.D. CODIFIED LAWS §§ 55-16-1 to 16-16 (2004); TENN. CODE ANN. §§ 35-15-501 to 15-507 (2007); UTAH CODE ANN. §§ 25-6-1 to 25-6-14 (2007); WYO. STAT. ANN. §§ 4-10-510 to 10-523 (2009).

49. *See* Randall J. Gingiss, *Putting a Stop to "Asset Protection" Trusts*, 51 BAYLOR L. REV. 987, 990 (1999).

50. *See* White, *supra* note 43, at 86-88.

51. *Id.* at 86.

52. *Id.*

53. *See id.* at 89-91.

54. *Id.* at 87. The trustee connection may consist of the following: arranging for custody of trust property in the host state, arranging of fiduciary tax returns in the host state, or maintaining information about the trust in the host state. *Id.*

3. Possible Disadvantages of Domestic Asset Protection Trusts

One could imagine that a trust, established for the settlor's benefit, which shields the settlor's assets from creditors, would be an appealing option for some individuals.[55] Unfortunately, these trusts may appeal to individuals with improper intentions; for example, DAPTs may prove to be a safe harbor for those trying to escape liability for a plethora of reasons.[56] In keeping with the theme of this Note, one could easily imagine the scenario where corporate officers stash assets into DAPTs in order to protect them in case the settlor faced individual liability for corporate irresponsibility.

C. Piercing the Corporate Veil

Traditionally, corporations and other limited liability business associations are "presumed to be 'separate and distinct from its officers, shareholders, and directors, and those parties will not be held personally liable for the corporation's debts and obligations.'"[57] In order for corporate officers, shareholders, and directors to be held individually liable for corporate actions, a plaintiff must pierce the corporate veil.[58] Piercing the corporate veil is an arduous task for plaintiffs.[59] However, under certain circumstances, the corporate structure will be discarded and corporate officers will be held liable for the business association's debts.[60]

Several U.S. Circuit Courts of Appeals have pinpointed common criteria for allowing plaintiffs to pierce the corporate veil of corporations

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55. *See* DUKEMINIER ET AL., *supra* note 14, at 624-27.

56. *See id.* "Anecdotes abound of doctors and corporate executives who, in the face of rising insurance premiums, have opted to drop their coverage in favor of moving their assets into an APT [Asset Protection Trust]." *Id.* at 627; *see also* Gingiss, *supra* note 49, at 991-92 ("A possible public policy justification for the [DAPT] legislation is that individuals who are at high risk for various types of liability are going to engage in transfers to protect their assets from creditors . . . .").

57. Judson Atkinson Candies, Inc. v. Latini-Hohberger Dhimantec, 529 F.3d 371, 378 (7th Cir. 2008) (quoting Tower Investors, L.L.C. v. 111 E. Chestnut Consultants, Inc., 864 N.E.2d 927, 941 (Ill. App. Ct. 2007)) (holding that the plaintiff did not successfully meet the burden to pierce defendant's corporate veil).

58. *See id.* at 378-79.

59. *Id.* at 379 ("Piercing the corporate veil is not favored and in general, courts are reluctant to do so."); NetJets Aviation, Inc. v. LHC Commc'ns, L.L.C., 537 F.3d 168, 176 (2d Cir. 2008) (stating that shareholders of corporations and members of a limited liability company are usually not responsible or liable for their business association's debts, and plaintiffs have a difficult task in persuading courts to pierce corporate veils).

60. *NetJets Aviation, Inc.*, 537 F.3d at 176.

and limited liability corporations.[61] For example, piercing the corporate veil is permissible when there has been fraud or the corporation is being used as an instrument or alter ego of the corporation's owner or corporate officer.[62] To use fraud to pierce a corporate veil, a plaintiff does not have to demonstrate that a business organization was created with fraudulent intent; it is sufficient for a plaintiff to show that the corporation was so used to commit fraud.[63] Additionally, a corporate veil may be pierced (1) when the unity of interest and ownership that separates the corporation from corporate individuals is no longer present and (2) when adhering to the falsity of that separate existence between the corporation and individuals would promote injustice.[64] Generally speaking, a corporate veil may be pierced and liability will be imposed on corporate officers and directors when doing so would result in an equitable disposition.[65]

II. Corporate Fraud in America

A. The Extent of the Problem

In 2002, President George W. Bush formed the "Corporate Fraud Task Force" with the mission to aid state and local governmental agencies in "investigat[ing] and prosecut[ing] significant financial crimes, recover[ing] the proceeds of such crimes, and ensur[ing] just and effective punishment of those who perpetrate financial crimes."[66] President Bush created the Task Force after several high-profile acts of corporate fraud.[67] Unfortunately, high-profile accounts of corporate fraud have adversely affected innocent investors, pensioners, and employees—"whose futures

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61. *See Judson Atkinson Candies, Inc.*, 529 F.3d at 379; *NetJets Aviation, Inc.*, 537 F.3d at 176.

62. *NetJets Aviation, Inc.*, 537 F.3d at 176 ("To prevail under the alter-ego theory of piercing the [corporate] veil, a plaintiff need not prove that there was actual fraud but must show a mingling of the operations of the entity and its owner plus an 'overall element of injustice or unfairness.'") (quoting Harco National Insurance Co. v. Green Farms, Inc., 1989 WL 110537, at *5 (Del. Ch. 1989)); Williamson v. Recovery Ltd. P'ship, 542 F.3d 43, 53 (2d Cir. 2008).

63. *NetJets Aviation, Inc.*, 537 F.3d at 177.

64. *Judson Atkinson Candies, Inc.*, 529 F.3d at 379. Factors to consider in determining whether there is unity of interest sufficient to pierce a corporate veil include the following: inadequate capitalization, insolvency of the debtor corporation, absence of corporate records, commingling of funds, and failure to observe corporate formalities. *Id.*; *Williamson*, 542 F.3d at 53.

65. *Williamson*, 542 F.3d at 53.

66. CORPORATE FRAUD TASK FORCE, REPORT TO THE PRESIDENT iii (2008).

67. *Id.*

and fortunes were harmed, and at times, even shattered, by corporate leaders they trusted with their savings."[68]

Although the government has taken steps to mitigate and combat corporate fraud, the problem still exists as high-profile executives continue to scheme and defraud innocent investors.[69] Statistics from several governmental agencies all point to an increase in corporate fraud in America.[70] Data from the Internal Revenue Service ("IRS") indicates that corporate fraud indictments/informations increased from fifty-three to eighty between fiscal years 2007 and 2008.[71] Additionally, the IRS statistics indicate that the incarceration rate for corporate fraud increased from approximately sixty-eight percent to seventy-eight percent over the same time frame.[72] Lastly, the statistics indicate that the average prison sentence for corporate fraud increased from twenty to forty-nine months between 2007 and 2008.[73]

Statistics from the Federal Bureau of Investigation ("FBI") indicate an even larger corporate fraud problem than the IRS statistics.[74] FBI statistics indicate that the total number of corporate and securities fraud cases have increased by approximately forty-three percent during the period from 2003 to 2007.[75] The number of corporate fraud cases alone has increased by a staggering eighty-four percent over that same time period.[76] Additionally, the number of corporate fraud convictions has increased by approximately twenty percent over that period of time.[77]

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68. *Id.*

69. *See, e.g.*, INTERNAL REVENUE SERV., EXAMPLES OF CORPORATE FRAUD INVESTIGATIONS—FISCAL YEAR 2009, http://www.irs.gov/compliance/enforcement/article/0,,id=187268,00.html (last visited Apr. 15, 2010). A hedge fund manager pleaded guilty and was sentenced to sixty months in prison for his participation in a conspiracy to commit mail and wire fraud in defrauding investors of approximately $49 million. *Id.* Bernard Madoff was arrested and charged with securities fraud after losing approximately $50 billion worth of investors' money in a Ponzi scheme. *See* Sandler, *supra* note 9.

70. *See generally* CORPORATE FRAUD TASK FORCE, *supra* note 66; INTERNAL REVENUE SERV., *supra* note 69.

71. INTERNAL REVENUE SERV., STATISTICAL DATA—CORPORATE FRAUD (2009), http://www.irs.gov/compliance/enforcement/article/0,,id=121471,00.html (last visited Apr. 15, 2010).

72. *Id.*

73. *Id.*

74. *See* CORPORATE FRAUD TASK FORCE, *supra* note 66, at 1.19-1.21.

75. *Id.* at 1.19. There were 1215 fraud cases in 2003 and 1746 in 2007. *Id.*

76. *Id.* at 1.20.

77. *Id.* There were 143 corporate fraud convictions in 2003 and 173 in 2007. *Id.*

The U.S. Postal Inspection Service ("USPIS") has also published statistics that indicate an increasing corporate fraud problem.[78] USPIS statistics indicate that the number of convictions for corporate fraud increased by nearly forty percent between 2004 and 2007.[79] Interestingly, there has also been an increase in both court-ordered restitution and criminal fines during that time period; this information may reflect an increased level of importance placed upon deterring corporate fraud.[80] In 2004, court-ordered restitution for corporate fraud was approximately $75.02 million.[81] For fiscal year 2007, courts ordered restitution for approximately $496.77 million.[82] Moreover, during that time period, criminal fines assessed for corporate fraud increased from $275,000 in 2004 to $19,185,000 in 2007.[83]

Generally speaking, the data provided by government agencies demonstrates that the corporate fraud problem has increased and that the government has become less tolerant of corporate malfeasance; however, the problem continues.

B. Corporate Irresponsibility Persists

Even after Madoff's high-profile arrest in December 2008, corporate irresponsibility continues to harm investors.[84] At least four other Ponzi schemes[85] have been broken up since Madoff's arrest.[86] First, in late December 2008, the Securities and Exchange Commission ("SEC") broke up a more than $20 million Ponzi scheme conducted by George Theodule.[87] Second, on January 8, 2009, the SEC broke up Joseph Forte's scam in which he bilked $50 million from approximately eighty investors.[88] Third,

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78. *See id.* at 1.22.

79. *See id.* There were thirty-three convictions in 2004 and forty-six in 2007. *Id.*

80. *See* CORPORATE FRAUD TASK FORCE, *supra* note 66, at 1.22.

81. *Id.*

82. *Id.*

83. *Id.*

84. *See* Robert Chew, *Beyond Madoff, Ponzi Schemes Proliferate*, TIME.COM, Jan. 23, 2009, http://www.time.com/time/business/article/0,8599,1873639,00.html [hereinafter *Beyond Madoff*].

85. Ponzi schemes are certainly not the only form of corporate irresponsibility that persists, but given their prominence in the news after Madoff's arrest, this Note cites, almost exclusively, to instances of Ponzi schemes. For information about other corporate scams see generally JERRY W. MARKHAM, A FINANCIAL HISTORY OF MODERN U.S. CORPORATE SCANDALS FROM ENRON TO REFORM 21 (2006).

86. *Beyond Madoff*, *supra* note 84.

87. *Id.* Theodule set up fictitious investment clubs aimed at supporting Haitian-American business ventures; the SEC estimates that Theodule lost ninety-seven percent of all his investors' funds. *Id.*

88. *Id.* ("Forte had been selling false securities in limited partnerships since 1995.").

on January 15, 2009, the SEC charged Atlanta's James Ossie and "shut down [his] high-flying currency trading outfit, CRE Capital Corp., [for] allegedly bilking 120 investors out of $25 million."[89] Finally, on June 18, 2009, a grand jury returned an indictment against Texas financier Robert Stanford accusing him of operating a Ponzi scheme and defrauding approximately 30,000 investors out of $7 billion.[90] Stanford, named one of the wealthiest Americans by *Forbes* magazine in September 2008, utilized his bank, Stanford International Bank, to sell certificates of deposit to investors, claiming that said deposits would provide double-digit returns on their investments.[91] Instead of providing investors with returns on their investments, Stanford diverted most of his clients' assets into personal loans to himself.[92] The total value of investors' money lost to the Ponzi schemes discussed in this Note is approximately $57 billion.

III. The Proposal: Increase Access to Domestic Asset Protection Trust Assets

With corporate irresponsibility continuing to be a problem, measures must be taken to ensure that victims have access to as many assets of corporate wrongdoers[93] as possible. States that have enacted legislation permitting DAPTs should amend that legislation by appending a section that allows victims, who have successfully pierced the corporate veil of a settlor's corporation, to access the trust assets to satisfy their claims. States should amend their legislation for numerous reasons, including a lack of sufficient means to access DAPT assets, public policy considerations, the promotion of justice, and because such an amendment would not impose a hardship upon settlors or legislatures.

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89. *Id.* Ossie's operation, like most Ponzi schemes, sounded too good to be true: he guaranteed investors a return between ten and twenty percent and employed an accounting firm to demonstrate the legitimacy of his operation. *See id.*

90. Clifford Krauss, *Texas Financier and Antiguan Official Charged with Fraud*, N.Y. TIMES, June 20, 2009, at B1, *available at* http://www.nytimes.com/2009/06/20/business/20stanford.html?pagewanted=1&sq=robert%20stanford&st=cse&scp=13; Clifford Krauss, *Indicted, Texas Financier Surrenders*, N.Y. TIMES, June 19, 2009, at B2, *available at* http://www.nytimes.com/2009/06/19/business/19stanford.html?scp=17&sq=robert%20stanford&st=cse.

91. Terry Frieden, *Missing Billionaire Found in Virginia*, CNNMONEY.COM, Feb. 19, 2009, http://money.cnn.com/2009/02/19/news/newsmakers/stanford/index.htm.

92. *See* Krauss, *Texas Financier and Antiguan Official Charged with Fraud*, *supra* note 90.

93. For the purposes of this Note, the term corporate wrongdoers refer to corporate officers or directors that are responsible for corporate irresponsibility. These are the individuals held personally liable because a victim has successfully pierced the corporate veil.

A. Insufficient Means to Access Domestic Asset Protection Trust Assets

At times, victims of corporate irresponsibility will not have access to sufficient funds from the corporate wrongdoer to fully compensate them for their financial losses.[94] The existing means for victims who successfully pierce the corporate veil of a corporate officer with a DAPT to access trust assets may be insufficient to satisfy their award of damages. The available avenues of recourse against corporate wrongdoers to access their trust assets include forcing involuntary bankruptcy, claiming that a transfer to the DAPT constituted a fraudulent transfer, and finding the settlor is in contempt of court for not relinquishing assets.[95] As will be discussed below, these avenues may be insufficient, and thus their insufficiency lends support to the position that victims need statutory authorization to access the assets of DAPTs.

1. Involuntary Bankruptcy

The victims of corporate wrongdoing may be able to force the debtor of a corporate veil judgment into involuntary bankruptcy if the victim has a claim of at least $10,000 against the debtor.[96] Section 541(a) of the Bankruptcy Code states that bankruptcy estates include "all legal or equitable interests of the debtor."[97] However, § 541(c)(2) states that a "restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title."[98] Thus, in bankruptcy proceedings, it is nonbankruptcy law that will govern property rights and whether a debtor's interest in a DAPT is included in the bankruptcy estate.[99]

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94. Carlyn Kolker et al., *Madoff Left No Trace He Made Any Trades, Picard Says*, BLOOMBERG, Feb. 20, 2009, http://www.bloomberg.com/apps/news?pid=20601103&sid=alYrIDoF2Css&refer=us (stating that Madoff's customer claims will be capped off at $500,000, for some that is a fraction of their total losses); Sandler, *supra* note 9 (stating that the victims of Madoff's $50 billion Ponzi scheme will have access to $1 billion).

95. *See In re* Lawrence, 279 F.3d 1294, 1297 (11th Cir. 2002); Sterk, *supra* note 37, at 1044-47; White, *supra* note 43, at 96-104.

96. 11 U.S.C. § 303(b)(2) (2006).

97. § 541(a)(1); White, *supra* note 43, at 100. Seemingly, this provision would include assets within DAPTs. *See* § 541(a)(1).

98. § 541(c)(2); White, *supra* note 43, at 100.

99. White, *supra* note 43, at 100.

Nonbankruptcy law includes both state and federal laws.[100] Thus, a debtor's interest in a DAPT may be exempted from the involuntary bankruptcy estate, and therefore out of reach of the debtor's creditors, if state or federal law enforces DAPT spendthrift provisions.[101] There are at least three situations in which a spendthrift provision would effectively exempt a debtor's interest in a DAPT from being included in the bankruptcy estate: (1) if state common law enforces such provisions; (2) if the federal tax code mandates the enforcement of the spendthrift provision; or (3) if a state statute mandates the enforcement of such a provision.[102] Court decisions indicate that § 541(c)(2) will not exempt a settlor's beneficial interest in a self-settled trust containing a spendthrift provision from the bankruptcy estate where state law does not mandate the enforcement of such provisions.[103] "However, in doing so the courts have suggested they would have reached a different result if applicable law had been different."[104]

Involuntary bankruptcy is an unfavorable approach for victims attempting to recover their financial losses from corporate wrongdoers—it is unknown if the courts located in states that statutorily authorize DAPTs will enforce such spendthrift provisions.[105] Furthermore, it is of no importance that a corporate wrongdoer may be domiciled in a state that does not authorize spendthrift provisions for the settlor's benefit—courts determine whether a trust qualifies as a spendthrift trust by referencing the laws of the state in which the settlor created the trust.[106] Thus, involuntary bankruptcy may not provide victims relief for their financial injuries.

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100. Patterson v. Shumate, 504 U.S. 753, 758 (1992); *In re* Mack, 269 B.R. 392, 398 (Bankr. D. Minn. 2001) (holding that the income stream from a debtor's self-settled trust, containing a spendthrift provision, qualified as property of the bankruptcy estate).

101. *See Patterson*, 504 U.S. at 758.

102. *See In re Mack*, 269 B.R. at 399.

103. *See In re* Bogetti, 73 F. App'x. 266, 268 (9th Cir. 2003) (holding that California law does not protect the assets of a debtor's self-settled trust that contains a spendthrift provision from the debtor's creditors); *In re* Brown, 303 F.3d 1261, 1271 (11th Cir. 2002) (holding that Florida law did not protect the assets of a self-settled trust, which contained a spendthrift provision, from the creditors of the settlor); *In re* Shurley, 115 F.3d 333, 338 (5th Cir. 1997) (holding that Texas state law did not protect the assets, contributed by one of the settlors who also benefited from the trust assets of a self-settled trust, from the creditors of the contributing settlor; therefore, the assets became part of the bankruptcy estate).

104. White, *supra* note 43, at 101.

105. *See id.* The uncertainty stems from a lack of cases involving challenges to DAPTs in jurisdictions that statutorily authorize such trusts. *See id.*

106. *See, e.g.*, *In re* Hunter, 261 B.R. 789, 791 (Bankr. M.D. Fla. 2001). A Bankruptcy proceeding in Florida referenced Missouri state law to determine if the trust qualified as a spendthrift trust because the trust was established in Missouri. *Id.*

2. Fraudulent Transfers

If involuntary bankruptcy proves to be a fruitless avenue, victims may consider examining whether a corporate wrongdoer's transfer of assets to a DAPT is fraudulent under the Uniform Fraudulent Transfer Act ("UFTA"), which most states have enacted, or a similar state statute.[107] UFTA section 4 describes the types of transfers that are fraudulent with respect to a debtor's creditors.[108] Generally, a transfer is fraudulent if the debtor completed the transfer:

> (1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or (2) without receiving a reasonably equivalent value in exchange for the transfer . . . and the debtor: was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.[109]

The UFTA also holds transfers to be fraudulent regardless of whether a victim's claim "arose before or after the transfer was made."[110] Accordingly, if victims can prove that a debtor-settlor transferred assets into a DAPT with the actual intent to defraud victims, whether future or present victims, then victims can set aside the debtor's transfer into the trust; therefore, victims could gain access to those assets to satisfy their claim.[111]

Alleging a fraudulent transfer is the first hurdle a victim must overcome.[112] The difficult task for a victim is to prove that the debtor transferred assets into a trust with the actual intent to defraud claimants.[113] The UFTA lists several factors to be considered in determining actual intent including, "the transfer or obligation was to an insider; the debtor retained possession or control of the property transferred after the transfer; the transfer or obligation was disclosed or concealed . . . [and] the transfer was of substantially all the debtor's assets."[114] If a victim is unable to demonstrate actual intent, he may still set aside the transfer upon

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107. *See* Sterk, *supra* note 37, at 1045. States like Alaska and Delaware have created their own version of the UFTA. *See id.* at 1052, 1055.

108. UNIF. FRAUDULENT TRANSFER ACT § 4 (1984).

109. §§ 4(a)(1)-(2)(i).

110. § 4(a).

111. Sterk, *supra* note 37, at 1046. By avoiding the transfer of those assets into the trust, the assets would be lumped together with the settlor's other assets not placed in trust and would presumably be accessible to victims.

112. *See id.*

113. *Id.* at 1047.

114. § 4(b).

demonstrating constructive fraud.[115] UFTA section 4(a)(2) contemplates constructive fraud by holding transfers fraudulent if the debtor fails to gain reasonable consideration and the debtor had either engaged in or would engage in a business for which the assets of the debtor were small in comparison to the business; or, if the debtor believed or should have reasonably believed that he would incur debts beyond his ability to pay such debts.[116]

If a victim successfully demonstrates that a debtor fraudulently transferred funds to a DAPT, he then faces the statute of limitations hurdle included in the UFTA.[117] The victim must seek relief as soon as is practicable because claims for fraudulent transfers extinguish within a certain timeframe, usually within four years of the date of the transfer.[118] In some circumstances, claims may be actionable for more than four years from the date of the transfer, but not longer than one year from the date that a victim could have reasonably discovered the transfer.[119] A victim who fails to bring a claim within four years may be provided a remedy by filing an involuntary bankruptcy petition against the debtor; the bankruptcy code allows a bankruptcy trustee to avoid fraudulent transfers that occurred for up to ten years before the filing of a bankruptcy petition.[120]

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115. Sterk, *supra* note 37, at 1047.

116. § 4(a)(2); *see* Sterk, *supra* note 37, at 1047. An example of constructive fraud would be:

> [I]f a settlor transfers property into trust while engaging in a business in which liability claims are likely, such as malpractice claims against a physician or lawyer, the settlor's future creditors may be able to set aside the transfers for constructive fraud, unless the settlor can establish that she has obtained adequate liability insurance.

Sterk, *supra* note 37, at 1047.

117. § 9.

118. *Id.*

119. *Id.*

120. 11 U.S.C. § 548(e)(1) (2006). This section provides:

> In addition to any transfer that the trustee may otherwise avoid, the trustee may avoid any transfer of an interest of the debtor in property that was made on or within [ten] years before the date of the filing of the petition, if (A) such transfer was made to a self-settled trust or similar device; (B) such transfer was by the debtor; (C) the debtor is a beneficiary of such trust or similar device; and (D) the debtor made such transfer with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made, indebted.

Id.

Fraudulent transfer statutes seemingly provide a workable avenue for victims to gain access to the assets of DAPTs to satisfy their claims.[121] In states that adopt the UFTA or similar statutes, victims who are successful in demonstrating a fraudulent transfer may gain access to the fraudulently transferred assets to fully satisfy their judgments.[122] However, there are numerous difficulties in prevailing in fraudulent-transfer claims beyond proving intent—an arduous task—and filing a claim within the statutory period.[123] Numerous defenses to fraudulent transfers exist including both disclosure of the transfer by the debtor and the size of the victim's claim not being foreseeable to the debtor.[124] Additionally, not every state has adopted the UFTA; Alaska has created its own fraudulent-transfer statute, which is not victim friendly.[125] Alaska's statute requires the victim to prove actual fraudulent intent and extinguishes all claims within four years of the date of the transfer.[126] Thus, victims seeking to void a transfer to a DAPT through a fraudulent-transfer statute face an uphill battle, which is made even more difficult in at least two states that statutorily authorize DAPTs.[127] Therefore, fraudulent-transfer statutes do not provide adequate protection for victims.[128]

3. Contempt of Court

Another potential remedy is the possibility that courts impose prison sentences on corporate wrongdoers found in contempt of court for failing to relinquish their DAPT assets.[129] The Eleventh Circuit has held a settlor in contempt of court for not relinquishing the assets of a foreign asset protection trust to a bankruptcy trustee.[130] The Ninth Circuit affirmed a decision to hold a settlor in contempt of court for failing to comply with a judicial order requiring the settlor to provide an accounting of trust assets

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121. *See* Sterk, *supra* note 37, at 1044-47.

122. *See* UNIF. FRAUDULENT TRANSFER ACT § 7(a)(1).

123. *See* White, *supra* note 43, at 107-08.

124. *Id.* at 108.

125. Sterk, *supra* note 37, at 1052.

126. *Id.* at 1052, 1055. Both Alaska's and Delaware's statutes do not protect those individuals who learn of the transfer later than four years from the date of the fraudulent transfer. *Id.*

127. *See id.* (referencing the extinguishing of all claims within four years from the date of the fraudulent transfer).

128. *See id.* at 1052-55.

129. *See, e.g.*, *In re* Lawrence, 279 F.3d 1294, 1297 (11th Cir. 2002); FTC v. Affordable Media, L.L.C., 179 F.3d 1228, 1243-44 (9th Cir. 1999).

130. *In re Lawrence*, 279 F.3d at 1299 (holding that the foreign trust was to be governed by Florida law, which does not enforce spendthrift provisions for the protection of a settlor's self-settled trust).

and to repatriate the assets of a foreign asset protection trust to the Federal Trade Commission.[131] In *FTC v. Affordable Media, L.L.C.*, the Ninth Circuit recognized that foreign asset protection trusts are outside of the jurisdiction of U.S. courts, but that the jurisdiction over the physical person of the settlor remains; therefore, U.S. courts could utilize contempt-of-court powers to force settlors to repatriate assets of foreign trusts to the United States.[132] Thus, in *Affordable Media*, the Ninth Circuit held that the district court properly held the settlors in contempt for not complying with a judicial order.[133]

Although circuit courts of appeals have approved imprisoning settlors for contempt, the availability and effectiveness of this remedy poses problems, especially in the context of DAPTs.[134] In terms of availability, case law indicates that contempt may be used when settlors of foreign asset protection trusts retain broad powers over the trust.[135] For example, the settlors in *Affordable Media* had significant control over the trust—the trust document originally listed the settlors as co-trustees, allowed the settlors to appoint new trustees, and contained a duress provision.[136] However, it is

131. *Affordable Media*, 179 F.3d at 1243-44. The settlor established a trust in the Cook Islands and was investigated by the Federal Trade Commission for operating a Ponzi scheme and placing fraudulently obtained assets into the foreign asset protection trust. *Id.* at 1231.

132. *Id.* at 1240.

133. *Id.* at 1243-44. The settlors claimed the defense of impossibility, stating that the trustee of their trust would not repatriate their assets and that it was therefore impossible to comply with the judicial order. *Id.* at 1239.

134. *See, e.g.*, DUKEMINIER ET AL., *supra* note 14, at 634 (calling into question the effectiveness of imprisoning settlors for contempt of court by referencing one case in which the imposition of jail time failed to compel settlors to comply with a judicial order to repatriate their assets tied up in a foreign asset protection trust); Sterk, *supra* note 37, at 1103-04 (questioning the availability of contempt orders since "it remains to be seen how often and in what circumstances courts would be willing to impose contempt sanctions").

135. *See Affordable Media*, 179 F.3d at 1243 (indicating that the lower court did not abuse its discretion in holding the defendants in contempt of court for not repatriating their assets because the defendants, as trust protectors, had the power to repatriate their trust's assets); Sterk, *supra* note 37, at 1103 (indicating that contempt orders may not be appropriate or available when settlors do not retain significant control over their trust assets).

136. *Affordable Media*, 179 F.3d at 1239 n.9 (stating that the duress provision provides that upon the occurrence of an event of duress (judgment, order, or decree, etc.) that affects the disposal of money by the trustee, the settlors would be replaced as trustees by a foreign trustee who is beyond the jurisdiction of the United States courts); Sterk, *supra* note 37, at 1102-03.

unknown if courts would hold settlors in contempt if they retained fewer powers over their trusts.[137]

In terms of effectiveness, the threat of prison does not appear to deter settlors of foreign asset protection trusts.[138] The settlors in *Affordable Media* never repatriated their trust assets and eventually settled the Federal Trade Commission's suit against them for $1.2 million.[139] Additionally, Stephen Lawrence, the settlor of an offshore asset protection trust,[140] served six years in prison for contempt of court for failing to comply with a judicial order, and never repatriated his assets.[141] Thus, these two examples of non-compliance with judicial orders suggest that "the foundation for imprisonment collapses."[142]

Contempt of court is an insufficient means for victims of corporate irresponsibility to access the assets of DAPTs. First, only settlors of foreign asset protection trusts have been held in contempt; therefore, it is unknown if courts would hold settlors of DAPTs in contempt for failing to transfer assets.[143] Second, when courts have held settlors in contempt, the settlors have chosen incarceration over repatriating the trust assets, indicating that incarceration is not an effective deterrent.[144] Thus, the shortcomings of holding settlors in contempt of court support the position that state statutes need to be amended to allow victims to access the assets of DAPTs.

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137. Sterk, *supra* note 37, at 1103.

138. *See* DUKEMINIER ET AL., *supra* note 14, at 634. The settlors in *Affordable Media* served six months in jail before being released; the settlors never complied with the judicial order. *Id.*

139. *Id.* The settlement amounted to the victims receiving a mere fraction of the $20 million the Federal Trade Commission originally sought in its complaint. *See id.* at 635.

140. *In re* Lawrence, 279 F.3d 1294, 1296 (11th Cir. 2002).

141. *See* Gideon S. Rothschild & Marlene Soukavanitch, *The United States of Asset Protection*, TRUSTS AND ESTATES, Jan. 2008, at 38, *available at* http://www.mosessinger.com/articles/files/The%20United%20States%20of%20Asset%20Protection,%20January%202008.pdf. The judge ordering Lawrence's release indicated that Lawrence valued his money more than his liberty and that he was entitled to whatever remained of the $20 million. *Id.*

142. Sterk, *supra* note 37, at 1103. The penalties for contempt, particularly incarceration, are designed to force the person in contempt to comply with a judicial order; if the contemnor is not deterred by the penalty, then the rationale for incarceration is unfounded, rendering the penalty ineffective. *See id.*

143. *See, e.g.*, *In re Lawrence*, 279 F.3d at 1300; FTC v. Affordable Media, L.L.C., 179 F.3d 1228, 1243 (9th Cir. 1999). It is unknown if courts would hold settlors of DAPTs in contempt because a review of case law reveals that no court has been confronted with the issue of a settlor of a DAPT failing to comply with a judicial order.

144. *See* Rothschild & Soukavanitch, *supra* note 141; Sterk, *supra* note 37, at 1103.

Victims of corporate irresponsibility are left without sufficient access to DAPT assets.[145] The three avenues of judicial recourse of involuntary bankruptcy, fraudulent-transfer law, and holding settlors in contempt of court are ineffective measures for victims to access DAPT assets.[146] Only under certain circumstances, namely when a victim demonstrates the defendant's actual intent to defraud, will the trust assets become available to satisfy a victim's judgment.[147] Clearly, there is a need for increased access to DAPT assets to satisfy the claims of victims.

B. Public Policy Considerations

DAPTs function as spendthrift trusts, thereby allowing the settlor to protect his trust assets from his creditors.[148] However, spendthrift-trust provisions have been held ineffective against certain types of claims for public policy considerations.[149] The rationales behind the exceptions to spendthrift-trust beneficiary protection from creditors vary as will be discussed below. It is of primary importance to recognize that exceptions to spendthrift trusts exist.

The first exception is that spendthrift trusts are unlikely to block the claims of a beneficiary's ex-wife or children for alimony and child support, respectively.[150] In *Shelley v. Shelley*, the Supreme Court of Oregon held that the income of a beneficiary's spendthrift trust was subject to the alimony and child support claims of the beneficiary's ex-wife and children.[151] The court held that allowing the beneficiary in such a situation to escape without the income of his trust being subject to the claims of his former wife and children "would be to invite disrespect for the administration of justice."[152] Further, the court held that "[o]ne who wishes

145. *See, e.g.*, Sandler, *supra* note 9; *see generally* discussion *supra* Part III.A.1-3.

146. *See, e.g.*, Patterson v. Shumate, 504 U.S. 753, 758 (1992); Sterk, *supra* note 37, at 1052-53; *see generally* discussion *supra* Part III.A.1-3.

147. Sterk, *supra* note 37, at 1046; *see generally supra* Part III.A.2.

148. White, *supra* note 43, at 86.

149. *See* Shelley v. Shelley, 354 P.2d 282, 286-87 (Or. 1960) (holding spendthrift clauses unenforceable against child support and alimony claims); UNIF. TRUST CODE § 503 (2005) (indicating that spendthrift clauses are unenforceable against child support and alimony); LaSalle Nat'l Bank v. United States, 636 F. Supp. 874, 877 (N.D. Ill. 1986) (holding spendthrift clauses unenforceable against federal tax liens); 2 RESTATEMENT (THIRD) OF TRUSTS § 59(a) (2003) (indicating that spendthrift clauses are unenforceable against child support and alimony).

150. *See Shelley*, 354 P.2d at 286-88. Several states authorizing DAPTs allow ex-spouses and children to access DAPT assets for alimony and child support claims. *See supra* Part I.B.2.

151. *Shelley*, 354 P.2d at 288.

152. *Id.* at 286.

to dispose of his property through the device of a trust . . . cannot force the courts to sanction his scheme of disposition if it is inimical to the interests of the state."[153] Essentially, the court did not want to allow the beneficiary to escape his responsibilities and require the community or state welfare to care for his children and ex-wife.[154] Also, in support of allowing children and spouses to access spendthrift-trust assets, Uniform Trust Code section 503(b) provides, even if a trust contains a spendthrift provision, "a beneficiary's child, spouse, or former spouse who has a judgment or court order against the beneficiary . . . may obtain from a court an order attaching present or future distributions to or for the benefit of the beneficiary."[155]

Second, federal tax claims are also successful in reaching the assets in spendthrift trusts.[156] If a trust is created under state law, that state law will not protect the trust assets from the attachment of a tax lien created by federal law.[157] The general rule is that "[n]o policy of state may interfere with [the] power of Congress to levy and collect income taxes."[158] The rationale behind allowing tax liens to attach to spendthrift trusts is straightforward; spendthrift trusts allow the beneficiary to be protected against "his own voluntary improvident or financial misfortune . . . . [But] [t]he imposition of the tax burden is not voluntary by the beneficiary [i]n a sense[,] the property itself incurs the tax[,] [not the beneficiary]."[159] Thus, allowing the federal government to attach tax liens does not violate the purpose of spendthrift trusts.[160] Also, the public policy rationale supporting the ability of federal tax liens to access spendthrift-trust assets is that the public is directly affected by the government's ability to collect taxes to support the federal government; the public may suffer if there is a shortfall of taxes due to the government's inability to attach liens to an individual's

153. *Id.*

154. *Id.*

155. UNIF. TRUST CODE § 503(b) (2005).

156. LaSalle Nat'l Bank v. United States, 636 F. Supp. 874, 877 (N.D. Ill. 1986).

157. *Id.*

158. *Id.* (internal quotations omitted). Regarding spendthrift trusts:

> [C]ourts have consistently held that a restraint on transferability, whether arising from the trust instrument or from state law, does not immunize the beneficiary's interest from a federal tax lien. Since such a restraint is merely a state-created exemption from the reach of creditors, and not an aspect of the substantive right, it cannot serve to defeat the federal tax lien.

United States v. Rye, 550 F.2d 682, 685 (1st Cir. 1977) (internal citations omitted).

159. Mercantile Trust Co. v. Hofferbert, 58 F. Supp. 701, 705 (D. Md. 1944).

160. *See id.*

property, such as a spendthrift trust.[161] Whether a state tax agency can reach spendthrift-trust assets depends upon each state's applicable state statute.[162]

There are situations in which courts and different levels of government have recognized a necessary ability to subject a beneficiary's interest in a spendthrift trust to satisfy certain claims.[163] The underlying rationale for allowing access to these trusts is to prevent individuals from becoming dependent on the community and government to care for them and to ensure that the federal government is properly supported by taxpayers.[164] The statistics and stories about corporate irresponsibility demonstrate that investors are losing large sums of money; some people are being completely wiped out financially.[165]

Like the ex-spouses and children who have been able to access spendthrift-trust assets,[166] the victims of corporate irresponsibility should be entitled to access the assets of a beneficiary's DAPT to satisfy their claims, after successfully piercing the corporate veil of the corporation of which the beneficiary is a corporate officer. Victims of corporate irresponsibility may too become dependent on the community or government for support after being financially wiped out.[167] Additionally, the federal government will lose out on taxes derived from the lost investments, thereby diminishing support for the federal government.[168] Therefore, public-policy considerations demonstrate the need for victims to be able to access the trust assets of DAPTs.[169]

C. Interest of Justice

The interest of justice for victims of corporate irresponsibility also supports the position of adding statutory amendments that allow limited access to DAPT assets. Sprinkled throughout the law are exceptions to established legal rules that seek to promote the interests of justice.[170] For example, Federal Rule of Evidence 807 allows for the admission of otherwise inadmissible hearsay if "the interests of justice will best be

161. *See id.*

162. DUKEMINIER ET AL., *supra* note 14, at 623.

163. *See LaSalle Nat'l Bank*, 636 F. Supp. at 877 (federal tax liens); Shelley v. Shelley, 354 P.2d 282, 286-87 (Or. 1960) (child support and alimony).

164. *Shelley*, 354 P.2d at 286-287; *see Mercantile Trust Co.*, 58 F. Supp. at 705.

165. *See* Chew, *supra* note 4; *supra* Part II.A-B.

166. *See, e.g.*, *Shelley*, 354 P.2d at 286-287.

167. *Cf. id.*

168. *Cf. LaSalle Nat'l Bank*, 636 F. Supp. at 877.

169. *Cf. id.*; *Shelley*, 354 P.2d at 289-90.

170. *See, e.g.*, FED. R. EVID. 807.

served by admission of the statement into evidence."[171] A statutory amendment to DAPT laws, providing an exception to the enforceability of spendthrift provisions, would promote the interests of justice by protecting investors from financial losses stemming from corporate irresponsibility.

D. Amending Legislation Would Not Pose a Hardship

The addition of a statutory amendment authorizing victims who have successfully pierced the corporate veil of the settlor's corporation to access the assets of a settlor's DAPT will not pose a hardship for settlors or legislators.[172] For settlors, victims have a difficult task in attempting to pierce a corporate veil.[173] Thus, by adding this caveat to DAPT legislation, settlors' trust assets will only be subjected to victims' claims in those rare instances when a victim pierces a corporate veil.[174] An amendment of this nature should not deter individuals from establishing DAPTs; rather, this legislation should only seek to deter corporate irresponsibility by making settlors fully accountable for their actions, while protecting society at large and instilling the public's faith back in investing.

As for legislators, it is their job to create and amend legislation.[175] The type of amendment called for in this Note would not be overly burdensome to create.[176] This legislation seeks to protect legislators' constituents, who coincidentally elect legislators into office.[177] Legislators stand to benefit from protecting their constituents and offering up an amendment as called for by this Note.[178] Additionally, in an attempt to lessen the burden for legislators, a model amendment is contained within the Appendix. Therefore, the ease of creating an amendment and the low impact on settlors support the call for amended legislation of DAPTs.[179]

CONCLUSION

Corporate irresponsibility continues to plague America. Americans are losing their investments with entities in which they have placed their trust. Unfortunately, that trust has been exploited and resulted in people,

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171. *Id.* The hearsay evidence must also relate to a material fact and be more probative than any other evidence for the point for which it is offered. *Id.*

172. *See supra* note 59 and accompanying text; *infra* app.

173. *See supra* note 59 and accompanying text.

174. *See supra* note 59 and accompanying text.

175. *See* U.S. CONST. art. I, §§ 1, 8.

176. *See infra* app. The amendment would not be burdensome to create as this Note proposes a model amendment from which legislators can build upon.

177. *See supra* notes 167-169 and accompanying text.

178. *See supra* notes 167-169 and accompanying text.

179. *See supra* note 59 and accompanying text.

such as Robert Chew, losing the bulk of their life savings or investments. One possible measure to combat corporate irresponsibility is to take away certain tools of corporate officers that shield their assets from victims of said irresponsibility. By eliminating or holding spendthrift clauses in DAPTs unenforceable in the circumstances described in this Note, corporate individuals will not be able to avoid satisfying the claims of victims who have successfully pierced the corporate veil.

The proposed statutory amendment, located in the Appendix, will be easy for states to add to their DAPT legislation. The amendment has built-in safeguards. First, the amendment proposes to hold DAPTs' spendthrift clauses unenforceable only in the event a plaintiff successfully pierces the veil of the settlor's corporation. As has been discussed, piercing the corporate veil is not an easy task for plaintiffs. Thus, this amendment does not promote arbitrary access to a settlor's trust assets. The amendment seeks to promote justice by protecting investors from corporate irresponsibility and punishing corporate individuals for their role in corporate irresponsibility.

APPENDIX: PROPOSED STATUTORY AMENDMENT

The following proposed amendment acts as a skeleton for states to follow. It has not been through the rigors of a legislative process; it is merely a starting point for legislators.

A. Definitions

1. "Corporate individual" shall mean a corporate officer, director, member of a board of directors—any corporate position that may face individual liability when the corporation's veil has been pierced.

2. "Corporate Irresponsibility" consists of malfeasance such as commingling funds, fraud, failing to keep appropriate corporate records or formalities—any acts or omissions that are commonly held to be sufficient for a plaintiff to pierce a corporation's veil.

3. "Domestic Asset Protection Trust" shall refer to any self-settled trust in which a settlor creates a trust for his or her own benefit and which contains a spendthrift clause in order to prevent the voluntary or involuntary alienation of the trust assets to creditors. Domestic Asset Protection Trusts refer to only such trusts established within and in conformance with the laws of the states, which offer such trusts in the United States.

B. Corporate Irresponsibility Liability

If the settlor of a Domestic Asset Protection Trust is a corporate individual, who may be exposed to liability for corporate irresponsibility, and a plaintiff has successfully pierced the veil of the corporation with

which the settlor is associated, then the plaintiff shall have access to the settlor's trust assets including both the trust principal and interest to satisfy the plaintiff's judgment, and the trust's spendthrift clause shall be invalid and unenforceable in such situations.

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ARTICLES

BARTLEBY, THE SCRIVENER: "A HOUSE LIKE ME"

GEORGE DARGO*

This Article revisits Herman Melville's *Bartleby*, the enigmatic copyist who "prefers not to copy." The story is a favorite in Law and Literature courses for reasons that defy complete explanation. It is, of course, a "law story" in that it takes place in a mid-nineteenth century law office where the principal character is the lawyer-narrator who runs the office and engages Bartleby. And then there is Bartleby himself, a law copyist who is hired to copy documents in the time-honored fashion in which legal instruments were duplicated in the centuries before our own age of endless duplication. This may help to explain why yet another discussion of *Bartleby, the Scrivener* belongs in a law journal. The story is part of the law school curriculum and, as such, it is open to interpretation just like any other legal or quasi-legal text that law students may come across in a course of study and that lawyers may encounter in practice.

Interpretations of *Bartleby* abound. At times it is as if "it is all *Bartleby*, all the time." "Ah, Bartleby! Ah, humanity!," the final words of the narrative, were even uttered by Janice, Tony's sister in an episode of *The Sopranos*. Bartleby as a Job-like figure has been likened to Joseph K. in Kafka's *Der Prozess* (*The Trial*) despite the fact that there is little evidence that Franz Kafka had direct, first-hand knowledge of the works of Herman Melville.[1] And Bartleby is sometimes compared with passive resisters from Sophocles' *Antigone* on down even though Bartleby's ostensible passivity has been called into serious question. Far from being a passivist, Bartleby's signature phrase—"I would prefer not to"—may have

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1. ILANA PARDES, MELVILLE'S BIBLES 44 (2008).

been a powerful linguistic "formula" capable of paralyzing social interaction.[2] As Melville biographer, Elizabeth Hardwick, has said, while Bartleby's mysterious utterance "cannot be interpreted [it also] cannot be misunderstood." Bartleby was in this way "a master of language."[3]

The interpretation advanced in this Article points to yet another way to think about Bartleby. It suggests that we do so from an architectural perspective. After all, the subtitle of Melville's classic is "*A Story of Wall Street*" and, if Wall Street is about anything, surely it is about "walls." Bartleby is surrounded by and embedded in walls and screens to such an extent that he can be heard but hardly ever seen. "The green screen that isolates his desk traces the borders of an experimental laboratory in which potentiality . . . frees itself of the principle of reason."[4] He is manifested more by the sound of his words—"I would prefer not to"—and the fact of his presence rather than how or when he appears. Accordingly, the Article asks that we think about Bartleby the way an architect might think about him.

But what does architecture have to do with law? What, if anything, can architecture teach us about the way the law works? How can architecture illuminate this "law story"? The answer may lie in the fact that architecture and law may actually move along parallel lines to a degree that we have not suspected. Consider this definition of architectural study from one of the leading professional textbooks. It holds that architecture is the study of "the essential elements of form and space and those principles that control their organization in our built environment. . . . [F]orm and space comprise the timeless and fundamental vocabulary of the architectural [design]."[5] But if we substitute *process* for form and *substance* for space we can begin to appreciate what these several disciplines—so apparently different—have in common. Form and space are as closely related to the field of architecture as procedure and substance are to the workings of the law. Procedure is the scaffolding—the architectural blueprint—which is indispensable to the very substance of the law itself. As one of the great historians of the English Common Law once put it, "substantive law [is] gradually secreted in the interstices of procedure."[6] Procedure and substance—like form and space—are so intimately related that one cannot exist, at least in our legal system, without the other.

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2. GILLES DELEUZE, *Bartleby; or, The Formula, in* ESSAYS: CRITICAL AND CLINICAL 69-90 (Daniel W. Smith & Michael A. Greco trans., Univ. of Minn. Press 1997).

3. ELIZABETH HARDWICK, HERMAN MELVILLE 108 (Viking Penguin 2000).

4. GIORGIO AGAMBEN, POTENTIALITIES: COLLECTED ESSAYS IN PHILOSOPHY 259 (Daniel Heller-Roazen trans., 1999).

5. FRANCIS D.K. CHING, ARCHITECTURE: FORM, SPACE & ORDER 6 (1979).

6. HENRY SUMNER MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM 389 (1883).

Furthermore, consider this definition of the architect's task:

> Art [and architecture] is solving problems that cannot be formulated before they have been solved. The shaping of the question is part of the answer. Designers inevitably prefigure solutions to problems they are confronted with. The depth and range of their design vocabulary will affect both their perception of a problem and the shape of its solution.[7]

But is this not also the task of the legally trained mind—not merely to find a solution to a problem but to "prefigure its solution"? Is not the phrase "the shaping of the question part of the answer" true as much in law as it is in architecture? In addition, architecture, like law, is about compromise and accommodation. "[T]he arrangement and organization of the elements of form and space will determine how architecture might promote endeavors, elicit responses, and communicate meaning."[8] But is this not also the ultimate task of the law—"to promote endeavors, elicit responses, and communicate meaning"?

Above all, architecture is about vision. It teaches us how to see. But this, too, is fundamental to law and to legal thought. After all the cases have been read, the doctrines learned, and the casebooks and hornbooks put aside, what the student of law should take away from the law school experience is a new-found ability to see things differently. Whether law is a science or an art, legal study should impart "vision"—an ability to see through and to see beyond. This is what all of the great professions teach—how to see. And that is certainly true of architecture as it is of law.

During the period in which Melville was writing "a hollowness came into architecture."[9] After 1830 there was a decline of an older pattern of design and construction. "[T]he old way of seeing began to be lost." "Use" replaced "pattern." "Buildings began to strike poses or else fall into routine. . . . [T]he meaning of design had changed." [10] The vision of urban life was dramatically transformed. Manhattan was no longer just spreading *outward* along a horizontal geometric grid; it was also starting to build *upward* in a virtual explosion of verticality. Manhattan was changing from its pre-industrial past to its new corporate present at an accelerating pace. The visible evidence of that transformation was everywhere to be seen. Nowhere was this happening at a more rapid pace, and more in evidence, than in Wall Street.

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7. CHING, *supra* note 5, at 10.

8. *Id.*

9. *See* JONATHAN HALE, THE OLD WAY OF SEEING 44 (1994).

10. *Id.* at 26.

Melville (and by extension, Bartleby) may not have had an architectural sensibility, but Melville was certainly sensitive to all that surrounded him, including the built environment. "[T]he changing face of New York that Melville made his way through month after month, year after year"[11] certainly had a profound impact upon him. Was Melville, through Bartleby, expressing a special kind of resistance to this new image of the urban landscape? Melville was, above all, a keen observer of the human experience. So was Bartleby. What the effects of the physical environment were upon the inscrutable scrivener is the subject of the interpretation advanced in these pages.

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When Henry David Thoreau went to live beside Walden Pond in 1845, his first project was to build himself a suitable shelter. Years later, when he reflected back upon his life in the woods, Thoreau observed that "if one designs to construct a dwelling-house, it behooves him to exercise a little Yankee shrewdness . . . . Consider first how slight a shelter is absolutely necessary."[12] But after his wholesome reminder about the advantages of architectural thrift, this singular individualist went deeper and touched the core of the architectural enterprise itself:

> What of architectural beauty I now see, I know has gradually grown from within outward, out of the necessities and character of the indweller, who is the only builder—out of some unconscious truthfulness, and nobleness, without ever a thought for the appearance and whatever additional beauty of this kind is destined to be produced will be preceded by a like unconscious beauty of life.[13]

Thoreau's understanding of the objective expressivity of the builder's inner voice resonates in the craftsmanship of Steven Holl, a unique contemporary architect. Holl has advanced the idea that "anchoring" is the main pillar of what architects do. By "anchoring," Holl means the relationship between building and site. "Architecture is bound to situation. . . . The site of a building is more than a mere ingredient in its conception. It is its physical and metaphysical foundation. . . . [A] building is more than something merely fashioned for the site. Building transcends

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11. 2 HERSHEL PARKER, HERMAN MELVILLE: A BIOGRAPHY, 1851-1891, at 829 (2002). *See also* Sarah Wilson, *Melville and the Architecture of Antebellum Masculinity*, 76 AMERICAN LITERATURE 59 (2004).

12. HENRY DAVID THOREAU, WALDEN AND OTHER WRITINGS 45 (Adamant Media Corp. 2006).

13. *Id.* at 62.

physical and functional requirements by fusing with a place, by gathering the meaning of a situation. Architecture does not so much intrude on a landscape as it serves to explain it."[14] But most important for our purpose here is Holl's admonition that "[a]bstract principles of architectural composition take a subordinate position within [an] organizing idea. The 'universal-to-specific' . . . is *inverted* to become 'specific-to-universal.'"[15] These ideas of "in" and "out," of going from the specific to the general, of reversal or *inversion* can inform our understanding of the enigmas of literature as well as of life and even of law. The deployment of Holl's phenomenological theories to the architect's task can illuminate the darkest corners of character and plot—in this case, the mysterious copyist depicted in Herman Melville's remarkable fable about Wall Street.[16]

It is said that Melville based his Bartleby fantasy upon the following notice that appeared in the *New York Tribune* on February 18, 1853:

> In the summer of 1843, having an extraordinary quantity of deeds to copy, I engaged, temporarily, an extra copying clerk, who interested me considerably, in consequence of his modest, quiet, gentlemanly demeanor, and in his intense application to his duties.[17]

Melville transformed this brief newspaper notice into a text that Elizabeth Hardwick has called "a work of austere minimalism, of philosophical quietism, . . . of consummate despair, and withal beautiful in the perfection of the telling."[18]

Melville's Wall Street story tells us of Bartleby, a scrivener or law-copyist, hired by a Wall Street lawyer with a modest law practice servicing the bonds, mortgages and title deeds of the rich. Appointed as a Master-in-Chancery, the lawyer-narrator tells of his need to hire a third copyist to meet the additional tasks placed upon his office that his several other, somewhat odd, law clerks could no longer complete without assistance.

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14. STEVEN HOLL, ANCHORING: SELECTED PROJECTS, 1975-1991, at 9 (3d ed. 1991).

15. *Id.* at 12.

16. The surge of modern interest in Melville's classic novella was realized, most recently but imperfectly, in the independent film shown in March 2001 at New York's Museum of Modern Art. *See* A. O. Scott, *So You're a Nowhere Man in a Nowhere World, Now Get Back to Work*, N.Y. TIMES, Mar. 23, 2001, at B18, *available at* http://movies.nytimes.com/movie/review?res=9902E0D9173CF930A15750C0A9679C8B63.

17. DAN MCCALL, THE SILENCE OF BARTLEBY 2 (1989). There is also a theory that Melville modeled Bartleby after Nemo, "The Law Writer" in Charles Dickens' *Bleak House*. *See* Frederick Busch, *Introduction* to HERMAN MELVILLE, BILLY BUDD AND OTHER STORIES xi-xii (Penguin ed., 1986) [hereinafter OTHER STORIES].

18. HARDWICK, *supra* note 3, at 106.

And so he engages Bartleby, a "motionless young man . . . pallidly neat, pitiably respectable, incurably forlorn."[19]

Thus constituted, this unlikely legal team occupies a solitary office in "a building entirely unhallowed by humanizing domestic associations . . . [and] deficient in what landscape painters call life."[20] Its few windows look out upon stone walls and a desolate air shaft. Bartleby himself sits behind a folding screen that keeps him isolated from sight but within the sound of his master's voice.

At first, the scrivener shows enormous appetite for copy work. "As if long famishing for something to copy, he seemed to gorge himself on my documents. There was no pause for digestion. He ran a day and night line, copying by sun-light and by candle-light."[21] But not long after the commencement of his employment, Bartleby refuses to proofread copies produced by his fellow clerks and demurs when asked to submit his own work to such proof. He develops a pattern of refusal declaring in each instance—but without "uneasiness, anger, impatience, or impertinence"—that he would "prefer not to" proofread, get coffee, run errands or do any of the other simple chores expected of clerks, office boys, scriveners and copyists in a busy nineteenth century law office.[22] Eventually, Bartleby even refuses to do the job for which he had been hired, simply announcing that he had "given up copying" altogether.[23] Moreover, the lawyer-narrator soon discovers that his eccentric law clerk actually inhabits the law office itself, never leaving its premises even on Sundays when "Wall Street is [as] deserted as Petra."[24] Like "Marius brooding among the ruins of Carthage, Bartleby lives among the walls of Wall Street"[25] and survives on a diet of ginger nuts.

The remainder of the narrative describes the various stratagems—all unsuccessful—the lawyer employs in trying to rid himself of this incubus of an employee. Lacking the heart, or the stomach, to order Bartleby's forcible eviction, he finally abandons his office altogether by simply moving out. The new tenant arrives only to discover Bartleby still inside. After confronting the scrivener's stubborn refusal to quit, he has him summarily arrested and confined to the "Halls of Justice," more commonly known as "The Tombs." Bartleby is visited by his remorseful former employer, but characteristically the scrivener has nothing to say. A second

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19. OTHER STORIES, *supra* note 17, at 11.
20. *Id.* at 5, 34.
21. *Id.* at 12.
22. *Id.* at 12.
23. *Id.* at 25.
24. OTHER STORIES, *supra* note 17, at 22.
25. *Id.* at 23.

visit finds Bartleby curled up in a moribund fetal position at the foot of one of the prison's highest walls "asleep . . . with kings and counselors."[26]

Later we learn that prior to his employment in New York, Bartleby had worked as a clerk in the Dead Letter Office of the Postal Service in Washington until a change of administrations had forced his departure. Thus ends the tale that, along with *Moby Dick* and *Billy Budd*, forms the corpus of "Melville's most revered work."[27]

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Literary constructions and deconstructions of this simple story have been deposited in thick layers of critical opinion over the past fifty years as interest in Melville has grown.[28] The narrative lends itself to psychoanalysis and supplies evidence for Marxist history, social criticism, Melville biographies and Critical Legal Studies.[29] Here, I want to pursue the somewhat different approach that historians call "counter-factual analysis"; to imagine facts other than those presented to us in Melville's Ur-Text. In short, based upon reasonable inferences drawn from the raw-literary data, let us give the story a different outcome than the one told by Melville. By *inverting* the story we can thereby enlarge our understanding of Bartleby himself and perhaps, even more importantly, determine what his creator had in mind in writing this extraordinary tale. It is this idea of *inversion* that will prove to be important in establishing a different approach to the character of this enigmatic figure.[30]

Let us imagine that instead of ejecting Bartleby by signing over his tenancy to one of his professional colleagues, the lawyer-narrator decides to accept the inevitable. No longer having the heart simply to evict Bartleby, and recognizing the scrivener's determination not to leave

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26. *Id.* at 45.

27. HARDWICK, *supra* note 3, at 110.

28. The first modern attempt to re-examine *Bartleby* is Egbert S. Oliver, *A Second Look at Bartleby*, *in* 6 COLLEGE ENGLISH 431, 432 (1945). Oliver sources Melville's vision as influenced by the work and experience of Thoreau whom Melville knew about indirectly through his friend Nathaniel Hawthorne. *Id.*

29. NEWTON ARVIN, HERMAN MELVILLE 240-42 (1950); RICHARD CHASE, HERMAN MELVILLE: A CRITICAL STUDY 143-49 (1971); Michael Clark, *Witches and Wall Street: Possession is Nine-Tenths of the Law*, *in* HERMAN MELVILLE'S BILLY BUDD, BENITO CERENO, BARTLEBY THE SCRIVENER AND OTHER TALES 127-47 (Harold Blood ed., 1987); Oliver, *supra* note 28, at 431, 431-39; Robin West, *Invisible Victims: A Comparison of Susan Glaspell's* Jury Of Her Peers, *and Herman Melville's* Bartleby the Scrivener, 8 CARDOZO STUD. IN L. & LITERATURE 203, 203-47 (1996). For additional bibliography, see Bartleby, the Scrivener: A story of Wall-Street, http://web.ku.edu/~zeke/bartleby/index.htm.

30. Counterfactual analysis properly refocuses attention upon Bartleby himself, as does the recent independent film adaptation. *See supra* note 16 and accompanying text.

voluntarily, his employer decides to improve the quarters that Bartleby established for himself by providing him with suitable living and work space in close proximity to the office that he "preferred not to" leave. In fact, before social pressures forced him to change his mind, the lawyer-narrator tentatively decided to do just that:

> Gradually I slid into the persuasion that these troubles of mine touching the scrivener had been all predestinated from eternity, and Bartleby was billeted upon me for some mysterious purpose of an all-wise Providence, which it was not for a mere mortal like me to fathom. Yes, Bartleby, stay there behind your screen, thought I; I shall persecute you no more; you are harmless and noiseless as any of these old chairs; in short, I never feel so private as when I know you are here. At last I see it, I feel it; I penetrate to the predestinated purpose of my life. I am content. Others may have loftier parts to enact, but my mission in this world, Bartleby, is to furnish you with office room for such period as you may see fit to remain.[31]

Let us further assume that the lawyer wished to comply with Bartleby's deepest desires and to make a home that expressed Bartleby's personality with all of its uncommon peculiarities. Let us even suppose that Bartleby himself had a hand in the design and construction of such quarters, much as Henry David Thoreau designed his hermitage at Walden Pond.[32] Let us then ask these questions: What can architecture tell us about Bartleby? What kind of a living/work space would be designed for Bartleby? How might spatial design inform our understanding of this peculiar individual in the unique environment in which he found himself?

To reach such an understanding, we must first examine that special environment. As noted above, the subtitle of Melville's fable is "A Story of Wall Street." Wall Street—New Amsterdam—Lower Manhattan where narrow spaces create an irregular, meandering street pattern. Wall Street, the historic birthing ground of the great American economic monolith. Wall Street, with its connotation of massiveness, power, and stability. No other architectural site embodies the American capitalist regime more than Wall Street. It is to this strength and this magnitude that Bartleby ultimately succumbs. Bartleby is the final, imperfect, and surreal end-product of the Wall Street system.

Structural evidence, architectural detail, and the use of space permeates this Wall Street fable. Walls—their description, their

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31. OTHER STORIES, *supra* note 17, at 35.

32. Oliver, *supra* note 28, at 432.

measurement, and their location—are the *leitmotif* of the text.[33] Thus, when the lawyer-narrator introduces his enigmatic copyist, he describes with great particularity the attention given to the scrivener's placement in his otherwise limited office space:

> I placed his desk close up to a small side window . . . , a window which originally had afforded a lateral view of certain grimy back yards and bricks, but which, owing to subsequent erections, commanded at present no view at all, though it gave some light. Within three feet of the panes was a wall, and the light came down from far above between two lofty buildings, as from a very small opening in a dome. . . . I procured a high green folding screen, which might entirely isolate Bartleby from my sight, though not remove him from my voice.[34]

Clearly, the office arrangements affected Bartleby's behavior. He went from a voracious consumer of copy work to a thoroughly spent employee depleted of energy, purpose, ambition, and psychic resources. Did spatial design have nothing to do with this? Bartleby was forced to sit apart, behind a screen, next to a window that looked out upon a brick wall whose proximity blocked all available light. And within the office, Bartleby was separated from his fellow clerks and from the lawyer himself with literal as well as figurative screens. Bartleby himself created new barriers to the employer-employee relationship as well as to the normal social interactions of the workplace. The results were evident from the start:

> I remembered that he never spoke but to answer. . . . I had never seen him reading—no, not even a newspaper; that for long periods he would stand looking out, at his pale window behind the screen, upon the dead brick wall.[35]

Had the lawyer been willing to design suitable space for his copyist, might he have been able to arrest the gradual onset of Bartleby's disposition toward dementia?

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Let us revisit the counterfactual model proposed earlier. Let us suppose that the lawyer has a house built for Bartleby in the airspace

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33. *See, e.g.*, Leo Marx, *Melville's Parable of the Walls*, 61 SEWANEE REV. 602, 602-27 (1953); James C. Wilson, *Bartleby: The Walls of Wall Street*, 37 ARIZ. Q. 335, 335-46 (1981).

34. OTHER STORIES, *supra* note 17, at 11-12.

35. *Id.* at 24.

adjacent to the law office, a house to Bartleby's liking. In this *inversion*, it is the design of this house itself that will physically express something about Bartleby that was not known or realized before, something that can best be understood through an examination of Bartleby's domestic space. What would Bartleby "prefer"? Surely, a habitation that would be perfectly functional, easily accessible yet totally private, unobtrusive, permanent and, above all, quiet and secluded.

Case in point: Curzio Malaparte, the mid-twentieth century Italian writer and architectural enthusiast, who designed and built a *casa comme me*, a "house like me," an "autobiographical house." Perched on the geologic formation known in Italy as *Faraglione*—raw cliffs and jagged rocks that dot the perimeter of the island high above the turbulent blue-green waters of the Adriatic. Actor, novelist, poet, film maker, soldier of fortune, playwright, war correspondent, political figure, composer and socialite, Malaparte named himself after (but opposite) Napoleon *Bonaparte*. Malaparte flirted with fascism as well as communism, and his political eccentricities led to his imprisonment and temporary exile on the desolate island of Lipari in the Aeolian Islands near Sicily. This was the inspiration behind his private ambition to build a hermitage, a place of solitary refuge. It was Curzio himself who was most responsible for the unique design of his Villa Malaparte (*Casa Malaparte*). The house "stands as a mysterious example of order in space, light and time."[36]

An "autobiographical house": a *casa comme me*. But how can the individuality of a human being manifest itself in architectural expression? What are some of the "anthropomorphic techniques" that cause buildings to express human feeling and, at the same time, to evoke human emotion? The *Casa Malaparte* stands in sharp, almost outrageous, contrast to the stone gray of the surrounding cliffs. It faces the pounding wind and surf of the Bay of Naples. It defies Nature itself, just as, in his time, Curzio Malaparte defied the Italian cultural elite. The position of the house on the site is simultaneously commanding and exposed, like Malaparte himself. Exposure eventually put Malaparte into prison much as the *Casa Malaparte's* exposure to the elements led to its own weathering and physical decline. In the case of the *Casa Malaparte*, the spirit of the man who built it, and lived in it, became part of the house itself. "In the selection of window type, the derivation of ornamental details, the arrangement of a plan, the processional approaches: all [have] potential for meaning. . . ."[37] For Malaparte, "architecture was a virtual text, with all the narrative power of literature."[38]

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36. HOLL, *supra* note 14, at 10.

37. MICHAEL MCDONOUGH, MALAPARTE: A HOUSE LIKE ME 21 (1999).

38. *Id.*

Casa Malaparte's location and its relationship to the natural environment makes it a great work of architecture as well as a monumental self-portrait of its occupant. Its most remarkable feature is its roof. Following the modern tradition of the flat-topped house with the Corbusian roof garden brought to the forefront, the top of *Casa Malaparte* has the duplicitous function of serving as a stairway as well. The stepped brick is dramatic and in the great tradition of formal processional stairways whose best expression in the nineteenth century were the grand staircases found in the formal homes and *chateaux* of the French bourgeoisie.

But the unique characteristic of the Malaparte "*staircased roof*" is its reversal of the traditional function of stairs. The staircase is brought from the inside out. It is an *inversion* of traditional architectural norms. In this "portrait in stone," Curzio Malaparte turned everything inside out. What is interior becomes exterior, and what is exterior becomes interior. Malaparte saw the opportunity to make himself over in an architectural form that paid close attention to surroundings. The windows themselves are the dominant interior expression. They frame views of the coast so that any decorations on the walls inside would pale by comparison. This itself is representative of the idea of *inversion*; the interior *inverts* the whole concept of decoration by bringing what is outside in.

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With *Casa Malaparte* in mind, let us now apply this example of *inversion* to Bartleby's dwelling space. The lawyer's office was located on Wall Street whose streets on weekends become as "deserted as Petra." Petra—an odd image, and yet one familiar to nineteenth century readers.[39] Petra—the archaeological site rediscovered in 1812 by Johann Ludwig Burckhardt. This ancient city built by the Nabataens in the sixth century B.C.E. in what is now the Kingdom of Jordan was, along with the Rosetta Stone and the Egyptian Pyramids, among the most dramatic discoveries of the Romantic Age. The city is virtually carved out of stone cliffs with ornate relief decorations that bore directly into the rock formations. In Petra, the buildings are molded, or "anchored," to their sites just like the buildings of Lower Manhattan. Petra, like Wall Street, is made entirely of stone. But "Petra was [also] the Wall Street of Arabia." Like Wall Street, "the business of Petra was business."[40] The architecture of Petra combined Egyptian, Greek as well as Roman elements and motifs. The fabulously rich merchants of Petra imported architects from Greece and Rome "to build them extravagant tombs for the time when they could no longer

39. James C. Wilson, *The Significance of Petra in "Bartleby,"* MELVILLE SOC'Y EXTRACTS, Feb. 1984, at 10-12.

40. *Id.* at 10-11.

stockpile their wealth."[41] In fact, even in its "golden age," Petra was "a whole necropolis, a fantastic city of the dead."[42] Surely, it must have been so for Melville who read travelers accounts that reported how "the tiers of tombs . . . overwhelmed their senses."[43]

The terrain of Wall Street is unique. Located amidst the narrow streets of Lower Manhattan, there is intense building density. The absence of available space causes all new construction to be vertical rather than lateral. Accordingly, in order to design and to build his living/work space, Bartleby would have had to have used the limitations defined by the Wall Street site "owing to the great height of the surrounding buildings"[44] and to employ materials closest to the Street's greatest structures. To find a suitable plot of ground for a residential space in 1850 in such a neighborhood would have been barred by building restrictions as well as by a shortage of room on which to build. The land itself was far too valuable, and virtually every square inch of Wall Street was taken up by its great monuments to commercial enterprise. To adapt to the neighborhood of Wall Street would mean occupying a site not normally intended for residential uses. The only possibility for Bartleby, then, would be the available spaces in the alleyways between buildings—the very space that the scrivener's office window looked out upon.

Normally, a building, or "figure" (e.g., a factory, office building, or residential home) must occupy a piece of "ground" upon which to build. This establishes what architects and designers call the "figure/ground relationship." With Wall Street, however, there is no "ground" onto which a "figure" can be placed; the absence of space precludes it. We must look to the buildings themselves, the "figures" already in place, as substitutes for the "ground" onto which yet another "figure" can be introduced. In short, the site itself is nothing but the space created by the proximity of two adjacent buildings. Instead of a "figure/ground" relationship, we are forced to employ a "figure/figure" relationship. Accordingly, the typical relationship of "figure" and "ground" becomes *inverted*, and Bartleby's *casa comme me*, a mirror of himself as well as of his neighborhood, would be located in the "negative space" between two buildings.

Building materials would have to be employed that were both native to the neighborhood and suitable for the site itself. Concrete and stone are ubiquitous on Wall Street. Moreover, concrete can be poured into spaces otherwise impossible to reach—spaces such as shafts and alleyways. But, when concrete is used as the basic construction material, the "figure" must

41. *Id.* at 11.

42. *Id.* (quoting M. ROSTOVTZEFF, CARAVAN CITIES 45 (1952)).

43. *Id.* at 11.

44. OTHER STORIES, *supra* note 17, at 5.

first be made as a "form" into which the concrete itself is poured. Then when the formwork is removed, the space left behind—into which the concrete has been poured—becomes the "figure." The concrete retains the history of its formwork—the evidence of that history is forever marked on the surface of the "figure."

In the case of Bartleby's *casa comme me*, the formwork would be the adjacent buildings, and the space they describe would become the concrete object, the "figure," the house itself. Thus, Bartleby's *casa* would be nothing more than a concrete block interlaced with spaces to accommodate Bartleby's duplicitous uses, for Bartleby could not inhabit a solid block. Dwelling spaces would have to be built in such a way as to create pockets within the block, pockets that would describe the space between the windows that face onto the alleyway, windows that would provide access to the dwelling space itself, and other pockets and spaces to satisfy the scrivener's simple needs. In short, the spaces would be carved from the concrete block—carved out like the buildings of Petra.

The interior of Bartleby's house would be a complete reversal of the traditional "domestic interior." Bartleby's *casa* would be exposed to the elements. Rain water finds its way into the house at its lowest point where it can be gathered and used as in an ancient cistern. Yet exposure would be perfectly natural to our scrivener for he is, after all, totally exposed. But that the interior is so exposed is a reversal of the ordinary idea of "interior space." Typically, in residences and workplaces, the architectural strategy is to let the visual aspects of the outside into the inside space while keeping the physical elements (e.g., rain, cold air, and wind) safely and comfortably out. However, none of this is true with our Bartleby. The physical elements of the exterior are brought inside while the visual elements are kept out. While some sunlight does make its way in, "views" are non-existent. Unlike the *Villa Malaparte*, the only framed views here are those that peer into other interior locations.

The interior itself is exceedingly small. Spaces are cramped with just two rooms that are connected by a steep, sloping, angled, and vertical hallway. Bartleby is forced to use the spaces for a variety of different activities and usages. The desk becomes a closet or a pantry. The sofa becomes a bed. The office becomes a bedroom and a kitchen. A table becomes a chair and a chair becomes a work surface. Rain becomes a shower. Everything has a duplicitous function. But Bartleby is used to adapting to his surroundings. While others would complain about these exiguous discomforts, Bartleby would "prefer not to" say anything. He would make do with what life had thrust upon him.

Bartleby's house gives form to his expression and would stand in sharp contradiction to time and place by its sheer power. Bartleby would not just inhabit Wall Street. Through his house he would be "anchored" to

it. Such anchoring "involves a metaphysical reversal: the site is then modified by the very piece of architecture conceived for it. . . . This phenomenological linkage between building and site" becomes a source of energy.[45] And the energy that is generated by the metaphysics of architectural design, would become part of Bartleby's own self. For that is what is missing from Bartleby: not sensibility, awareness, intelligence or articulation, but energy.

After abandoning his office, the lawyer-narrator returns one day to find Bartleby alone in his chambers, but he is no longer staring at blank walls and empty space. Instead, the normally distracted scrivener is frolicking about like some contented cherub: "Going upstairs to my old haunt, there was Bartleby silently sitting upon the banister at the landing. 'What are you doing here, Bartleby?' said I. 'Sitting upon the banister,' he mildly replied."[46] When Bartleby is alone and unconfined his energy is released. When he is "sitting upon the banister" he is no longer staring at blank walls, a prisoner of empty space. At least for that moment, Bartleby is in a space and a time that liberates his spirit and sets him free.

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"I would prefer not to," utters Bartleby. Yet, this strange man of few words could not be more articulate. Bartleby's "mysterious utterance . . . cannot be interpreted [but] . . . cannot be misunderstood . . . . Bartleby, in his mute way, is a master of language."[47] Bartleby knows the futility of language and the entropic effects of its gross misuse and, accordingly, refuses to copy, to proofread or even to speak.[48] Like the stone monuments of Petra, Bartleby is rigid, absolute, and eternal.

About Bartleby there is, in the words of Thoreau, "unconscious truthfulness and nob[ility]."[49] There is never a thought for appearance and none for artifice. In Bartleby's truth—a truth that grows "from within outward"—there is not only beauty but strength. The indeterminism, complexity and contradictions of character would, if given the chance, create an architecture of energy and vitality. His dwelling space would become a "contextual sponge"[50] absorbing and refracting interior truths

45. Kevin Lippert, *Foreword* to HOLL, *supra* note 14, at 4.

46. OTHER STORIES, *supra* note 17, at 40.

47. HARDWICK, *supra* note 3, at 107-08.

48. Peter A. Smith, *Entropy in Melville's Bartleby the Scrivener*, 32 CENTENNIAL REV. 156-58 (Spring 1988).

49. HENRY DAVID THOREAU, WALDEN, OR LIFE IN THE WOODS 31 (Forgotten Books 2008) (1854).

50. J. Wines, *From Ego-Centric to Eco-Centric*, *in* MCDONOUGH, *supra* note 37, at 92-95.

about space and time. Bartleby's house would give form to his expression and would stand in gross contradiction to its time and place by its sheer power.

In the end, this is what makes Bartleby so thoroughly menacing. "Bartleby represents the only real, if ultimately ineffective, threat to society; his very presence even supports Thoreau's view that one lone intransigent man can shake the foundations of our institutions."[51] That is why the lawyer cannot carry out his fleeting desire "to furnish you with office room for such period as you may see fit to remain."[52] For that cannot be. Bartleby must remain cabined and controlled, his energies stilled, his life force spent. There he lies behind the high, silent, canyon walls of Wall Street in his own private Petra, his eternal necropolis "asleep . . . [w]ith kings and counselors . . . . Ah, Bartleby! Ah, humanity!"[53]

51. MCCALL, *supra* note 17, at 73 (internal citations omitted).

52. OTHER STORIES, *supra* note 17, at 35.

53. *Id.* at 45-46.

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UNDERSTANDING CERCLA THROUGH *WEBSTER'S NEW WORLD DICTIONARY* AND STATE COMMON LAW: FORESTALLING THE FEDERALIZATION OF PROPERTY LAW

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Abstract: The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") was hastily enacted in 1980 in the wake of the Love Canal disaster, where vast amounts of toxic wastes were found buried beneath a residential community. The contours of this legislation, though comprehensive in its outward scope, have been difficult to discern, largely as a consequence of vague and confusing expression. Though often the first tool resorted to for interpretation is the dictionary, the courts have looked beyond the literal terms, in an effort to determine the intended and sensible limits, consistent with both the congressional aim to reach broad categories of responsible parties and conduct, as well as with long-settled principles on the burdens that come with land ownership and enterprise. The most recent Supreme Court decision interpreting CERCLA, *Burlington Northern & Santa Fe Railway Co. v. United States*, recognized the challenges of applying the statute and seemed to affirm the approach taken by the lower courts. That approach stands in clear contrast to what appears in other areas to be a determined march by federal courts toward the federalization of property law—either by redefining or reshaping well-settled common law concepts or by devising a federal concept calculated to serve particular federal interests. These maneuvers, where they are not principled and ignore historical rationales for the state law concept, threaten to undermine the

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law's validity and legal theory. The approach taken in interpreting CERCLA should guide federal courts in preserving the historical importance of common law concepts. Understanding CERCLA teaches us about purposive decisionmaking.

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INTRODUCTION

Purposive legislation. Purposive acts. Purposive decisionmaking. This framework for statutory understanding may be discerned in a decision by the United States Supreme Court last term, *Burlington Northern & Santa Fe Railway Co. v. United States*,[1] where the Court was called upon to determine what it means to be an "arranger" for the disposal of hazardous wastes, within the meaning of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").[2] Congress enacted CERCLA in 1980 in the wake of the Love Canal disaster, where it was discovered that a residential community had been built atop a toxic waste dump.[3] Though the conduct of the polluters could have been

1. 129 S. Ct. 1870 (2009).

2. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (2006)).

3. Molly J. Walker Wilson & Megan P. Fuchs, *Publicity, Pressure, and Environmental Legislation: The Untold Story of Availability Campaigns*, 30 CARDOZO L. REV. 2147, 2195-96 (2009) (stating CERCLA was enacted just over sixteen months after the Love Canal disaster climaxed). In the late 1940s and early 1950s, Love Canal, an area located in New York, was filled with over twenty-thousand tons of liquid chemical wastes. Schools and homes were then constructed on this dump site. The original developer of the area envisioned a dream community, but economic conditions diverted the use for industry. The harmful externalities were ignored; indeed, literally covered up with a thin veneer of soil. Later, the dream of a community was again pursued, but with horrific results. When the grim tale emerged, scores of different compounds (many carcinogenic) had begun percolating upwards through the soil, drum containers rotting and leaching their contents

addressed by existing state common law, such as nuisance and negligence,[4] Congress stepped in with comprehensive federal legislation. It seems easy to characterize the act of dumping, then burying toxins so negligently, so wantonly as an offense to the nation and our posterity. But, Congress's intent with CERCLA can be described in many respects as schizophrenic—on the one hand, it states that in applying the act, courts should embrace common law principles; on the other, it is a broad, comprehensive measure, which by its terms seem to extend, if not overrule, state common law principles by identifying broad categories of potentially responsible parties (starting with owners) and wide ranges of actionable conduct.[5] But, the statute is rife with vagueness and omission—it does not define "owner" or clearly state what "disposal" means.[6]

In interpreting CERCLA, it seems that the main task of the courts has been to mediate between its aggressive agenda and upsetting settled common law notions about liability, reliance, and expectations that come from ownership of property. They have employed the usual canons of construction; they have looked to *Webster's*, the ordinary dictionary, to explain ordinary words, but then they have looked, responsibly, to state law

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into the backyards and basements. Eckardt C. Beck, *The Love Canal Tragedy*, EPA JOURNAL, Jan. 1979, http://www.epa.gov/history/topics/lovecanal/01.htm.

4. RESTATEMENT (SECOND) OF TORTS §§ 432, 821D (1977).

5. "Potentially responsible parties," include landowners where the wastes are discovered; operators of a facility disposing of such wastes; arrangers of the disposal of such wastes; and transporters of such wastes. 42 U.S.C. § 9607(a) (2006).

6. Many courts have criticized the statute for vagueness and confusing language. *See, e.g.*, Amoco Oil Co. v. Borden, Inc., 889 F.2d 664, 677 (5th Cir. 1990) (stating that CERCLA has "'acquired a well-deserved notoriety for vaguely-drafted provisions and an indefinite, if not contradictory, legislative history.'" (quoting United States v. Mottolo, 605 F. Supp. 898, 902, 905 (D.N.H. 1985))); HRW Sys., Inc. v. Wash. Gas Light Co., 823 F. Supp. 318, 327 (D. Md. 1993) ("[T]he legislative history of CERCLA gives more insight into the 'Alice-in-Wonderland'-like nature of the evolution of this particular statute than it does helpful hints on the intent of the legislature."); Rhodes v. County of Darlington, 833 F. Supp. 1163, 1174 (D.S.C. 1992) ("CERCLA is not a paradigm of clarity or precision. It has been criticized frequently for inartful drafting and numerous ambiguities attributable to its precipitous passage." (quoting Artesian Water Co. v. Gov't of New Castle County, 851 F.2d 643, 648 (3d Cir. 1988))); *In re* Acushnet River & New Bedford Harbor, 716 F. Supp. 676, 681 n.6 (D. Mass. 1989) (complaining of the "difficulty of being left compassless on the trackless wastes of CERCLA"); United States v. Wade, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983) (noting that the legislative history of CERCLA is "unusually riddled by self-serving and contradictory statements"). While a subsequent substantial amendment to CERCLA attempted to clarify some points, see, for example, H.R. REP. NO. 99-253, pt. I, at 59, 79 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2841, 2861; S. REP. NO. 99-11, at 44 (1985), there remains much uncertainty about what CERCLA does and does not cover. William D. Araiza, *Text, Purpose and Facts: The Relationship Between CERCLA Sections 107 and 113*, 72 NOTRE DAME L. REV. 193, 224 (1996).

to identify and heed underlying societal interests. As suggested in the beginning and as will be developed in this Article, "purposiveness" seems to be the approach taken by most courts as they strive to give meaning to various terms and concepts in CERCLA. While CERCLA presents unique issues of interpretation, I propose that this framework should guide courts in identifying the contours of a federal statute where a literal application of its language threatens to upset established notions of state law. In Part I, I will describe CERCLA itself as purposive legislation, aimed to achieve specific goals. In Part II, I will examine various terms to determine whether they contemplate purposive acts, considering the tools that the courts have employed toward rational construction. In Part III, I will discuss the notion of purposive decisionmaking, exploring what should guide the courts in their rulings. In Part IV, I show how in recent times, decisionmaking by federal courts (at least in the realm of property law) has become less principled and more driven to further some particular federal government interest, thereby undermining well-settled state law principles. Finally, I offer conclusions on how this movement threatens the law's validity and legal theory's ability to interpret law and why the approach taken with CERCLA is the right one.

I. Purposive Legislation: The Aims and Language of CERCLA

CERCLA was designed to promote the "timely cleanup of hazardous waste sites."[7] It is "sweeping" in its aims and is designed to ensure that "*everyone* who is potentially responsible for hazardous-waste contamination may be forced to contribute to the costs of cleanup."[8] Absent a showing that one of CERCLA's affirmative defenses[9] applies, liability for owners and operators is strict.[10] While these words seem eminently clear, CERCLA's coverage has been quite vividly described as a "black hole that

7. Meghrig v. KFC W., Inc., 516 U.S. 479, 483 (1996); Consol. Edison Co. v. UGI Utils., Inc., 423 F.3d 90, 94 (2d Cir. 2005); *see also* Dedham Water Co. v. Cumberland Farms Dairy, Inc., 805 F.2d 1074, 1081 (1st Cir. 1986).

8. United States v. Bestfoods, 524 U.S. 51, 56 n.1 (1998) (quoting Pennsylvania v. Union Gas Co., 491 U.S. 1, 21 (1989) (Brennan, J., plurality opinion)).

9. *See* 42 U.S.C. § 9607(b) (2006) (enumerating three statutory defenses to CERCLA liability: "(1) an act of God; (2) an act of war; and (3) an act [of an independent, intervening] third party"); *see also* § 9601(35)(A) (providing that the innocent landowner defense precludes liability upon showing that "the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility").

10. *See* B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1198 (2d Cir. 1992).

indiscriminately devours all who come near it."[11] The core legislative purposes of the statute, though, are relatively clear. The final version was a compromise among three competing bills then under consideration by Congress: House of Representatives Bill 85 ("H.R. 85"),[12] House of Representatives Bill 7020 ("H.R. 7020"),[13] and Senate Bill 1480 ("S. 1480").[14] H.R. 85 targeted oil pollution by establishing a comprehensive system of liability and compensation for oil-spill damage and clean-up costs.[15] H.R. 7020 was intended to regulate inactive waste sites by establishing reporting, monitoring and clean-up schemes.[16] By its terms, it applied only to hazardous waste sites, and did not purport to address all hazardous releases.[17] The third bill, S. 1480, was by far the broadest and most ambitious of the three competing measures, covering "all releases of hazardous chemicals into the environment, not merely spills or discharges from abandoned waste disposal sites."[18]

II. Purposive Acts

How have the courts gone about discerning the reach of CERCLA? Some have been highly formalistic in their approach, employing a textual analysis, with the concerns about CERCLA's impact being of secondary consideration. Others have carefully considered the impact of CERCLA on broader notions of fairness and responsibility. In all cases, the courts seem to begin with the general rule that the starting point is the language of the statute;[19] clear and explicit statutory language is to be applied as written[20]

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11. Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust, 32 F.3d 1364, 1366 (9th Cir. 1994) (quoting Jerry L. Anderson, *The Hazardous Waste Land*, 13 VA. ENVTL. L.J. 1, 6-7 (1993)).

12. Oil Pollution Liability and Compensation Act, H.R. 85, 96th Cong. (2d Sess. 1980).

13. Hazardous Waste Containment Act of 1980, H.R. 7020, 96th Cong. (2d Sess. 1980).

14. Environmental Emergency Response Act, S. 1480, 96th Cong. (2d Sess. 1980); *see generally* SUPERFUND: A LEGISLATIVE HISTORY: THE EVOLUTION OF SELECTED SECTIONS OF THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT xiii (Helen Needham & Mark Menefee eds., 1982) [hereinafter "SUPERFUND"]; Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1, 1-6 (1982).

15. *See* Grad, *supra* note 14, at 3.

16. *Id.* at 4.

17. *Id.*

18. 125 CONG. REC. S17,989 (1979) (comments of Sen. Culver, co-sponsor of S. 1480); *see also* 126 CONG. REC. S14,964-65 (1980).

19. Bailey v. United States, 516 U.S. 137, 144 (1995); Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992); Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 330 (1978); Coronado-Durazo v. I.N.S., 123 F.3d 1322, 1324 (9th Cir. 1997).

20. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999).

and construed according to its ordinary or natural meaning absent clearly expressed congressional intent to the contrary.[21] However, if that meaning leads to absurd or futile results, or one "'plainly at variance with the policy of the legislation as a whole,' [courts must] follow[] that purpose, rather than the literal words."[22]

Long ago, Justice Oliver Wendell Holmes declared for the Court, "[w]e [the Court] do not inquire what the legislature meant; we ask only what the statute means."[23] More recently, in the context of CERCLA, Justice Clarence Thomas, in *Cooper Industries, Inc. v. Aviall Services, Inc.*,[24] seemed to embrace Justice Holmes's view when he stated that "[g]iven the clear meaning of the text, there is no need to resolve this dispute or to consult the purpose of CERCLA at all. [Instead,] '[i]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.'"[25] But, sometimes, the legislative intent is poorly expressed; sometimes, the operative language is at odds with the statute's stated purposes and aims. Sometimes, the operative terms are words of common parlance but are being used within the peculiar context of the statute, in which case they should be given a particular meaning in that context.

Legislative history, a tool of last resort in construing a statute,[26] has proven to be of little value in interpreting CERCLA.[27] In varying degrees, courts have found an authoritative (even dispositive) source for guidance in the plain old *Webster's Dictionary*. But, for most, it is just the starting point.

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21. Williams v. Taylor, 529 U.S. 420, 431 (2000); Beck v. Prupis, 529 U.S. 494, 500-01 (2000); Field v. Mans, 516 U.S. 59, 69 (1995); United States v. Alvarez-Sanchez, 511 U.S. 350, 356-57 (1994); United States v. Shabani, 513 U.S. 10, 13 (1994).

22. United States v. Am. Trucking Ass'ns, 310 U.S. 534, 543 (1940) (quoting Takao Ozawa v. United States, 260 U.S. 178, 194 (1922)).

23. OLIVER WENDELL HOLMES, *The Theory of Legal Interpretation*, *in* COLLECTED LEGAL PAPERS 207 (Peter Smith ed., 1952) (1920).

24. 543 U.S. 157 (2004) (failing to find a section 113(f) contribution claim against potentially responsible party absent either a section 106 or 107 suit against claimant).

25. *Id.* at 167-68 (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998)).

26. United States v. Smith, 795 F.2d 841, 845-46 (9th Cir. 1986). Courts are not free to substitute legislative history for the language of the Act, and legislative history is not an adequate substitute for congressional action. Escondido Mut. Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 772 (1984) (citing North Dakota v. United States, 460 U.S. 300, 312 (1983); Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)).

27. Aviall Servs., Inc. v. Cooper Indus., Inc., 312 F.3d 677, 684 (5th Cir. 2002) (citing *In re* Bell Petroleum Servs., 3 F.3d 889, 901 n.13 (9th Cir. 1993)).

A. "Owner"

As the Fourth Circuit long ago pointed out, "the trigger to liability under § 9607(a)(2) is ownership or operation of a facility at the time of disposal, not culpability or responsibility for the contamination."[28] Should "owner" mean something different under CERCLA than it does under state law?[29] The definition contained in the statute is a tautology: "owner" is "any person owning or operating [a] facility" where a disposal of hazardous substances occurred.[30] The Ninth Circuit has stated that this definition "is a bit like defining 'green' as 'green.'"[31] The courts have taken this circularity in the statutory language to mean that "the statutory terms have their ordinary meanings rather than unusual or technical meanings."[32] They have also taken the generality of the term to suggest that Congress intended courts to employ "common law analogies."[33] In other words, this tautological definition of "owner" opens up the question whether to apply or incorporate common law definitions of "owner" or to craft one that appears specifically to serve the ends of the statute.[34]

While in *Burlington*, the Court seemed to suggest that liability attaches solely by virtue of the status of ownership,[35] the lower courts have not taken that view. Instead, many have held that "bare legal title"—without more—is insufficient for purposes of liability under CERCLA.[36] In

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28. Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 846 (4th Cir. 1992).

29. Under common law notions, ownership is described as those six sticks in a bundle of rights giving the right to possess, use, enjoy the fruits and profits, destroy, alienate and to exclude. The sticks can be owned at different times and by different persons jointly. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982).

30. 42 U.S.C. § 9601(20)(A)(ii) (2006).

31. Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust, 32 F.3d 1364, 1368 (9th Cir. 1994).

32. Sidney S. Arst Co. v. Pipefitters Welfare Educ. Fund, 25 F.3d 417, 419 n.1 (7th Cir. 1994) (citing Edward Hines Lumber Co. v. Vulcan Materials Co., 861 F.2d 155, 156 (7th Cir. 1988)).

33. *See Edward Hines Lumber*, 861 F.2d at 157.

34. *But see* 42 U.S.C. § 9601(20)(A)(iii) (exempting from liability persons who merely hold a security interest in the property).

35. Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870, 1878 (2009) (although not ruling on the question, the Court stated that the "Railroads qualify as PRPs under both §§ 9607(a)(1) and 9607(a)(2) because they owned the land leased [out] at the time of contamination and continue to own it.").

36. *See, e.g.*, Ameripride Servs., Inc. v. Valley Indus. Serv., Inc., No. Civ. S-00-113 LLK/JFM, 2007 U.S. Dist. LEXIS 18806, at *19 (E.D. Cal. Feb. 28, 2007) (stating that a person holding title for less than twenty-four hours, who never exercised any control or exclusive use over the property, was not liable as owner); United States v. Friedland, 152 F. Supp. 2d 1234, 1241-44 (D. Colo. 2001) (holding legal title not enough to show owner

every case, the courts have pointed out that the starting point in determining whether one is an owner is state law.[37] The inevitable consequence of this starting point, though, is that a determination may vary from state to state.[38] In some cases, merely identifying the nature of the property interest held, leads to the determination whether one is an owner. For instance, courts have considered the nature of an easement or mineral servitude and concluded that holders of these interests, though they own these limited interests, do not become owners of a contaminated site merely because these interests give rights to use or profit from the underlying estate.[39] This ruling that "owner" means owner of the estate is compelled by the fact that many easements, such as the right to plant utility poles, lay railroad tracks, build irrigation systems, pass on foot, and preserve scenic and historical values of the land, are beneficial and non-polluting,[40] and no good would be served by imposing liability upon the holders, inasmuch as they generally lack the right to interfere with activities occurring on the land.[41]

The courts seem in general agreement that a lessee can be an "owner," depending upon the extent to which that person exercises the powers and

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liability); Castlerock Estates, Inc. v. Markham, 871 F. Supp. 360, 366 (N.D. Cal. 1994) (finding bare legal title was not enough to make one liable as an owner). *But see* City of Phoenix v. Garbage Servs. Co., 816 F. Supp. 564, 566-68 (D. Ariz. 1993) (deeming trustee bank as an "owner" of contaminated site, despite absence of involvement in the site's day-to-day operations, but limited to exercising an option to buy the contaminated site; legal title, coupled with paying property taxes and procuring liability insurance were requisite indicia of ownership for liability).

37. *See, e.g.*, Canadyne-Georgia Corp. v. NationsBank, N.A., 183 F.3d 1269, 1273 (11th Cir. 1999).

38. *See id.*

39. Long Beach Unified Sch. Dist. v. Dorothy B. Godwin Cal. Living Trust, 32 F.3d 1364, 1366-68 (9th Cir. 1994) (rejecting the imposition of liability on the holders of an easement to run pipelines across the land where the pipeline was in no way connected to the pollution because, under state law "an easement conveys rights in or over the land *of another*," but does not mean ownership of the burdened land) (citing, *inter alia*, Camp Meeker Water Sys., Inc. v. Public Utils. Comm'n, 799 P.2d 758, 770 (Cal. 1990); 12 B. WITKIN, SUMMARY OF CALIFORNIA LAW § 434 (9th ed. 1987) (stating an easement is an "*interest in the land of another*, which entitles the owner of the easement to a *limited use or enjoyment* of the other's land")).

40. *Long Beach*, 32 F.3d at 1369 (citing Pennsylvania v. Union Gas Co., 491 U.S. 1, 7 (1989) (finding that CERCLA "imposes the costs of the cleanup on those responsible for the contamination")); United States v. Reilly Tar & Chem. Corp., 546 F. Supp. 1100, 1112 (D. Minn. 1982) (agreeing that Congress "intended those responsible for problems caused by disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created").

41. *Long Beach*, 32 F.3d at 1369 n.6.

rights of a fee holder.[42] In *Commander Oil Corp. v. Barlo Equipment Corp.*,[43] the central question was whether a nominative sublease was a true sublease or merely a "bookkeeping measure." At first, the owner/lessor leased one lot to the lessee for use as offices and a warehouse and a second lot to another party for use as a fuel depot.[44] Thereafter, the owner/lessor consolidated the two leases into one: both lots were leased to the first lessee, with the responsibility to maintain the property and to pay the taxes,[45] and that lessee in turn subleased the second lot to the other party.[46] After contamination was discovered, the lessor sought to hold the lessee liable for some of the costs of cleanup.[47]

In this case of first impression, the Second Circuit began its analysis bemoaning having yet again to resolve "another ambiguity within CERCLA's miasmatic provisions."[48] Despite the broad remedial purposes of the statute, the court believed that CERCLA should not be read to impose absolute liability upon all persons with any connection with the facility.[49] The two opposing assertions were that "owner" meant on the one hand, "record owner"; and on the other, one with the right to control property, whether that right stemmed from the right to possess or from formal legal title.[50] The court resorted to the dictionaries; one of the English language and the other of the language of law. *Webster's* seemed to confirm the second meaning: an owner is "one that has the legal or rightful title whether the possessor or not."[51] However, *Black's Law Dictionary* seemed to embrace both meanings, defining an owner as "one who has the right to possess, use, and convey something," and as "one who has the

42. *See, e.g.*, United States v. Monsanto Co., 858 F.2d 160, 166-68 (4th Cir. 1988); Scarlett & Assocs. v. Briarcliff Ctr. Partners, LLC, No. 1:05-CV-0145-CC, 2009 U.S. Dist. LEXIS 90483, at *25-26 (N.D. Ga. Sept. 30, 2009); Delaney v. Town of Carmel, 55 F. Supp. 2d 237, 258 (S.D.N.Y. 1999); Nestle USA Beverage Div. v. Overmyer Co., No. C-96-1207(VRW), 1998 U.S. Dist. LEXIS 4257, at *8 (N.D. Cal. Mar. 27, 1998); Burlington N. R.R. v. Woods Indus., Inc., 815 F. Supp. 1384, 1391 (E.D. Wash. 1993); United States v. A & N Cleaners and Launderers, Inc., 788 F. Supp. 1317, 1333 (S.D.N.Y. 1992); United States v. S.C. Recycling and Disposal, Inc., 653 F. Supp. 984, 1002-03 (D.S.C. 1984).

43. 215 F.3d 321 (2d Cir. 2000).

44. *Id.* at 324.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 326.

49. *Commander Oil*, 215 F.3d at 327.

50. *Id.*

51. *Id.* (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1612 (1981)).

primary or residuary title to property."[52] The court remarked that the ambiguity seemed to reflect the long-standing view held among scholars that the meaning of ownership, and consequently "property," was not readily intuitive, but was a concept bound up with social policy and political philosophy;[53] that in finding property, the law seeks to mediate competing claims between persons to enable security and the development of expectations necessary for investment and productive activities.[54]

While at least under the *Black's* definition—"ownership" signifying control—imposing owner liability on the basis of site control alone would threaten to define all owners as operators and render most of the operator-liability language in the statute superfluous.[55] But, what beyond mere site control is relevant?

It seems the most compelling consideration for the court was the overall intent of Congress when it provided for strict liability of the potentially responsible parties:[56] those that "enter into a business or activity for his own benefit, and that benefit results in harm to others, should bear the responsibility for that harm."[57] But this justification wanes when it is offered to support liability upon lessees/sublessors; whereas here, it was the relationship between the record owner and the sublessee that was responsible for the release of hazardous waste, and not the relationship between the sublessee and the lessee/sublessor.[58] Here, the lessee's interposition between the record owner and the sublessee was merely formal and not at all substantive in terms of determining power, responsibility and benefit. The court expressed concern about disturbing settled common law notions and expectations of persons as they assess the wisdom of acquiring varying interests in real property. That is, inasmuch as a prospective buyer of property would perform an environmental assessment before purchasing, and whereas a lessee would only look to see that the land was suitable for its purposes, it would be wrong to hold the

52. *Id.* (quoting BLACK'S LAW DICTIONARY 1130 (7th ed. 1999)).

53. *Id.* at 327.

54. *Id.* at 327-28.

55. *See* Castlerock Estates, Inc. v. Estate of Markham, 71 F. Supp. 360, 367 (N.D. Cal. 1994) ("The test for 'ownership' liability under CERCLA . . . has become similar to [the] test for 'operator' liability under CERCLA.").

56. *Commander Oil*, 215 F.3d at 329 (citing Rylands v. Fletcher, [1868] 3 L.R.E. & I. App. 330 (H.L.)).

57. *Id.* at 330 (quoting United States v. FMC Corp., 572 F.2d 902, 907 (2d Cir. 1978)).

58. Richard D. Jones & Ivan S. DeVoren, *Managing Environmental Risks in Commercial Real Estate Leases*, 1996 A.L.I.-A.B.A. CONTINUING LEGAL EDUC. 121, 126.

lessee/sublessor liable for the conditions on the land, which he did not investigate, nor bargain for.[59]

In *United States v. Capital Tax Corp.*,[60] the Seventh Circuit considered whether to apply the state common law principle—equitable conversion, under which a purchaser is regarded as owner of the land—or to adopt a new federal rule for finding liability during a contract's executory period. Though ultimately the court found that the facts did not establish the predicate for equitable conversion under state law, the importance of state law in the origins and development of property in the common law could not be discounted.[61] Indeed, given Congress's direction to use traditional, common law meanings of ownership, "to invent out of whole cloth a distinctly federal law of property would be inappropriate, if not impossible."[62] This was so because the contours of the doctrine of equitable conversion among the states was largely the same and it seemed "highly unlikely that states would alter core principles of property law . . . in order to affect their impact on pollution liability."[63] Significantly, the court believed that not adopting state law might produce inequitable rights, inasmuch as "citizens naturally look to state law to determine their relative rights and obligations with respect to the issue of property" and "it would seem unfair for a party who was not an 'owner' under state law to face liability under a federal statute based on ownership."[64]

While the court intelligently explained why resorting to state law principles to understand the concept of how equitable title arose made sense, it did not explain why equitable ownership should suffice for purposes of CERCLA liability.[65] Equitable conversion is based upon the maxim that "equity considers as done that which [ought] to be done."[66] This is said to mean that because the parties have signed a contract, then it is appropriate to view the purchaser as owner for the purposes of giving him an equitable remedy of specific performance on the contract. The

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59. *Commander Oil*, 215 F.3d at 330. While no doubt there may be instances where a lessee could be treated as an owner, such as where the lessee holds full control over the activities that can be carried on without interference from the lessor, those facts were not present in the case. *Id.* at 330-31; *cf.* Bedford Affiliates v. Sills, 156 F.3d 416, 425 (2d Cir. 1998) (noting that the innocent owner exception to liability under CERCLA is not determined by an entity's involvement in those activities relating to contamination but is founded on the entity's status).

60. 545 F.3d 525 (7th Cir. 2008).

61. *Id.* at 532.

62. *Id.*

63. *Id.* at 532 n.6.

64. *Id.*

65. *Id.* at 532-34.

66. 17 RICHARD A. LORD, WILLISTON ON CONTRACTS § 50:42 (4th ed. 2009).

equitable title otherwise gives the purchaser no rights in or about the property; it does not entitle him to possession before legal title is conveyed, nor the right to interfere with what the legal owner does on the property. If the idea behind putting liability on "owners" is that they have the power and interest to control activities on the land, then finding an equitable owner a potentially responsible party fails to serve the purposes of CERCLA.

B. "Operator"

To "operate," on its face, seems to require some intentional, purposive act. This presupposes authority and ability to control activities. Yet, no universal formula for determining such liability has emerged. The one recurring theme is that courts have broadly construed "operating" "in order to effectuate the perceived intent of Congress to extend liability [for clean up] to all who profit from the treatment or disposal of hazardous substances."[67] At the same time, courts have been careful not to read CERCLA as creating unlimited liability for those only tangentially or remotely involved with hazardous substances.[68]

Some courts have fashioned specific definitions of "operator." In *Kaiser Aluminum & Chemical Corp. v. Catellus Development Corp.*, the Ninth Circuit stated that "'operator' liability . . . only attaches if the defendant had authority to control the cause of the contamination at the time the hazardous substances were released into the environment."[69] Other courts have focused on actual participation in the management of a facility.[70] The Supreme Court made clear in *United States v. Bestfoods* that state common law should determine "operator" liability in the context of a corporate parent and subsidiary relationship.[71] Under well-established

67. THE LAW OF HAZARDOUS WASTE: MANAGEMENT, CLEANUP, LIABILITY, AND LITIGATION § 14.01[4][c][ii] (Susan M. Cooke & Mathew Bender eds., 2006).

68. *See* Reading Co. v. City of Philadelphia, No. 91-2377, 1993 U.S. Dist. LEXIS 2930, at *18, *55 (E.D. Pa. Mar. 9, 1993).

69. 976 F.2d 1338, 1341-42 (9th Cir. 1992) (finding that a contractor who was hired to excavate land and who contaminated soil in the process could be an operator under CERCLA because the contractor had sufficient control over this phase of the development) (citing CPC Int'l Inc. v. Aerojet-Gen. Corp., 731 F. Supp. 783, 788 (W.D. Mich. 1989) (finding that control over the activity causing the pollution is the most important metric)).

70. *See* Levin Metals Corp. v. Parr-Richmond Terminal Co., 781 F. Supp. 1454, 1457 (N.D. Cal. 1991) (holding that liability requires a showing of actual participation in the operation of the facility—control over, or intrinsic involvement in, the entity directly responsible for operations); *see also* Redland Soccer Club, Inc. v. Dep't of the Army, 801 F. Supp. 1432, 1437 (M.D. Pa. 1992) ("[T]o be held liable as an operator, a party must currently participate in decisions regarding the overall operations at a facility.").

71. 524 U.S. 51, 62-64 (1998). There, the parent corporation, CPC International Inc., of

principles, mere ownership or control of the operating entity without more is not sufficient to make another entity an owner.[72] Instead, in order for a parent corporation to be held liable for the acts of its subsidiary corporation, the corporate veil must be pierced under state common law.[73] The instances in which the corporate veil can be pierced are generally limited to cases where the parent has not maintained sufficient separation from the subsidiary or where adherence to the corporate form would be a perversion of justice.[74]

At the same time, a parent corporation that actually operates the subsidiary can be liable as an "operator" under CERCLA. The Court thought that in the "organizational sense obviously more intended by CERCLA," to operate means "[to direct] the workings of, manage[], or conduct[] the affairs of [the] facility[,] . . . specifically related to . . . the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations."[75]

C. "Disposal"

CERCLA provides that the meaning of "disposal" shall have the meaning provided in the Solid Waste Disposal Act, which defines "disposal" as:

> [T]he discharge, deposit, injection, dumping, spilling, leaking, or placing of any solid waste or hazardous waste into or on any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters.[76]

Almost from the enactment of the statute, there arose a split among the circuit courts as to whether the statutory definition of "disposal" encompassed passive migration of hazardous substances or whether an affirmative act, involving some casting off or placement of substances, is

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the Ott Chemical Co. had selected the subsidiary's board of directors and appointed the executives. It also had a significant role in developing the subsidiary's environmental compliance policy. *Id.* at 59.

72. *Id.* at 62-63.

73. *Id.* at 61-62. This was a bedrock principle at common law. *Id.* at 63.

74. *Id.* at 62-63.

75. *Id.* at 66 (The Court first looked to the *American Heritage Dictionary*, finding "to control the functioning of; run," then to *Webster's New International Dictionary*, finding "to work; as to operate a machine.") (alteration omitted) (citation omitted).

76. Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 6901(29) (2006); Solid Waste Disposal Act, 42 U.S.C. § 6903(3) (2006).

required. On one side of the issue stands the Third[77] and Sixth[78] Circuits, which read "disposal" as requiring affirmative human conduct. On the other side, the Fourth[79] and Fifth[80] Circuits believe that passive migration of waste is contemplated by "disposal." Then there are those circuits that seem to straddle the line, the Second[81] and Ninth[82] Circuits.

In *United States v. CDMG Realty Co.*,[83] finding the meaning of the statutory definition not readily intuitive, the Third Circuit looked up two words in *Webster's Third New International Dictionary, Unabridged*: "leak" ("to permit to enter or escape through a leak") and "spill" ("to cause or allow to pour, splash, or fall out").[84] The court also employed an established canon of construction, *noscitur a sociis*, requiring the two terms to be read together with the surrounding words in the definition ("discharge, deposit, injection, dumping and placing"), all of which "envision[ed] a human actor."[85] Moreover, the court found that treating passive migration as disposal would nullify the innocent-landowner defense since no one could show acquisition of the property *after* disposal, as there would generally be no such point in time;[86] it would create the anomalous result that prior owners who had no knowledge that their land was contaminated would fall within the statute's liability provisions, while current owners could assert the innocent owner defense.[87]

In *Nurad, Inc. v. William E. Hooper & Sons Co.*,[88] the Fourth Circuit read certain words in the definition of disposal (leaking or spilling) as readily admitting of a passive component, that did not suggest the need for active human participation for liability to arise.[89] It believed that an interpretation requiring affirmative human conduct would frustrate the statutory policy of encouraging voluntary private acts to remedy

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77. United States v. CDMG Realty Co., 96 F.3d 706, 713-18 (3d Cir. 1996).

78. United States v. 150 Acres of Land, 204 F.3d 698, 705-06 (6th Cir. 2000).

79. Nurad, Inc. v. William E. Hooper & Sons Co., 966 F.2d 837, 844-46 (4th Cir. 1992).

80. Tanglewood E. Homeowners v. Charles-Thomas, Inc., 849 F.2d 1568, 1573 (5th Cir. 1988).

81. ABB Indus. Sys., Inc. v. Prime Tech., Inc., 120 F.3d 351, 357-59 (2d Cir. 1997) (expressing "no opinion" on whether "prior owners are liable if they acquired a site with leaking barrels [and] the prior owner's actions are purely passive.").

82. Carson Harbor Village, LTD, v. Unocal Corp., 270 F.3d 863 (9th Cir. 2001).

83. 96 F.3d 706 (3d Cir. 1996).

84. *Id.* at 714 (citing WEBSTER'S THIRD INTERNATIONAL DICTIONARY UNABRIDGED 1285 (Philip Babcock Gove ed., 1986)).

85. *Id.* at 714.

86. *Id.* at 716.

87. *Id.* at 717.

88. 966 F.2d 837 (4th Cir. 1992).

89. *Id.* at 845.

environmental hazards and would create the anomalous situation where a current owner would have full liability to clean-up whereas a former owner who sat by allowing hazards to fester would not be liable. Such a regime, Congress could not have intended.[90]

In *Carson Harbor Village, Ltd. v. Unocal Corp.*,[91] the Ninth Circuit took the position that passive migration of contaminants is not actionable under CERCLA. But it did not adopt a categorical rule. Rather, the words of the statute were applied to the facts of the case.[92] When the facts only present "the gradual passive migration of contamination through the soil" it cannot be regarded as a "discharge, deposit, injection, dumping, spilling, leaking or placing" of substances.[93] None of these terms described the activity sought to be addressed—the gradual, subtle spread through the soil of contaminants. Nothing was deposited by a human actor; nothing spilled out of or over anything; nor leaked out of any container.[94] The court thus rejected the "absolute binary 'active/passive' distinction used by other courts."[95] Further, examining the statute as a whole, construing "disposal" as not including passive soil migration alone, but allowing for instances in which passive migration might be actionable was consistent with CERCLA's purposes. That is, passive owners who are responsible for the migration of contaminants that results from their conduct and for passive migration will ensure prompt clean up and efforts aimed at preventing spills and leaks.[96] This reason seemed to be compelled by another important consideration—imposing liability upon all owners for passive migration would entirely confuse the categories of responsible parties as disposal would become a "perpetual process" and every landowner after the first disposal would be liable. At the same time, a purely active meaning would nullify the strict liability scheme embraced by the statute.[97]

Either view can be seen as requiring a purposive act before imposing liability. If the end is to cause the landowner to become vigilant about monitoring activities occurring on the land, that is, to become a good steward, then the Fourth Circuit's view should prevail. If, on the other

90. *Id.* at 845-46.

91. 270 F.3d 863 (9th Cir. 2001). There, Carson Harbor Village owned and operated a mobile home park on the land, that had previously been leased to Unocal for petroleum production, using oil wells, pipelines, above-ground storage tanks, and other production facilities. The runoff from these operations made its way into the wetlands. *Id.* at 868.

92. *Id.* at 875-77.

93. *Id.* at 879.

94. *Id.* at 879.

95. *Id.* at 879.

96. *Id.* at 881.

97. *Carson Harbor*, 270 F.3d at 883.

hand, the aim is simply to impose the burdens of the injury caused by unwise, harmful activities on those responsible, then the Third Circuit's view should control. The latter view seems more in line with common-law landowner tort liability as it had evolved when CERCLA was enacted.[98] However, the nuanced view taken by the Ninth Circuit, to the extent it imposes liability upon one who put the migration in motion, but not upon one who merely purchases a property after the fact, seems a sensible medium between the two ends.

D. "Arranger"

CERCLA imposes liability on any person who arranges "by contract, agreement, or otherwise" for the "disposal or treatment . . . [or] for transport for disposal or treatment" of "hazardous substances" that are "owned or possessed" by that person.[99] On the face of it, the phrase "to arrange . . . for the disposal" is clear and straightforward. But does it contemplate a formal agreement or plan to discard waste, or are mere transfers to others who later discard sufficient? Before *Burlington*, this question arose quite often but was not always resolved on consistent or coherent principles.

In *GenCorp, Inc. v. Olin Corp.*, the court determined the meaning of "arranger," by reference to *Webster's*,[100] which defined "arrange" as meaning to "'plan or prepare' for it, though not necessarily to implement the plan."[101] This conception of arrange "d[id] not require a formal disposal agreement, as the statute provides that a person may arrange for hazardous waste disposal 'by contract, agreement or otherwise.'"[102] Moreover, "neither must the arrangements for waste disposal stem from a discrete

98. *See* Carson Harbor Village, Ltd. v. Unocal Corporation, 227 F.3d 1196, 1207 (9th Cir. 2000); *see also* Elf Altochem N. Am., Inc. v. United States, 868 F. Supp. 707 (E.D. Pa. 1994) (noting that the disposal occurred at a facility where owner discharged hazardous substances through a pipe to be carried to a waste pond); Prudential Ins. Co. v. U.S. Gypsum Co., 711 F. Supp. 1244, 1253 (D.N.J. 1989) (relying on *Webster's*, disposal means "giving away, transfer, bestowal . . . a disposing of, getting rid of"); United States v. Hardage, CIV-86-1401, 1989 U.S. Dist. LEXIS 17877, *10, 15 (W.D. Okla. 1989) (relying on *Webster's* definition of "application" to conclude that disposal of used pesticides did not fall within the "pesticide application" exception).

99. 42 U.S.C. § 9607(a)(3) (2006).

100. 390 F.3d 433, 445 (6th Cir. 2004). In the 1960s, GenCorp, Inc. and Olin Corporation entered into an agreement under which Olin built a manufacturing plant to produce urethane foam, which generated hazardous wastes that were eventually deposited offsite into a landfill. *Id.* at 437.

101. *Id.* at 445 (citing WEBSTER'S II NEW COLLEGE DICTIONARY 62 (2001)); *see* WEBSTER'S NEW COLLEGE DICTIONARY 63-64 (3d ed. 2008).

102. *GenCorp, Inc.*, 390 F.3d at 445 (citing 42 U.S.C. § 9607(a)(3)).

event; they may arise from a broader 'transaction.'"[103] Therefore, a construction agreement that contemplated the handling of waste generated by the plant created arranger liability.[104]

In setting the limits of arranger liability, the courts have created the useful-product exception.[105] One who is merely selling a useful, albeit hazardous, product to an end user is not liable as an arranger for what the purchaser does with the product, simply by virtue of the sale.[106] But, an entity "that manufactures, sells, or installs a useful product that is intended to direct, and when used as designed, directs a hazardous substance into the environment," can be liable as an arranger.[107]

Even if a useful product is involved, the courts have looked beyond the mere formal relationship of the parties to examine their ultimate objectives as well as their respective involvement with the substances' use and disposal. In *United States v. Cello-Foil Products, Inc.*,[108] the court found that by leaving significant amounts of solvents in the drums containing them—from one-half tea cup to one-half gallon—knowing that the producers would remove the solvents when reclaiming the drums, an inference was raised that the purchaser intended a disposal of the product.[109] This inference of intention was appropriate even though CERCLA contemplates strict liability because of the language used—"otherwise arranged for disposal."[110] This general term, "following in a series [of] two specific terms and embrac[ing] the concepts similar to those of 'contract' and 'agreement,'"[111] instructed the court to inquire "into what transpired between the parties and what the parties had in mind with regard

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103. *Id.*

104. *Id.* at 446.

105. *See, e.g.*, Freeman v. Glaxo Wellcome, Inc., 189 F.3d 160, 164 (2d Cir. 1999); Uniroyal Chem. Co. v. Deltech Corp., 160 F.3d 238, 257 (5th Cir. 1998); Fla. Power & Light Co. v. Allis Chalmers Corp., 893 F.2d 1313, 1317 (11th Cir. 1990).

106. Gen. Elec. Co. v. AAMCO Transmissions, Inc., 962 F.2d 281, 286-87 (2d Cir. 1992) (concluding that an "obligation to exercise control over hazardous waste disposal . . . makes an entity an arranger under CERCLA's liability provision").

107. Berg v. Popham, 412 F.3d 1122, 1129 (9th Cir. 2005) (adopting the rule declared by Alaska Supreme Court in *Berg v. Popham*, 113 P.3d 604, 612 (Alaska 2005)); *see also* AM Int'l v. Int'l Forging Equip. Corp., 982 F.2d 989, 992, 999 (6th Cir. 1993) (finding that a sale of an industrial facility on an "as is, where as" basis, where certain solutions had been left in place, was a sale of a useful asset and not an arrangement for disposal of wastes).

108. 100 F.3d 1227 (6th Cir. 1996).

109. *Id.* at 1230, 1233.

110. *Id.* at 1231 (citing United States v. R.W. Meyer, Inc., 889 F.2d 1497, 1507 (6th Cir. 1989); J.V. Peters & Co. v. Adm'r, EPA, 767 F.2d 263, 266 (6th Cir. 1985)).

111. *Id.* (citing 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.17, at 188 (5th ed. 1992); Woods v. Simpson, 46 F.3d 21, 23 (6th Cir. 1995)).

to disposition of the hazardous substance."[112] With this intent factor in mind, the court concluded that a trier of fact could conclude that the parties did not intend by this "deposit arrangement [a] sale of a useful hazardous substance for its original intended purpose" or as "transactions [in] matters involving only the drums."[113] Instead, getting rid of the contents of the drums (i.e., hazardous substances) was a critical part of the arrangement.[114]

What if the producer/seller of hazardous substances is aware of actionable conduct by the purchaser? That was the scenario presented in *Burlington* during the 2008-2009 Term.[115] In that case, in 1960, Brown & Bryant, Inc. ("B&B") operated a chemical distribution facility on land owned by others.[116] B&B purchased chemicals, including pesticides, from Shell Oil Company and stored them on the land.[117] The chemicals were delivered to B&B by tanker trucks, then transferred to other containers on the site.[118] During the transfer, chemicals would invariably spill to the ground.[119] Shell tried to help B&B avoid the spills through instruction and discounts for safe transfers.[120] The EPA and the California Department of Toxic Substances Control sued B&B, as an operator; the land owner, as an owner; and Shell, as an arranger for the disposal of wastes.[121] Shell argued that it should not be liable as an arranger under CERCLA because it was merely delivering a useful product to the operator, not arranging for disposal.[122] However, the Ninth Circuit found the company liable largely because spills were routine and Shell was aware of them.[123]

Examining the statute to understand what "arrange" meant, the Court identified the two clear cases at either end of the inquiry: on the one end, an entity that enters into a "transaction for the sole purpose of discarding a used and no longer useful hazardous substance;" and on the other, an entity that merely sells "a new and useful product and the purchaser of that product later, and unbeknownst to the seller, disposed of the product in a way that led to contamination."[124] In the former case, liability as an

112. *Cello-Foil Prods., Inc.*, 100 F.3d at 1231.
113. *Id.* at 1232 n.1.
114. *Id.* at 1232.
115. Burlington N. & Santa Fe Ry. Co. v. United States, 129 S. Ct. 1870 (2009).
116. *Id.* at 1874.
117. *Id.*
118. *Id.* at 1875.
119. *Id.*
120. *Id.*
121. *Burlington N.*, 129 S. Ct. at 1876.
122. *Id.* at 1877.
123. *Id.*
124. *Id.* at 1878.

"arranger" is clear and in the latter, non-liability is equally clear.[125] The difficult area includes those where "the seller has some knowledge of the buyers' planned disposal or whose motives for the 'sale' of a hazardous substance are less than clear."[126] Resolution of cases in the gray area require close examination of the facts, by looking beyond the label the parties have attached to their relationship.[127] Heeding the canon of construction that ordinary words be given their ordinary meanings, the Court looked to *Merriam-Webster's Collegiate Dictionary* and found that it defines "arrange" as "to make preparations for: plan[;] . . . to bring about an agreement or understanding concerning: settle."[128] The obvious understanding of these terms is that some intentional acts are necessary for liability as an arranger.

> While it is true in some instances an entity's knowledge that its product will be leaked, spilled, dumped, or otherwise discarded may provide evidence of the entity's intent to dispose of its hazardous wastes, knowledge alone is insufficient to prove that an entity "planned for" the disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product.[129]

Indeed, the Court concluded, in order to satisfy the definition of arranger, Shell needed to agree to the sale of hazardous substances with the intention that a small portion would be disposed during transfer by either discharging, depositing, injection, dumping, spilling, leaking, or placing as described in § 6903(3).[130] Here, no facts showed that Shell intended for the spills to occur when the product was delivered. Indeed, Shell tried, though unsuccessfully, to reduce the spills.[131]

Although at first blush *Burlington* seems to have narrowed "arranger" liability under CERCLA, on closer examination, and inasmuch as the decision did not rest entirely upon a literal dictionary definition, it leaves a considerable opening for liability. The gray area of difficult cases identified

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125. *Id.*; *see also* Amcast Indus. Corp. v. Detrex Corp., 2 F.3d 746, 751 (7th Cir. 1993), *cert. denied*, 510 U.S. 1044 (1994) (concluding that the term "arranged for" implies "intentional action").

126. *Burlington N.*, 129 S. Ct. at 1879.

127. *See id.*

128. *Id.* (internal quotations omitted). The Court also cited with approval, *Amcast Indus. Corp. v. Detrex Corp.*, 2 F.3d 746 (7th Cir. 1993) and *United States v. Cello-Foil Prods., Inc.*, 100 F.3d 1227 (6th Cir. 1996).

129. *Burlington N.*, 129 S. Ct. at 1880.

130. *Id.*

131. *See* United States v. Burlington N. & Santa Fe Ry. Co., 520 F.3d 918, 960 (9th Cir. 2008).

by the Court seemed to describe the scenario of *Cello-Foil*, which the Court cited with approval.[132] Under the reasoning there, one can be an "arranger" notwithstanding the absence of a formal contract or agreement for the disposal of wastes and absent communication between the producer of the hazardous substances and one who takes control over the disposal, if the logical result of such relationship is disposal of wastes. What does seem clear though, is that the Court intended that CERCLA should not be read to impose liability merely on the basis of a seller/buyer relationship, not even with knowledge that the purchaser of a useful product may be unlawfully disposing that product. Instead, some purposive act by the would-be responsible party is required.

III. Purposive Decisionmaking

The objective of any court ruling is to do justice—to the law, the parties and to the public. What is the just course or result is not easy to discover and is often burdened or clouded by the politics of the decisionmakers and/or the subject of the case. It is a fallacy to think that law is deductively decided through the operation of an exact, consistent and complete system; rather, it is the case that common law judges do legislate, they decide cases by reference to their beliefs about what is expedient for the community, using their own judgment as to the worth of competing values.[133]

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132. *Burlington N.*, 129 S. Ct. at 1879. Many other cases decided before *Burlington* ruled on the various permutations of "arranger" liability without resorting to the dictionary. *See, e.g.*, American Cyanamid Co. v. Capuano, 381 F.3d 6 (1st Cir. 2004) (stating that while mere brokering the disposal of hazardous waste, without more, will not give rise to liability, where that broker does so by exercising control over the waste, such as finding a site and arranging to pick up the waste and for it to be dumped at the site, that control can amount to constructive possession for purposes of liability); S. Fla. Water Mgmt. Dist. v. Montalvo, 84 F.3d 402 (11th Cir. 1996) (holding that landowners who merely contracted for the aerial spraying of their crops were not arrangers for purposes of clean-up of the site where pesticides spilled on the airstrip during the mixing and loading into the application tanks of the planes); United States v. Vertac Chem. Corp., 46 F.3d 803 (8th Cir. 1995) (precluding liability merely because of statutory and regulatory authority over the activities absent showing of supervision or responsibility for the transportation or disposal of substances or supplying raw materials); United States v. Atlas Lederer Co., 282 F. Supp. 2d 687 (S.D. Ohio 2001) (selling junk batteries to a scrap lead company that extracted the lead and never resold as whole batteries was an arrangement for disposal); Cal. Dept. of Toxic Substs. Control v. Interstate Non-Ferrous Corp., 298 F. Supp. 2d 930 (E.D. Cal. 2003) (taking spent battery parts to smelting plant for recovery of lead).

133. OLIVER WENDELL HOLMES, JR., THE PATH OF THE LAW AND ITS INFLUENCE 140 (Steven J. Burton ed., 2000). Holmes believed that judges should be upfront about the fact of legislating. Such an admission would leave them freer to openly consider competing policies that really determined their decisions and more likely adopt the best rule as opposed

Usually the process of resolving legal issues is a gradual one, but sometimes the courts see fit to make a stark break with existing rules, by sharply expanding or establishing new rules. But, the new law must be viewed as having evolved from existing law as judges strive to follow analogies and anchor their decisions in existing principles.[134] This process may be ignored in the case of a federal court ruling on claims involving individual state common law rights and federal claims where the case is resolved upon the facile assertion by the government: federal preemption, thereby ignoring all conventions and customs bound up with the state common law rights.

The most significant impacts of CERCLA are on the common law meanings of ownership of property, landowner liability and the right to contribution from joint tortfeasors. The Supremacy Clause[135] provides unambiguously, "that if there is any conflict between federal and state law, federal law shall prevail."[136] Preemption may be implied (where the federal regulatory scheme is pervasive) or express.[137] But, it is not categorical; it is disfavored and should not occur "in the absence of persuasive reasons—either that the nature of the related subject matter permits no other conclusion, or that the Congress has unmistakably so ordained."[138] Nonetheless, even when matters of special concern to states are at issue, such as real property, this circumstance does not preclude preemption.[139]

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to one driven by their peculiar political and economic sympathies. *See id.*

134. *See, e.g.*, Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1077 (D.C. Cir. 1970) (requiring landlords to repair property while rejecting concept of independent covenants); Johnson v. Davis, 480 So. 2d 625, 629 (Fla. 1985) (rejecting *caveat emptor*); Ellsworth Dobbs, Inc. v. Johnson, 236 A.2d 843, 857 (N.J. 1967) (rejecting old rule as to when broker's commission is earned).

135. "[T]he Laws of the United States . . . shall be . . . the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST., art. VI, cl. 2.

136. Gonzales v. Raich, 545 U.S. 1, 29 (2005).

137. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

138. Chicago & Nw. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981).

139. Free v. Bland, 369 U.S. 663, 666 (1962); *see also* Mansell v. Mansell, 490 U.S. 581, 587 (1989); Rose v. Rose, 481 U.S. 619, 625 (1987); Ridgway v. Ridgway, 454 U.S. 46, 54-55 (1981) (discussing that even in areas of law typically left to the states, like domestic relations, federal law still may preempt state law; federal anti-attachment provisions regarding serviceman's life insurance policies preempted state law property family settlement rules); McCarty v. McCarty, 453 U.S. 210, 235-36 (1981) (holding that military-retirement pay provisions preempted state community property laws); Hisquierdo v. Hisquierdo, 439 U.S. 572, 590 (1979); Ablamis v. Roper, 937 F.2d 1450, 1460 (9th Cir. 1991) (holding Employee Retirement Income Security Act of 1974 preempts any state community property law which arguably provides a predeceasing nonemployee spouse with a testamentary interest in a fully vested surviving employee spouse's pension benefits).

Yet, the federal courts assert a stricter inquiry where these kinds of matters are at issue.[140]

But, what is a conflict? In *United States v. Kimbell Foods, Inc.*,[141] the Court observed that it had consistently held that federal law governs questions involving the rights of the United States arising under nationwide federal programs.[142] When the federal government is asserting claims no different from those an individual might assert, is preemption appropriate? Even where federal courts do not explicitly speak the language of preemption, they avoid the application of state rules, such as of property, often on the mere finding of some federal interest.

While CERCLA provides that it applies "[n]otwithstanding any other provision or rule of law,"[143] it does not provide for a complete preemption of otherwise applicable state law,[144] and does not anticipate that all responsible parties will be held accountable in all circumstances.[145] As the Supreme Court has stated, "there is no federal policy that the fund should always win," and "more money arguments" alone are insufficient to justify displacement of state law.[146]

One consequence of preemption is that sometimes it is necessary for federal courts to craft federal common law. When Congress has not spoken on a particular issue, and when there exists a "significant conflict between some federal policy or interest and the use of state law,"[147] federal courts

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140. Hines v. Davidowitz, 312 U.S. 52, 68 n.22 (1941) (stating that evidence of a congressional intent to preempt state law should be even clearer when federal law fails to address a subject matter that is "peculiarly adapted to local regulation").

141. 440 U.S. 715 (1979). There, the Court addressed the issue "whether contractual liens arising from certain federal loan programs take precedence over private liens, in the absence of a federal statute setting priorities." *Id.* at 718.

142. *See id.* at 726 ("'When the United States disburses its funds or pays its debts, it is exercising a constitutional function or power. . . . In [the] absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law according to their own standards.'" (quoting Clearfield Trust Co. v. United States, 318 U.S. 363, 366-67 (1943))).

143. 42 U.S.C. § 9607(a) (2006).

144. Marsh v. Rosenbloom, 499 F.3d 165, 177 (2d Cir. 2007); Bedford Affiliates v. Sills, 156 F.3d 416, 426 (2d Cir. 1998); *see generally* B.F. Goodrich Co. v. Murtha, 958 F.2d 1192, 1198 (2d Cir. 1992).

145. Commander Oil Corp. v. Barlo Equip. Corp., 215 F.3d 321, 327 (2d Cir. 2000) ("[N]either does CERCLA automatically assign liability to every party with any connection to a contaminated facility."). In other words, CERCLA's cost-recovery objective, while strong, is not absolute and may yield to countervailing considerations.

146. O'Melveny & Myers v. FDIC, 512 U.S. 79, 86-88 (1994) (discussing federal common law in the context of the Financial Institutions Reform, Recovery, and Enforcement Act).

147. Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966); *see* City of Milwaukee

have found it necessary, in a "few and restricted" instances,[148] to develop federal common law.[149] Indeed, said the Court in *United States v. Little Lake Misere Land Co.*:

> At the very least, effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or judicial legislation, rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress. In other words, it must mean recognition of federal judicial competence to declare the governing law in an area comprising issues substantially related to an established program of government operation.[150]

That is to say that it is a "necessary expedient"[151] but may be used even if not explicitly authorized by Congress.[152] In *O'Melveny & Myers v. FDIC*, the Court noted that "cases in which judicial creation of a special federal rule would be justified[] . . . [are] 'few and restricted' . . . , limited to situations where there is a 'significant conflict between some federal policy or interest and the use of state law.'"[153] Matters left unaddressed by a comprehensive federal statutory scheme are presumably left subject to the disposition provided by state law—there must exist a discrete conflict with an important federal policy before a court should consider resorting to federal common law.[154] In determining whether such a conflict exists, the

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v. Illinois, 451 U.S. 304, 314 n.7 (1981) ("In this regard we note the inconsistency in Illinois' argument and the decision of the District Court that both federal and state nuisance law apply to this case. If state law can be applied, there is no need for federal common law; if federal common law exists, it is because state law cannot be used.").

148. Wheeldin v. Wheeler, 373 U.S. 647, 651 (1963).

149. *See, e.g.*, Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943).

150. 412 U.S. 580, 593 (1973) (citing Paul J. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 800 (1957)).

151. *See* Comm. for Consideration of Jones Falls Sewage Sys. v. Train, 539 F.2d 1006, 1008 (4th Cir. 1976).

152. *See Clearfield Trust Co.*, 318 U.S. at 366-67. The Court pointed out that even without an explicit statutory grant of authority, the fashioning of federal common law may still be appropriate when duties and rights of the United States are at issue. The Court went on to rule that a uniform federal rule should apply in an action by the United States on a guaranty made on a federal check. *See Little Lake Misere Land Co.*, 412 U.S. at 593-94 (explaining that the right to seek legal redress for duly authorized proprietary transactions was "a federal right").

153. 512 U.S. 79, 87 (1994) (quoting Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63, 68 (1966)).

154. United States v. Kimbell Foods, Inc., 440 U.S. 715, 726, 728 (1979).

Court has identified three factors: the need for uniformity of law across the nation; "whether application of state law would frustrate specific objectives of the federal programs"; and "the extent to which application of a federal rule would disrupt commercial relationships predicated upon state law."[155]

As shown above, CERCLA left much unsaid, undefined and unexplained. Yet, courts have been reluctant to craft a new language of liability, out of whole cloth. This reluctance stands in contrast to what seems to be a determined march of federal law into the realm of property rights and a broadening of the notion of federalism, particularly through exercise of the Commerce Clause.[156] The original division of power between state and federal governments contemplated that only matters of national importance would be reserved to the federal government. Yet, over the last few decades, the federal presence in areas traditionally viewed as being within the province of the states has grown at a remarkable pace. The responsibility for educating our children,[157] the essential requirement for an enforceable contract for land,[158] and how much interest a lender may charge on a mortgage loan,[159] were matters traditionally reserved to the states, but are now subject to pervasive and sometimes burdensome federal prescriptions.[160]

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155. *Id.* at 728-29.

156. *See* Sam Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1365 (2006) (discussing the increasingly broad reach of the federal government through the Commerce Clause to preempt many state laws).

157. *See, e.g.*, No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.).

158. *See, e.g.*, Electronic Signatures in Global Commerce and National Commerce Act, Pub. L. No. 106-229, 114 Stat. 464 (2000) (codified as amended in scattered sections of 15 U.S.C.).

159. *See, e.g.*, 12 U.S.C. § 3801 (2006); *see also* Fid. Fed. Sav. & Loan Ass'n v. De Le Cuesta, 458 U.S. 141, 159 (1982) (upholding preemption of state laws limiting operation of due-on sale clauses in mortgages).

160. Many states have challenged the No Child Left Behind Act and have lost. *See* Michael Dobbs, *NEA, States Challenge 'No Child Program,'* THE WASH. POST, Apr. 21, 2005, at A21, *available at* http://www.washingtonpost.com/wp-dyn/articles/A4741-2005Apr20.html; Pauline Vu, *No Child Law Faces Medley of Changes*, KANSAS CITY INFOZINE, Mar. 28, 2007, http://www.infozine.com/news/stories/op/storiesView/sid/21900/. States are still grappling with the E-Sign legislation, as many trial courts have refused to accept its provisions. *See, e.g.*, Vista Developers Corp. v. VFP Realty LLC, 847 N.Y.S. 2d 416 (Sup. Ct. Queens Co. 2007) (holding that signed e-mail did not satisfy the statute of frauds in a real estate transaction).

A. The Virtues of State Common Law

This march of federal law is a marked departure from common law. In the generic sense of the term, the "common law" has been defined as "the ancient unwritten law of England": "the body of those principles and rules of action relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming and enforcing such usages and customs."[161] A.W.B. Simpson once noted that if the common law's existence is thought of as a set of rules, "it is in general the case that one cannot say what the common law is."[162] This is because it is impossible to demark conclusively such a rule set that corresponds to the common law. "As a system of legal thought the common law . . . is inherently incomplete, vague and fluid . . . ."[163] Professor Simpson writes:

> The ideas and practices which comprise the common law are customary . . . in that their status is thought to be dependent upon conformity with the past, and they are traditional in the sense that they are transmitted through time as a received body of knowledge and learning. . . . Such rules . . . serve also as guides to proper practice, since the proper practice is in part the normal practice.[164]

The noted jurist Roscoe Pound believed the common law was a mode of decisionmaking—guided by past judicial precedents.[165] Despite the chaos and fluidity identified by Simpson, there is yet unity in the common law, which has been attributed to the "fact that law is grounded in, and logically derived from, a handful of general principles."[166] For Blackstone, law is "fraught with the accumulated wisdom of ages";[167] it embodies an ancient wisdom, which may be timeless and yet continually evolving

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161. W. Union Tel. Co. v. Call Pub. Co., 181 U.S. 92, 102 (1901) (citing BLACK'S LAW DICTIONARY 232 (1st ed. 1891)).

162. Brian Simpson, *The Common Law and Legal Theory*, *in* LEGAL THEORY AND COMMON LAW 8, 16 (William Twining ed., 1986).

163. *Id.* at 17.

164. *Id.* at 20-21.

165. ROSCOE POUND, THE SPIRIT OF THE COMMON LAW 182 (1921). He goes on to identify the spirit of the common law as residing in among other things, "judicial empiricism" (pragmatic case-by-case decision-making guided by past judicial precedents; a method of working that "combines certainty and power of growth [of law] as no other doctrine has been able to do"). *Id.*

166. ROGER COTTERRELL, THE POLITICS OF JURISPRUDENCE: A CRITICAL INTRODUCTION TO LEGAL PHILOSOPHY 24 (1989).

167. *Id.*

through collective experience.[168] A system based in custom can function only if it is able to insist upon continuity and cohesion in traditional ideas and adherence to these ideas.[169]

Property law factors prominently within the common law. Decades ago, the Supreme Court declared: "Property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules and understandings that stem from an independent source such as state law."[170] Property issues arise not only when the question is whether to recognize an asserted interest as property, but also when there is a question of the extent and contours of that interest, such as how the interest may be created, when rights expire, when the interest can be attached and how it passes to heirs.[171]

Property does more than simply protect what people have; it also protects what they might acquire, that is, their "expectations"—the right to realize any future value arising out of that present ownership.[172] Protecting

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168. *Id.* at 28.

169. SHIRLEY ROBIN LETWIN, ON THE HISTORY OF THE IDEA OF LAW 337-38 (Noel B. Reynolds ed., 2005).

170. Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972); *see also* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984) (citation omitted); Hughes v. Washington, 389 U.S. 290, 295 (1967) (Stewart, J., concurring) ("[A]s a general proposition[,] the law of real property is, under [the] Constitution, left to the individual States to develop and administer."). The Court has also stated: "The great body of law in this country which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state." Davies Warehouse Co. v. Bowles, 321 U.S. 144, 155 (1944). This is particularly true with respect to real property, for "[e]ven when federal [common] law was in its heyday [under the teachings of *Swift v. Tyson*] an exception was carved out for local laws of real property." United States v. Little Lake Misere Land Co., 412 U.S. 580, 591 (1973).

171. Any of the rights inhering in property can be transferred separately (wholly, partially, or temporally) and subdivided (several people can simultaneously hold rights in the same thing). In such cases, the task becomes determining the particular limited rights each transferee or co-owner holds. *See* United States v. Gen. Motors Corp., 323 U.S. 373, 378 (1945) (stating that property includes "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it"); THOMAS C. GREY, LIBERTY, PROPERTY AND THE LAW 69-70 (2000). Ownership gives power and sovereignty over oneself, things and other persons. *See* Morris Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8, 12 (1928). That is because, if "somebody . . . wants to use the food, the house, the land, or the plow which the law calls mine, he has to get my consent." *Id.* Fundamentally, the law of property thus enables an owner to exclude others from using what is determined to be hers. But as Professor Cohen explains, "it by no means follows that [an owner] may use [his property] arbitrarily or that his rule shall prevail indefinitely after his death." *Id.* at 15.

172. "[P]rotecting . . . rights of a landlord means giving him the right to collect rent,

expectations allows intelligent choices about investment, consumption and saving.[173]

B. Social Construct Through Conventions

Those expectations are bounded by what a state chooses to recognize as entitled to protection. This means that certain private expectations, or desires, of property owners may not be supported by the state and therefore are not recognized as property. The prevailing conception is that property is a social instrument; it exists to serve human needs.[174] This means that while there are some bedrock principles that protect property, those same principles are not etched in that bedrock. Instead, as human needs change, so do property rights. Communities created property, and communities can curtail it.[175] In other words, property is a creation of law.[176]

David Hume, in *A Treatise of Human Nature*,[177] described property rights as "conventions"[178] that arise spontaneously from:

> a general sense of common interest; which sense all the members of the society express to one another, and which induces them to regulate their conduct by certain rules. . . . [T]he actions of each of us have a reference to those of the other, and are perform[ed] upon the supposition, that something is to be perform[ed] on the other part.[179]

A convention is generally a shared understanding or implicit agreement, adhered to because of a general expectation that others will follow.[180] Conventions arise in response to a felt need, then as routinely

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protecting the property of a railroad or a public service corporation means giving it the right to make certain charges. Hence . . . ownership . . . determines what share of . . . goods various individuals shall acquire." Cohen, *supra* note 171, at 13.

173. Richard A. Epstein, *How to Create—or Destroy—Wealth in Real Property*, 58 ALA. L. REV. 741, 748 (2007).

174. *See* State v. Shack, 277 A.2d 369, 372 (N.J. 1971).

175. For example, the duration of real covenants and possibility of reverters have been limited to thirty years, unless recorded or renewed by the interested parties, and then they are only enforced by damages and not an injunction. *See, e.g.*, N.Y. REAL PROP. LAW § 345 (McKinney 2006); MASS. GEN. LAWS ch. 184, §§ 27, 30 (2008).

176. Bentham wrote that property "is entirely the work of law," "[p]roperty and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases." JEREMY BENTHAM, THEORY OF LEGISLATION 68-69 (Richard Hildreth trans., 1975).

177. Book 3, Part 2, §2 (Oxford, Clarendon Press 1965) (1740).

178. *Id.* at 490.

179. *Id.*

180. THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 454 (Peter Newman

practiced, take on the force of law. They guide behavior and set the contours of rights and obligations.[181]

Should CERCLA aim to overrule common law principles? Does it aim to ensure justice for those injured by dangerous activities? Ensure that the burdens of remedying the effects of these dangerous activities fall upon the actors? Encourage honest and good behavior? Punish bad? Such questions are part of the debate among the circuits on whether "disposal" of hazardous wastes encompasses passive migration resulting in liability to all who happen to own contaminated land or instead requires active human conduct[182] and whether a mere titular owner is an "owner" for purposes of CERCLA liability.[183]

By the twentieth century, natural law as a legal philosophy[184] had become eclipsed by legal positivism. The legal system was described in terms of its normative functions, that is, of "'ought propositions,' which could be, within [their] own terms, valid and illuminating, regardless of the moral quality of those norms, and indeed independent of all extraneous ethical, social, economic, or political values."[185] Roscoe Pound stated that:

> [T]he law is an attempt to reconcile, to harmonize, [or] to compromise . . . overlapping or conflicting interests, either through securing them directly and immediately, or through securing certain individual interests . . . so as to give effect to the greatest number of interests or to the interests that weigh most in our civilization, with the least sacrifice of other interests.[186]

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ed., Stockton Press 1998).

181. *See, e.g.*, Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (standing for the view that conventions are seen in the pervasive presence of land use regulations); Javins v. First Nat'l Realty Co., 428 F.2d 1071, 1081-82 (D.C. Cir. 1970) (requiring landlords to keep rented premises habitable); Johnson v. Davis, 480 So. 2d 625, 629 (Fla. 1985) (establishing a movement away from *caveat emptor* and requiring sellers of real property to disclose dangerous conditions in the premises).

182. *See discussion, supra* at text accompanying notes 76-98.

183. *See discussion, supra* at text accompanying notes 28-66.

184. Natural law is "[a] philosophical system of legal and moral principles purportedly deriving from a universalized conception of human nature or divine justice rather than from legislative or judicial action" BLACK'S LAW DICTIONARY 1127 (9th ed. 2009).

185. JOHN MAURICE KELLY, A SHORT HISTORY OF WESTERN LEGAL THEORY 356 (1992). In other words, the legal "*ought*," the norm, was viewed as of a purely formal character, subject to evaluation of its own terms and logic, not of any other scientific or sociological standards.

186. Roscoe Pound, *A Theory of Social Interests*, *in* READINGS IN JURISPRUDENCE 238, 245-46 (Jerome Hall ed., 1938).

The law can legitimately impose liability on conduct without any pretense that such conduct is morally wrong or otherwise blameworthy. Law operates by either the threat of "the bayonet" in one's back or "the rope."[187] The great legal pragmatist Oliver Wendell Holmes[188] suggested that rules we apply contemporaneously may have little to do with accomplishing any particular social purpose. Instead, the "purpose" of law may simply reflect the power and will of the majority backed up by "the club and the bayonet ready to drive you to prison or to the rope if you go beyond the established lines."[189]

How legal principles are derived is found in Holmes's most famous aphorism that "[t]he life of the law has not been logic: it has been experience."[190] It seems that by this phrase Holmes meant that there are often no general principles available to resolve various disputes.[191] Instead, he pointed out that the "[c]ommon law [is] the result of courts using the doctrine of precedent to create a body of rules out of individual decisions, and using fiction and equity to adapt those rules to gradual social change."[192]

But this cynical view cannot be entirely embraced, for as Habermas pointed out, the "[l]aw's validity, . . . [as] a matter of its normative character, its nature as a coherent system of meaning, as prescriptive ideas and values[, rests upon its] capacity to make claims supported by reason, in a discourse that aims at and depends on agreement between citizens."[193] This means that the legal system must be "socially effective" and "ethically justified." Habermas argued that in order for law to retain its claim to authority, legal philosophy must be cognizant of fundamental changes in

187. OLIVER WENDELL HOLMES, JR., THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 109 (Mark DeWolfe Howe ed., 1962).

188. Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 788 (1989).

189. HOLMES, *supra* note 187.

190. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 3 (John Harvard Library 2009) (1881).

191. Holmes sought to expose the legal reasoning of judges for what it was—bound up with personal or political biases, while attempting to cast the decision as the result of pure deduction.

192. Thomas C. Grey, *Holmes on the Logic of the Law*, *in* THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR. 137 (Steven J. Burton ed., 2000). "When change accelerated under conditions of modernity, explicit forward-looking legislation became the main instrument of rule specification and legal reform." *Id.*

193. ROGER COTTERRELL, LAW, CULTURE AND SOCIETY: LEGAL IDEAS IN THE MIRROR OF SOCIAL THEORY 31 (2006); *see generally* Jürgen Habermas, *Between Facts and Norms: An Author's Reflections*, 76 DENV. U. L. REV. 937 (1999) (describing the relationship between the form of modern law and the moral conscience of society).

the world of social beliefs and values.[194] In sum, "the only law that counts as legitimate is one that could be rationally accepted by all citizens in a discursive process of opinion and will-formation."[195]

IV. The Federalization of State Law Through Preemption and Federal Common Law

While the breadth of the language of CERCLA seemed to suggest a radical departure from common law, as discussed above, it has not been interpreted that way. Indeed, the construction and application of CERCLA seems to resist a movement that I call the "federalization of property," occurring in other areas of law. By this, I mean the increasing introduction of federal preemptive laws and preemptive interpretation of federal laws that overwhelm well-grounded common law principles. This is occurring in a host of different contexts: determinations as to when an interest is cognizable;[196] when an interest terminates;[197] what rights a transferee receives;[198] the effect of recording statutes;[199] the nature of a tenancy by the entirety;[200] when rights can be disclaimed[201] and when an interest can

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194. COTTERRELL, *supra* note 193, at 32.

195. JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 135 (William Rehg trans., 1996).

196. United States v. Murray, 217 F.3d 59, 63 (1st Cir. 2000) (acknowledging that federal law determines whether a state law property interest existed).

197. Barclay v. United States, 443 F.3d 1368, 1373 (Fed. Cir. 2006) (holding that upon issuing a Notice of Interim Trail Use or Abandonment, the National Trail System Act dictates when abandonment or railway easements occur).

198. United States v. MacInnes, 223 F. App'x 549, 553 (9th Cir. 2007) (holding that the transferee who received property from the government that was taken by forfeiture received title unburdened by prior liens).

199. AA Am. Dev. Corp. v. United States, No. CIV 06-2450-PHX-SMM, 2007 U.S. Dist. LEXIS 59692, at *10-11 (D. Ariz. Aug. 14, 2007) (finding that the government need not record notice of impending taking of property).

200. United States v. Craft, 535 U.S. 274, 288 (2002). There, the Court redefined the state law concept of a tenancy by the entirety by ruling that the Internal Revenue Service could attach property held as tenancy by the entirety, based upon the husband's sole tax liability; whereas under the common law, creditors of one spouse could not attach property under those circumstances. *See* Sawado v. Endo, 561 P.2d 1291, 1296-97 (Haw. 1997) (discussing the history of this type of tenancy and finding that the interest could not be attached based upon the liability of just one spouse). About one-third of the states still recognize the tenancy by the entirety in its classical form. *Id.* at 1294. On the other hand, many states today allow a lien arising from the debts of one spouse to attach to entireties property, but the lien cannot be levied upon during the marriage. *Id.* At most, the creditor recovers if the husband and wife divorce (and the tenancy becomes a tenancy in common) or if the debtor spouse survives the other. *See, e.g.*, V.R.W., Inc. v. Klein, 503 N.E.2d 496, 500 (N.Y. 1986). In not yielding to the common law limits and concerns, it became necessary for the Court to recast the nature of the common law interest, ignoring its most

terminate.[202] The law's validity is threatened as courts cast off or reconfigure long-held conventions and understandings in favor of some presumed dominant federal interest. This movement is occurring in areas, to be sure, where a federal interest is present, but also in many cases where that federal interest would not necessarily be frustrated by observing state law limitations.

This recharacterization of property results not only from the assertion of the preeminence of federal interests,[203] but also from the insistence of "background principles." In *Lucas v. South Carolina Coastal Council*, determining whether a landowner had the right to construct a dwelling along the waterfront notwithstanding land use regulations that prohibited construction, Justice Scalia explained that such a right existed unless there was a limitation that inhered in the title that was found in some "background principle" under the common law.[204] That pronouncement became the new measure of ownership rights and has expanded to include not only principles from state common law but any federal law. In *American Pelagaic Fishing Co. v. United States*, no taking of property occurred by the revocation of a permit to engage in fishing in the national waters pursuant to regulations adopted long after the permit was issued.[205] The court found that a pervasive regime of regulation was in place when the plaintiff purchased its ship, that there was an "existing rule" or "background principle" of federal law that inhered in plaintiff's title and

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important characteristic.

201. Drye v. United States, 528 U.S. 49, 52 (1999) (ruling that even though under state law an heir could disclaim an inheritance, this would not preclude the Internal Revenue Service from collecting taxes owed by that heir against the disclaimed interest; notwithstanding that under state law, the disclaimer created the legal fiction that the disclaimant predeceased the decedent and consequently the dislaimant's share of the estate passed to the person next in line to inherit. *Id.* at 52, 54.

202. United States v. Locke, 471 U.S. 84, 108-09 (1985) (upholding the Federal Land Policy Management Act ("FLPMA"), 43 U.S.C. § 1744 (2006)). The FLPMA required all mining claims to be recorded with the Bureau of Land Management within three years of passage of the Act and thereafter, on an annual basis, a filing of notice of intention to hold a claim, along with an affidavit of assessment of work done on the claim, the claim was otherwise extinguished; explaining that "[e]ven with respect to vested property rights, a legislature generally has the power to impose new regulatory constraints on the way in which those rights are used, or to condition their continued retention on performance of certain affirmative duties." *Id.* at 104.

203. *See, e.g.*, United States v. Stadium Apartments, 425 F.2d 358 (9th Cir. 1970), *cert. denied*, 400 U.S. 926 (1970) (denying a mortgagor a state right to redeem where the foreclosing mortgagee is the federal government).

204. *See* 505 U.S. 1003, 1029-30 (1992).

205. 379 F.3d 1363, 1374 (Fed. Cir. 2004).

therefore burdened it.[206] As a result, an owner can never be certain of the contours of his property if the government could at any time adopt regulations under a regulatory scheme limiting his ownership in ways that were not plain at the time the interest was acquired.

In *Bair v. United States*, "background principles" were employed to defeat the interests of claimants who were prior in time, in favor of the United States, under a federal loan program which conferred super-lien status.[207] The court determined that the statute created "a pre-existing limitation on the property rights that the [claimants] could acquire under state law."[208] The claimants challenged the government's assertion of priority on the ground, among other things, that the statute purported to create property rights in contravention of the principle that only states can create and define property rights.[209] If Congress could create these property rights, the claimants argued, the result would be an end-run around the Takings Clause.[210] The Federal Circuit took the opposite view that a federal statute can serve as a "background principle" in categorical takings decisions. It noted that the Supreme Court previously held that federal law can limit state-created property interests.[211] However, by the inclusion of

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206. *Id.* at 1379. The Magnuson Act was enacted to take immediate action to conserve and manage the fishery resources found off the coast of the United States; the rights created by the Act necessarily included the right to fish, and nothing in the act purported to grant to owners of fishing privileges a property right to fish. *See id.*

207. 515 F.3d 1323, 1325, 1327 (Fed. Cir. 2008).

208. *Id.* at 1326.

209. *Id.* at 1327.

210. *Id.* at 1327 n.1.

211. *Id.* at 1327-28 (citing Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992)); *see also* Maritrans Inc. v. United States, 342 F.3d 1344, 1352 (Fed. Cir. 2003) ("'[B]ackground principles' derived from an independent source, such as state, federal, or common law, define the dimensions of the requisite property rights for purposes of establishing a cognizable taking." (citing *Lucas*, 505 U.S. at 1030)). But see *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003), where that same court seemed to have reached the limits of its indulgence in this theory. It rejected the federal government's assertion of the concept in an effort to impose specific limitations on rights of parties who had received government benefits. *Id.* at 1330-31. Through new regulations, the government sought to preclude owners from prepaying loans it had guaranteed, which would have permitted the owners to charge market rents for the housing built with the guaranteed funds. The court found that despite the existence of a set of regulations governing the program when the loans were taken out, the power of the agency to adopt new regulations was not a "background principle" as would enable it to redefine the property held by the owners. *Id.* at 1331. The new regulations would have changed the interest from one in which the owner could expect free and unfettered control after twenty years, to one in which the original burdens would continue indefinitely. *Id.* at 1323-24. The court rejected the notion that the existence of a regulatory scheme gives rights to adopt regulations, even if they are not

provisions such as the innocent landowner defense,[212] the burdens of clean up under CERCLA would not fall upon all new owners by way of background principles.

CONCLUSION

Incursions into the realm of state property law, altering settled meanings in order to achieve very narrow federal interests, is an assault on legal theory and frustrates its historical role. Legal theory seeks specifically to develop a theoretical understanding of the nature of law as a social phenomenon. It aims at rationality in legal doctrine—necessary for its understanding and forecasting outcomes and for seeing how legal rules and regulations fit within a rational structure, their linkages and relationships.[213] It may involve a search for "purposive unity of law, so that all its elements are to be interpreted and evaluated in terms of some fundamental objective (for example social, moral, economic, or political) which they are thought to serve."[214]

To some, unity as a practical matter entails two forms of predictability:

> [P]redictably consistent internal relationships of elements (rules, principles, concepts, decisions, . . .) within a legal system. . . . [and] predictably consistent external relationships between the system and what lies outside it, so that the determination of the legal from the non-legal (for example, legal rules from moral rules; judicial decisions from political decisions) can be a reliable one.[215]

But the rationality of law disintegrates when the application of concepts are pragmatic rather than principled.[216]

CERCLA is at once sweeping in its aims, yet imprecise in its expression. This circumstance could have been taken as a blank slate by courts, enabling a wholesale crafting of a new rights and liability regime with broad aims and draconian results. But the courts have been cautious,

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reasonably foreseeable, or that participants in government programs could not have reasonable investment-backed expectations. *Id.* at 1347-48.

212. *See supra* note 9; Montana v. Atlantic Richfield Co, 266 F. Supp. 2d 1238 (D. Mon. 2003) (discussing section of CERCLA precluding recovery of natural resource damages occurring before passage of the statute). For a discussion of the innocent landowner defense, see also United States v. CDMG Realty Co., 96 F.3d 706 (3d Cir. 1996) and Carson Harbor Village, Ltd v. Unocal Corp., 270 F.3d 863 (9th Cir. 2001).

213. *See* COTTERRELL, *supra* note 166, at 6.

214. *Id.* at 9.

215. *Id.* at 10.

216. *See id.* at 6.

finding preemption of state common law principles sparingly[217] and otherwise yielding to those principles that serve the ends of fairness and predictability.[218] The courts have taken pains to ensure that CERCLA does not apply indiscriminately, too harshly, or to persons who cannot fairly be said to share any responsibility for the harm sought to be remedied. In setting these contours, courts have resorted to tools of interpretation most likely to yield sensible and rational applications. While the ordinary dictionary is often the first tool they employ, they have endeavored to moor their interpretations to existing state law principles, particularly since property interests are at stake. Property relations have historically been governed by state law, and the expectations and understandings derived therefrom urge that the federal standard should be rooted in an adoption of state property law. As recent cases show, a federal common law of property is unsettling; it subjects citizens to two regimes where rights and definitions are at variance and dispute outcomes depend largely on the regime in which the citizen happens to find herself and between whom the contest arises, that is, individual *versus* individual or individual *versus* the federal government. If it is individual *versus* the federal government, it may mean that the federal government will win, not because it has the more meritorious case, but because it is the federal government. Understanding CERCLA teaches us about purposive decisionmaking.

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217. *See* United States v. General Battery Corp., 423 F.3d 295, 299 (3d Cir. 2005) (discussing the caution courts must employ before adopting a federal rule).

218. Canadyne-Georgia Corp. v. NationsBank, N.A., 183 F.3d 1269, 1273 (11th Cir. 1999) ("The question of whether a particular defendant can be deemed an 'owner' under CERCLA . . . turns on application of state law . . . ."); United States v. Bestfoods, 524 U.S. 51, 62-64 (1998) (determining that state common law determines "owner" and "operator" liability in the context of a corporate parent and subsidiary relationship).

DISAPPEARING CIVIL LIBERTIES: THE CASE OF POST-9/11 FICTION

CARLA SPIVACK*

Abstract: This Article examines several examples of so-called "post 9-11 literature" and questions their lack of concern with the attacks on civil rights perpetrated by the Bush administration in the wake of the attacks. The novels analyzed are: Helen Schulman, *A Day at the Beach* (2007), Claire Messud, *The Emperor's Children* (2006), Ken Kalfus, *A Disorder Peculiar to the Country* (2006), and Ian McEwan, *Saturday* (2005). The Article discusses the ways in which the works reviewed both parody and to some extent take part in American society's response to the attacks: its narcissism, its willful oblivion to world history, its need for the reassurance of happy endings and its longing for a myth of a prefect community. Ultimately, the author raises the question of art's relationship to the world around it, and asks whether it can stand far enough outside of culture to critique its failings, or whether it must always also reenact them.

INTRODUCTION

Critics are in the process of anointing a body of American and British fiction written after 2001 as "post September 11 literature"; that is, literature that explicitly addresses the impact of the effect of American society and culture. This Article discusses several of these works and their seeming lack of interest in what, to many of us, was the most dramatic repercussion of the 9/11 attacks; namely, the curtailment of civil and human rights both domestically and abroad by the Bush Administration.[1]

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1. Several websites are devoted to tracking developments in this regard. *See, e.g.*, Loss of U.S. Civil Liberties: History Commons, www.historycommons.org/timeline.jsp?timeline =civilliberties&startpos=300 (last visited May 1, 2010); American Civil Liberties Union, www.ACLU.org/search/post%209/11?show_aff=1 (last visited May 1, 2010). There are also law review articles on the topic. *See, e.g.*, Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335 (2004); Judith Resnik, *Detention, the War on Terror, and the Federal Courts*,

The works I discuss are as follows, in reverse chronological order: Helen Schulman, *A Day at the Beach* (2007) ("*Beach*"); Claire Messud, *The Emperor's Children* (2006) ("*Emperor's Children*"); Ken Kalfus, *A Disorder Peculiar to the Country* (2006) ("*Disorder*"); and Ian McEwan, *Saturday* (2005).[2] These works, with the exception of McEwan's, which is set in London with British characters,[3] to one degree or another satirize American society's response to the attacks, skewering its narcissism,[4] its oblivion to world history,[5] the reassurance of happy endings[6] and its need for the myth of the perfect community.[7] I include McEwan's work because it seems to similarly turn political violence into family drama. Why do none of them, then, address the many measures that deprived Americans and others of constitutional guarantees of security in both their homes and persons and protection against governmental spying and eavesdropping?[8] I make no argument that the novelists at issue *should* address these concerns;

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110 COLUM. L. REV. 579 (2010); Dawinder S. Sidhu, *First* Korematsu *and Now* Ashcroft v. Iqbal*: The Latest Chapter in the Wartime Supreme Court's Disregard for Claims of Discrimination*, 58 BUFF. L. REV. 419 (2010).

2. Readers who keep current on fiction will of course know that there are other novels published post-9/11 that arguably also address its impact on American society or at least seem to have been inspired partly by the attacks and their aftermath. *See, e.g.*, LORRAINE ADAMS, HARBOR (2005); SUSAN CHOI, A PERSON OF INTEREST (2008); ANDRE DUBUS III, THE GARDEN OF LAST DAYS (2009); JONATHAN SAFRAN FOER, EXTREMELY LOUD AND INCREDIBLY CLOSE (2006). The focus of these works, however, is sufficiently different from the direct satire and critique of those I address in this Article that I exclude them from my particular concerns here.

3. I nonetheless include it here because of the close political relationship between Great Britain and the United States in the aftermath of the attacks and the strong support that President Bush received from the British Government. Moreover, given England's longer history of experience with terrorist attacks on its soil, I would argue that it has faced similar concerns about rights and security for longer than the United States and that McEwan's is a relevant voice in this discussion.

4. The classic work in this regard is Christopher Lasch's *The Culture of Narcissism: American Life in an Age of Diminishing Expectations* (1991); see also JEAN M. TWENGE & W. KEITH CAMPBELL, THE NARCISSISM EPIDEMIC: LIVING IN THE AGE OF ENTITLEMENT (2009).

5. *See generally* WHAT THEY THINK OF US: INTERNATIONAL PERCEPTIONS OF THE UNITED STATES SINCE 9/11 (David Farber ed., 2007).

6. The best account of the "positive attitude" aspect of American culture is Barbara Ehrenreich's *Bright Sided: How the Relentless Promotion of Positive Thinking Has Undermined America* (2009). Ehrenreich notes that "positive thinking" is "part of our ideology" and a "discipline of trying to think in a positive way." *Id.* at 4.

7. Ehrenreich shows how the obsession with positive thinking is a form of social control that she compares to Communism's enforced optimism and punishment of dissenting voices that dared to express "defeatism." *Id.* at 202.

8. *See* sources cited *supra* note 1.

creativity cannot and should not be channeled into political camps. Nor am I complaining about the artistry of these novels, all of which I enjoyed. Nonetheless, I think it is worth expressing surprise at this lacuna and trying to understand it, since it may tell us something about society, our art, and the relationship between them.

These works have garnered praise from critics as examples of an explicit genre of "post 9/11 fiction": *The New York Times* called McEwan's *Saturday* "one of the most powerful pieces of post-9/11 fiction yet published," and *Elle* credited Schulman with "bravely and skillfully illuminat[ing] the domino effect of the falling towers on people's psyches and lives." *The Times Literary Supplement* described Kalfus's *Disorder* "[t]he most original novel to be written about America's moral climate in the aftermath of the 9/11 attacks," and according to *The New Yorker*, "Kalfus skewers the pieties surrounding 9/11," and to the *Los Angles Times Book Review* he "free[s] the way we think about September 11" by his "interbleeding of public and private story lines and his lampooning approach."[9]

What these works fail to address, however, as noted above, is the dismemberment of civil rights and constitutional protections that started almost immediately after the attacks. To summarize: shortly after September 11, 2001 the FBI significantly increased its warrantless wiretaps of U.S. citizens.[10] This facilitated procedures by which the National Security Agency began eavesdropping on international calls made by U.S. citizens, eventually assembling, with the help of AT&T, Verizon and Bell South, a database of over ten million Americans, none of whom were suspected of crimes or linked to terrorism.[11] Then on September 17, President Bush authorized the CIA to establish an international network of secret detention facilities for the interrogation of terrorism suspects known as "black sites."[12] The International Committee of the Red Cross ("ICRC") would later call these sites a "hidden global internment network" designed for secret detentions, interrogations, and ultimately torture.[13] Shorty

9. These quotes appear in the front pages of the editions of the books cited in the Article.

10. Dan Eggen, *FBI Papers Indicate Intelligence Violations: Secret Surveillance Lacked Oversight*, WASH. POST, Oct. 24, 2005, at A1; U.S. Civil Liberties: History Commons, *supra* note 1.

11. Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls*, USA TODAY, May 11, 2006, *available at* http://www.usatoday.com/news/washington/2006-05-10-nsa_x.htm.

12. Mark Danner, *U.S. Torture: Voices From the Black Sites*, N.Y. REV. OF BOOKS, Apr. 9, 2009, at 1, *available at* http://www.nybooks.com/articles/archives/2009/apr/09/us-torture-voices-from-the-black-sites/.

13. *Id.*

thereafter, Justice Department lawyer John Yoo wrote a memo asserting that Fourth Amendment protections against arbitrary infringement of a citizen's rights would be irrelevant if the President determined that the threat of terrorism was great enough; a few weeks later, President Bush authorized warrantless surveillance of electronic communications to and from the United States, a practice banned by federal law since 1978.[14] Most notoriously, perhaps, a detention facility for suspects was established at Guantánamo Bay, Cuba where detainees were held indefinitely without access to trials, legal counsel, or the evidence against them.[15]

While many of these acts were secret at the time, most had come to light by the time the works I discuss were written. Moreover, the atmosphere of repression and disregard for civil liberties had been apparent since early on: in September 2001, White House Press Secretary Ari Fleischer warned Americans that they needed to "watch what they say[,] watch what they do" in response to comments by television host Bill Maher about U.S. missile strikes on Afghanistan.[16] The backlash against Maher for expressing views securely protected by the First Amendment protections was alarming; advertisers withdrew commercials from his show,[17] and ABC cancelled it at the end of the season.[18] The highly publicized events surrounding Maher coincided with the less well-known firing of several journalists for criticizing President Bush.[19] Again, none of this is to suggest that the content of art can or should be dictated by current events or political agendas; it is merely to show that the attacks on civil liberties as well as the overall atmosphere of repression were amply present in the public arena when these works about the impact of 9/11 were being written.

These works certainly do critique American society. They have at least three themes in common in this regard: the culture of narcissism, obliviousness to history, and a hunger for the perfect community and happy endings.[20] They both parody these aspects of American culture and, at the same time, to some extent, participate in them. These three cultural quirks

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14. Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, at A1; Cauley, *supra* note 11.

15. John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004.

16. Maher said "the hijackers were not cowards but that it was cowardly for the United States to launch cruise missiles on targets thousands of miles away." Bill Carter & Felicity Barringer, *In Patriotic Time, Dissent Is Muted*, N.Y. TIMES, Sept. 28, 2001, at A1.

17. *Id.*; Editorial, *Free Speech in Wartime*, WASH. POST, Sept. 29, 2001, at A26.

18. *Incorrect to the End; It's Bye-Bye Brains as Bill Maher and Politically Incorrect Sign off*, TORONTO STAR, June 26, 2002, at F7.

19. Manuel Mendoza, *Media's Voices of Dissent May No Longer Be Welcome*, DALLAS MORNING NEWS, Oct. 3, 2001, at A27.

20. *See supra* notes 4-7 and accompanying text.

help explain what I find to be a surprising lack of engagement with these political issues and raise the question of how far artists can subvert the culture of which they are a part, which in turn raises the question of the interface of literature and the law.

I. It's All About Us

These works portray how Americans transformed the September 11 attacks from acts of political-historical significance into acts of their own private dramas, ignoring their implications about the world around us and the forces in it that were, for whatever reason, committed to our destruction. As one character says, "Who knew what the Arabs were like, really? Who the fuck cared?"[21] To some extent—perhaps this is a risk of parody—the novels replicate that transformation. Messud, for example, allows the destruction of the Towers to work a rebirth—whether one that will be actualized is left untold—and renewal for at least one of the characters. McEwan also reworks the specter of terrorism into a form of spiritual and emotional renewal for a family. Both these authors seem to take the idea of world historical events as catalysts for rebirth at least somewhat seriously. Others, like Schulman and Kalfus, more openly parody the narcissism contained in such a notion.

In *Beach*, the Towers' fall becomes the culminating act in the drama between a husband and wife. The couple at the center of the story is Gerhard, a German immigrant and ballet choreographer, and his wife Suzannah, a former ballerina and the grandchild of Polish Jews. The marriage is fraught with financial worries, Gerhard's control issues and his ambivalence about the couple's young child, and Suzannah's emotional isolation. As the attacks are broadcast, and as the day disintegrates around them, Suzannah increasingly equates the events of the day with the drama of her marriage, ultimately screaming at Gerhard that "[y]ou made [our son] miss his first day of school. How will he ever forgive you?"[22]

In Kalfus's *Disorder*, the attacks explode into the lives of a divorcing Manhattan couple who, despite the fact that they now passionately hate each other, continue to share, for financial reasons, an "ill-lit, inadequately maintained, brilliantly located co-op in Brooklyn Heights."[23] The first reaction of each to the news of the fall of the Towers is the delighted—and in both cases futile—hope that the other has been killed in the catastrophe. Marshall (the husband) works in the Trade Towers, and as Joyce (the wife) watches the news among her shocked and horrified co-workers, she "fe[els] something erupt inside her, something warm, very much like, yes it was, a

21. KEN KALFUS, A DISORDER PECULIAR TO THE COUNTRY 150 (2006).

22. HELEN SCHULMAN, A DAY AT THE BEACH 192 (2007).

23. KALFUS, *supra* note 21, at 5.

pang of pleasure, so intense it was nearly like the appeasement of hunger.... She covered the lower part of her face to hide her fierce, protracted struggle against the emergence of a smile."[24] Marshall, for his part, dares to hope that Joyce was on one of the planes that flew into the Trade Center since he did not know she had changed her plans to fly to San Francisco at the last minute. Once he escaped from the building, surrounded by wounded fellow survivors, he "head[s] for the bridge, nearly skipping."[25]

The characters' spinning of the attacks into the story of their personal lives continues. Joyce, envious of a colleague who is having an affair with a firefighter, muses that she, too, wants "some terror sex. After everything that had happened, to her city and to her marriage, she deserved it."[26] Later, she muses, "her life hadn't changed. She was still not divorced and she had lost hope of ever being divorced."[27] Marshall, eavesdropping on a phone conversation from his bedroom in the apartment, hears her refer to his presence by saying, "I can't talk. Osama's holed up in Tora Bora."[28] In the farcical culmination of this trend, Marshall wires himself with explosives and tries to detonate himself in the couple's kitchen where Joyce is making lunch for the children and ignoring him. When the device fails to go off, they squabble over who can make it work:

> "God is great," he announced. He took a moment to inhale and brought the clips together.
>
> She looked up, annoyed that he had spoken to her, apparently without necessity. It was against their ground rules.
>
> . . .
>
> "God is great," he repeated, again touching the clips. He opened one and clipped it around the other, but it slipped off. He then squeezed both clips and snagged one in the other, jaw to jaw. They held.
>
> "What are you doing? What is that?"
>
> "A suicide bomb.... I made it myself. I have enough dynamite to blow up half the block. God is great."
>
> . . .
>
> "Why doesn't it work then?"

24. *Id.* at 3.
25. *Id.* at 20.
26. *Id.* at 23.
27. *Id.* at 63.
28. *Id.* at 76.

> "I don't know," he said, irritated. "The wiring is tricky."
>
> "Did you follow the instructions?"
>
> "They were in Arabic. But there was a diagram."
>
> She put down the carrot and the peeler and sighed wearily.
>
> "Let me see."
>
> "I can fix it myself," he declared.
>
> "Don't be an asshole."[29]

McEwan's *Saturday* performs the least self-critical move in this regard. In *Saturday*, Henry Perowne, a successful neurosurgeon, wakes at 3:40 one February day and, fully awake, leans out of a bedroom window and sees what he thinks is a terrorist attack on an airplane coming into Heathrow:

> The leading edge of the fire is a flattened white sphere which trails away in a cone of yellow and red. . . . As though in pretence of normality, the landing lights are flashing. But the engine note gives it all away. Above the usual deep and airy roar is a straining, choking banshee sound growing in volume—both a scream and a sustained shout, an impure, dirty noise that suggests unsustainable mechanical effort beyond the capacity of hardened steel, spiraling upwards to an end point, irresponsibly rising and rising like the accompaniment to a terrible fairground ride. Something is about to give.[30]

The fire turns out to be nothing more than that—a fire on a cargo plane, which lands without incident. But the fantasy of political violence turns into reality in the family's life that day when Perowne and his family are held hostage in their home by a thug with whom Perowne had had an altercation on the way to work that morning. The situation is ultimately defused, after a knife wielding and a threatened rape, by Perowne's daughter reciting Matthew Arnold's "*Dover Breach*," which, improbably, leaves one of the intruders so moved that he changes his mind about wishing to harm the family. The closest we get to an explanation for this about-face is the attacker's statement that the poem is "beautiful . . . . [i]t makes me think about where I grew up."[31] This is as unconvincing in the book as it sounds here—its purpose here can only be to proclaim a meditation on art's power in the face of anarchy, a power that, the incredible nature of the episode tells us, is nonexistent.

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29. KALFUS, *supra* note 21, at 188-89.

30. IAN MCEWAN, SATURDAY 14 (2005).

31. *Id.* at 231.

II. History Attacks

Post-9/11 fiction depicts the planes that crashed into the Towers on September 11 as missiles history sent exploding into the midst of a nation happily oblivious to the world around it. Now the characters cannot escape it; one of them feels that "world history [is] hot on her trail, about to rap its knuckles on her door."[32] Another character, "a burly sad-eyed general practitioner from some mysterious country of the East," says to a patient, "Now you know what it's like to live in history."[33] This flight from history is part of the reason, I suggest, that these novels fail to engage the issue of post-9/11 assault on civil rights: if our government "disappears" people, spies on us, and eavesdrops on our phone conversations, we are no longer the "shining city upon a hill"[34] risen above the sins of history to create an exceptional nation of righteousness. On the contrary, we become no better than Argentina, Chile, or Guatemala; such a realization threatens our very notions of national selfhood. If this is the case, the parodies of Americans interpreting the attacks to be about their private lives also provide a degree of comfort: they save us from seeing that we as a nation are no different from anyone else—no more pure, no more free of sin.

The first pages of *Emperor's Children* reveal, more directly than *Disorder*, history and the marks it has left on the various peoples of the world, "rapping its knuckles" on America's door. The opening scene takes place at a literary soiree in Sydney, where one of the main characters, a New Yorker named Danielle, is visiting to research a potential documentary about the Australian government's relationship with the Aborigines as a "lens" through which to view the idea of reparations for African Americans. Danielle subversively wonders, however, whether an American audience "could care less about the Aborigines? Were the

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32. KALFUS, *supra* note 21, at 181-82.

33. *Id.* at 57-58.

34. This imagery is from John Winthrop's 1630 sermon *City Upon a Hill*, in which he told his fellow pilgrims:

> for wee must Consider that wee shall be as a Citty upon a Hill, the eies of all people are uppon us; soe that if wee shall deale falsely with our god in this worke wee have undertaken and soe cause him to withdrawe his present help from us, wee shall be made a story and a by-word through the world, wee shall open the mouthes of enemies to speake evill of the wayes of god and all professours for Gods sake; we shall shame the faces of many of gods worthy servants, and cause theire prayers to be turned into Cursses upon us till wee be consumed out of the good land whether wee are goeing.

NEW WORLD METAPHYSICS: READINGS ON THE RELIGIOUS MEANING OF THE AMERICAN EXPERIENCE 53 (Giles Gunn ed., 1981). For a general discussion of American exceptionalism, see Godfrey Hodgson, *The Myth of American Exceptionalism* (2009).

situations even comparable?"[35] Later at dinner, this act of displacement—Aborigines across the world taking the place of the American enslavement of Africans—is itself undermined by an allusion to the uncanny power of the colonial repressed to boomerang back on the colonizers. The guests are reminiscing about exotic vacation spots like Tahiti, where, as one of them says, it is "very Gauguin, and so sexy. I mean, the people on that island are *so* sexy, it's to die."[36] Danielle asks whether that was where "Captain Cook got killed, in the end?" and is firmly corrected—"Oh no, doll, that was Hawaii."[37]

The appearance of Captain Cook in the pages of the literature of a colonial power is never a good sign. Recall the opening pages of Dickens's *Bleak House*, a novel saturated with anxiety about the colonial encounter, when Esther, Richard and Caroline arrive at Bleak House and see their rooms:

> Our sitting-room was green; and had framed and glazed, upon the walls, numbers of surprising and surprised birds, staring out of pictures at a real trout in a case, as brown and shining as if it had been served with gravy; at the death of Captain Cook; and at the whole process of preparing tea in China, as depicted by Chinese artists.[38]

As the specter of the revenge of the colonized, it is hard to beat Captain Cook, famously thought to have been devoured by the Hawaiian Island cannibals and thus a warning of the ultimate threat—dismemberment and destruction by the very objects of colonial power.[39] Cook's appearance in the early pages of *Emperor's Children*, I suggest, constitutes a literary foreshadowing of September 11, and it may also explain our aversion, shared with most other colonial powers, to facing our own history in our domestic spheres. Depictions of the power of the colonized to disrupt the colonizer's world from within are not new—Paul Brown showed how Caliban, the "thing of darkness," in Shakespeare's *Tempest* interrupts Prospero's famous speech at the end of the play in an act of disruption that attacks the very center of colonial power.[40] In all these cases, the message

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35. CLAIRE MESSUD, THE EMPEROR'S CHILDREN 5 (2006).

36. *Id.* at 9.

37. *Id.*

38. CHARLES DICKENS, BLEAK HOUSE 86 (1853) (Nicola Bradbury ed., 1996).

39. For the theme of cannibalism and fear of dismemberment in the colonial imagination, see, for example, Harry Sewlall, *Cannibalism in the Colonial Imaginary: A Reading of Joseph Conrad's "Falk,"* 22 J. OF LITERARY STUDIES 158 (2006) and Steven Slemon, *Bones of Contention: Post-Colonial Writing and the 'Cannibal' Question*, *in* LITERATURE AND THE BODY 163 (Anthony Purdy ed., 1992).

40. *See* Paul Brown, *This Thing of Darkness I Acknowledge Mine; The Tempest as the*

is that the world we have made—thus, history itself—will come back to haunt us, hunt us, and maybe worse.

History erupts even more blatantly into Schulman's narrative in *Beach.* The couple, a German married to the descendant of Polish Jews, is exactly the kind of couple that America symbolizes—a union that transcends history, living in the present and future, released from Old World hatreds and blood feuds. After the attacks, they flee the city to take refuge in the wife's mother's beach house in the Hamptons. Amidst the chaos of escaping Manhattan, the husband befriends a young French woman with a baby, Martine, whose husband is missing and feared dead; Gerhard brings her along to the beach, and suddenly history casts its shadow: Jewish Suzannah becomes irrationally convinced that Martine's blue-eyed baby is Gerhard's:

> "I've got eyes in my head," shouted Suzannah. "I've seen that baby's eyes!"
>
> "Eyes, eyes? What are you talking about?"
>
> . . . .
>
> "What? Martine? Wylie? Are you talking about Wylie?" Her inference was beginning to dawn upon him.
>
> "He's got your eyes, Gerhard."
>
> . . . .
>
> "Suzannah, you are out of your mind," said Gerhard. "You belong in a mental hospital."[41]

History's poison has infected others too—another character, Leah, accuses Gerhard of fathering the blue-eyed child as well. In fact, it is seeping in everywhere: Suzannah analogizes their flight to the Hamptons to her grandparents' flights from pogroms; Gerhard subconsciously addresses Martine when he finds her slumped on the floor of the ATM as "Fraulein"; Gerhard himself wonders, thinking about his son, "[t]he Jew and the German. Were they wrong after all to mix their unholy blood?"[42]

The most forceful explosion of history into American life, however, occurs in Kalfus's novel: the attacks occur in the midst, not only of Marshall and Joyce's divorce, but also in the middle of the wedding plans of Neal (a Jew) and Flora (an Anglican). After 9/11, Marshall becomes an Iago-like character set on fomenting sectarian strife between the couple and

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Discourse of Colonialism, in THE TEMPEST: A CASE STUDY IN CRITICAL CONTROVERSY 205-29 (Gerald Graff & James Phelan eds., 2000).

41. SCHULMAN, *supra* note 22, at 191.

42. *See id.* at 194.

their families and between bride and groom as well. At the fiancé's bachelor party, he remarks that the hatred behind the attacks was partly caused by "fanatics from Brooklyn[,] . . . those Jewish settlers on the West Bank"[43] and calls Israel a "crappy little country,"[44] provoking an outburst from the fiancé's brother:

> They'll never accept us, never. . . . That's why they fought so hard against you and don't want the least Jewish content in your wedding: no rabbi, a single lousy Jewish prayer, a huge argument just to get the chuppah. . . . [T]heir environment is totally inimical to everything you are.[45]

Finally, Marshall almost manages to sabotage the arrangements for the chuppah, and the wedding is saved only at the last minute by the groom, who arrives an hour late, dragging the canopy up the aisle, as his mother-in-law glares at "her imminent son-in-law, an hour late for his own wedding, with a fury that would resonate down through the decades."[46] So much for banishing blood feuds behind to the old country.

III. Happy Endings and American Myths

These works offer a happy ending or, to one degree or another, satirize the wish for one, in uneasy complicity with the American insistence on optimism.[47] The endings occupy a spectrum between reflecting on and satirizing our refusal to acknowledge divisions in the body politic. On the milder side, Claire Messud offers the hope of rebirth for at least one of her characters, the misfit Frederick, also called Bootie, who has just written an exposé of another character in the novel, his uncle, a prominent New York intellectual, who has taken Bootie in, hired him as his assistant, and sought to mentor the young man. Not that we as readers are unsympathetic to Bootie's public exposure of a pompous hypocrite, but the result of his transgression is that he must leave the apartment and start afresh. He achieves this by faking his own death—or not contradicting the other characters' assumptions that he died—in the fall of the Twin Towers. In one of the last scenes of the novel, one of the other characters spots him working in a restaurant and, shocked to see him alive, insists he contact his mother and the family, but he refuses, saying he is just "doing what [he needs] to do to survive" and that "Frederick [no longer] exist[s]."[48] Packing

43. KALFUS, *supra* note 21, at 96-97.

44. *Id.* at 99.

45. *Id.* at 100.

46. *Id.* at 126.

47. *See supra* notes 6-7.

48. MESSUD, *supra* note 35, at 429.

to leave town after this encounter, he thinks "This person in motion was who he was becoming: it was something, too: a man, someday, with qualities. Ulrich New. Great geniuses have the shortest biographies, he told himself; and take them by surprise. Yes. He would."[49]

This ending seems to offer some genuine hope to this one character, at least. Schulman's *Beach* also presents the events of 9/11 as offering renewal and redemption to some of her characters, but the hollowness of their hopes is more apparent than it is in Messud's text. The morning after their fight, Gerhard and Suzannah meet on the beach, where it becomes clear that Gerhard is hopelessly deluded about both the state of the country and that of his marriage, which have become one and the same:

> "Now we know what we are made of and we are better for it. The world will come together. The world will heal itself of this shocking, brutal performance. The world will rise to the occasion. You'll see, Suzannah. Don't scoff."
>
> . . . .
>
> "You'll see," said Gerhard. "We will be better, Suzannah."
>
> . . . .
>
> He held his wife in his arms. He infused her with his strength. He believed himself.
>
> He believed himself, that day at the beach.[50]

Even the British McEwan seems susceptible to the appeal of the happy ending. Despite its very personal violence, the novel ends in a bath of benevolence: the doctor decides to forgive the intruder and operate to cure his congenital disease instead. He and his wife reconcile themselves to their daughter's pregnancy—discovered when the intruders made her strip in front of them—and the surgeon falls asleep in bed next to his wife, thinking, "[t]here's always this . . . there's only this. . . . this day's over."[51]

The most satiric conclusion is Kalfus's *Disorder*. The ending savagely mocks the myth of community: the historical aspects of the story slide off the continuum of reality into historical fantasy; the Iraq war is swiftly won and the Americans impose a "Velvet Occupation"; Iraqis find Saddam but refuse to turn him over to U.S. forces and insist on executing him themselves to a chorus of "*The Star Spangled Banner*." Soon entrepreneurs start selling t-shirts adorned with the silk-screened image of the dictator's hanging corpse; American investigators uncover a caché of

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49. *Id.* at 431.

50. SCHULMAN, *supra* note 22, at 212.

51. MCEWAN, *supra* note 30, at 289.

nuclear weapons in Iraq; soon thereafter, the Israelis and Palestinians make peace, and Bin Laden is captured. At this, crowds fill the streets of Manhattan, waving flags, throwing confetti and singing patriotic songs. Marshall suddenly feels consumed by "sudden love for his country . . . an honest, unalloyed, uncompromised white-hot passion."[52]

It is clear that this fantasy of national unity leaves no room for the possibility that individuals should be singled out for treatment different from the rest—part of its allure is the erasure of difference. Marshall sings "*My Country Tis of Thee*" "squeezed between a young sari-wrapped woman and a tall man in dreads."[53] In this context, to acknowledge that the "sari-wrapped woman" or the "tall man in dreads" might in the next moment disappear into a night and fog of indefinite detention is an unwelcome intrusion into a dream of unity and wholeness.

It is worth asking why this yearning for the perfect community holds such power that it makes it hard to face the destruction of the very constitutional values from which it stems. The Preamble to the Constitution calls for a "more perfect union," a phrase whose solecism might be seen to reveal some anxiety about that union.[54] How can something become "more perfect?" Of course, the Framers believed, in harmony with their age, that true perfection did not exist on earth and could be found only "beyond the veil," and thus the idea that we could and should keep striving, in this life, for "more perfection" makes philosophical sense, but grammatically, the

52. KALFUS, *supra* note 21, at 236.

53. *Id.*

54. For a discussion of this phrase, see Martin Diamond, The Federalist *on Federalism: "Neither a National Nor a Federal Constitution, But a Composition of Both*," 86 YALE L.J. 1273, 1280-81 (1977) (asserting that "[t]he phrase . . . is no grammatical solecism, but an accurate description of the compromised, compoundly federal and national system that resulted from the [constitutional] Convention" a claim which, I argue, undermines itself) and A.H. Feller, Book Review, 51 COLUMB. L. REV. 537, 538 (1951) (reviewing HANS KELSEN, THE LAW OF THE UNITED NATIONS, (1950)) (referring to the phrase's "celebrated solecism"). For the meaning of the phrase in constitutional interpretation throughout American history, see R.B. BERNSTEIN, THE FOUNDING FATHERS RECONSIDERED 168-69, 175-76 (2009) (noting that the phrase suggests that "the framers' recognition that the Constitution not only was improving on the Union as defined by the Articles of Confederation but that both it and the Union were capable of further improvement" and noting that the idea of "perfecting the union has been a key theme of African American constitutional thought" and central to President Obama's vision of American historical progress). I agree that the term was not a political or philosophical solecism as the Framers meant it, but I do maintain that grammatically it is still problematic, and that the contradiction it contains—the idea improving something that by definition cannot be improved—might both reflect and inspire anxiety. Indeed, the Framers had reason to be worried about the state of their fragile union at the time, as the very notion of sovereign states under a federal government seemed like an unstable concept.

phrase remains illogical. The Framers were indeed anxious about the union, both in their time and in times to come.[55] A popular graphic of the era shows a snake cut into eight pieces over the caption "Join, or Die."[56] Clearly, union was a matter of life or death—both literally and figuratively. Does the phrase "a more perfect union" impose continual striving for the unattainable, the way the Calvinist God demanded ceaseless scouring of the world for ever new signs of salvation, never allowing for a definitive answer?

One way to reassure ourselves of our "more perfect union" is to decline to hold anyone out from that union as accountable for the civil rights violations that occurred after 9/11. Indeed, we as a nation have shown an alarming refusal to do so. For example, despite the fact that Human Rights Watch has collected over 330 reports of abuse implicating over 600 U.S. personnel, no CIA official and very few military members have been charged.[57] An internal memo declined to recommend the disbarment of John Yoo, the Justice Department official whose "torture memo" gave President Bush the legal authority to torture detainees and prisoners of war, finding him guilty of only "poor judgment."[58] Another way is to look away from rights violations that target those in our midst who have Arabic sounding names or travel to suspect parts of the world.

CONCLUSION

Schulman notes in the afterword to *Beach* that a photograph of a man falling head first from the Towers "inspired and haunted" her through the writing of the book.[59] This seems to indicate that the story she tells is a kind of sublimation of that image, both inspiration and specter. How did this image of a person plunging to his death metamorphose into ballet, art and marriage? On the one hand, Schulman reveals as hollow the belief that art

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55. *See* BERNSTEIN, *supra* note 54, at 41-49.

56. *See id.* at 110. The image of a snake became a popular symbol at the time, in part because of the superstition that a snake that had been cut into pieces could come back to life if someone joined the pieces together before sunset. In this cartoon, it is a plea for the colonies to stay alive by joining together in the face of threat from Great Britain. *See* Chris Whitten, *Don't Tread on Me: The History of the Gadsden Flag and How the Rattlesnake Became a Symbol of American Independence*, FOUNDING FATHERS.INFO, July 5, 2001, http://www.foundingfathers.info/stories/gadsden.html#history.

57. HUMAN RIGHTS WATCH, BY THE NUMBERS: FINDINGS OF THE DETAINEE ABUSE AND ACCOUNTABILITY PROJECT 2, http://www.humanrightsfirst.info/pdf/06425-etn-by-the-numbers.pdf (2006).

58. Posting of Michael Isikoff to Declassified NewsWeek Blog, http://blog.newsweek.com/blogs/declassified/archive/2010/02/19/report-bush-lawyer-said-president-could-order-civilians-to-be-massacred.aspx (Feb. 19, 2010, 20:16 EST).

59. SCHULMAN, *supra* note 22, at 214.

can ward off or make sense of destruction; on the other hand, the very act of sublimation that is the novel attempts this. Indeed, one might see certain images in the novel in this way: at one point Suzannah imagines that she and another character are "falling together forever down the black hole inside her head."[60] Has the image of one man falling head first transformed itself into this internal fall in a way that is at once both reassuring—because it is now psychological rather than external—and disturbing—because it is no longer cabined in its slot in time but "forever"?

While *Beach* is a meditation on sublimation and the role of art, to what extent is it itself—and the other works I discuss here—an act of sublimation that replicates what it seeks to satirize? As the narrator of *The Reluctant Fundamentalist* puts it:

> As a society, you were unwilling to reflect upon the shared pain that united you with those who attacked you. You retreated into myths of your own difference, assumptions of your own superiority. And you acted out these beliefs on the stage of the world, so that the entire planet was rocked by the repercussions of your tantrums, not least my family, now facing war thousands of miles away. Such an America had to be stopped in the interests not only of the rest of humanity, but also in your own.[61]

As a society, we were oblivious before 9/11 to the degree of hatred toward us in parts of the world; after it, as these works show, we were reluctant to acknowledge ways that those very powers that had caused that hatred were attacking our own cherished rights and freedoms, and to hold accountable those responsible. Instead, reflecting and reenacting our anxious longing for that perfect union, we made it all about ourselves. The question that emerges for the interface of law and literature is, to what extent can art stand outside of culture; can it highlight its failings without to some extent reenacting them?

60. *Id.* at 183.

61. MOHSIN HAMID, THE RELUCTANT FUNDAMENTALIST 168 (2007).

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BOOK REVIEW

A REVIEW OF: THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE

JEFF BOVARNICK*

THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE. By: *Geoffrey S. Corn, et al.* New York: Oxford University Press, Inc. 2009. Pp v., 248. Hardcover, $85.00.

Abstract: Since the terrorist attacks of September 11, 2001, scholars have debated the law of war and its applicability to the war on terror from numerous perspectives, to include the policy, human rights, and law enforcement perspectives. Various viewpoints cover the full spectrum of law of war issues, ranging from conflict classification to targeting, detention, interrogation, and trial of terrorists, as well as the responsibility of the commanders leading the war effort. Arguably, one of the most important perspectives on these issues—the military perspective—has been the most underrepresented. Considering the complexity of the legal issues on the modern battlefield, scholars who have served in the military and advised commanders have a critical perspective to round out the debate.

The co-authors of *The War on Terror and the Laws of War* have enhanced the legal debate by providing the reader a comprehensive analysis of the major issues in the current armed conflict against transnational terrorists. This review presents a synopsis of the co-authors' legal analysis from their collective experience as military officers and judge advocates who served and advised commanders on law of war issues during periods of armed conflict. Through their scholarship, the co-authors offer readers another perspective—the essential military perspective—and a more thorough understanding of the complex legal landscape in the war on terror.

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> [E]valuating the propriety of twenty-first century military operations requires a sophisticated understanding of the law of war, an understanding made all the more complicated by the rise of non-state actors who operate transnationally and use terrorism as their principal weapon.[1]

INTRODUCTION

In the above quote, Major General Charles Dunlap[2] provides an apt description of the complex legal landscape in the current war on terror. The controversy over the laws applicable to the armed conflict against terrorists has touched all branches of the United States government and everyone from legal scholars, human rights advocates, and military practitioners entered the debate. And while there may be controversy, the fact remains that executive, legislative, and judicial branches all recognize "that the United States has and will continue to invoke the law of war as a source of authority for military operations to destroy, disable, capture, and incapacitate terrorist enemies."[3]

In *The War on Terror and the Laws of War*, the authors' collective ability to provide a clear analysis of this specialized area of the law[4] makes this comprehensive one-volume text[5] relevant for those scholars, advocates, practitioners, and government officials who help shape U.S. law and policy in this arena. The book's seven chapters could stand as independent law review articles on the essential law-of-war topics they cover, yet taken together they provide the reader with the critical "linkage of a technical

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1. Charles J. Dunlap, Jr., *Foreword* to GEOFFREY S. CORN ET AL., THE WAR ON TERROR AND THE LAWS OF WAR: A MILITARY PERSPECTIVE vii (2009) (emphasis added).

2. Major General Charles J. Dunlap, Jr., is the Deputy Judge Advocate General of the United States Air Force Judge Advocate General's Corps, a position that he has held since May 2006. He will retire in June 2010 after thirty-four years of service as a judge advocate. Biographies: Major General Charles J. Dunlap Jr., http://www.af.mil/information/bios/bio.asp?bioID=5293 (last visited May 1, 2010).

3. Geoffrey S. Corn, *Introduction* to CORN ET AL., *supra* note 1, at xvi.

4. As used in the book, the terms "law of war" and "law of armed conflict" (LOAC) refer to the law governing the conduct of belligerents engaged in armed conflict and is the official term used by the Department of Defense. *See* CORN ET AL., *supra* note 1, at 1 n.2; U.S. DEP'T OF DEFENSE, DIR. 2311.01 E, DOD LAW OF WAR PROGRAM (9 May 2006). These terms are also synonymous with "international humanitarian law" (IHL).

5. While *The War on Terror and the Laws of War* is part of Oxford University Press's *Terrorism and Global Justice Series*, each of the three books in the series are separate and distinct and not part of a multi-volume set. The other two books in the series are Amos Guiora's *Freedom From Religion* (2009) and Philip O'Neill's *Verification in an Age of Insecurity: The Future of Arms Control Compliance* (2009).

understanding of the law of war with the actual practice of war."[6] With a focus on the warfighters' efforts at the front of our nation's effort to combat transnational terrorism, the authors provide in-depth, understandable legal analysis on the practical application of the law to: (1) the armed conflict itself; (2) the targeting of persons and property; (3) detention; (4) interrogation and treatment of detainees; (5) trial and punishment for battlefield misconduct; (6) command responsibility; and (7) battlefield perspectives.[7]

This review will examine why the authors are well-suited to provide a military perspective, "a heretofore underrepresented viewpoint in the contemporary scholarly landscape," and how the authors provide the reader with "a keen understanding of how the law of war is implemented by warfighters in today's battles against terrorists."[8]

I. A Military Perspective

The true strength of *The War on Terror and the Laws of War* comes from its six authors[9] and their "military perspective." While there has been a proliferation of legal scholarship in the aftermath of September 11, 2001, few books or texts combine the talents and experience of multiple military practitioners, specifically former judge advocates—military lawyers—who devoted the majority of their legal careers to the practice of law in the military.[10] As Major General Dunlap notes, *The War on Terror and the Laws of War*:

> aims to bring to the discussion the perspective of lawyers who have served in what the Supreme Court in *Parker v. Levy* calls the "specialized society separate from civilian society" which is the armed forces. By virtue of their military service in this

6. Dunlap, *Foreword* to CORN ET AL., *supra* note 1, at viii.

7. These are the book's seven chapters. *See id.* at v (displaying the Table of Contents).

8. Dunlap, *Foreword* to CORN ET AL., *supra* note 1, at ix.

9. The six authors, Geoffrey S. Corn, Victor M. Hansen, Dick Jackson, Eric Talbot Jensen, Michael W. Lewis, and James A. Schoettler, Jr., have more than 115 years of combined active duty and reserve military service with the majority of that time as judge advocates. *See* CORN ET AL., *supra* note 1, at 1 (Corn), 37 (Jensen), 67 (Schoettler), 125 (Jackson), 187 (Hansen), and 209 (Lewis) for the author's individual biographies.

10. Prior to becoming judge advocates, four of the authors (Corn, Hansen, Jackson, and Jensen) served as active duty-line officers in military branches other than the Judge Advocate General's Corps. Corn served as a Military Intelligence Officer, Jackson served as an Infantry Officer, and Hansen and Jensen served as Armor Officers before entering the U.S. Army Judge Advocate General's Corps via the Funded Legal Education Program. Telephone Interview with Geoffrey S. Corn, Assoc. Professor of Law, S. Tex. Coll. of Law, in Houston, Tex. (Jan. 21, 2010).

> "specialized society," these attorneys bring a unique perspective to the law of war.... [T]he collective experience of these authors in the art of war—understanding weapons, tactics, and especially, the psychology of warriors on a non-traditional battlefield—enables the authors to provide an often overlooked perspective on these increasingly complex and important legal issues.[11]

With a wide target audience that includes law students, legal scholars, human rights advocates, and policymakers (in addition to military practitioners), the military perspective in the debate over the laws applicable to the war on terror cannot be underestimated. In an armed conflict, our military commanders are charged with the immense responsibility of ensuring that the laws of war are applied by the service members under their command. These commanders, highly skilled in executing military operations, must rely on their legal advisors—primarily judge advocates—to provide timely and accurate legal advice on today's complex battlefield. Thus the task falls to judge advocates to understand not only their commanders' decision-making processes, but also the complexities of the military operations that their commanders orchestrate. It follows that the authors of this book[12] (who once filled the critical role[13] of advising commanders) possess and provide that critical military perspective when analyzing the laws of war and their applicability to the current conflict.

As noted above, there has been a large increase in the scholarship devoted to the law and its applicability to the war on terror. As such, there are numerous perspectives—the human rights perspective, the policy perspective, the international perspective, and the law enforcement perspective among others. These differing perspectives on controversial issues lead to healthy debates. When the issues involve armed conflict and, consequently, matters of life and death, the debates become even more contentious. For any healthy debate, knowledge of the full range of issues is essential and, of course, for lawyers debating the law, this is an understatement. In *The War on Terror and the Laws of War*, the authors'

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11. Dunlap, *Foreword* to CORN ET AL., *supra* note 1, at viii (quoting Parker v. Levy, 417 U.S. 733, 744 (1974)).

12. All but one of the authors served as judge advocates. Professor Mark Lewis was an active duty Navy pilot before attending law school, and he did not serve on active or reserve duty as a judge advocate. Michael W. Lewis, *Battlefield Perspectives on the Laws of War*, *in* CORN ET AL., *supra* note 1, at 209.

13. Although he retired from active duty after thirty years, as the Law of War Legal Advisor for the Department of the Army, Dick Jackson continues to advise senior officers and government officials.

collective expertise on the laws of war and their credentials as both military practitioners and legal scholars are impeccable. Due to this combined background, the authors provide a wide audience of readers with a view of the debate through a lens they may not have otherwise considered, or if it had been considered, little scholarship existed to further the debate. What follows is the authors' military perspective of the laws of war in the war on terror.

II. The Laws of War

A. What Law Applies to the War on Terror?

In Chapter 1, Professor Corn, perhaps the most prolific writer[14] among the six authors, proffers the threshold question that lays the foundation for the entire text. While the question itself appears simple, for reasons discussed below, the answer, and how it is derived, is not. Professor Corn's proposed answer—the law of armed conflict (LOAC)—is the subject of much debate from other non-military perspectives. Therein lies the challenge for Professor Corn—how to explain to (or convince) a wide audience of lawyers and non-lawyers, students and scholars, military and civilians, and international and domestic practitioners in the fields of international humanitarian law and human rights law that it is the LOAC that applies (as a matter of law, not policy) to the war on terror. In thirty-six pages with dozens of references, Professor Corn accepts and meets the challenge.

Presuming a baseline knowledge of LOAC, the author begins with a review of the law-of-war framework and the traditional law-triggering paradigm for international armed conflict (Common Article 2) and non-international (or internal) armed conflict (Common Article 3).[15] Central to

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14. In addition to this book, Professor Corn's Faculty Bibliography lists forty-five articles, thirty-five commentaries, another book, a book review, and six chapters for other publications. Corn—Faculty Bibliography of Writing, South Texas College of Law, http://www.stcl.edu/faculty_pages/facbiblo.htm#corn (last visited May 1, 2010).

15. See generally Geoffrey S. Corn, *What Law Applies to the War on Terror?*, *in* CORN ET AL., *supra* note 1, at 1, 2 & n.3 for a discussion of Common Articles 2 and 3 of the four Geneva Conventions of 1949. *See also* Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field arts. 2 and 3, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter GCI, Common Article 2 and Common Article 3], *reprinted in* INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., LAW OF WAR DOCUMENTARY SUPPLEMENT 101 (2009) [hereinafter LAW OF WAR DOC SUPP]. International armed conflict (between two States) triggers Common Article 2 and therefore the entire body of laws contained in the four Geneva Conventions of 1949 as well as Additional Protocol I of 1977. Non-international (or internal) armed conflict (intra-State conflict restricted to the territory of a single state between regular armed forces and dissident or insurgent groups or those armed forces

this analysis is the distinction between LOAC principles applying to an armed conflict as a matter of law or as a matter of policy. Even when armed conflicts do not meet the criteria to trigger Common Articles 2 or 3, if the United States sends military forces overseas, those forces will adhere to LOAC principles (military necessity, distinction, proportionality, and humanity) as a matter of policy even when they may not apply as a matter of law.[16] Moving on to the war on terror specifically, Professor Corn then makes his critical point that serves as the launching pad for the remainder of the chapter:

> A new legal position began to emerge: the authority of the LOAC would be asserted to provide the legal basis for the execution of military operations against al Qaeda—an entity considered to be engaged in an armed conflict with the United States; however, . . . al Qaeda captives were afforded no . . . LOAC protections because the conflict they engaged in defied classification under either Common Article 2 or 3.
>
> The incongruity of this theory was readily apparent: the United States was engaged in an armed conflict that provided the authority to engage, destroy, capture, and detain the newly defined enemy; however [because] it was an armed conflict that did not fit into the traditional Common Article 2/3 "either/or" . . . paradigm, the LOAC did not apply to constrain or regulate U.S. operations. With regard to execution of combat operations, this incongruity had little impact due to the military practice of following LOAC principles during all operations as a matter of policy.[17]

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fighting each other) triggers Common Article 3 (only) and its limited rules as well as the narrowly applied Additional Protocol II of 1977. *Id.*; *see also* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Additional Protocol I) [hereinafter API] and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II) [hereinafter APII], *opened for signature* Dec. 12, 1977, 16 I.L.M. 1391 *reprinted in* LAW OF WAR DOC SUPP, *supra*, at 187-231; *see also* INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN.'S LEGAL CTR. & SCH., THE LAW OF WAR DESKBOOK 17-24 (2010) [hereinafter LAW OF WAR DESKBOOK]. In addition to the four Geneva Conventions of 1949 and Additional Protocols I and II of 1977, numerous other treaties and documents are reprinted in their entirety in the LAW OF WAR DOC SUPP. These two books, the Law of War Deskbook and the Law of War Documentary Supplement (along with the INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GEN. LEGAL CTR. & SCH., OPERATIONAL LAW HANDBOOK (2009)), are available at http://www.loc.gov/rr/frd/Military_Law/LCS-International-and-Operational-Law-Dept.html.

16. Corn, *supra* note 15, at 2-3.

17. *Id.* at 4 (footnote omitted).

After recapping the well-documented flaws in the Bush Administration's policies and criticizing the administration's "authority without obligation" paradigm,[18] Professor Corn then educates the reader on the alternative legal theories[19] that emerged to cover "transnational armed conflict,"[20] to include the United States Supreme Court's decision in *Hamdan v. Rumsfeld*,[21] that Common Article 3 applies in "contradistinction" to Common Article 2 in the United States armed conflict against al Qaeda.[22]

> What is even more problematic from a pragmatic military perspective is that the Common Article 3 characterization of combat operations against transnational non-state enemies fails to address principles of the law related to the application of combat power. Common [A]rticle 3's substantial mandate is focused only on the treatment of persons rendered *hors de combat* (unable to fight), and does not regulate the application of combat power. Thus, even when Common Article 3 is applied in "contradistinction" to Common Article 2, the trigger for application of these equally important and relevant regulatory LOAC principles remains undefined.[23]

Although Professor Corn criticizes the *Hamdan* decision and the Court's view of an "either/or" Common Article 2/3-law triggering paradigm,[24] he proposes a solution and perhaps, a new paradigm. In

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18. *Id.* at 4-10.

19. *Id.* at 10-11. Based on the premise that the United States use of armed force against the non-state al Qaeda terrorist fell into a regulatory gap outside the common Article 2/3 paradigm, Professor Corn discusses the four theories that emerged: (1) the International Committee of the Red Cross (ICRC) view that there is no gap and that either Common Article 2 or Common Article 3 applies to all armed conflict; (2) the "internationalized" Common Article 3 theory—if it is not Common Article 2, then it must be Common Article 3 (*see also infra* note 23); (3) the "militarized" extraterritorial law enforcement theory that it is not armed conflict, but law enforcement operations governed by human rights law; and (4) the "transnational armed conflict" theory advanced by Professor Corn and his colleagues (*see also infra* note 20).

20. Transnational Armed Conflict is "the extraterritorial application of military combat power by the regular armed forces of a state against a transnational non-state armed enemy." *Id.* at 10 n.25.

21. 548 U.S. 557 (2006).

22. Corn, *supra* note 15, at 12, 18-19 n.31 (quoting Justice Stevens's majority opinion in *Hamdan v. Rumsfeld*).

23. *Id.* at 22-23.

24. *See generally id.* at 20-24 (subsection entitled "Rethinking the Core Purposes of the 1949 Law Triggering Paradigm"). In this section, Professor Corn provides options outside a stringent reliance on the "either/or" paradigm "in favor of a more pragmatic armed conflict trigger that responds to . . . 'transnational' combat operations [to reconcile] . . . national

response to his question "what law applies to the war on terror?" the author concludes that LOAC applies—"at least applicability of fundamental LOAC principles such as humanity, distinction, proportionality, and the prohibition against inflicting unnecessary suffering—to invocation of the most basic authority of armed conflict: inflicting death as a measure of first resort."[25]

So then, the real question may be: what triggers these LOAC principles in the war on terror? Again, the author proposes a solution—the need for a *de facto* indicator of armed conflict—that is to say certain "law-triggering conditions beyond those focused on the inter/intra-state conflict paradigm."[26] Here, the author suggests that the distinction between "conduct-based use-of-force authority" versus "status based use-of-force authority" is the key factor in the analysis and he concludes that "when armed forces conduct operations pursuant to a status based use-of-force authority, they are essentially operating within an armed conflict paradigm."[27] In status based military operations, deadly force as first resort is the norm and such operations are legally permissible as long as they comply with the other fundamental LOAC principles.

In Chapter 1, the author concludes that a transnational armed conflict trigger that invokes the fundamental LOAC principles (including the regulation of the application of combat power and the requirement to provide humane treatment of captured and detained personnel) will serve the interests of both the victims of war and the warriors that engage in combat.[28]

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policy concerns with the need to provide a logical and relevant operational regulatory framework." *Id.* at 23.

25. *Id.* at 26.

26. *Id.* at 24.

27. *Id.* at 27-28.

> This dichotomy between conduct-based and status-based use-of-force authority mirrors the dichotomy between the law enforcement and armed conflict legal paradigms. This conclusion is derived from a simple truism: the most fundamental distinction between law enforcement and armed conflict is manifested in the scope of use of deadly force authority—a distinction between the use of deadly force as a last resort and use of deadly force as a first resort. As a result, use-of-force authority provides an effective *de facto* indicator of the line between non-conflict and conflict operations—a line that indicates when regulatory principles of LOAC must come into force.

Id. at 29 (footnote omitted). Here the author continues that LOAC principles (deadly force as first resort) are inconsistent with law enforcement activities which operate under domestic law and human rights law paradigms. *Id.*

28. Corn, *supra* note 15, at 34-36.

B. Targeting of Persons and Property

> *"[I]f the anticipated death of a certain number of civilians as collateral damage in an attack will disqualify that attack, this serves the perverse purpose of incentivizing terrorists to continue to operate among innocent civilians."*[29]

In Chapter 2, Professor Jensen provides an in-depth analysis of targeting with a focus on the inherent challenges faced by an armed force confronted by terrorists that do not distinguish themselves from innocent civilians, and in fact, by their terrorist tactics that seek to endanger the civilian populace by operating from within their midst. Additional challenges include the targeting of those who aid terrorist activities and the determination of the type, amount, and duration of the support that causes a civilian to cross the line into terrorism. The author addresses these challenges by educating the reader on the legal principles related to targeting in combat operations generally and then by exploring the application of those principles of targeting against transnational terrorists specifically. Interestingly, the author concludes that while the laws of war have long provided a legal framework for targeting in combat, the current war on terror has given rise to targeting measures more restrictive than are required by the laws of war.[30]

Professor Jensen begins with a dissertation of the origins of the laws of war with respect to the targeting of persons and property and how they developed from ancient to modern times.[31] This historical background includes the development of customary laws that were first codified in a set of rules called the Lieber Code, which was drafted by Francis Lieber in 1863 at the request of President Lincoln for use by the Union forces in the U.S. Civil War.[32] Also of interest is the discussion of the "Hague tradition" which grew out of the conventions held in the early twentieth century, particularly the 1907 Hague IV Convention Respecting the Laws and Customs of War on Land,[33] which focused on the means and methods of warfare and regulated the targeting of persons and property in armed

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29. Eric T. Jensen, *Targeting of Persons and Property*, *in* CORN ET AL., *supra* note 1, at 37, 62 (emphasis added).

30. *Id.* at 39.

31. *Id.* at 39-44.

32. The "Lieber Code" was also known as the Instructions for the Government of Armies of the United States in the Field (U.S. War Dep't, Gen. Order No. 100 (24 Apr. 1863)).

33. *See* Convention (IV) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, The Hague, 18 October 1907, *reprinted in* LAW OF WAR DOC SUPP, *supra* note 15, at 20-26.

conflict. The "Geneva tradition" (also known as the "respect and protect" tradition) came later, after World War II (WWII), when the four Geneva Conventions of 1949 focused on the protection of numerous classes of potential victims in armed conflict.

Next, the author reviews the law with respect to targeting persons and property in armed conflict,[34] focusing on one of the fundamental principles of armed conflict—distinction.[35] Military forces must "distinguish between the civilian population and combatants and between civilian objects and military objectives."[36] The principle of distinction dictates that the military cannot target civilians or civilian objects—they are immune from attack.[37] In an age when terrorists look more like civilians than uniformed combatants, this rule becomes an ally to the terrorist who hides behind it and problematic for military operators who abide by it.

As Professor Jensen points out, "[d]istinction is really about target selection"[38] and the immunity granted to civilians is not absolute—it applies "unless and for such time as they take . . . direct part in hostilities."[39] As also noted by the author, these words—direct participation in hostilities (DPH)—have been the subject of great debate, primarily over how they are applied in military operations against suspected terrorists. In the war on terror,

> [r]esponding to the often raised "revolving door" problem where civilians are farmers by day [and] insurgents every night, the [International Committee of the Red Cross (ICRC)] recognizes that these individuals should have an expanded window of targetability. However, to fall into that expanded window, they must be members of an organized group operating as the armed wing of a non-state party to an armed conflict.[40]

In May 2009, after *The War on Terror and the Laws of War* went to the publisher, the ICRC published its *Interpretive Guidance on the Notion of Direct Participation in International Humanitarian Law* (ICRC

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34. The author notes that "[n]o distinction need be made between international and non-international armed conflict. Rather, the principles of targeting apply generally to all forms of armed conflict. This is exemplified by the fundamental targeting principle of distinction." Jensen, *supra* note 29, at 44.

35. *Id.*

36. *Id.* (quoting Article 48 of API).

37. *Id.* at 46.

38. *Id.*

39. *Id.*; *see also* LAW OF WAR DOC SUPP, *supra* note 15, at 201 (stating the full text of API, Article 51(3) for the law protecting the civilian populace and Article 52 for the law protecting civilian objects).

40. Jensen, *supra* note 29, at 48.

Guidance).[41] In its guidance, the ICRC sets forth a three-prong cumulative test;[42] however, that test is not accepted as the United States' view on DPH. The U.S. test for DPH applies the "for such time" analysis but focuses on the person's function or the critical task that person is performing "for such time" as they are participating in the hostilities.[43]

While there is no dispute that civilians must remain immune from attack, and there is relatively little dispute that civilians who directly participate in hostilities lose that immunity, it is equally acknowledged that an absolute requirement to comply with the principle of distinction is no more complex than in the context of transnational armed conflict against non-state fighters with no geographical boundaries. Professor Jensen then takes up the question of what rules apply to the targeting of non-state actors in the war on terror. After analyzing the problem, he concludes that the time-honored principles of LOAC remain the best set of legal principles to guide commanders.[44] In short, when a civilian joins the armed wing of a transnational terrorist organization, he surrenders his civilian status and becomes targetable based on his membership, regardless of his function, whether he is a cook or clerk, and remains targetable until he affirmatively renounces membership and restricts his participation in the armed wing of the organization.[45] Such an approach "will not only increase a State's

41. INTERNATIONAL COMMITTEE OF THE RED CROSS, INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW [hereinafter ICRC GUIDANCE], *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/direct-participation-report_res/$File/direct-participation-guidance-2009-icrc.pdf; *see also* Michael N. Schmitt, *"Direct Participation in Hostilities" and 21st Century Armed Conflict*, *in* CRISIS MANAGEMENT AND HUMANITARIAN PROTECTION (2004).

42. The three-part cumulative test includes: (1) a threshold of harm; (2) if one is met, then establish a direct link between the action and the harm; and if the first two criterion are met, then (3) there must be a belligerent nexus—the act must be designed to directly cause the required threshold of harm. If all three prongs are met, then the civilian's direct participation is established and the civilian can be targeted. ICRC GUIDANCE, *supra* note 41, at 16-17.

43. The United States uses a function analysis to determine if a civilian is taking a direct part in hostilities and if so, for what time period that person remains a lawful target. The function analysis reviews the critical nature of the person's particular task or importance of their knowledge or position to determine if they are taking a direct part in hostilities. Finally, the analysis considers whether that person remains a target only while performing that particular task or whether they remain a target at all times due to the importance of their knowledge or position. Interview with Major Christopher R. Brown, Assoc. Professor of Law, Int'l & Operational Law Dep't, The Judge Advocate Gen.'s Legal Ctr. & Sch., U.S. Army, in Charlottesville, Va. (Jan. 21, 2010). See also LAW OF WAR DESKBOOK, *supra* note 15, at 97-99 for a more in-depth analysis of the U.S. application of the DPH test.

44. Jensen, *supra* note 29, at 59.

45. *Id.* at 58.

ability to respond to terrorists but will also reinforce the fundamental principles of the LOAC that are designed to protect civilians from the effects of hostilities."[46]

C. Detention of Combatants and the Global War on Terror

> *"Under the law of war, detention of an enemy combatant is not a form of punishment. Instead, the purpose of detention is to take the combatant off the battlefield and to neutralize any threat he or she may pose to the capturing State and its forces."*[47]

At fifty-six pages, Chapter 3 is the book's longest and, in the reviewer's opinion, is probably the most comprehensive one-chapter primer on detention operations in the war on terror. Professor Schoettler covers the full spectrum of detention, from the status determination to the prosecution of the detainees, including an analysis of the federal litigation regarding detention operations.[48]

In his review of detention laws and policies, the author "provides insight into one of the most important questions affecting the treatment of combatants, namely their status once captured."[49] He concludes with the recommendation that the application of treaty law to all detainees captured in the war on terror "could be useful in addressing [the] concerns of the Judicial branch regarding long-term military detentions under the law of war."[50]

In an armed conflict, an individual's status determines treatment once captured, including the protections afforded under the law.[51] The seminal protections for captured combatants are afforded by the Third Geneva Convention Relative to the Treatment of Prisoners of War (GC III).[52] However, it is relatively undisputed among U.S. legal scholars that non-state terrorists captured in the war on terror are not afforded prisoner-of-war (PW) status and are not entitled to the full panoply of PW protections derived from GC III, primarily combatant immunity.[53] In analyzing these

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46. *Id.* at 59.

47. James A. Schoettler Jr., *Detention of Combatants and the Global War on Terror, in* CORN ET AL., *supra* note 1, at 67, 70 (emphasis added).

48. *See generally id.* at 67-123.

49. *Id.* at 69.

50. *Id.* at 70.

51. *Id.* at 73.

52. *Id.* at 68 & n.3; *see also* Convention (III) Relative to the Treatment of Prisoners of War *opened for signature* Aug. 12, 1949, 6 U.S.T. 3116, 75 U.N.T.S. 135 [hereinafter GCIII], *reprinted in* LAW OF WAR DOC SUPP, *supra* note 15, at 124-56.

53. See Schoettler, *supra* note 47, at 82 for a discussion of combatant immunity.

rules, Professor Schoettler reviews the U.S. policies regarding detainees captured in the war on terror and the application (or non-application) of the laws to those detainees. "Thus, for States fighting al Qaeda . . . determining that terrorists are combatants who can be detained under the law of war . . . is the foundation of the military detention paradigm being used in the [war on terror]."[54] However, the author continues the analysis at length, describing why al Qaeda detainees are not lawful combatants entitled to PW status and its protections,[55] including an examination of the due process procedures afforded to detainees from initial status determinations (Article 5 tribunals)[56] to challenges and review of the detention itself (under Additional Protocol I).[57]

In his exploration of detention policies and litigation specific to the war on terror, Professor Schoettler reviews the legality of the United States' initial policies and provides a summary review of the Supreme Court's habeas corpus litigation of those policies as of the time he submitted his chapter.[58] "The principal outcome of the Supreme Court decisions is . . . an expanded extraterritorial reach on the constitutional right to the writ of habeas corpus . . . ."[59] On January 7, 2010, oral arguments were held in the United States Court of Appeals for the District of Columbia Circuit regarding extension of the writ of habeas corpus to detainees held at Bagram Air Field in Afghanistan.[60]

In addressing one of the Supreme Court's main concerns regarding detention in the war on terror, primarily the concept of indefinite detention of seized terrorists in the war on terror, the author concludes that a stronger process for making enemy combatant determinations, including substantial due process rights and meaningful periodic reviews, would help alleviate the Court's concern. Although the author carefully qualifies his concluding remarks—"[t]his is not to suggest that combatant immunity be given to detainees who would not otherwise qualify for it under existing treaties"—

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54. *Id.* at 78.

55. *Id.* at 79. It should be noted that one of the threshold issues for the applicability of GC III (beyond Common Article 3) is the international armed conflict trigger for Common Article 2.

56. See generally *id.* at 86-95, including a description of the United States' implementation policy for Article 5 Tribunals contained in Army Regulation 190-98. *Id.* at 90 n.2; *see also* U.S. DEP'T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES para. 1-6, at 2-3 (OCT. 1, 1997).

57. Schoettler, *supra* note 47, at 88-91.

58. *Id.* at 101-23. The cases discussed include: *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 517 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); and *Boumediene v. Bush*, 553 U.S. 723 (2008).

59. Schoettler, *supra* note 47, at 115 (emphasis omitted).

60. Al Maqaleh v. Gates, 604 F. Supp. 2d 205 (D.D.C. 2009).

he does go further to suggest that detainees captured in the war on terror should be provided the "standards of treatment accorded to prisoners of war."[61]

D. Interrogation and Treatment of Detainees in the Global War on Terror

> *"Judge Advocates usually took the 'high road' in offering advice to commanders, applying GCIII or GCIV standards to the problems they encountered, and counseling caution in applying techniques that were close to the lines on torture and 'cruel, inhumane, and degrading treatment.'"*[62]

There are but a few "law-of-war experts" within the military community that possess the credentials of Dick Jackson, the author of Chapter 4's review of interrogation and detainee treatment in the war on terror. As the Special Assistant to the U.S. Army Judge Advocate General for Law of War Matters, Mr. Jackson has the special trust and confidence of the U.S. Army's top lawyer on all issues concerning the law of war.[63] Of all the topics in the book, including the Supreme Court habeas litigation, interrogation in the war on terror is perhaps the most controversial and certainly has earned the harshest critiques on the national and international stages. Mr. Jackson deftly guides the reader through a critical analysis of the history of interrogation policies and procedures past and present, not shying from the flawed post-9/11 policies that authorized aggressive interrogation techniques that resulted in the mistreatment of detainees in U.S. custody. Mr. Jackson then brings the reader full-circle, concluding that time-tested standards adhered to prior to September 11, 2001 have been restored and must remain the standard in all future interrogation operations.

Recounting the evolution of the laws of war, Mr. Jackson quotes Article 15 of the Leiber Code to emphasize that, from its first code of laws on the topic, the United States recognized the fundamental principle of humane treatment of its enemies: "'Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.'"[64] Based on the standards of treatment required by the pre-WWII treaties, the Army Field Manuals for interrogation in the 1940's prohibited coercive treatment.[65] In 1949, with

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61. Schoettler, *supra* note 47, at 123.

62. Dick Jackson, *Interrogation and Treatment of Detainees in the Global War on Terror*, *in* CORN ET AL., *supra* note 1, at 125, 158 (emphasis added).

63. *Id.* at 125.

64. *Id.* at 127 (quoting the Leiber Code); *see also supra* note 33.

65. *Id.* at 128 & n.7 (referring to the 1940 and 1945 versions of U.S. WAR DEP'T FIELD MANUAL 30-15, MILITARY INTELLIGENCE: EXAMINATION OF ENEMY PERSONNEL,

the universal acceptance of the Geneva Conventions and, in particular, Common Article 3's requirement for humane treatment and prohibition against cruelty, torture, and humiliating and degrading treatment,[66] all subsequent U.S. laws, regulations, and policies for interrogation accounted for these prohibitions.[67]

In the next two sections of his chapter, Mr. Jackson offers his learned perspective on the oft-debated "torture memos"—those ill-conceived legal opinions authored by the Justice Department's Office of Legal Counsel and endorsed by the White House Legal Counsel. Despite efforts by then Secretary of State Colin Powell to apply the Geneva Conventions to the armed conflict in Afghanistan,[68] his arguments were rejected in favor of a vague humane treatment standard and treatment of detainees "in a manner consistent with the principles of Geneva"[69] and not "in accordance with" Geneva. A review of the players on both sides of the debate and the application of the policies stemming from those debates is covered in detail to provide the reader with a concise synopsis of what can go wrong when adherence to time-tested standards is disregarded, even in times of national emergencies.[70] A former active duty staff judge advocate, Mr. Jackson points out errors committed by judge advocates in their respective roles as legal advisors at both Guantanamo Bay and Abu Ghraib.[71]

Mr. Jackson concludes by highlighting the "restoration of standards" in the wake of detainee abuse at Abu Ghraib, beginning in 2005, whereby:

> The Army provided detailed guidance to interrogators on the application of Common Article 3 and GC's III and IV to the interrogation function, filling the specific "legal void" created by DoD interrogation policy by providing Training Support Packages to the field and emphasizing the use of [Army Regulation] 190-8 and [Field Manual] 34-52 as guidance . . . .[72]

In addition to the Detainee Treatment Act of 2005,[73] the new Department of Defense Detainee Program Directive was issued to set forth

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REPATRIATES, DOCUMENTS AND MATERIAL (22 July 1940 and June 1945)).

66. *Id.* at 131.

67. Jackson, *supra* note 62, at 131-37.

68. *Id.* at 138.

69. *Id.* at 139.

70. *See generally id.* at 137-52.

71. *Id.* at 142-43 (discussing Guantanamo Bay); *id.* 150-51 (discussing Abu Ghraib).

72. *Id.* at 152.

73. Pub. L. No. 109-148, § 1005(e), 119 Stat. 2680, 2742-44.

the policy guidance for treatment standards for individuals detained in the war on terror.[74] Coming full circle:

> The U.S. Army is left with the standards it began the War on Terror with—the minimum humane treatment standards of Common Article 3 as a legal baseline in all conflicts, supplemented, as a matter of policy, with the protections afforded by GCIII and GCIV, to treat all those that are hors de combat . . . as decently and humanely as the conscience of our individual soldiers and the dictates of the public conscience demand.[75]

E. Trial and Punishment for Battlefield Misconduct

> *"[T]here is no logical reason why individuals who transgress certain fundamental LOAC norms should be immune from such jurisdiction simply because their misconduct is subject to the concurrent jurisdiction of civilian courts."*[76]

In Chapter 5, Professors Corn and Jensen team up to outline the jurisdiction for crimes committed on the battlefield, with a particular focus on the jurisdiction over crimes committed in transnational armed conflict. The initial legal distinction between "war crimes" and the crime of "terrorism" is essential to the analysis that follows. As the authors point out, these two terms "differ in certain legally substantial ways:" War crimes are "defined by international law and subject to criminal sanction either through international tribunals or domestic tribunals invoking the substance of international law" whereas terrorism is "the subject of domestic law, subject to criminal sanction as the result of domestic criminal prohibition."[77] While the distinction had little practical significance prior to September 11th, once President Bush established Military Commissions to try terrorists in "law of war" courts, the controversy began.[78] The authors look at each side of the debate and offer their opinion on the legitimacy of LOAC jurisdiction over terrorists, provided the proper substantive and procedural safeguards are in place.

First, the authors note that a policy-based application of LOAC principles (i.e., trying terrorists at military commissions) does not provide a legal basis for such trials. In their analysis of the *Hamdan* decision, the

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74. Jackson, *supra* note 62, at 155.

75. *Id.* at 159.

76. Geoffrey S. Corn & Eric T. Jensen, *Trial and Punishment for Battlefield Misconduct*, *in* CORN ET AL., *supra* note 1, at 161, 163 (emphasis added).

77. *Id.* at 161.

78. *Id.* at 162.

authors highlight the fact that, for all the extensive litigation in that landmark case, the defense never challenged the jurisdiction to try Hamdan as a war criminal, essentially conceding that law-of-war jurisdiction was applicable.[79]

> Thus, from the outset of the Global War on Terror, the struggle against transnational terrorism has been treated by the United States as an armed conflict triggering LOAC obligations. This determination is critical, for it provides the jurisdictional basis for designating acts and omissions of terrorist operatives as "war crimes." . . . At a more immediate level, however, must be a critique of the subordinate issues created by this invocation of LOAC: what is the legitimate scope of criminal jurisdiction derived from a transnational armed conflict, and what, if any, procedural protections does the LOAC demand for any person subject to trial for violating this law?[80]

Traditionally, war crimes fell solely within the realm of international armed conflict. That changed in 1996 with the historic decision rendered in *Prosecutor v. Tadic* where the International Criminal Tribunal for the Former Yugoslavia extended, for the first time, the concept of individual criminal responsibility to non-international armed conflict.[81] As a result, the differences between international and non-international armed conflict "have become virtually transparent at the operational level."[82] The next logical step was the extension of war-crimes jurisdiction to the armed conflict against transnational terrorists.[83]

With jurisdiction derived, the authors turn to the issue of what substantive and procedural protections are afforded by the LOAC. First, with respect to substantive provisions, the authors propose a simple charge alleging violations of the laws of war for the prosecution of a terrorist operative at a military tribunal or commission.[84] Second, for the procedural

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79. *Id.* at 165.

80. *Id.* at 165.

81. *Id.* at 166-67.

82. Corn & Jensen, *supra* note 76, at 168.

83. *Id.* at 168-69.

84. *Id.* at 175. In standard military charging style, the authors provide a sample Charge and Specification:

The Charge: Violation of the Laws of War.

> The Specification: In that, (name of individual), a member of an armed organization engaged in armed conflict against the United States, did, at or near, (location) on or about (date), engage in conduct in violation of the principle of (humanity, distinction, prohibition against the use of special[] weapons), to wit: participating in an attack directed against

safeguards, the authors suggest the due process standards prescribed by Article 75 of Additional Protocol I, which are universally accepted to include all fundamental due process guarantees.[85] The authors also address the serious concern over the use of evidence obtained by coercion. At the time of the book's publication, the Military Commission Act (MCA) of 2006 still authorized use of such evidence subject to review and decision by a judge;[86] however, the MCA of 2009 prohibits use of such evidence altogether, thus eliminating this concern.

The authors conclude with the realization that detainees captured in the war on terror will continue to be subject to military commissions, and the MCA of 2009 (enacted after the book's publication) validated their prediction and, in fact, as noted above, refined some of the detainees' substantive and procedural due process rights to address concerns noted by the authors.

F. Command Responsibility and Accountability

> *"By imposing liability on commanders for subordinates' misconduct that the commanders were capable of preventing, suppressing, and punishing, the law incentivizes the discharge of command responsibility in a manner that fosters a climate of respect and compliance with . . . LOAC."*[87]

While preceding chapters analyze many of the controversial issues that have made headlines as they are debated among all three branches of government, arguably no topic is more important to military practitioners than the one addressed in Chapter 6 written by Professor Hansen: "The doctrine of command responsibility is the cornerstone [LOAC] compliance mechanism. It is derived from the expectation that the LOAC is only as effective as the military commanders entrusted with the responsibility to ensure that their subordinates understand and respect this law."[88]

This doctrine is what separates modern, civilized armed forces from terrorists who do not comport with the LOAC in any form or fashion and

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> civilians (and) (or) civilian objects (with the intent of terrorizing the population).
>
> *Id.*

85. *Id.* at 181-83. While the United States has not ratified Additional Protocol I, a number of its provisions, including Article 75, are considered to be customary international law. Additionally, the *Hamdan* Court noted its approval of the safeguards outlined in Article 75. *Id.* at 181-82 (quoting Hamdan v. Rumsfeld, 548 U.S. 557, 633 (2006)).

86. Military Commissions Act of 2006, 10 U.S.C. § 948r(c), (d); Corn & Jensen, *supra* note 76, at 184-85.

87. Victor M. Hansen, *Command Responsibility and Accountability*, *in* CORN ET AL., *supra* note 1, at 187 (emphasis added).

88. *Id.*

whose leaders brazenly promote violations of the LOAC. Professor Hansen examines all aspects of the doctrine, from its background and theory of criminal culpability to its application and its place, if any, in transnational armed conflict.

By viewing the doctrine through the lens of substantive criminal responsibility, Professor Hansen notes that "[t]he essence of this doctrine lies in its scope of liability"[89] which he describes as the "derivative imputed liability"[90] of the commander. The commander's liability is derived from the superior/subordinate relationship and the link between the commander's act or omission and the subordinate's crimes. Questions to be asked in analyzing the commander's liability include: what did the commander know or fail to know (the mens rea component) and what did he do or fail to do to prevent future war crimes, stop on-going war crimes, or punish past war crimes (the actus reus component)?[91]

Professor Hansen traces the historical roots of the doctrine through tribunals and its subsequent codification in Additional Protocol I in 1977 and other international statutes.[92] By considering the doctrine's application in armed conflict, particularly international courts' expansion of the doctrine to non-international armed conflict,[93] Professor Hansen ably supports his proposition for the logical extension of the command-

89. *Id.*

90. *Id.* at 191. Prior to his conclusion, Professor Hansen explains why command responsibility does not refer to situations of direct liability such as where a commander orders, encourages, or assists his subordinates in committing a war crime or situations of strict vicarious liability where the commander is liable solely due to the position even if he/she was in no way derelict in his/her duties. *Id.* at 189-90.

91. *Id.* at 191.

92. *Id.* at 192-98. Professor Hansen highlights the seminal command responsibility case of General Tomoyuki Yamashita, which was the first post-World War II case to address the doctrine. General Yamashita was tried and found guilty by a military commission convened by General Douglas MacArthur for LOAC violations committed by his forces during WWII. The theory of liability, ultimately upheld by the U.S. Supreme Court (in *In re Yamashita*, 327 U.S. 1 (1946)), was that General Yamashita failed to effectively control his forces, and he was therefore criminally responsible for their LOAC violations. *Id.* at 193-94 & nn.13-17. Articles 86 (Failure to Act) and 87 (Duty of Commanders) of Additional Protocol I to the Geneva Conventions codified the doctrine within the treaties. *Id.* at 195-96. The international tribunals and the additional international statutes that addressed and codified the doctrine of command responsibility include the International Court for the Former Yugoslavia and Article 7(3) of that court; the International Court for Rwanda and Rule 6(3) of that court; and the International Criminal Court and Rule 28 of the Rome Statute. *Id.* at 196-98.

93. Hansen, *supra* note 87, at 198-201.

responsibility doctrine into the "emerging realm of transnational armed conflict."[94]

> Like other LOAC principles . . . , it is the *de facto* existence of armed conflict, or perhaps more importantly[,] the *de facto* invocation of authorities derived from this law, that makes it imperative that this doctrine operate to incentivize effective and responsible command decision-making. . . . Failure to extend the doctrine of command responsibility to transnational armed conflicts can have serious consequences.[95]

Vague (or no) guidance in complex areas, especially those areas that deal with treatment of individuals, can lead to untenable results. This was true of the vague guidance on interrogation techniques discussed earlier. Similarly, Professor Hansen suggests that the absence of a command responsibility doctrine in the war on terror could result in the failure of commanders to "properly prioritize LOAC compliance, respond appropriately to allegations of LOAC violations, [and] properly train subordinates on LOAC obligations."[96] While there are international statutes addressing the doctrine, it is noticeably absent from the Uniform Code of Military Justice (UCMJ). Professor Hansen suggests that an amendment to the UCMJ in the form of a punitive article clearly defining the commander's duty to prevent, stop, and punish war crimes committed by subordinates and the consequences for failing that duty will fill the current gap in the law and eliminate any operational uncertainty that may exist in transnational armed conflicts.

Professor Hansen's point is well made; however, despite the doctrine's absence from the UCMJ, it is hard to imagine that commanders currently operating in the war on terror do not consider themselves subject to the doctrine of command responsibility. What is more compelling is Professor Hansen's conclusion that the doctrine should be applied unilaterally to the United States military.

> It makes little sense to impose a legal duty on a terrorist leader, which requires him to make sure that when his forces engage in terrorist activities they comply with the LOAC. By their very nature, terrorist operations violate the LOAC. Because the terrorist leader will face criminal sanctions no matter what he does, he gets no benefit from exercising the type of care that is expected of a responsible commander of a conventional military force . . . . With respect to that leader, command responsibility is

94. *Id.* at 201.

95. *Id.* at 202.

96. *Id.*

> simply another means of imposing sanctions and does not provide any concomitant incentives to abide by the LOAC. Logically it makes little sense to apply this doctrine to terrorist leaders engaged in a transnational armed conflict.[97]

III. The War on Terror: *Battlefield Perspectives on the Laws of War*

> *"The student of the law must . . . always be aware of the reality that the strategic and operational complexity of law must somehow effectively translate into practical application."*[98]

The last section of this review is separated from the prior sections because Chapter 7 distinguishes itself from the six preceding chapters by providing a different military perspective—one from the battlefield itself. In military terminology, this chapter focuses on the tactical level while the first six chapters focus on the strategic and operational levels. Also, unlike his five co-authors, Professor Lewis is the only author that did not serve on active duty as a judge advocate. No, he "only" served as an F-14 naval pilot for seven years flying missions in support of Operation Desert Shield and graduating as a Topgun from the Naval Weapons School.[99] This author provides a perspective from the "tip of the spear," which, for a servicemember in combat executing the missions from higher headquarters, is the only perspective that matters. This chapter is invaluable to those non-military lawyers and policymakers, as it provides a glimpse of how strategic goals and operational plans are put into practice on the ground. Professor Lewis combines his practical experience as a pilot with his expertise as a law-of-war scholar to explain how "[t]he nature of warfare means that [the LOAC] can only be effective if it is instilled in the combatants involved in the armed conflict."[100]

Professor Lewis poses and then answers some interesting questions regarding the process of effectively injecting law into warfare, the factors influencing the effectiveness of the process, and how that effectiveness is measured.[101] In answering these abstract questions, the author, using as examples aviation, artillery, and infantry methods of targeting in the war on terror, educates the reader on the long and complex process of effectively injecting law into war.[102] The author concludes that key elements to success in this endeavor are technology, simplicity, clarity, and the close interaction

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97. *Id.* at 207.

98. Lewis, *supra* note 12, at 209 (emphasis added).

99. *Id.* at 209.

100. *Id.* at 210.

101. *Id.* at 211.

102. *See generally id.* at 212-28.

of legal officers with their fellow line officers involved in tactical operations.

Beginning with his personal area of expertise—aviation—the author looks at the development and effectiveness of the implementation of the laws regulating aerial bombardments, from Desert Storm through the current war on terror, noting that, as technology in weapons advanced (to an accuracy of a few meters), civilian casualties have decreased. Equally as important as technology is the human factor and the "cooperation between legal, intelligence, and targeting officers . . . to develop in a way that strengthens the law's role in [planning operations and improving] legal compliance with proportionality requirements."[103] Here, the most important function a military lawyer can serve is converting legal standards, such as the laws on targeting, to simple, clear, concise legal advice and recommendations. To be clear, the lawyers provide the advice, but the final judgment rests with the aircrew conducting the attack:

> The other critical factor in the law's successful application to aerial bombardment has been the recognition that simplicity and clarity are vital. Law is better served when aircrew are given concrete guidance. While correctly instructing aircrew on the legal standard they are expected to uphold, that the harm to civilians must be "proportional" to the military advantage gained, is perhaps legally sufficient, in many ways it is not particularly helpful. While aircrew may benefit from receiving much more concrete Rules of Engagement ("ROE") guidance, [judge advocates] tend to favor the exercise of judgment by those executing the mission. . . . Although the final judgment rests with the aircrew conducting the attack, curtailing or simplifying that judgment so that it will not be subject to the inevitable vagaries of split-second decision-making may be a legally sound choice for [judge advocates.][104]

Through this example and others, Professor Lewis demonstrates that legal advisors at the tactical level have challenges in the war on terror just as those advisors at the higher levels. Judge advocates must first gain the respect and confidence of the commanders they are advising and the staffs they work with. Additionally, legal advisors must maintain credibility by ensuring that their legal advice can be implemented in a practical manner. Professor Lewis provides some practical examples of how lawyers can achieve this, including one for how "humane treatment" can be described:

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103. *Id.* at 220.

104. Lewis, *supra* note 12, at 221.

"'Would you find it acceptable if the people under your command were treated this way by the enemy if they were taken into custody?'"[105]

Where Major General Dunlap begins the book with a quote concerning the complexity of applying the laws of war in the war on terror, Professor Lewis concludes by capturing the essence of the legal advisor's role in the war on terror—that it falls upon the legal advisor at the tactical level to simplify these complexities to an understandable format that can be implemented by the warriors. "It is the first task of legal officers to communicate the core principles of [the LOAC] in a manner that increases the likelihood that combatants will *believe* in these restrictions and guidelines rather than just accept them."[106]

CONCLUSION

> *"It is impossible for an expert in one area (such as law) to truly understand the perspective of an expert in another field (such as combat)."*[107]

Ironically, this quote comes from one of the authors—Professor Lewis—in the last chapter of the book. Collectively, the six authors of the book, including Professor Lewis, successfully challenge this premise. In compiling *The War on Terror and the Laws of War: A Military Perspective*, the authors achieve the stated purpose of the book and provide the reader with a "keen understanding of how the law of war is implemented by warfighters in today's battles against terrorists and extremists . . . [and] a military perspective on the difficult task of ensuring adherence to the law under circumstances hardly imaginable only a decade ago."[108]

The authors achieve this purpose through a comprehensive examination of all of the major areas of the laws of war as they relate to the fight against transnational terrorists. The authors' collective skill at analyzing a complex area of the law and providing insight applicable to a wide audience of readers is a tribute to their former service as U.S. Army judge advocates (and a Naval pilot) and their current service as legal scholars; it demands attention from all law students, legal scholars, and military practitioners seeking a concise, expertly drafted one-volume treatise on the contemporary legal landscape in the war on terror.[109]

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105. *Id.* at 187.

106. *Id.* at 234.

107. *Id.* at 212 (emphasis added).

108. Charles J. Dunlap, Jr., *Foreword* to CORN ET AL., *supra* note 1, at ix.

109. Judge advocates studying the law of war or preparing to deploy during periods of transnational armed conflict will find this book an invaluable supplement to those published by the U.S. Army Judge Advocate General's School: The Operational Law Handbook, The Law of War Deskbook, and The Law of War Documentary Supplement. *See supra* note 15.

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NOTES

STREET CHILDREN AS UNACCOMPANIED MINORS WITH SPECIALIZED NEEDS: DESERVING RECOGNITION AS A PARTICULAR SOCIAL GROUP

*Martha Drane**

Abstract: In December 2008, President Bush signed the William Wilberforce Trafficking Victims Protection Reauthorization Act, which requires the examination of the "specialized needs" of an unaccompanied minor during an asylum proceeding. When examining the specialized needs of street children who enter the United States as unaccompanied minors—children who face brutality and endure physical, mental, and emotional vulnerabilities—courts should now find that such children constitute a particular social group for asylum purposes.

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> [The children] are cold, hungry, and helpless. They are hunted like animals by corrupt police, bandits, and gang members . . . . [M]ost are robbed, beaten, or raped, usually several times. Some are killed.
>
> They set out with little or no money. Thousands . . . make their way through Mexico clinging to the sides and tops of freight trains. . . . To evade . . . authorities, the children jump onto and off the moving train cars. Sometimes they fall, and the wheels tear them apart.[1]

INTRODUCTION

More than one hundred million children call a city street their home.[2] This number will increase dramatically as the plight of parentless children in countries throughout the world is extreme.[3] There are various reasons for why children end up on the street including "poverty, high birth rates, government repression, urbanization, lack of education, lack of economic opportunity and dysfunctional families."[4] Once life on the street begins, the very reasons for initially leaving a family are exacerbated;[5] the abuse and neglect worsen from both the poverty-stricken and violent conditions of the street.[6] It is estimated that "50,000 [human beings] die daily as a result of poor shelter, water, or sanitation,"[7] and street children are particularly

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1. SONIA NAZARIO, ENRIQUE'S JOURNEY: THE STORY OF A BOY'S DANGEROUS ODYSSEY TO REUNITE WITH HIS MOTHER 5-6 (2006).

2. *See* Casa Alianza, Exploitation of Children – A Worldwide Outrage, http://www.childtrafficking.com/Docs/casa_allianca_statistics_7.pdf (last visited May 1, 2010).

3. *See id.*

4. Marc D. Seitles, Note, *Effect of the Convention on the Rights of the Child upon Street Children in Latin America: A Study of Brazil, Colombia, and Guatemala*, 16 IN PUB. INTEREST 159, 161 (1998).

5. *See id.* at 161-64.

6. *See id.* at 162-63 (discussing "police death squads" and the "government-supported policy of 'social cleansing'" of street children).

7. Janet Ellen Stearns, *Urban Growth: A Global Challenge*, 8 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 140, 141 (1999).

vulnerable because of the violence and disease to which they are exposed.[8] The alarming number of street children throughout the world, which is increasing on a daily basis,[9] and the horrific conditions in which they must live, is further demonstrated by the influx of such children who flee to the United States;[10] they abandon their country of origin in order to begin a life free of violence, torture, and neglect.[11] Once in the United States, however, it is likely that a child will be apprehended by immigration authorities.[12] If this occurs, a child will find him or herself before an immigration judge at a removal hearing.[13]

The Immigration and Nationality Act offers two forms of relief: asylum[14] and withholding of removal.[15] These are two separate forms of relief[16] that are sought simultaneously.[17] An asylum seeker must prove he is a refugee and is unwilling to return to his home country because of a well-founded fear of persecution on account of "race, religion, nationality, membership in a particular social group, or political opinion."[18] A grant of withholding of removal requires an applicant to demonstrate that his or her life or freedom would be threatened on account of the same five statutory grounds as an asylum seeker.[19] Finally, pursuant to the Convention Against Torture ("CAT"),[20] the individual must demonstrate that it would be more

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8. *See generally Protecting Street Children: Vigilantes or the Rule of Law?: Hearing Before the Subcomm. on Africa, Global Human Rights and Int'l Operations of the H. Comm. on Int'l Relations*, 109th Cong. 91-92 (2005), *available at* http://www.globalsecurity.org/military/library/congress/2005_hr/050913-transcript.pdf ("Street children are always hungry. They leave home hungry and beg on the street where they are vulnerable to sexual exploitation, disease, malnutrition, illiteracy, abuse and trafficking for sexual exploitation.").

9. *See id.* at 2 ("[T]he problems of street children have reached epidemic proportions because good people will not confront this evil or do enough to deal with it.").

10. *See* Laura P. Wexler, Note, *Street Children and U.S. Immigration Law: What Should Be Done?*, 41 CORNELL INT'L L.J. 545, 546 (2008).

11. *See* Linda A. Piwowarczyk, *Our Responsibility to Unaccompanied and Separated Children in the United States: A Helping Hand*, 15 B.U. PUB. INT. L.J. 263, 266, 274 (2006).

12. *See* Logan Bobo, Note, *Wedlock, Blood Relationship, and Citizenship*, 14 CARDOZO J.L. & GENDER 351, 361-62 (2008).

13. *See* Immigration and Nationality Act (INA) § 237(a)(1), 8 U.S.C. § 1227(a)(1) (2006).

14. INA § 208, 8 U.S.C. § 1158.

15. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3).

16. I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 428 n.6 (1987).

17. 8 C.F.R. § 1208.3(b) (2009).

18. INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i).

19. *Compare id., with* INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A) (2006).

20. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85

likely than not that they would be tortured if returned to their country.[21] The benefits granted by each relief vary,[22] with asylum affording the most protection.[23]

For the street children who find themselves on U.S. territory as unaccompanied minors,[24] a grant of asylum[25] will provide the greatest amount of safety as the benefits accompanying a successful claim permit an individual to become a U.S. permanent resident.[26] Street children will most likely apply based on membership in a particular social group—which involves demonstrating an immutable characteristic[27]—but problems

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[hereinafter Convention Against Torture]. CAT is an international treaty that prohibits the return of a non-citizen to a country where there are substantial grounds for believing that he or she would be subject to torture. *Id.* art. 3, S. TREATY DOC. NO. 100-20 at 6, 1465 U.N.T.S. at 114.

21. 8 C.F.R § 208.16(c)(2).

22. *See* U.S. CITIZENSHIP AND IMMIGRATION SERVICES, I AM A REFUGEE OR ASYLEE: HOW DO I . . . BECOME A U.S. PERMANENT RESIDENT? (2008), http://www.uscis.gov/files/article/D3eng.pdf. The granting of asylum permits an individual to apply for permanent resident status. *Id.* A lawful permanent resident ("LPR") possesses "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." INA § 101(a)(20), 8 U.S.C. § 1101(a)(20). This status additionally permits family reunification and work authorization. *See* INA § 208(b)(3)(A), (c)(1)(B), 8 U.S.C. § 1158(b)(3)(A), (c)(1)(B). A successful withholding of removal claim, however, only affords an individual the right to remain in the United States and the opportunity to obtain work authorization. *See* Immigration Equality, Issues: Withholding of Removal and CAT, http://www.immigrationequality.org/template.php?pageid=168 (last visited May 1, 2010).

23. *See* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 428 n.6 (1987). Although asylum is granted on a discretionary basis, once granted, it provides "broader benefits" than does withholding of removal. *Id.*

24. An unaccompanied minor is one who:

> (A) has no lawful immigration status in the United States; (B) has not attained [eighteen] years of age; and (C) with respect to whom—(i) there is no parent or legal guardian in the United States; or (ii) no parent or legal guardian in the United States is available to provide care and physical custody.

6 U.S.C. § 279(g)(2) (2006).

25. For many asylum seekers, their most difficult challenges arise on their journey to the United States. *See* DAVID WEISSBRODT, THE HUMAN RIGHTS OF NON-CITIZENS 131 (2008) ("Receiving countries often provide limited social services for asylum seekers, and countries such as the United States provide 'no assistance whatsoever to the asylum seeker during the period of application.'") (quoting Susan F. Martin & Andrew I. Schoenholtz, *Asylum in Practice: Successes, Failures, and the Challenges Ahead*, 14 GEO. IMMIGR. L.J. 589, 614 (2000)).

26. *See* sources cited *supra* notes 22-23.

27. *In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) ("'[P]ersecution on account of membership in a particular social group' [refers] to . . . persecution that is directed toward

instantly arise because "street children" generally fail to constitute a "particular social group" for purposes of asylum claims.[28]

This Note will argue that due to the recent passing of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008,[29] which requires the recognition and consideration of the "specialized needs" of an unaccompanied minor during an asylum proceeding,[30] a street child's age must be recognized as an important element; the child's young age[31] is the underlying reason why he or she lives on the street, why he or she faces brutal violence from such a life, and why he or she flees to the United States.[32] Part I of this Note will explain who street children are and why they live on the streets. Part II will provide a detailed overview of current U.S. immigration law and the remedies available to children involved in a removal proceeding. Part II will further explain why past courts have failed to recognize "street children" as a "particular social group" for purposes of asylum. Part III of this Note details the mental and physical vulnerabilities street children experience and how such vulnerabilities correlate with living on the street. This Note argues that under the recent Reauthorization Act, which now focuses on the specialized needs of unaccompanied minors, courts should find that street children in fact constitute a particular social group for purposes of asylum.[33]

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an individual who is a member of a group of persons all of whom share a common, immutable characteristic.").

28. *See* Escobar v. Gonzales, 417 F.3d 363, 367 (3d Cir. 2005) (holding that Honduran street children failed to constitute a "particular social group").

29. Pub. L. No. 110-457, 122 Stat. 5044 (to be codified in scattered sections of 8 and 22 U.S.C.).

30. § 235, 122 Stat. at 5081 (to be codified as 8 U.S.C. § 1232).

31. The average age of a child living on the streets within Latin America is nine. Wexler, *supra* note 10, at 549.

32. *See* Piwowarczyk, *supra* note 11, at 266 (discussing the increase of homeless, unaccompanied youth who travel to the United States alone, and often "the circumstances from which they are fleeing are dangerous, some report wishing to improve their own circumstances without regard to other family"). "Juvenile immigrants to the United States are generally vulnerable youths seeking safety, reunification, or opportunity." *Id.* at 274.

33. *See infra* Part III.C.

I. Street Children

There is not a uniform definition of "street children,"[34] but generally, street children are recognized as minors who lack a permanent home,[35] commit acts of violence, and steal in order to survive.[36] Such children join gangs to create a sense of security that is often lacking because of an absent family.[37] These children have been mistreated, imprisoned, and are often forgotten or ignored by society[38]—they are the "[c]hildren nobody smiles to, nobody cuddles, nobody protects, nobody comforts."[39]

The number of street children increases on a daily basis, and although it is difficult to provide a precise number, there are "tens of millions" of

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34. *See, e.g.*, Wexler, *supra* note 10, at 547-48. Street children may be seen as those "who survive by expedients, by theft, and by violence. Children who coalesce into gangs and re-invent a family; a structure they have never known; a security that always eluded them. Children who are used unscrupulously by others; mistreated, imprisoned, even eliminated." *Id.* (internal quotations omitted) (quoting SUSANNA AGNELLI, STREET CHILDREN, A GROWING URBAN TRAGEDY: REPORT FOR THE INDEPENDENT COMMISSION ON INTERNATIONAL HUMANITARIAN ISSUES 11 (1986)).

35. *Id.* ("The Save the Children Fund adds that 'a street child is any minor who is without a permanent home or adequate protection.'") (quoting Catherine Panter-Brick, *Street Children, Human Rights, and Public Health: A Critique and Future Directions*, 31 ANN. REV. OF ANTHROPOLOGY 147, 149 (2002)).

36. *See, e.g.*, Aransiola J. Oyeniyi & Agunbiade O. Melvin, *Coping Strategies of Street Children in Nigeria*, 2 J. SOC. & PSYCHOL. SCI. 13, 15, 31 (2009) (researching the coping mechanisms of street children in Nigeria and finding that "street children in Nigeria just like any other part of the world, do engage in illegal activities such as stealing, pick-pocketing, violence and even robbery among others").

37. In their study on street children, Oyeniyi and Melvin interviewed and administered questionnaires through Focus Group Discussions. *Id.* at 13. In one discussion, one adult male reported "[y]ou will see them on the street with rubber plates with which they beg for food and they always wear rags. It is evident all over them that there are no traces of care for them by any adult." *Id.* at 24. Another male explained, "[s]treet children form gangs to protect themselves against external enemy and to assist one another in times of trouble. They form their own artificial family on the streets." *Id.* at 25. Similar conditions exist in varying countries, street children in Colombia may find, for example, that "[t]heir families neglect them, the gangs don't. . . . Family and school maltreat them, the gang doesn't. Family and school give them no love, the gang does." DUNCAN GREEN, HIDDEN LIVES: VOICES OF CHILDREN IN LATIN AMERICA AND THE CARIBBEAN 90-91 (1998). *See also* Seitles, *supra* note 4 (arguing that the street, rather than the child's family serves as the child's home where "there is no protection, supervision, or direction from responsible adults").

38. A fourteen-year-old boy, Dolgion, who lives in a sewage pit in Mongolia explained, "[w]e have nothing. We're just like human garbage. Nobody needs us." *Dolgion: 'Life Is Given Only Once'*, NEW INTERNATIONALIST, April 2005, *available at* http://www.newint.org/issue377/dolgion.htm.

39. Wexler, *supra* note 10, at 547 (internal quotations omitted) (quoting AGNELLI, *supra* note 34).

children living on the streets throughout the world.[40] These children are young[41] and must survive on their own[42] despite the harsh and problematic street environment.[43] An impoverished life contaminated by the filth of the streets causes many children to develop severe physical and mental health problems,[44] and the children cope with such stressful lives by resorting to drugs and alcohol.[45] The surrounding community lacks compassion for street children,[46] and this view further adds stress to the children's lives because they are treated like social deviants within their country of origin.[47] Many times street children are unable to gain help from the police,[48] and in

40. *See* UNICEF, THE STATE OF THE WORLD'S CHILDREN 2006: EXCLUDED AND INVISIBLE 40-41 (2005), *available at* http://www.unicef.org/sowc06/pdfs/sowc06_fullreport.pdf [hereinafter STATE OF THE WORLD'S CHILDREN] ("Indeed, every city in the world has some street children, including the biggest and richest cities of the industrialized world.").

41. *See* Joyce Koo Dalrymple, Note, *Seeking Asylum Alone: Using the Best Interests of the Child Principle to Protect Unaccompanied Minors*, 26 B.C. THIRD WORLD L.J. 131, 131-33 (2006) ("Children under eighteen make up about half of the world's refugee population."); Wexler, *supra* note 10, at 549 ("[T]he average age of a Latin American street child is reported as nine years old.").

42. Most street children are without families. *See* GREEN, *supra* note 37, at 90 (noting that street children flee broken homes).

43. *See* Gabriel Julien, *Street Children in Trinidad and Tobago: Understanding Their Lives and Experiences*, 11 COMMUNITY WORK & FAM. 475, 485 (2008) (reporting street children's response to interviews about their life experience on the street).

44. CHILD WELFARE COMMITTEE, THE NATIONAL CHILD TRAUMATIC STRESS NETWORK & NATIONAL CHILDREN'S ALLIANCE, CAC DIRECTORS' GUIDE TO MENTAL HEALTH SERVICES FOR ABUSED CHILDREN 13-45 (2008) [hereinafter CHILD WELFARE COMMITTEE] (discussing the possible reactions to trauma experienced by a child).

45. In order to relieve mental, emotional, and physical pain, children may resort to a variety of substances including the use of "alcohol, nicotine, opioids, stimulants, hypnosedatives, hallucinogens and inhalants." *See* WORLD HEALTH ORGANIZATION, WORKING WITH STREET CHILDREN, MODULE 3: UNDERSTANDING SUBSTANCE USE AMONG STREET CHILDREN 15, 28 (2000), *available at* http://www.unodc.org/pdf/youthnet/who_street_children_module3.PDF.

46. *See* Julien, *supra* note 43, at 484 ("[One street vendor] placed street children at the very end of the ladder, claiming they were the 'worst.'"); Carolyn J. Seugling, Note, *Toward a Comprehensive Response to the Transnational Migration of Unaccompanied Minors in the United States*, 37 VAND. J. TRANSNAT'L L. 861, 886 (2004) ("Branded as 'anti-social' or demonstrating 'anti-social behavior,' street children are viewed with suspicion and fear by many who would simply like to see street children disappear.").

47. *See* Caroline McHale, Note, *The Impact of U.N. Human Rights Commission Reform on the Ground: Investigating Extrajudicial Executions of Honduran Street Children*, 29 FORDHAM INT'L L.J. 812, 812-16 (2006) (noting that Honduran police inflict "arbitrary acts of violence" upon street children, including assaulting, murdering, and stealing from the children).

48. In a study conducted in Brazil, it was found that street children viewed the police as

Latin America, the judiciary and police view street children as delinquents unable to rehabilitate.[49] "Latin American countries are especially notorious for their vicious and sadistic practices against street children. Death squads and armed police forces regularly comb the city streets to perform savage 'social cleansings.'"[50] Such a view persists through varying countries.[51]

As one child explains:

> Many policemen there, you're not doing anything, they book you, they beat you, they humiliate you. They humiliate you, they call you a thief in front of everyone . . . they throw you to the ground . . . they take you . . . (he sighed) they take you to the rear . . . they take you to the darkness, they beat you, they give you black eyes, they leave you beaten up, with legs and back full of marks.[52]

Increasing numbers of street children flee their countries of origin in search of protection from the harsh human rights abuses they have been subjected to[53] including rape, human trafficking, female genital mutilation,

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a fearful figure. *See* M.O. Ribeiro, *Street Children and Their Relationship with the Police*, 55 INT'L NURSING REV. 89, 92 (2008) ("[I]nstead of playing the role of protector, the police subjected the [street] children . . . to violence.").

49. Wexler, *supra* note 10, at 550; *see* McHale, *supra* note 47, at 813-16.

50. EVGENIA BEREZINA, VICTIMIZATION AND ABUSE OF STREET CHILDREN WORLDWIDE 2 (2004), *available at* http://www.yapi.org/rpstreetchildren.pdf ("Unspeakable police brutality reflects the governments' perception of street children as parasites to be exterminated . . . ."); *see* James Brooke, *Gunmen Said to Be Police Kill 7 Street Children in Rio*, N.Y. TIMES, July 24, 1993, http://www.nytimes.com/1993/07/24/world/gunmen-said-to-be-police-kill-7-street-children-in-rio.html?pagewanted=1 (reporting the Candelaria Church Massacre, where military police officers murdered street children sleeping at the Church, and the alarming statistics of similar incidents); *Guatemala: Allegations of Police Killings Must Be Investigated-New Report*, AMNESTY INT'L, Dec. 15, 2009, http://www.amnesty.org.uk/news_details.asp?NewsID=18548 (explaining that Guatemalan officials fail to investigate the police involvement in reoccurring "social cleansing" of young children—"[t]he bodies of victims, some as young as [thirteen], have been discovered in vacant lots or on rubbish tips—with their hands tied behind their backs, strangled or with multiple gun shot wounds inflicted at close range").

51. Seugling, *supra* note 46, at 885-86.

52. Ribeiro, *supra* note 48.

53. For example:

> Fifteen-year-old Isau fled his home in Honduras to escape extreme physical abuse by his stepfather, persecution by government death squads, and torment by youth gangs. Isau's stepfather beat Isau with rods, pieces of wood, and a machete handle, and burned him with numerous hot objects. After running away from his stepfather's home, Isau lived on the streets where he faced harassment from authorities and

recruitment as a child soldier, and abuses on the street.[54] These vulnerable youths[55] flee their country of origin in hopes of establishing safety and stability within their lives.[56]

II. U.S. Immigration Law and Forms of Relief

Street children who flee to the United States without family are seen as "unaccompanied alien child[ren]" for purposes of U.S. immigration law.[57] This title attaches because such children are generally less than eighteen years of age, undocumented, and without a legal guardian or parent in the United States.[58] For an unaccompanied alien child, just like adults, there are three legal remedies available for pursuing relief in the United States: asylum,[59] withholding of removal,[60] and withholding of removal under the CAT.[61] Asylum is the more generous and desirable form of protection, but it is a discretionary remedy,[62] while withholding of

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gangs. He fled to the United States and was apprehended by the Immigration and Naturalization Service (INS).

Areti Georgopoulos, Note, *Beyond the Reach of Juvenile Justice: The Crisis of Unaccompanied Immigrant Children Detained by the United States*, 23 LAW & INEQ. 117, 117 (2005).

54. *See In re* Kasinga, 21 I. & N. Dec. 357, 358 (B.I.A. 1996) (agreeing that female genital mutilation qualified as a basis for asylum); JONATHAN TODRES ET AL., THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY PROVISIONS AND IMPLICATIONS OF U.S. RATIFICATION 303 (2006) ("The seminal study by the United Nations on children in armed conflict estimates that approximately 300,000 children globally are engaged in military conflict in over [thirty] countries."); Dalrymple, *supra* note 41, at 131-32 (narrating the fears of a sixteen-year-old boy constantly threatened and battered by a local street gang); Justina Uram, Comment, *Les Enfants de Mauvais Souvenir: Conceived Through Violence, Born as Outcasts, Living in Danger. Why Parentless and Orphaned Children of Rape Should Receive Refugee or Asylum Status*, 26 PENN ST. INT'L L. REV. 935, 937 (2008) ("Without an accepting family or community to raise and protect them, children of rape have a significant likelihood of becoming street children, who are routinely physically, emotionally and sexually abused and forcibly recruited into militia groups and political demonstrations.").

55. *See, e.g.*, Jonathan Todres, *Rights Relationships and the Experience of Children Orphaned by AIDS*, 41 U.C. DAVIS L. REV. 417, 429 (2007) ("[S]treet children are vulnerable to a host of abuses, including violence at the hands of the police.").

56. *See* Piwowarczyk, *supra* note 11.

57. 6 U.S.C. § 279(g)(2) (2006). This Note will use the term "unaccompanied minor" when referring to an "unaccompanied alien child."

58. *Id.*

59. INA § 208, 8 U.S.C. § 1158 (2006).

60. INA § 241(b)(3), 8 U.S.C. § 1231(b)(3).

61. *See* Convention Against Torture, *supra* note 20, at art. 3, S. TREATY DOC. NO. 100-20 at 6, 1465 U.N.T.S. at 114.

62. *See* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 428 nn.5 & 6 (1987).

removal requires the applicant to satisfy a higher standard of proof.[63] Withholding of removal is a mandatory form of relief despite the fact that it affords fewer benefits when compared to asylum.[64]

A. Applicant's Burden of Proof

1. Asylum

An asylum applicant holds the burden of demonstrating he or she satisfies the definition of refugee.[65] This requires establishing either an experience of past persecution[66] or a well-founded fear of future persecution, on account of the individual's "race, religion, nationality, membership in a particular social group, or political opinion,"[67] if returned to his or her prior country of residence.[68] The Attorney General possesses discretion in granting asylum,[69] and utilizes both subjective and objective

63. *Compare* I.N.S. v. Stevic, 467 U.S. 407, 413 (1984) (stating that an alien seeking relief through withholding of removal must demonstrate "a clear probability of persecution to avoid deportation"), *with* 8 U.S.C. § 1158(b)(1)(B)(i) ("The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title."). Under § 1101(a)(42)(A), a refugee must establish a "well-founded fear of persecution." 8 U.S.C. § 1101(a)(42)(A).

64. *See Cardoza-Fonseca*, 480 U.S. at 423-24.

65. *See* INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i). Refugee is defined as:

> [A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1101(a)(42)(A).

66. *See* 8 U.S.C. § 1101(a)(42)(A). Persecution includes "threats to life, confinement, torture, and economic restrictions so severe that they constitute a real threat to life or freedom." Lin v. I.N.S., 238 F.3d 239, 243-44 (3d Cir. 2001); *see also* De Souza v. I.N.S., 999 F.2d 1156, 1158 (7th Cir. 1993) (defining persecution as the "punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate"); Kovac v. I.N.S., 407 F.2d 102, 107 (9th Cir. 1969) (defining persecution as "the infliction of suffering or harm upon those who differ (in race, religion, or political opinion) in a way regarded as offensive").

67. 8 U.S.C. § 1101(a)(42)(A); *see* INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i).

68. *See* Kayembe v. Ashcroft, 334 F.3d 231, 234 (3d Cir. 2003).

69. *Cardoza-Fonseca*, 480 U.S. at 427 & n.5.

> It is important to note that the Attorney General is *not required* to grant asylum to everyone who meets the definition of refugee. Instead, a

inquiries.[70] The subjective component is satisfied by proof that the fear is genuine.[71] The objective component is satisfied by proof that the alien's subjective fear is reasonable in light of all of the recorded evidence.[72]

2. Withholding of Removal

Withholding of removal prohibits the removal of an individual when there is a clear probability of persecution if returned to his or her home country.[73] An applicant must demonstrate that his or her life or freedom would be threatened due to the individual's "race, religion, nationality, membership in a particular social group, or political opinion."[74] Although these are the same five grounds required for a refugee seeking protection through asylum,[75] an applicant seeking withholding of removal must satisfy a higher burden than an asylum applicant.[76]

3. Protection Under the Convention Against Torture

The burden of proof for a CAT claim requires the applicant to establish that "it is more likely than not that he or she would be tortured if removed to the proposed country of removal. The testimony of the

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finding that an alien is a refugee does no more than establish that the alien *may* be granted asylum *in the discretion of the Attorney General.*

Id. at 428 n.5 (internal quotations omitted).

70. *See id.* at 450 (Blackmun, J., concurring) ("Thus, as the Court observes, . . . the very language of the term 'well-founded fear' demands a particular type of analysis—an examination of the subjective feelings of an applicant for asylum coupled with an inquiry into the objective nature of the articulated reasons for the fear." (internal citation omitted)).

71. This element is satisfied if an applicant presents "'candid, credible, and sincere testimony' demonstrating a genuine fear of persecution." Chen v. I.N.S., 195 F.3d 198, 201-02 (4th Cir. 1999) (quoting Berroteran-Melendez v. I.N.S., 955 F.2d 1251, 1256 (9th Cir. 1992)).

72. In order to satisfy this element, the applicant must establish "specific, concrete facts, that a reasonable person in like circumstances would fear persecution." *Id.* at 202. *See also* Guo v. Ashcroft, 386 F.3d 556, 564-65 (3d Cir. 2004) (finding applicant's testimony credible and thus demonstrating a subjective fear when applicant stated, "[i]f I was sent back to China, I will be forcibly aborted. If I was sent back after I delivered the second child, either my husband or I will be sterilized by [the] Chinese government because we violated [its] family planning policy").

73. *See Cardoza-Fonseca*, 480 U.S. at 430 (relying on I.N.S. v. Stevic, 467 U.S. 407, 428 (1984)).

74. INA § 241(b)(3)(A), 8 U.S.C. § 1231(b)(3)(A) (2006).

75. *Compare id., with* INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i).

76. *See Stevic*, 467 U.S. at 428 (rejecting the notion that every alien who qualifies as a refugee is entitled to withholding of removal as well as asylum); *Cardoza-Fonseca*, 480 U.S. at 449 (rejecting the view that the clear evidence of persecution necessary to show entitlement to withholding of removal also governs asylum applications).

applicant, if credible, may be sufficient to sustain the burden of proof without corroboration."[77] The "more likely than not" standard of proof has no subjective component, but instead requires the alien to establish, by objective evidence, that it is more likely than not that he or she will be subject to torture upon removal.[78] In determining whether it is "more likely than not" that the individual would be tortured, the factors and evidence related to the possibility of future torture that must be considered include:

> (i) Evidence of past torture inflicted upon the applicant; (ii) Evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured; (iii) Evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and (iv) Other relevant information regarding conditions in the country of removal.[79]

To qualify for CAT relief, however, the applicant must show that the harm feared meets the definition of torture.[80] Additionally, an applicant must further demonstrate that each link in the events that would result in torture must be more likely than not.[81] The likelihood of being tortured is determined in a future analysis,[82] and once the burden is met, the applicant is automatically granted CAT relief.[83]

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77. 8 C.F.R. § 208.16(c)(2) (2009).

78. *See Cardoza-Fonseca*, 480 U.S. at 430 (stating that when evaluating the "well founded fear" in an asylum claim, the Court performed a subjective inquiry but failed to do so when assessing the eligibility for withholding of removal).

79. 8 C.F.R. § 208.16(c)(3)(i-iv).

80. *Id.* § 208.16(c)(2). Torture is:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. . . . Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Id. § 208.18(a)(1), (3).

81. *See id.* § 208.16(c)(2).

82. *Id.*

83. *See id.* § 208.16(c)(4).

B. A Particular Social Group and Street Children

Although benefits associated with asylum have the greatest appeal, street children often have a difficult time presenting a successful asylum claim.[84] With regard to the five groups an asylum claim can be based on, a street child will most likely attempt to argue that "street children" constitute a "particular social group." Problems with such a claim quickly develop, however, because courts have struggled with defining "particular social group."[85]

The term was first defined in *In re Acosta* as "a group of persons all of whom share a common, immutable characteristic."[86] Such shared characteristics are usually innate such as sex, race, familial ties, or a shared past experience.[87] The common characteristics that define the group must either be so fundamental to the member's identity or be ones that the members have no ability to change.[88] Additionally, the social group must be highly visible and well known in the country of origin.[89]

Courts have recognized women under the threat of genital mutilation,[90] gays and lesbians,[91] and children with serious and long-lasting disabilities being cared for by parents, as individuals who are members of a particular social group.[92] Conversely, courts have failed to recognize young males of military age who did not serve in the military,[93] minors with gang-related tattoos,[94] and adult women who were raped and abused when children, as members of a particular social group.[95] Although there are an alarming number of children living on the streets throughout the world, all

84. *See, e.g.*, Escobar v. Gonzales, 417 F.3d 363, 365-67 (3d Cir. 2005) (failing to recognize street children as a particular social group).

85. *See* Monica Fanesi, Note, *Relief Pursuant to the Convention Against Torture: A Framework for Central American Gang Recruits and Former Gang Members to Fulfill the "Consent or Acquiescence" Requirement*, 13 ROGER WILLIAMS U. L. REV. 308, 316 (2008).

86. 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

87. *See id.*

88. *See id.*

89. *See* Fanesi, *supra* note 85, at 316-17.

90. *See, e.g.*, *In re* Kasinga, 21 I. & N. Dec. 357, 365 (B.I.A. 1996) (finding that young women from the Tchamba-Kunsuntu Tribe who had not had female genital mutilation and opposed it were members of a particular social group).

91. *See, e.g.*, Toboso-Alfonso, 20 I. & N. Dec. 819, 822 (B.I.A. 1990).

92. *See, e.g.*, Tchoukhrova v. Gonzales, 404 F.3d 1181, 1188-89 (9th Cir. 2005).

93. *See, e.g.*, Sanchez-Trujillo v. I.N.S., 801 F.2d 1571, 1575-77 (9th Cir. 1986).

94. *See, e.g.*, Castellano-Chacon v. I.N.S., 341 F.3d 533, 549 (6th Cir. 2003) (rejecting "tatooed youth" as constituting a social group).

95. *See, e.g.*, Gomez v. I.N.S., 947 F.2d 660, 664 (2d Cir. 1991).

of whom face similar struggles due to their similar situations, courts have failed to recognize such children as members of a particular social group.[96]

For example, in *Escobar v. Gonzalez*, Escobar was a nine-year-old boy when he ran away from his family and began his life on the streets of Honduras.[97] He was physically abused by gangs, and the police refused to protect him.[98] He fled to Mexico and then to the United States.[99] He was taken into custody, and an immigration judge refused to grant Escobar's claim for asylum or withholding of removal.[100] Upon appeal, the Third Circuit recognized that Escobar's claim rested on issues of poverty, homelessness, and youth.[101] These issues and conditions exist beyond Honduras, however, and the court reasoned that because impoverished children live in every country throughout the world, it was impossible to distinguish Escobar from children living in similar depressing conditions in, for example, Guatemala;[102] the presence of such universal conditions were insufficient to satisfy Escobar's claim, and the court failed to recognize street children as members of a particular social group.[103]

C. Children, Specialized Needs, and Application for Asylum

Asylum law has generally taken an adult-centered approach where a child and adult were viewed under the same standards, as there was no distinction within the statutory language.[104] Many have argued that "[b]y not distinguishing unaccompanied minors from adults, the law gives no consideration to children's unique difficulties in satisfying the same legal standards."[105] On December 23, 2008, however, President Bush signed the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008.[106] This Act amends Title 8, § 1158 of the United States Code and

96. *See, e.g.*, Escobar v. Gonzales, 417 F.3d 363, 368 (3d Cir. 2005).

97. *Id.* at 364.

98. *Id.*

99. *Id.*

100. *See id.* at 365.

101. *Id.* at 367.

102. *See Escobar*, 417 F.3d at 367.

103. *See id.* at 367-68.

104. *See* INA § 208, 8 U.S.C. § 1158 (2006) (failing to distinguish between minors and adults); Dalrymple, *supra* note 41, at 139.

105. *See, e.g.*, Dalrymple, *supra* note 41, at 139; *see also* Danuta Villarreal, Comment, *To Protect the Defenseless: The Need for Child-Specific Substantive Standards for Unaccompanied Minor Asylum-Seekers*, 26 HOUS. J. INT'L. L. 743, 763 (2004) (criticizing the fact that child asylum claims are examined under the same standards as adults).

106. Pub. L. No. 110-457, 122 Stat. 5044 (to be codified as amended in scattered sections of 8 and 22 U.S.C.); *see* United States Senate Committee on the Judiciary, 110th Congress: Bills Considered by the Senate Judiciary Committee, http://judiciary.senate.gov/

establishes a distinction between child and adult asylum applicants.[107] This Act was first developed in 2000, and was subsequently reauthorized in 2003, 2005, and again in 2008.[108] This legislation aims at combating human trafficking through the use of law enforcement.[109] The 2008 reauthorization aims to help victims of trafficking, and also provides "[p]ermanent [p]rotection for [c]ertain [a]t-[r]isk [c]hildren."[110] In order to achieve such goals, the Act calls for a change in the access to asylum protections and specifically, the amendment states:

> Applications for asylum and other forms of relief from removal in which an unaccompanied alien child is the principal applicant shall be governed by regulations which take into account the specialized needs of unaccompanied alien children and which address both procedural and substantive aspects of handling unaccompanied alien children's cases.[111]

III. Street Children as Unaccompanied Minors and an Examination of Their Specialized Needs[112]

Poverty and familial breakdown are consistently responsible for the plight of a majority of street children,[113] who may be as young as nine.[114]

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legislation/110thCongress.cfm? (last visited May 1, 2010).

107. *Compare* 8 U.S.C. § 1158, *with* § 235, 122 Stat. at 5081 (to be codified at 8 U.S.C. § 1232).

108. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464; Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875; Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 19 Stat. 3558; William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044.

109. *See generally* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 122 Stat. 5044.

110. *See* § 235, 122 Stat. at 5079.

111. § 235, 122 Stat. at 5081. There have not been any cases or further information interpreting this Act, and thus there are little resources available to further explain such a reauthorization.

112. When reading the following analysis, it is important to remember that asylum is a discretionary remedy. "[T]he Attorney General is *not required* to grant asylum to everyone who meets the definition of refugee. Instead, a finding that an alien is a refugee does no more than establish that 'the alien *may* be granted asylum *in the discretion of the Attorney General*.'" I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 428 n.5 (1987). With the William Wilberforce Trafficking Victims Protection Reauthorization Act, which requires an immigration judge to consider the specialized needs of an unaccompanied minor, the scope of this Note therefore focuses on the specialized needs associated with street children who arrive in the United States as unaccompanied minors.

113. *See, e.g.*, Georgopoulos, *supra* note 53 (describing how a fifteen-year-old boy from Honduras fled in order to escape the abuse inflicted upon him by his step-father and gangs);

With children under eighteen years old constituting nearly half of the refugee population throughout the world,[115] there are large numbers of street children who, under the age of eighteen, abandon their homes and family and travel to the United States.[116] When they arrive in the United States they are found without legal status,[117] and because they are under the age of eighteen and without a parent or legal guardian, they are classified as unaccompanied minors for immigration purposes.[118] If seeking relief on asylum grounds, such a child will have his or her specialized needs accounted for under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008.[119] An examination of a street child's specialized needs will reveal that the persecution he or she faces within the country of origin is a direct result of the street environment and such needs are further exacerbated by the child's age;[120] because childhood

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Piwowarczyk, *supra* note 11, at 263-64 (detailing the story of a young boy who was abandoned by his mother when he was five because she became pregnant, was poor, and could no longer care for him).

114. *See* Wexler, *supra* note 10, at 549.

115. Dalrymple, *supra* note 41, at 133; Hillary Mayell, *Refugee Children, Victims of War and Want*, NAT'L GEOGRAPHIC NEWS, June 19, 2003, http://news.nationalgeographic.com/news/pf/30908037.html ("Of the 35 million people who have had to flee their homes in the face of persecution and armed conflict, more than 17 million are children.").

116. Dalrymple, *supra* note 41, at 133 ("Each year about five thousand children under the age of eighteen enter the United States without legal guardians . . . .").

117. *See* Huyen Pham, *The Private Enforcement of Immigration Laws*, 96 GEO. L.J. 777, 782 (2008) ("[T]here are those who initially arrive without legal status (like applicants for political asylum) but then, as allowed by U.S. law, take steps to legalize their presence.").

118. 6 U.S.C. § 279(g)(2) (2006) (defining "unaccompanied alien child"). Children entering the United States from Mexico and Central America constitute the largest group of unaccompanied children. Piwowarczyk, *supra* note 11, at 266. It is difficult to estimate the prevalence of unaccompanied minors throughout the United States. *See* OLGA BYRNE, UNACCOMPANIED CHILDREN IN THE UNITED STATES: A LITERATURE REVIEW iii (Vera Inst. of Justice ed., 2008) (articulating that there is indeed a lack of any systematic research performed on unaccompanied children and their migration to the Unites States). In 1990, out of the 8500 children arrested by the INS, seventy percent were unaccompanied. *See* Reno v. Flores, 507 U.S. 292, 295 (1993). In 2001, the INS detained 5385 unaccompanied immigrant children in the United States. Georgopoulos, *supra* note 53, at 118 (explaining that this number has near doubled since 1997, which at the time was 2375).

119. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235, 122 Stat. 5044, 5081 (to be codified at 8 U.S.C. § 1232).

120. *See* Piwowarczyk, *supra* note 11, at 278-83 (detailing the trauma and violence to which street children are exposed, which disrupts the child's emotional and developmental maturity); *see also* Devon A. Corneal, *On the Way to Grandmother's House: Is U.S. Immigration Policy More Dangerous Than the Big Bad Wolf for Unaccompanied Juvenile Aliens?*, 109 PENN ST. L. REV. 609, 615 (2004) ("[C]hildren are 'increasingly becoming the targets of abuses directed at them because of their age . . . .'") (quoting WOMEN'S

is an immutable characteristic, a street child arriving unaccompanied in the United States may now constitute a particular social group for asylum purposes.[121]

A. Street Children's Specialized Needs: Resulting from Their Environment and Age

Living in an environment dominated by violence and stricken by poverty, street children experience severe physical and mental health problems.[122] An impoverished lifestyle, for example, leads to infection and poor nutrition, which then physically deteriorates a child's health and well-being.[123] Health risks are heightened for these children when their physical safety is jeopardized while police and gangs lurk and inflict brutal acts of violence upon the children.[124] Police target street children and view them as deviants specifically because they are physically worn down and mentally undeveloped;[125] they are vulnerable.[126]

COMMISSION FOR REFUGEE WOMEN AND CHILDREN, PRISON GUARD OR PARENT?: INS TREATMENT OF UNACCOMPANIED REFUGEE CHILDREN 4 (2002)).

121. Although *Escobar v. Gonzalez* held that street children failed to constitute a particular social group, this Note is distinguishable. Escobar was not an unaccompanied minor, he was protected by a legal guardian and was accompanied, and therefore the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 would not mandate an immigration judge to consider his specialized needs resulting from living as a street child.

122. Street life is associated with stress and children witness and endure traumatic events. *See* National Child Traumatic Stress Network, Understanding Child Traumatic Stress, http://www.nctsnet.org/nccts/nav.do?pid=ctr_aud_prnt_under (last visited May 1, 2010) [hereinafter Understanding Child Traumatic Stress] (summarizing the effects children face, developmentally and emotionally, after they experience trauma).

123. *See* STATE OF THE WORLD'S CHILDREN, *supra* note 40, at 5-6. "Malnutrition not only weakens children physically, it also impairs their ability to learn." *Id.* at 6.

124. *See id.* at 41.

> Street children often find themselves in conflict with the police and other authorities and have been harassed or beaten by them. They have been rounded up, driven outside city limits and left there. And they have been murdered by vigilantes in the name of "cleaning up the city", often with the complicity or disregard of local authorities.

Id.

125. *See* Wexler, *supra* note 10, at 550 ("'The most frightening manifestation of this view is the emergence of 'death squads': self proclaimed vigilantes, many of whom are involved with security firms and the police and seek to solve the problem [of street children] by elimination.'") (quoting Thomas J. Scanlon et al., *Street Children in Latin America*, 316 BRIT. MED. J. 1596, 1598 (1998)).

126. STATE OF THE WORLD'S CHILDREN, *supra* note 40, at 40.

Such exposure to violence and trauma causes severe adverse developmental impacts on a child.[127] Many children experience and exhibit symptoms of posttraumatic stress disorder and depression.[128] Witnessing and experiencing the extreme violence on the streets impairs a child's brain development and delays a child's ability to cope and respond to future dangers "like those changes found among combat veterans."[129] Reactions to trauma and its impact on the child's mental health drastically alter the level of stress hormones within the child.[130] The hormonal imbalance then negatively impacts a child's ability to function appropriately in future stressful situations.[131] Street children are thus left extremely vulnerable both mentally and physically as a result of the impoverished living situations and exposure to violence: "Those who are neglected or abused in the first years of life suffer damage from which they may never fully recover and that may prevent them from reaching their full potential as older children, adolescents and eventually as adults."[132]

Children are subjected to these health problems because of the conditions of the streets and are left in a vulnerable state both physically and mentally.[133] These children are targeted by the police and specifically recruited by gangs because they are young and thus vulnerable.[134] "The most vulnerable children are those who are poor, separated from their families, displaced from their homes, orphaned, living in or near a combat zone, or with limited access to education."[135] Similar to incidents of other human rights violations, like sex trafficking and recruitment of child

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127. The age of the child experiencing abuse affects the development issues that follow. *See* CHILD WELFARE COMMITTEE, *supra* note 44, at 10-13. *See generally* Videotape: Children of War: Video for Educators (National Child Traumatic Stress Network 2005).

128. *See* Understanding Child Traumatic Stress, *supra* note 122. "Posttraumatic Stress Disorder (PTSD) is used when posttraumatic stress reactions are serious, continue, and interfere with the daily functioning of children and adolescents." *Id.*

129. *See id.*; CHILD WELFARE COMMITTEE, *supra* note 44, at 14-15 (noting that trauma affects a child's ability to learn and hinders brain development).

130. Understanding Child Traumatic Stress, *supra* note 122.

131. *See id.*

132. STATE OF THE WORLD'S CHILDREN, *supra* note 40, at 5-6.

133. *See id.*

134. *See* Corneal, *supra* note 120.

135. TODRES ET AL., *supra* note 54, at 304; *see also* Matthew D. Muller et al., *Practitioners Section on Representing Undocumented Minors in U.S. Courts:* Escobar v. Gonzales*: A Backwards Step for Child Asylum Seekers and the Rule of Law in Particular Social Group Asylum Claims*, 10 U.C. DAVIS J. JUV. L. & POL'Y 243, 243-44 (2006). A Honduran expert testified that "street children there are marginalized by the general population, blamed—often unjustly—for committing crimes, and targeted for vigilante justice. Homeless children are at a high risk of gang violence . . . are forced to commit crimes for gangs and the police, and are exploited financially and sexually." *Id.*

soldiers, a child's fragile physical and mental state combined with their level of immaturity makes them "favored targets" as they are easy to direct, control, and manipulate.[136] A street child's specialized needs are therefore a direct result of the street's environment coupled with the developmental stages—emotional and physical—of childhood.[137]

B. The *Acosta* Formula: Childhood as an Immutable Characteristic

Under *Acosta*, the Board of Immigration Appeals (B.I.A.) defined particular social group as "a group of persons all of whom share a common, *immutable characteristic*. . . . that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."[138] A street child's specialized needs—severe physical and mental weaknesses accompanied with developmental delays—surface after living on the streets and from exposure to extreme acts of violence.[139] Children are at a stage in which

136. TODRES ET AL., *supra* note 54, at 304. Street children are one example of a group of children who experience violence because of their age, but this incident of abuse is on the rise as "children are 'increasingly becoming the targets of abuses directed at them because of their age,' including 'bonded labor, child trafficking, child prostitution, sexual servitude, child pornography, child marriages, life as street children, and female genital mutilation.'" *See* Corneal, *supra* note 120, at 615 (quoting WOMEN'S COMMISSION FOR REFUGEE WOMEN AND CHILDREN, PRISON GUARD OR PARENT?: INS TREATMENT OF UNACCOMPANIED REFUGEE CHILDREN 4 (2002)).

137. *See* Understanding Child Traumatic Stress, *supra* note 122 ("In early childhood, the brain is growing. During these early years, neglect, physical, sexual, and emotional abuse can affect the normal development of the brain . . . .").

138. *In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (emphasis added). This definition has been adopted by several circuits. Niang v. Gonzales, 422 F.3d 1187, 1199 (10th Cir. 2005) ("We agree that the term *social group* is ambiguous and find the [*Acosta* formula] to be reasonable. . . . [and] is therefore a permissible construction of the statute to which we must defer."); Fatin v. I.N.S., 12 F.3d 1233, 1240 (3d Cir. 1993) ("We have no doubt that [the *Acosta* formula] is a permissible construction of the relevant statutes, and we are consequently bound to accept it."). *See also* Tapiero De Orejuela v. Gonzales, 423 F.3d 666, 673 (7th Cir. 2005) (holding an "educated, landowning class" of cattle farmers satisfied the definition of particular social group); Mohammed v. Gonzales, 400 F.3d 785, 798 (9th Cir. 2005) (concluding that an applicant's claim of persecution due to her membership in a particular social group existed, "whether it be defined as the social group comprised of Somalian females, or a more narrowly circumscribed group, such as young girls in the Benadiri clan . . . reflects a plausible construction of our asylum law").

139. *See generally* EVGENIA BEREZINA, VICTIMIZATION AND ABUSE OF STREET CHILDREN WORLDWIDE 2 (2004), *available at* http://www.yapi.org/rpstreetchildren.pdf (explaining that police in Latin American countries are notorious for their vicious behavior toward street children); *see* Understanding Child Traumatic Stress, *supra* note 122 (detailing the type of mental and physical responses children experience after traumatic and violent events).

they are not developmentally mature.[140] The street's environment exposes the child's vulnerabilities and intensifies the child's specialized needs; the child faces further mental and physical weaknesses and developmental delays.[141] A street child's specialized needs therefore originate from their youth, health, and vulnerability all of which are caused by the developmental stages of childhood and which are then exacerbated by the extreme conditions of the streets upon which they live;[142] these are immutable characteristics which satisfy the *Acosta* formula[143] and permit an unaccompanied street child to seek asylum-based relief.[144]

C. Street Children's Specialized Needs Derive from Immutable Characteristics, Thus Mandating Recognition as a Particular Social Group for Purposes of Asylum.

An asylum applicant must demonstrate that she or he was persecuted in the past or possesses a well-founded fear of persecution in the future due to the individual's "race, religion, nationality, membership in a particular social group, or political opinion."[145] For those street children who are unaccompanied minors, the B.I.A. must now consider the minor's specialized needs when determining whether to grant relief.[146] The child's specialized needs stem from the fact that the child resides in filth, is malnourished, and poorly educated. Such children are then targeted and recruited by gangs and abused by the police.[147] The violence inflicted upon them adversely affects their mental, physical, and emotional well-being, which is already in a vulnerable state due to the natural developments

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140. *See* Understanding Child Traumatic Stress, *supra* note 122 (explaining the physical, mental, and emotional development changes of children).

141. The traumatic stress resulting from living on the street can lead to extreme changes concerning brain development. *See id.*

142. *See supra* notes 139-141 and accompanying text.

143. *See In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

144. *See* INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2006); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 235, 112 Stat. 5044, 5081 (amending 8 U.S.C. § 1158 by requiring consideration of an unaccompanied minor's specialized needs for asylum purposes).

145. INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i).

146. *See* § 235, 122 Stat. at 5081.

147. *See* Jennifer Bol, *Using International Law to Fight Child Labor: A Case Study of Guatemala and the Inter-American System*, 13 AM. U. INT' L L. REV. 1135, 1169-70 (1998) ("Casa Alianza, an organization that works with street children in Guatemala City, estimates that most street children eat less than one meal per day. Health problems include skin, dental, gastro-intestinal and respiratory problems, trauma, and sexually transmitted diseases. In addition, street children constantly face the threat of violence at the hands of both non-state and state agents, including the police and the army.").

associated with childhood.[148] All street children are young and thus experience similar vulnerabilities—this is something they cannot change nor should they be required to.[149] Such factors constitute immutable characteristics[150] and serve as the underlying reason for why street children will continually fear persecution within the borders of their home countries.[151] Street children hold immutable characteristics and therefore satisfy the definition of particular social group for asylum purposes.[152] An unaccompanied street child seeking asylum should therefore apply on the ground that if returned home, he or she will face persecution due to the child's membership in a particular social group—living as a street child.[153]

1. Age-Based Asylum Claims

An individual's age constituting a basis for asylum relief is not a novel concept, but instead has been previously recognized by several courts.[154] There are forms of persecution that apply only to children, and thus the fact that an individual is a child—a focus on one's age—can serve as a basis for an asylum claim.[155] For example, youth was recognized and

148. *See* Maria Bucci, Note, *Young, Alone, and Fleeing Terror: The Human Rights Emergency of Unaccompanied Immigrant Children Seeking Asylum in the United States*, 30 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 275, 280-86 (2004) (discussing vulnerabilities implicit in the early childhood years). "Juvenile immigrants to the United States are generally vulnerable youths seeking safety, reunification, or opportunity." Piwowarczyk, *supra* note 11, at 274. "Children fleeing persecution, for example, are often faced with many distressing hurdles, especially if they are unaccompanied by an adult." *Id.* at 280.

149. *See* Uram, *supra* note 54, at 938 ("[U]naccompanied refugee children seeking asylum are some of the most vulnerable people in the world.").

150. *See* Muller et al., *supra* note 135, at 246 ("Street children . . . will eventually grow older, but for the duration of childhood their status as youths is fundamental and immutable.").

151. The police, after all, target these children and view them as deviants. *See* McHale, *supra* note 47, at 813-16.

152. *See* Muller et al., *supra* note 135, at 246 (agreeing that childhood and youth are fundamentally immutable); *In re* Acosta, 19 I. & N. Dec. 211, 233 (B.I.A. 1985) (requiring immutable characteristics to bring an asylum claim as a member of a particular social group).

153. *See* INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2006); *In re Acosta*, 19 I. & N. Dec. at 233; Muller et al., *supra* note 135, at 246 ("[T]he duration of childhood [and] their status as youths [are] fundamental and immutable.").

154. Asylum is based on fear of persecution, and there are specific circumstances that qualify as child persecution. *See* Michelle Brané & Christiana Lundholm, *Human Rights Behind Bars: Advancing the Rights of Immigration Detainees in the United States Through Human Rights Frameworks*, 22 GEO. IMMIGR. L.J. 147, 154 (2008).

155. *See* Jacqueline Bhabha & Wendy A. Young, *Through a Child's Eyes: Protecting the Most Vulnerable Asylum Seekers*, 75 INTERPRETER RELEASES 757, 762-66 (1998) (explaining that child-specific persecution includes infanticide, recruitment as a child

served as a major component for defining a particular social group in *In re Kasinga*.[156] The B.I.A. granted asylum to a young woman due to her fear of persecution on the basis that she was a young woman and a member of the Tchamba-Kunsuntu Tribe.[157] This specific tribe practiced female genital mutilation and, as a young woman, she strongly opposed such practice.[158] She did not want to return to her home country for her fear of undergoing such an invasive act if she returned.[159] Existing as a young woman and a member of the tribe, the B.I.A. held, were immutable characteristics she could not change, and therefore qualified for membership within a particular social group:[160] "Although the asylum applicant in *Kasinga* would eventually 'age out' of her youth status, the BIA found youth to be an integral component in defining her particular social group."[161]

Other youth-based asylum claims have been granted. For example, children recruited as soldiers have been recognized as constituting a particular social group for asylum purposes.[162] Involvement in a war negatively impairs a child's physical, mental, and emotional well being; it "violates their innocence, exploits their particular vulnerability, and destroys their future."[163] Similar to street children, child soldiers are exposed to disease and abuse, and as one girl explained, "I found out that girls were obliged to have sexual relations 'to alleviate the sadness of the combatants.' And who alleviated our sadness after going with someone we hardly knew? There is a great pain in my being when I recall all these things[,] they trampled my human dignity."[164] Just as street children are targeted by gangs and the police, children are recruited to serve as obedient

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soldier, child abuse, incest, female genital mutilation, child labor, and finally child marriage).

156. *See* 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

157. *Id.*

158. *See id.* at 359.

159. *Id.*

160. *Id.* at 365.

161. Wexler, *supra* note 10, at 563.

162. *See, e.g.*, Lukwago v. Ashcroft, 329 F.3d 157, 178-79 (3d Cir. 2003). In *Lukwago,* the court found that a former child soldier satisfied the refugee definition due to a shared "past experience of abduction, torture, and escape with other former child soldiers. His status as a former child solider is a characteristic he cannot change and one that is now, unfortunately, fundamental to his identity." *Id.*

163. Amy Beth Abbott, Note, *Child Soldiers–The Use of Children as Instruments of War*, 23 SUFFOLK TRANSNAT'L L. REV. 499, 518 (2000) (internal quotations omitted) (internal citations omitted).

164. Jennifer R. Silva, Note, *Child Soldiers: A Call to the International Community to Protect Children from War*, 31 SUFFOLK TRANSNAT'L L. REV. 681, 689 (2008) (alterations omitted) (internal quotations omitted).

soldiers because they can be manipulated and taught to follow instructions.[165]

Child soldiers are afforded protection because it is well documented and accepted that the behavior and violence they are exposed to establishes a well-founded fear of persecution from a child's viewpoint;[166] exposure to and participation in armed conflict causes posttraumatic stress disorder, high levels of stress and anxiety, and a mental and psychological deterioration that negatively interferes with a child's ability to learn and cope with future stressful situations.[167] Similarly, for street children, separation from one's family, a lack of education, trauma associated with civil upheaval, living on the street, and prostitution, if experienced by a child, establishes a well-founded fear of persecution.[168] A street child faces the same emotional, physical, and mental damage as other youth-based protected groups[169] and now, under the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008—an Act designed to protect vulnerable children—may seek asylum protection.[170]

2. Blocking the Floodgate

The statutorily recognized asylum-based grounds—race, religion, nationality, and political opinion—fail to exist as a narrow classification.[171] There are, for example, close to twenty-two major religions throughout the world, many with at least 1,000,000 members.[172] Acknowledging the youth-based asylum claim associated with female genital mutilation in *Kasinga*, also encompassing a huge group of individuals, was therefore not unusual. Due to the fact that each year over 100,000,000 women are

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165. *Compare id.* at 688 (stating that children are vulnerable and are obedient soldiers because they are taught to follow instructions), *with* TODRES ET AL., *supra* note 54, at 304 (stating that children are vulnerable because their physical and mental immaturity allows them to be manipulated into participating in war/conflict).

166. *See* Bhabha & Young, *supra* note 155; *see also* Annette Lopez, Comment, *Creating Hope for Child Victims of Domestic Violence in Political Asylum Law*, 35 U. MIAMI INTER-AM. L. REV. 603, 610 (2004) ("A child's increased dependence may also give rise to persecution in cases where adults would not be deemed persecuted. This is due in part because children have distinct needs for support and protection.").

167. *See* Bucci, *supra* note 148, at 280-85.

168. *See* Bhabha & Young, *supra* note 155, at 762-66.

169. *See generally* Piwowarczyk, *supra* note 11, at 278-86.

170. Pub. L. No. 110-457, § 235, 122 Stat. 5044, 5079 (creating an amendment to Title 8, § 1158 under the section entitled "Permanent Protection for Certain At-Risk Children").

171. *See, e.g.*, Major Religions of the World Ranked by Number of Adherents, http://www.adherents.com/Religions_By_Adherents.html (last visited May 1, 2010).

172. *See id.*

subjected to and threatened with female genital mutilation,[173] many feared that recognizing such a ground for asylum purposes would create an immense increase in the number of women seeking asylum protection in the United States.[174] After *Kasinga*, however, it was reported by the Immigration and Naturalization Service (INS) that "[a]lthough genital mutilation is practiced on many women around the world, INS has not seen an appreciable increase in the number of claims based on F[emale] G[enital] M[utilation]."[175] Furthermore, the INS announced "it did not expect to see a large number of claims if the U.S. recognized domestic violence as a basis of asylum."[176]

Clearly, there are millions of people who may satisfy the asylum requirements in the United States, yet in 2008 the "United States received [only] 49,000 asylum requests."[177] There are varying reasons for why the number of those who may be eligible for asylum protections fail to venture to the United States, and for those who do apply, asylum remains a discretionary form of relief; every application is not automatically granted.[178] Similarly, classifying street children as a particular social group will not open a flood gate; comparable to other recognized groups who qualify for asylum protection under U.S. Immigration Law, there are millions of street children throughout the world who deeply fear persecution in a home country.[179]

CONCLUSION

"Like the worldwide plague of trafficking in women, men and children, the problems of street children have reached epidemic proportions . . . ."[180] The increasing number of street children throughout the world can be traced to extreme poverty, lack of employment opportunities, high birth rates, unfit parents, overcrowding and

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173. "It is estimated that between 100 million and 140 million girls and women worldwide have been subjected to [female genital mutilation] procedures, and that about three million girls and women are at risk of undergoing a [female genital mutilation] procedure[] every year in Africa." World Health Organization, Report by the Secretariat, *Female Genital Mutilation*, EB 122/15 (Jan. 10, 2008), *available at* http://apps.who.int/gb/ebwha/pdf_files/EB122/B122_15-en.pdf.

174. *See* Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL'Y & L. 119, 132 (2007).

175. *Id.* at 132-33.

176. *Id.* at 133.

177. Caroline Brothers, *Asylum Seekers Increase for 2nd Straight Year*, INT'L HERALD TRIB., Mar. 24, 2009.

178. *See* I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 427-28 (1987).

179. *Compare* Casa Alianza, *supra* note 2, *with* Musalo, *supra* note 174, at 132-33.

180. *Protecting Street Children*, *supra* note 8, at 2.

urbanization.[181] There has been an influx of street children who flee to the United States,[182] but once in the United States, it is likely that a child will be apprehended by immigration authorities.[183]

Although being a "street child" in the past has failed to satisfy the definition of "particular social group" for asylum purposes, the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, now requires an immigration judge to consider the "specialized needs" of an unaccompanied minor during an asylum proceeding.[184] For those street children who flee to the United States without a legal guardian and are under the age of eighteen, the vulnerabilities and mental, physical, and emotional developments that are adversely affected from life on the street must now be examined as "specialized needs."[185]

A street child's age becomes a crucial element for an asylum claim because the vulnerabilities associated with childhood demonstrate the specialized needs to which the Act calls attention.[186] These vulnerabilities serve as the underlying reason for why a child lives on the street, why the child faces brutal violence from the police, and why the child flees to the United States. They are immutable characteristics that a child cannot change,[187] and "[c]hildren, by their inherently vulnerable character, need special protection."[188] When looking at a street child's specialized needs, it is evident that an unaccompanied "street child" shall now satisfy the definition of a particular social group for asylum purposes.[189]

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181. Seitles, *supra* note 4 (deeming social and economic factors as contributing to the "plight of 'street children'").

182. *See* Wexler, *supra* note 10.

183. *See* Bobo, *supra* note 12, at 361.

184. Pub. L. No. 110-457, § 235, 122 Stat. 5044, 5081.

185. *See id.*

186. *See* STATE OF THE WORLD'S CHILDREN, *supra* note 40; Understanding Child Traumatic Stress, *supra* note 122.

187. Muller et al., *supra* note 135, at 246.

188. Bucci, *supra* note 148, at 284.

189.

> While it is apparent that the definition of a "social group" is a flexible one, which encompasses a wide variety of groups who do not otherwise fall within the other categories of race, nationality, religion, or political opinion, it is also apparent that the term cannot be without some outer limit . . . .

Castellano-Chacon v. I.N.S., 341 F.3d 533, 549 (6th Cir. 2003). This Note only extends to those children under eighteen, without a parent or guardian and lack legal status, and even then, the granting of asylum remains discretionary.

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FEDERAL COURTS ACT AS A TOLL BOOTH TO THE INFORMATION SUPER HIGHWAY—ARE INTERNET RESTRICTIONS TOO HIGH OF A PRICE TO PAY?

*John L. Sullivan III**

Abstract: This Note focuses on the propriety of Internet restrictions as a condition of probation for offenders convicted of possessing child pornography. The Supreme Court's failure to grant certiorari to resolve the issue has led to substantial disagreement among the federal circuit courts regarding the extent to which such restrictions may be imposed. This Note attempts to take an objective stance on this controversial area of the law and argues that due to the indispensable nature of the Internet in modern society, such restrictions are entirely inappropriate in the absence of aggravating circumstances beyond mere possession of such materials.

This Note in no way attempts to diminish the deplorable nature of possessing child pornography. However, this Note provides comprehensive background and analysis in arguing that Internet restrictions are an inappropriate condition of probation for persons convicted of such offenses. Drawing from the important role occupied by the Internet in today's world, the federal sentencing guidelines, the mission of the U.S. Probation Department, and the numerous adequate alternatives to imposing such restrictions, this Note argues that offenders convicted of possessing child pornography should be afforded at least *some* access to the Internet upon release from incarceration. In so arguing, this Note concludes that Internet restrictions as a condition of probation for offenders convicted of possessing child pornography constitute

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a greater deprivation of liberty than is reasonably necessary in violation of 18 U.S.C. § 3553(a).

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INTRODUCTION

Remember life before the Internet? It seems like a long time ago, but in only a few short years the Internet has effectively altered the way people "live, work and play."[1] The Internet allows users to book vacations, arrange for bills to be paid automatically, find directions to tourist attractions, and obtain long-term weather forecasts.[2] Additionally, it allows users to stay connected with the news and keep in touch with family and friends.[3] It has completely "altered the pace of popular culture" by making information immediately accessible and has revolutionized communication.[4] These examples merely scratch the surface of the prominent role that the Internet plays in modern society.

Now imagine trying to live in today's society *without* the Internet. Imagine all the amenities offered by the Internet held beyond reach—while the rest of the world moves forward with all its benefits. It would essentially relegate one to the status of a second-class citizen *at best.*[5] This is the reality faced by many individuals on supervised release with the U.S. Probation Department; specifically, those convicted of possessing child pornography.

This Note recognizes at the outset the sensitive nature of child pornography and in no way intends to diminish the gravity of such unlawful conduct. This Note suggests, however, that those offenders convicted of possessing child pornography still have rights and that imposing sweeping bans on their Internet access after release from prison is unjust. Additionally, this Note focuses only on offenders convicted of *possessing* child pornography in the absence of any other aggravating circumstances, such as improperly contacting or engaging in sexual contact with children.

This Note attempts to take an objective stance on a highly controversial subject.[6] In so doing, it offers comprehensive background information and provides in-depth analysis of the relevant issues. Part I provides the historical background of the Internet and explains how it works. It also discusses the past and present uses of the Internet. Part II offers both a broad definition of child pornography and a brief history of its

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1. Steve Almasy, *The Internet Transforms Modern Life*, CNN.COM, Oct. 10, 2005, http://www.cnn.com/2005/TECH/internet/06/23/evolution.main/index.html.

2. *Id.*

3. *Id.*

4. *Id.*

5. *See infra* text accompanying notes 218-19.

6. *See* United States v. Villard, 700 F. Supp. 803, 809 (D.N.J. 1988) ("There is no subject which elicits a more passionate response than the sexual exploitation of children. Society abhors, and rightfully so, the victimization of the defenseless child.").

development in the United States and explains its movement to the Internet in recent years. Part III presents the sentencing scheme in the federal courts. Specifically, it provides an overview of the creation of the federal sentencing guidelines. Further, it discusses the U.S. Supreme Court's decision in *United States v. Booker* and explains the effect it had on the federal sentencing guidelines. Lastly, Part III analyzes the requirements that federal courts must follow when imposing conditions of probation upon criminal offenders. Part IV discusses the divergent case law that has developed on this issue and provides a detailed explanation of the opposing viewpoints adopted by the federal courts of appeals. Part V provides a comprehensive analysis of the reasons that Internet restrictions are an inappropriate condition of probation for offenders convicted of possessing child pornography and concludes that Internet restrictions constitute a greater deprivation of an offender's liberty than is reasonably necessary.

I. The Internet

A. What Is the Internet and How Does It Work?

The Internet is an international network connection of individual computers.[7] Essentially, it is "a loose collection of millions of computers throughout the world that share information and files."[8] In modern times, it comprises a "unique . . . medium of worldwide human communication."[9]

In its plainest terms, the Internet can be described as a vast number of computers that connect with one another to create several systems.[10] Together, these various systems formulate local networks.[11] In turn, thousands of local networks connect with one another and, managed by communication software, formulate the Internet.[12]

The Internet is a public network and is not controlled or owned by any single person or entity.[13] There is no central storage location of the information transmitted via the Internet, nor is there a universal channel of communication.[14] Instead, each separate computer or network

7. Reno v. ACLU, 521 U.S. 844, 849 (1997).

8. Jennifer L. Newman, Note, *Keeping the Internet Neutral: Net Neutrality and Its Role in Protecting Political Expression on the Internet*, 31 HASTINGS COMM. & ENT. L.J. 153, 156 (2008).

9. ACLU v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996).

10. Jay Krasovec, *Cyberspace: The Final Frontier, for Regulation?*, 31 AKRON L. REV. 101, 103 (1997).

11. *Id.*

12. *Id.*

13. *See id.* at 105; *see also Reno*, 929 F. Supp. at 832 (stating that "[n]o single entity—academic, corporate, governmental, or non-profit—administers the Internet").

14. *See* Newman, *supra* note 8.

"independently . . . exchange[s] communications and information with other computers."[15]

Internet access can be obtained by individuals through a variety of sources.[16] Such sources include typical Internet hosts, like America Online or CompuServe, and also include colleges and universities, places of employment, local libraries, or Internet cafés.[17] Once an individual obtains access to the Internet, he or she can make use of any of the communication or information gathering features that the Internet offers, such as "electronic mail (e-mail), automatic mailing list services ('mail exploders,' sometimes referred to as 'listservs'), 'newsgroups,' 'chat rooms,' and the 'World Wide Web.'"[18]

The most prominently used Internet service is the World Wide Web ("the Web").[19] The Web allows Internet users to utilize a web browser to access electronic documents, known as "web pages," which have been stored on other computers connected to the Internet.[20] Web pages typically "contain text, graphics, pictures, sound, video, [or] other computer software that is used to create special effects for a particular [w]eb page."[21] Internet users have the ability to view web pages "no matter where in the world [the] [w]eb page is located."[22]

B. Past and Present Use of the Internet

In 1969, a military program known as "ARPANET"[23] was designed to allow computers controlled by the military, defense contractors, and universities to connect and communicate with each other via redundant channels.[24] This program provided the framework for the development of a civilian network that "now enable[s] tens of millions of people to communicate with one another and to access vast amounts of information from around the world."[25]

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15. *Reno*, 929 F. Supp. at 832.

16. Reno v. ACLU, 521 U.S. 844, 850 (1997).

17. *Id.*

18. *Id.* at 851.

19. David Wille, *Personal Jurisdiction and the Internet—Proposed Limits on State Jurisdiction over Data Communications in Tort Cases*, 87 KY. L.J. 95, 193 (1999).

20. *Id.*

21. *Id.*

22. *Id.*

23. ARPANET is an acronym for the Advanced Research Project Agency Network. *Reno*, 521 U.S. at 850 n.3.

24. *Id.* at 849-50.

25. *Id.* at 850.

In March 1972, the first basic electronic mailing software was created.[26] Motivated by the necessity of ARPANET developers to have an "easy coordination mechanism," Ray Tomlinson, an employee of the company responsible for working on ARPANET, created the new system.[27] By July 1972, Tomlinson had expanded the utility of the electronic mailing program to include message listing, filing, forwarding, and message response capabilities.[28] The usefulness of electronic mail, as well as computer networking as a whole, spread through many other professional communities and disciplines that could provide funding for it.[29] ARPANET and other computer networking programs designed for professional communities, however, were largely purpose-built, meaning that the use of such programs was restricted to those persons within the professional communities.[30]

Over the next several years, the Internet experienced "extraordinary growth."[31] Public use of the Internet, however, was hotly debated because, since its inception, the Internet had been used solely for academic and research purposes.[32] Despite objections from the academic community, by 1995 dial-up system services—such as America Online, CompuServe, and Prodigy—began providing Internet access "to the increasingly large audience of the consuming public."[33] Once the Internet was made available to the general public in 1995, fewer than one in seven Americans had access.[34]

Today, "[t]he Internet is no longer a fragile new means of communication."[35] It is now "a dominant—perhaps the preeminent—means through which commerce is conducted."[36] In addition to using the Internet for purposes of commerce, the Internet is also used for "mak[ing],

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26. Barry M. Leiner et al., *A Brief History of the Internet*, http://www.isoc.org/internet/history/brief.shtml (last visited May 1, 2010).

27. *Id.*

28. *Id.*

29. *Id.*

30. *See id.*

31. *See* ACLU v. Reno, 929 F. Supp. 824, 831 (E.D. Pa. 1996).

32. Mark G. Tratos, *The Impact of the Internet & Digital Media on the Entertainment Industry*, *in* 862 PRACTISING LAW INSTITUTE: COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 127, 161 (2006).

33. *Id.* at 162.

34. Almasy, *supra* note 1.

35. Fair Hous. Council v. Roomates.Com, L.L.C., 521 F.3d 1157, 1164 n.15 (9th Cir. 2008). Currently, it is estimated that two out of three Americans spend time on the Internet "surfing the Web, exchanging e-mail, reading bank statements and [sports] scores, [and] checking the weather." Almasy, *supra* note 1.

36. *Fair Hous. Council*, 521 F.3d at 1164 n.15.

maintain[ing], and rekindl[ing] friendships; [and] find[ing] places to live, work, eat, and travel."[37] Essentially, the Internet is now "a legitimate means to obtain important information" and useful as "a means of communication in our society."[38]

Consisting of approximately 158 million websites, the Internet hosts more than 1.3 billion users worldwide.[39] The typical user utilizes the Internet for purposes such as conducting research, obtaining a weather update, or reading a newspaper online.[40] These uses and statistics indicate that the "Internet . . . [has] become virtually indispensable in the modern world of communications and information gathering."[41]

II. Child Pornography

A. Child Pornography Overview

The definition of child pornography offenses varies among jurisdictions.[42] To provide a broad definition, child pornography is essentially "any record of sexual activity involving a prepubescent person."[43] A "record" is construed as any video, audio, or photograph containing such offending activity.[44] Typically, child pornography prevention laws criminalize the creation, possession, or dissemination of pornography featuring minors.[45]

The advent of the camera in the early nineteenth century also brought about the production of sexual images involving children.[46] Almost immediately, the production of child pornography began, as did its trade and collection.[47] As a result, the production of child pornography became restricted by law.[48]

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37. *Id.* at 1176 (McKeown, J., concurring and dissenting).

38. United States v. Deaton, 204 F. Supp. 2d 1181, 1183 (E.D. Ark. 2002).

39. *Fair Hous. Council*, 521 F.3d at 1176 (McKeown, J., concurring and dissenting).

40. United States v. White, 244 F.3d 1199, 1206 (10th Cir. 2001).

41. United States v. Peterson, 248 F.3d 79, 83 (2d Cir. 2001).

42. Stephen F. Smith, *Jail for Juvenile Child Pornographers?: A Reply to Professor Leary*, 15 VA. J. SOC. POL'Y & L. 505, 513 (2008).

43. RICHARD WORTLEY & STEPHEN SMALLBONE, U.S. DEP'T OF JUSTICE, CHILD PORNOGRAPHY ON THE INTERNET 7 (2006), *available at* http://www.cops.usdoj.gov/files/ric/Publications/e04062000.pdf.

44. *See id.*

45. *See* Smith, *supra* note 42.

46. *See* WORTLEY & SMALLBONE, *supra* note 43, at 1.

47. *Id.*

48. *See id.*

Prior to the 1960s, images of child pornography "were usually locally produced, of poor quality, expensive, and difficult to obtain."[49] The 1960s, however, saw censorship standards relaxed.[50] As such, the availability of child pornography increased.[51] By 1977, approximately 250 magazines of child pornography were in circulation throughout the country, most of which had been imported from Europe.[52]

In 1978, Congress severely hampered the child pornography industry by enacting the first federal law specifically banning the creation or possession of child pornography.[53] This law rendered illegal the use of children under the age of sixteen in pornographic photographs or videos.[54] The law was expanded in 1984 to include children under the age of eighteen.[55] As it stands today, federal law defines child pornography as:

> any visual depiction, including any photograph, film, video, picture or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means of sexually explicit conduct where the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct; such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct; or such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct.[56]

In addition to the federal law, every state and the District of Columbia have laws criminalizing possession of child pornography.[57] The nature of the legislation in each state, however, varies considerably.[58] Despite, the

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49. *Id.*

50. *Id.*

51. *Id.*

52. WORTLEY & SMALLBONE, *supra* note 43, at 1.

53. Kurt Eichenwald, *A Shadowy Trade Migrates to the Web*, N.Y. TIMES, Dec. 19, 2005, http://www.nytimes.com/2005/12/19/business/19kidswebhistory.html; *see* WORTLEY & SMALLBONE, *supra* note 43, at 4, 5 tbl.1 (stating that the Sexual Exploitation of Children Act, passed in 1978, was the first federal law prohibiting child pornography, targeting the manufacture and commercial distribution of obscene material involving minors under sixteen).

54. Eichenwald, *supra* note 53.

55. *Id.*

56. 18 U.S.C. § 2256(8) (2006).

57. Nat'l Ctr. for Missing & Exploited Children, Child Pornography Fact Sheet http://www.missingkids.com/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=2451 (last visited May 1, 2010).

58. WORTLEY & SMALLBONE, *supra* note 43, at 6.

discrepancy among state child pornography prevention legislation, the mere existence of such legislation has allowed state police forces to join with federal agencies in the prevention of child pornography.[59]

B. Child Pornography and the Internet

By the middle of the 1980s, the trafficking of child pornography throughout the United States had been nearly eliminated.[60] The enactment of a federal law preventing the creation, possession, or dissemination of child pornography, as well as a number of successful anti-child pornography campaigns waged by law enforcement, rendered the production, purchase, and trade of child pornography both difficult and expensive.[61] Anonymity in the creation or distribution of child pornography was nearly impossible, and it was extremely difficult for those involved in the market for child pornography to find or interact with one another.[62] The introduction of the Internet into mainstream society, however, changed the situation.[63]

"The popularity of online communications . . . made possible, for the first time, anonymous gatherings of people with sexual attractions to children."[64] As such, the Internet revived the market for child pornography and allowed for the collection and trading of such materials "with the vigor and obsession usually found among baseball card enthusiasts."[65] The Internet has made production of child pornography easy and inexpensive and has allowed such materials to be accessed and traded at the click of a button.[66]

"The Internet has escalated the problem of child pornography by increasing the amount of material available, the efficiency of its distribution, and the ease of its accessibility."[67] It has been estimated that there are more than one million images of child pornography on the Internet at any given time.[68] Additionally, it has been estimated that approximately 200 new images are posted on the Internet each day.[69] With

59. *Id.*

60. U.S. Dep't of Justice, Child Exploitation & Obscenity Section, Child Pornography, http://www.usdoj.gov/criminal/ceos/childporn.html (last visited May 1, 2010).

61. *Id.*

62. *Id.*

63. *Id.*

64. Eichenwald, *supra* note 53.

65. *Id.*

66. U.S. Dep't of Justice, *supra* note 60.

67. WORTLEY & SMALLBONE, *supra* note 43, at 8.

68. *Id.* at 12.

69. *Id.*

as many as 100,000 pedophiles involved in organized child pornography rings across the globe—one-third of which are located within the United States[70]—it is clear that the Internet's "technological ease, lack of expense, and anonymity . . . has resulted in an explosion in the availability, accessibility, and volume of child pornography" present throughout the United States.[71]

III. Sentencing in the Federal Courts and the Sentencing Guidelines

A. An Overview: Pre-*United States v. Booker*[72]

"[C]oncerns of disparate treatment and undue leniency in punishment" led Congress to assemble the United States Sentencing Commission to draft sentencing guidelines and thus limit the discretion of the federal judiciary.[73] The Commission was created as part of the Sentencing Reform Act provision of the Comprehensive Crime Control Act of 1984.[74] The Congressional goals for creation of the Commission were threefold: (1) to structure the "previously unfettered sentencing discretion" of federal trial judges; (2) to concretize the administration of punishment; and (3) to target specific types of offenders for more serious penalties.[75] On November 1, 1987, the United States Sentencing Guidelines ("the Guidelines") became obligatory in the federal courts.[76]

The Guidelines were essentially the legal framework for a set of rules used in sentencing convicted federal offenders.[77] After a federal criminal defendant pled guilty to a charge or was found guilty at trial, the trial judge was required to fashion an appropriate sentence for the defendant in accordance with the Guidelines.[78] The Guidelines, however, encountered adversity.[79] Not long after their implementation, criminal defendants began

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70. *Id.* at 13.

71. U.S. Dep't of Justice, *supra* note 60.

72. 543 U.S. 220 (2005).

73. Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, 458 POL'Y ANALYSIS 1, 1 (2002), *available at* http://www.cato.org/pubs/pas/pa458.pdf.

74. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended in scattered sections of U.S.C.); Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 1987, 2017-34 (codified as amended at 28 U.S.C. §§ 991-998 (2006 & Supp. 2008)); *see* U.S. SENTENCING COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 1 (2008), http://www.ussc.gov/general/USSC_Overview_200806.pdf.

75. *See* U.S. SENTENCING COMM'N, supra note 74, at 1-2.

76. *See id.* at 2; Luna, *supra* note 73, at 21.

77. Luna, *supra* note 73, at 2.

78. *Id.*

79. *See* U.S. SENTENCING COMM'N, *supra* note 74, at 2.

challenging their constitutionality and validity.[80] Additionally, the federal judiciary itself was "particularly adamant in its opposition" to the Guidelines.[81] This adversity laid the groundwork for the U.S. Supreme Court's opinion in *Booker*.[82]

B. The Effect of *United States v. Booker* on the Sentencing Guidelines

1. The Facts

Freddie J. Booker was arrested and charged with possession of narcotics with intent to distribute, in violation of 21 U.S.C. § 841(a)(1).[83] Booker was alleged to have been in possession of 92.5 grams of crack-cocaine.[84] After the jury heard this evidence, it returned a verdict of guilty.[85] The statute that Booker was found to have violated mandated a minimum ten-year sentence and a maximum sentence of life imprisonment under the Guidelines.[86]

After Booker was convicted at trial, the district court judge held a post-trial sentencing hearing.[87] At the hearing, the judge found, by a fair preponderance of the evidence, that Booker was in possession of an additional 566 grams of crack-cocaine.[88] On the basis of that finding, the judge sentenced Booker to thirty years in prison, instead of the twenty-one years and ten months that would have been imposed in the absence of such a finding.[89]

Booker appealed his sentence of imprisonment to the Court of Appeals for the Seventh Circuit.[90] On appeal, the Seventh Circuit reversed the ruling of the district court, reasoning that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[91] As such, the Seventh Circuit determined that

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80. *Id.*

81. Luna, *supra* note 73, at 3.

82. 543 U.S. 220 (2005).

83. *Id.* at 227.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Booker*, 543 U.S. at 227.

89. *Id.*

90. *See id.*

91. United States v. Booker, 375 F.3d 508, 510, 515 (7th Cir. 2004) (internal quotations omitted) (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).

the district court's sentence violated the Sixth Amendment and remanded the case with instructions to either sentence Booker in accordance with the jury's findings or to hold a sentencing hearing before a jury.[92] As a result, the Government appealed the Seventh Circuit's ruling to the U.S. Supreme Court.[93]

2. The Holding

The U.S. Supreme Court affirmed the Seventh Circuit's ruling and remanded the case for resentencing.[94] The Court determined that the portion of the statute that made the Guidelines mandatory upon the federal courts was unconstitutional.[95] The Court's conclusion was essentially based upon a finding that "the constitutional jury trial requirement [was] not compatible with the [Guidelines] as written."[96]

The Court, however, did not find that the Guidelines as a whole were unconstitutional but instead decided to keep them intact.[97] In order to make the Guidelines comport with constitutional requirements, the Court concluded that the provision making the Guidelines mandatory upon federal courts had to be "severed and excised."[98] As such, the Court stated that "as amended . . . the Guidelines [are] effectively advisory."[99]

3. The Aftermath

In its holding, the Supreme Court expressly stated that its amendments to the Guidelines "require[] . . . sentencing court[s] to consider Guidelines ranges . . . but it permits the court to tailor the sentence in light of other statutory concerns as well."[100] The severance of the unconstitutional provisions of the Guidelines "rendered the . . . [G]uidelines effectively advisory."[101] Therefore, the effect of the Supreme Court's decision in *Booker* was not to require the district courts to be bound

92. *Booker*, 543 U.S. at 228.

93. *See id.* at 227.

94. *See id.* at 267-68.

95. *See id.* at 245.

96. *Id.* at 248.

97. *See id.* at 264 (noting that portions of the Guidelines remain in place).

98. *Booker*, 543 U.S. at 245.

99. *Id.*

100. *Id.* at 245-46.

101. U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 16 (2006), *available at* http://www.ussc.gov/booker_report/Booker_Report.pdf [hereinafter FINAL REPORT].

by the Guidelines but to require them to "consult [the] Guidelines and take them into account when sentencing."[102]

The *Booker* Court's decision, which rendered the Guidelines merely advisory, has "immediately raised the question of the extent to which courts must take the sentencing guidelines into account [when] imposing sentence[s]."[103] Essentially, the aftermath of *Booker* saw two main schools of thought formulate with respect to the extent to which the district courts must consult the Guidelines when sentencing a criminal defendant.[104]

The first school of thought was that "substantial weight" should be accorded to the Guidelines.[105] This line of reasoning was first seen in *United States v. Wilson*,[106] in which the United States District Court for the District of Utah concluded that, "in exercising its discretion in imposing sentences, the court will give heavy weight to the recommended Guidelines sentence in determining what sentence is appropriate."[107] The court additionally noted that "the Guidelines should be followed in all but the most exceptional cases."[108]

The second school of thought was articulated in *United States v. Ranum*.[109] In *Ranum*, the United States District Court for the Eastern District of Wisconsin concluded that "courts must treat the guidelines as just one of a number of sentencing factors."[110] In so holding, the district court stated that "[t]he guidelines are not binding, and courts need not justify a sentence outside of them."[111]

As noted above, since the U.S. Supreme Court's decision in *Booker*, the district courts have developed essentially two different approaches to sentencing.[112] However, a third school of thought has emerged in which the district courts "consider[] the applicable guideline range first and then proceed[] to decide whether consideration of [additional] factors . . . warrant[s] imposition of a non-guideline sentence."[113]

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102. *Booker*, 543 U.S. at 264.

103. FINAL REPORT, *supra* note 101, at 17.

104. *Id.*

105. *Id.*

106. 350 F. Supp. 2d 910 (D. Utah 2005).

107. *Id.* at 925.

108. *Id.*

109. FINAL REPORT, *supra* note 101, at 17.

110. United States v. Ranum, 353 F. Supp. 2d 984, 985 (E.D. Wis. 2005).

111. *Id.* at 987.

112. *See* FINAL REPORT, *supra* note 101, at 17.

113. *See id.*

C. Sentencing and Conditions of Probation in Federal Courts in General

The analysis employed by district courts in sentencing criminal defendants and fashioning conditions of probation has changed dramatically since the U.S. Supreme Court's decision in *Booker*.[114] The Supreme Court stated that when sentencing or crafting conditions of probation, district courts must begin by using the Guidelines to calculate the appropriate sentencing range.[115] The purpose for using the Guidelines as a "starting point" or "initial benchmark" is to ensure consistency in sentencing.[116] After calculating the appropriate sentence range under the Guidelines, the parties will be afforded the opportunity to present arguments in support of an appropriate sentence or probationary condition.[117]

After hearing oral arguments, the trial judge must then consider the factors set forth in § 3553(a)[118] to determine whether the sentences requested by the parties are appropriate.[119] In conducting this analysis, the trial judge "may not presume that the Guidelines range is reasonable" as "[h]e must make an individualized assessment based on the facts presented."[120] After arriving at an appropriate sentence, the trial judge is required to "adequately explain the chosen sentence to allow for meaningful appellate review."[121]

As noted in the U.S. Supreme Court's opinion in *Gall v. United States*, a trial judge is obliged to consider the seven factors set forth in

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114. *See* Gall v. United States, 552 U.S. 38, 49-50 (2007); Rita v. United States, 551 U.S. 338, 357-58 (2007).

115. *Gall*, 552 U.S. at 49.

116. *Id.*

117. *See id.* at 49-50.

118. This statute sets forth the factors that a sentencing court must consider when imposing a sentence or probationary condition upon an offender:

> The court . . . shall consider—(1) the nature and circumstances of the offense and the history and characteristics of the defendant; [and] (2) the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553(a) (2006).

119. *Gall*, 552 U.S. at 49-50.

120. *Id.* at 50.

121. *Id.*

§ 3553(a) when fashioning a sentence or condition of probation for a criminal defendant.[122] Using § 3553(a), the trial judge must first consider both the nature and circumstances of the offense, as well as the history and characteristics of the defendant.[123] In addition, the trial judge must ensure that the sentence or condition of probation imposed upon the offender reflects the seriousness of the offense, adequately deters future criminal conduct, and protects the public from future crimes that the offender might commit.[124]

Appellate review of a district court's sentence or condition of probation is limited to only an abuse-of-discretion standard.[125] The appellate court must first ensure that the trial judge committed no procedural errors and then review the "substantive reasonableness" of the sentence.[126] So long as the appellate court determines that the district court's order was within its discretion, even if the appellate court would have imposed a different sentence, the district court's order must be affirmed.[127]

IV. The Circuit Split Regarding Internet Restrictions as a Condition of Probation in Child Pornography Cases

The U.S. Supreme Court has yet to grant certiorari to resolve the circuit split regarding the extent to which a sentencing court may restrict the Internet use of a defendant who has been convicted of possessing child pornography.[128] The failure of the Court to resolve this matter has led to a substantial split in the federal circuits and district courts on this issue. The result has been divergent case law and differing results under circumstances that, on their face, appear strikingly similar.

A. Disapproval of Internet Restrictions: The Second Circuit

Of all the circuits, the Second Circuit has been the most blatantly opposed to the permissibility of Internet restrictions as a condition of

122. *Id.* at 49-50 & 50 n.6.

123. *Id.* at 50 n.6.

124. *Id.*

125. *Gall*, 552 U.S. at 51.

126. *Id.*

127. *See id.*

128. *See, e.g.*, United States v. Rearden, 349 F.3d 608 (9th Cir. 2003), *cert. denied*, 543 U.S. 822 (2004); United States v. Holm, 326 F.3d 872 (7th Cir. 2003), *cert. denied*, 540 U.S. 894 (2003); United States v. Zinn, 321 F.3d 1084 (11th Cir. 2003), *cert. denied*, 540 U.S. 839 (2003); United States v. Crandon, 173 F.3d 122 (3d Cir. 1999), *cert. denied*, 528 U.S. 855 (1999).

probation.[129] The Second Circuit's first opinion regarding this issue came in *United States v. Peterson*.[130] In *Peterson*, the defendant was arrested and charged with bank larceny.[131] After he pled guilty, the defendant was sentenced in the district court to five years of probation, subject to several special conditions.[132] One of the special conditions restricted the defendant's "ability to possess or use computers or the Internet."[133]

In concluding that such a restriction on the defendant's Internet access was proper, the district court took into consideration the defendant's prior conviction for incest, as well as the fact that he engaged in excessive online access of adult pornography.[134] The defendant appealed the imposition of the Internet restriction and argued to the Second Circuit that such a restriction on Internet access was not reasonably related to legitimate sentencing objectives.[135]

The Second Circuit vacated the district court's Internet restriction and stated that the condition was "not 'reasonably related' to 'the nature and circumstances of the offense' or [the defendant's] 'history and characteristics.'"[136] In so holding, the court recognized the existence of a relationship between the Internet restriction and the defendant's conviction for incest, as well as his excessive online access of adult pornography.[137] However, the court found that the mere existence of such a relationship did not conclusively indicate that the Internet restriction was reasonably related "to any of the numerous broad sentencing grounds set forth in § 3553(a)(2)."[138] To support this conclusion, the court stated that the Internet restriction was not reasonably necessary to protect the public or to deter the defendant from the commission of any future crimes.[139]

The Second Circuit continued its "intolerance of Internet bans" in *United States v. Sofsky*.[140] In *Sofsky*, the defendant was charged with possession of child pornography after more than 1000 offending images

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129. *See* Brian W. McKay, Note, *Guardrails on the Information Superhighway: Supervising Computer Use of the Adjudicated Sex Offender*, 106 W. VA. L. REV. 203, 221 (2003).

130. *See* 248 F.3d 79 (2d Cir. 2001).

131. *Id.* at 80.

132. *Id.* at 80-81.

133. *Id.* at 81.

134. *See id.*

135. *See id.* at 82.

136. *Peterson*, 248 F.3d at 82 (internal citation omitted).

137. *See id.* at 83.

138. *Id.*

139. *Id.*

140. McKay, *supra* note 129, at 222.

were discovered on his personal computer.[141] The defendant pled guilty to the charge and was sentenced to 121 months of imprisonment.[142] Additionally, the district court imposed a three-year period of probation upon release from custody.[143] As a condition of probation, the defendant was ordered to "not access a computer, the Internet, or bulletin board systems at any time, unless approved by the probation officer."[144]

On appeal of the Internet restriction, the Second Circuit stated that "the condition exceed[ed] even the broad discretion of the sentencing judge."[145] The court reasoned that the Internet restriction was overly broad because it would prevent the defendant from using a computer for commonplace purposes, such as "doing . . . research, getting a weather forecast, or reading a newspaper online."[146] Because the restriction prevented proper use of the Internet in addition to improper use, the court determined that the condition "inflict[ed] a greater deprivation [of the defendant's] liberty than [was] reasonably necessary."[147]

B. Affirmation of Broad Internet Restrictions

The view espoused by the Second Circuit is not shared by the other circuits. For example, the Fifth Circuit made clear in *United States v. Paul* that it would not find "that [a] district court abused its discretion in determining that an *absolute* ban on computer and Internet use was reasonably necessary to protect the public and to prevent recidivism."[148] The Fifth Circuit recently reaffirmed its holding in *Paul* when it upheld a condition of supervised release imposing a *total* prohibition on Internet use in *United States v. Locke*.[149]

In its first Internet restriction case, the Eleventh Circuit adopted *Paul* in reaching its decision.[150] In *United States v. Zinn*, the defendant was charged with possession of child pornography after 4000 images of child pornography were found on his personal computer.[151] The defendant pled guilty to the charge and was sentenced to thirty-three months of

141. United States v. Sofsky, 287 F.3d 122, 124 (2d Cir. 2002).

142. *Id.*

143. *Id.*

144. *Id.* (internal quotations omitted).

145. *Id.*

146. *Id.* at 126 (alterations omitted) (internal quotations omitted) (quoting United States v. White, 244 F.3d 1199, 1206 (10th Cir. 2001)).

147. *Sofsky*, 287 F.3d at 126.

148. 274 F.3d 155, 169 (5th Cir. 2001) (emphasis added).

149. *See* 482 F.3d 764, 768 (5th Cir. 2007).

150. McKay, *supra* note 129, at 225.

151. 321 F.3d 1084, 1086 (11th Cir. 2003).

imprisonment to be followed by a period of probation.[152] The defendant's probation was attended with a condition that stated that he "not possess or use a computer with access to any on-line service at any location, including employment, without written approval from [his] probation officer."[153] On appeal, the Eleventh Circuit affirmed the Internet restriction and stated that it "'readily accomplish[ed] the goal of restricting use of the Internet and . . . the goals of sentencing.'"[154] The court's holding heavily relied upon the fact that the defendant was found in possession of a vast amount of child pornographic images.[155]

Like the Eleventh Circuit, both the Ninth Circuit and the D.C. Circuit have been willing to recognize at least *some* limitation on an offender's Internet use during a period of supervised release.[156] In *United States v. Rearden*, the Ninth Circuit upheld a condition of supervised release that allowed Internet access only with prior approval of the probation officer for a defendant convicted of possessing child pornography.[157] Similarly, in *United States v. Sullivan*, the D.C. Circuit stated that in cases where a defendant has been convicted of possessing child pornography, "some measure of Internet restriction is appropriate."[158]

The Eighth Circuit best embodies the indecision that federal courts have had in arriving at a uniform policy regarding Internet restrictions as conditions of supervised release.[159] The Eighth Circuit has issued opinions on both sides of the equation—having both affirmed and overturned Internet restrictions imposed upon defendants convicted of possession of child pornography.[160] In *United States v. Ristine*, the Eighth Circuit upheld a condition of supervised release that allowed the defendant to have Internet access only after receiving permission from his probation officer.[161] However, only two years later in *United States v. Crume* the Eighth Circuit *struck down* a probationary condition that prohibited a defendant from using the Internet without obtaining prior approval from his probation officer.[162] The Eighth Circuit is seemingly of the position that the

152. *Id.*

153. *Id.* at 1087 (internal quotations omitted).

154. *Id.* at 1093 (quoting United States v. Walser, 275 F.3d 981, 988 (10th Cir. 2001)).

155. *See id.* at 1093 n.11.

156. *See* United States v. Sullivan, 451 F.3d 884, 896 (D.C. Cir. 2006); United States v. Rearden, 349 F.3d 608, 621 (9th Cir. 2003).

157. *Rearden*, 349 F.3d at 621.

158. *Sullivan*, 451 F.3d at 896.

159. *See* United States v. Crume, 422 F.3d 728, 733 (8th Cir. 2005); United States v. Ristine, 335 F.3d 692, 696 (8th Cir. 2003).

160. *See Crume*, 422 F.3d at 733; *Ristine*, 335 F.3d at 696.

161. *Ristine*, 335 F.3d at 696.

162. *Crume*, 422 F.3d at 733.

more severe the crime, the more likely the Internet restriction is to be upheld, and vice versa.[163]

C. The Supposed "Middle Ground"

The supposed middle ground on this issue has been taken by the Third, Seventh, and Tenth Circuits.[164] The Third Circuit first faced this issue in *United States v. Crandon*.[165] In *Crandon*, the defendant was charged with, among other things, possession of child pornography.[166] The defendant pled guilty to the charge, and the district court imposed a seventy-eight month sentence of incarceration followed by a period of probation.[167] As part of the defendant's probation, he was required to refrain from accessing the Internet unless specifically approved by the probation office.[168] On appeal, the Third Circuit affirmed the Internet restriction and held that "the special condition [was] narrowly tailored and [was] directly related to deterring [the defendant] and protecting the public."[169]

The Third Circuit refined its view of Internet restrictions in *United States v. Freeman*, where the defendant was charged *only* with possession of child pornography.[170] In *Freeman*, the district court, in addition to imposing a period of incarceration, ordered the defendant to refrain from "possess[ing] or us[ing] a computer with access to any on-line computer service at any location without the written approval of [his] Probation Officer."[171] On appeal, the Third Circuit took note of the fact that e-mail is a "widely used form of communication."[172] In vacating the district court's order, the court distinguished the case from *Crandon* on the grounds that, unlike *Crandon*, the defendant in *Freeman* was merely found in *possession* of pornographic images of children.[173] As a result, the court found that in the absence of something more—such as using the Internet to *contact* children—there was no need to cut off the defendant's "access to e-mail or

163. *See id.* (suggesting that crimes involving serious abuse of computers deserve heavier restrictions on Internet use, but in the absence of serious abuse, such restrictions should not be upheld).

164. *See* McKay, *supra* note 129, at 227.

165. *See* 173 F.3d 122, 127-28 (3d Cir. 1999).

166. *Id.* at 125.

167. *Id.*

168. *Id.* at 127.

169. *Id.* at 128.

170. *See* United States v. Freeman, 316 F.3d 386, 387-88 (3d Cir. 2003).

171. *Id.* at 389-90 (internal quotations omitted).

172. *Id.* at 392.

173. *Id.* at 387, 391-92.

benign internet usage when a more focused restriction . . . [could] be enforced."[174]

Both the Seventh and Tenth Circuits have issued opinions regarding Internet restrictions that *completely* prohibit an offender's access to the Internet throughout a period of probation.[175] The Tenth Circuit, in *United States v. White*, overturned an Internet restriction imposed by the district court that ordered the defendant to "not possess a computer with Internet access."[176] The Tenth Circuit reasoned that the same objectives could have been achieved using means less restrictive than completely eliminating the defendant's access to the Internet[177] and suggested instead that "filtering software [could be used] to interpose a barrier between the computer's web browser and Internet connection."[178]

Similarly, the Seventh Circuit faced an appeal from an order of the district court stating that the defendant "not possess or use a computer . . . that allows access to any part of the Internet."[179] The court overturned the district court's order and held that, because the Internet restriction was a "total ban on Internet use, it swe[pt] more broadly and impose[d] a greater deprivation [of the defendant's] liberty than [was] necessary."[180] As the basis for its holding, the Seventh Circuit noted the importance of the Internet in modern society and stated that such a complete ban on Internet access would "render[] modern life . . . exceptionally difficult."[181]

Most recently, the First Circuit has faced the issue of Internet restrictions as conditions of supervised release.[182] In *United States v. Perazza-Mercado*, the defendant was a teacher for special needs students at the Department of Defense's Education and Administration Antilles Intermediate School.[183] While on duty, the defendant engaged in sexual contact with a nine-year-old female student under his care.[184] Another student witnessed the incident and reported the matter to another faculty member.[185] As a result, the defendant was arrested for engaging in sexual contact with a female under the age of twelve—to which he later pled

174. *Id.* at 392.

175. *See, e.g.*, United States v. Holm, 326 F.3d 872 (7th Cir. 2003); United States v. White, 244 F.3d 1199 (10th Cir. 2001).

176. *White*, 244 F.3d at 1201 (internal quotations omitted).

177. *See id.* at 1205.

178. *Id.* at 1206.

179. *Holm*, 326 F.3d at 877.

180. *Id.*

181. *Id.* at 878.

182. *See* United States v. Perazza-Mercado, 553 F.3d 65, 66 (1st Cir. 2009).

183. *Id.* at 67.

184. *Id.*

185. *Id.*

guilty.[186] At the sentencing hearing, the district court sentenced the defendant to forty-six months of incarceration and fifteen years of probation upon release.[187] As a condition of probation, the district court ordered that the defendant not have any access to the Internet within his home.[188]

On appeal of the district court's order, the defendant argued that the Internet restriction was not reasonably related to his offense conduct, nor did it advance the aims of deterrence or protection of the public.[189] The First Circuit recognized that an unduly harsh condition of supervised release would be a "significant barrier to a[n offender's] full reentry into society."[190] It also noted, however, that the Internet restriction at issue in the case was not a total ban on access.[191] With these factors in mind, the First Circuit concluded that "[i]n light of the 'ubiquitous presence' of the internet[,] . . . a total ban on [the defendant's] internet use at home . . . . would be an excessive deprivation of liberty."[192] As such, the First Circuit held that the availability of adequate alternatives to a sweeping ban on Internet access required that the restriction be vacated.[193]

V. The Impermissibility of Sweeping Bans on Internet Access for Offenders Convicted of Possessing Child Pornography

Without question, possession of child pornography is a very serious criminal offense. In no way does this Note intend to diminish the gravity of such an offense or the effects that it has on its victims and their families.[194] This Note focuses on the very narrow offense of *possessing* child pornography, rather than the creation of child pornography or its distribution. Further, this Note focuses not on the periods of incarceration that typically attend convictions for these offenses, but on the periods of supervised release that follow.

When an offender uses the Internet to obtain images of child pornography, the easy course of action for the courts to take is to impose

186. *See id.*

187. *Id.* at 68.

188. *Perazza-Mercado*, 553 F.3d at 68-69.

189. *Id.* at 70.

190. *Id.* at 71 (internal quotations omitted) (quoting Frank E. Correll, Jr., *"You Fall into Scylla in Seeking to Avoid Charybdis": The Second Circuit's Pragmatic Approach to Supervised Release for Sex Offenders*, 49 WM. & MARY L. REV. 681, 704 (2007)).

191. *Id.* at 71-72.

192. *Id.* at 72 (quoting United States v. Voelker, 489 F.3d 139, 145 (3d Cir. 2007)).

193. *See id.* at 74.

194. *See* WORTLEY & SMALLBONE, *supra* note 43, at 17 (discussing the effects on children who appear in child pornography materials).

both a period of incarceration and a sweeping ban on the offender's Internet access as a condition of his probation. Concededly so, a period of incarceration as the principal mode of punishment is entirely appropriate in these cases.[195] However, imposing a sweeping ban on an offender's Internet access simply goes too far.

It may seem logical for offenders who used the Internet to violate laws intended to prevent child pornography to have their privilege of Internet access revoked, but such a view would deny the significant role occupied by the Internet in modern society. Furthermore, it would violate the principles set forth in § 3553(a).[196] Lastly, there are other methods that may be employed by law enforcement to fight the war on Internet child pornography that do not involve restrictions of an offender's Internet access.[197]

A. The Importance of the Internet in Modern Society Indicates That Restrictions on Its Access Constitute a Greater Deprivation of an Offender's Liberty Than Is Reasonably Necessary to Facilitate Rehabilitation.

Most adults in the United States find that "Internet access [is] essential to daily life in today's economic climate."[198] A survey conducted by Harris Interactive and sponsored by the Intel Corporation revealed that approximately sixty-five percent of adults feel that they cannot live without the Internet.[199] These numbers alone indicate the important role that the Internet plays in today's society.[200]

"Computers and Internet access have become virtually indispensable in the modern world of communications and information gathering."[201] Many legal activities are conducted via the Internet that cannot be as readily carried out in public.[202] Managing medical records and online banking are examples of "important activities that one might not wish to conduct in public because of a legitimate interest in keeping the

195. *See* 18 U.S.C. § 2252(b)(1) (2006).

196. *See* Jonathan Chiu, Comment, United States v. Booker*: The Demise of Mandatory Federal Sentencing Guidelines and the Return of Indeterminate Sentencing*, 39 U. RICH. L. REV. 1311, 1316 (2005); *infra* Part V.B.

197. *See* WORTLEY & SMALLBONE, *supra* note 43, at 37-38.

198. *Most Adults Find Internet Access Essential to Daily Life in Today's Economy: Intel Survey*, INTEL CORP., Dec. 15, 2008, http://www.intel.com/pressroom/archive/releases/2008/20081215corp.htm.

199. *Id.*

200. *See id.*

201. United States v. Peterson, 248 F.3d 79, 83 (2d Cir. 2001).

202. United States v. Perazza-Mercado, 553 F.3d 65, 72 (1st Cir. 2009).

information private."[203] Being that the Internet is "an important medium of communication, commerce, and information-gathering[,]"[204] it can plainly be seen that sweeping restrictions on Internet access would effectively prevent an offender from "function[ing] in the modern world."[205]

The current importance of the Internet is buttressed by the public WiFi movements.[206] "[T]he free [public WiFi] idea is catching on all over the country."[207] Cities and towns are increasingly reviewing the possibility of setting up public WiFi areas for their residents and visitors.[208] Essentially, local governments are considering creating municipal wireless Internet systems to "help bridge the digital divide" among citizens.[209] These efforts by local governments to "mak[e] WiFi Internet part of the public infrastructure"[210] indicate that it has been universally recognized—by both citizens and the government—that Internet access has "become an omnipresent aspect of American life."[211]

A condition of supervised release in the federal system must "involve[] no greater deprivation of liberty than is reasonably necessary."[212] Based upon the foregoing data, the prominent role occupied by the Internet in modern society is readily apparent. Arguably, the Internet occupies a role in society greater than that occupied by telephones and mailing services.[213] Yet, were an offender found in possession of child pornography obtained through placing an order over the telephone and receiving it through the mail, no court would be likely to restrict the offender's telephone access or mail usage.[214]

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203. *Id.*

204. United States v. Crume, 422 F.3d 728, 733 (8th Cir. 2005).

205. *See* United States v. Holm, 326 F.3d 872, 878 (7th Cir. 2003).

206. *See* Robert MacMillan, *Life, Liberty and Free WiFi*, WASHINGTONPOST.COM, May 2, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/05/02/AR2005050200449.html.

207. *Id.*

208. *See generally id.* (describing efforts to launch WiFi "hot zones" in Michigan and Florida).

209. *Id.*

210. *Id.*

211. United States v. Crandon, 173 F.3d 122, 128 (3d Cir. 1999).

212. 18 U.S.C. § 3583(d)(2) (2006).

213. *See* Brian Amble, *Web & Email More Important than the Phone*, MANAGEMENT-ISSUES, June 20, 2003, http://www.management-issues.com/2006/8/24/research/web-email-more-important-than-the-phone.asp. Research conducted by an Internet provider found that many small businesses would be devastated by a loss of their web and e-mail functions, whereas fewer firms indicated a loss of telephones would hamper their business. *Id.*

214. *See* United States v. Peterson, 248 F.3d 79, 83 (2d Cir. 2001) ("Although a defendant might use the telephone to commit fraud, this would not justify a condition of probation that includes an absolute bar on the use of telephones."); *see also* United States v.

Because most courts would balk at the idea of imposing telephone or mail use restrictions for offenders convicted of only possessing child pornography, the importance of the Internet indicates that similar restrictions on its access for the same offenses are entirely inappropriate.[215] The fact that the Internet is used by many as a primary means "of communications and information gathering"—more so than telephones or mail—leads to the inevitable conclusion that imposing restrictions on its access constitutes a greater deprivation of liberty than reasonably necessary.[216]

Concededly so, possession of child pornography is an egregious criminal offense.[217] But when an offender is released from prison and reintegrated into society, it would be anomalous to deprive him of Internet access. Depriving an offender on supervised release from federal custody from accessing the Internet—given its "ubiquitous presence"[218]—has the effect of treating the offender as a second-class citizen.[219] Where, in the absence of additional aggravating circumstances, the offender has been convicted of only *possessing* child pornography and has paid his debt to society by serving a period of incarceration, the offender should be afforded at least some form of access to the Internet as a means of more effective reintegration into society.

One of the goals of the United States Probation Department is to bring about "long-term, positive changes" in individuals under supervision.[220] Additionally, the United States Probation Department requires that people under its supervision obtain lawful employment.[221] However, depriving an offender of Internet access while on supervised release is inapposite to this mission. Treating an offender as a second-class citizen by depriving him of Internet access essentially works as a long-term *negative* change.[222] Because many jobs require—to some extent—computer usage or access to

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Sofsky, 287 F.3d 122, 126 (2d Cir. 2002) (stating that a condition of supervised release that prohibited an offender convicted of mail fraud from using the mail would be inappropriate).

215. *See Peterson*, 248 F.3d at 83.

216. *See id.*

217. *See* United States v. Villard, 700 F. Supp. 803, 809 (D.N.J. 1988) ("There is no subject which elicits a more passionate response than the sexual exploitation of children. Society abhors, and rightfully so, the victimization of the defenseless child.").

218. United States v. Voelker, 489 F.3d 139, 145 (3d Cir. 2007).

219. *See* MARIA E. WYNNE & LANE F. COOPER, POWER UP: THE CAMPAIGN FOR DIGITAL INCLUSION 4 (2007), *available at* http://www.digitalaccess.org/pdf/White_Paper.pdf.

220. U.S. Probation & Pretrial Servs., Charter for Excellence, http://www.uscourts.gov/fedprob/system/CharterHandout.pdf (last visited May 1, 2010).

221. *See* U.S. Probation & Pretrial Servs., Supervision, http://www.uscourts.gov/fedprob/supervise.html (last visited May 1, 2010).

222. *See infra* text accompanying notes 223-224.

the Internet, such restrictions would have a negative impact not only on an offender's personal life but also on his financial livelihood.[223] As a result, the importance of the Internet, as well as the mission of the United States Probation Department, demonstrate that any restriction on an offender's Internet access constitutes "a greater deprivation of . . . liberty than is reasonably necessary for [an offender's] rehabilitation."[224]

B. Internet Restrictions as a Condition of Supervised Release for Offenders Convicted of Possessing Child Pornography Violate the Factors Set Forth in 18 U.S.C. § 3553.

In addition to considerations of the important role of the Internet in today's society, restrictions on Internet access as a condition of supervised release also violate the factors set forth in 18 U.S.C. § 3553.[225] Specifically, § 3553 provides that the district courts, when imposing sentences or conditions of probation, should consider "the need for the sentence imposed . . . to afford adequate deterrence to criminal conduct; [and] to protect the public from further crimes of the defendant."[226] Internet restrictions fail to satisfy either of these considerations.

1. Internet Restrictions Fail to Afford Adequate Deterrence to Criminal Conduct.

Section 3553(a) encourages courts to consider the need for a condition of supervised release to afford sufficient deterrence to future criminal conduct of the offender.[227] However, court-imposed Internet restrictions fail to satisfy this consideration.[228] On its face, depriving an offender of using the instrument by which he committed a criminal offense would seem logical. However, this reasoning is misplaced.[229]

In the typical case, an offender is sentenced to a lengthy period of incarceration before being released and placed on probation.[230] It is beyond

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223. *See* WYNNE & COOPER, *supra* note 219. Computer access and literacy "is now a growing requirement for all kinds of jobs, including occupations traditionally considered 'blue-collar.'" *Id.* Jobs in the fields of manufacturing, retail, and construction are now requiring some extent of computer literacy and Internet access. *Id.*

224. United States v. Perazza-Mercado, 553 F.3d 65, 73 (1st Cir. 2009).

225. *See* United States v. White, 244 F.3d 1199, 1206 (10th Cir. 2001).

226. 18 U.S.C. § 3553(a)(2) (2006).

227. *Id.* § 3553(a)(2)(B).

228. *See infra* text accompanying notes 235-43.

229. *See infra* text accompanying notes 235-43.

230. *See, e.g.*, United States v. Sullivan, 451 F.3d 884, 887 (D.C. Cir. 2006) (thirty months of incarceration and two years of probation); United States v. Rearden, 349 F.3d 608, 612 (9th Cir. 2003) (fifty-one months of incarceration); United States v. Zinn, 321 F.3d

argument that offenders have *no access* to the Internet while in federal custody.[231] Therefore, such deprivation of Internet access need not continue into a period of supervised release.[232] Because an offender is deprived of Internet access while in custody—it is the incarceration itself, and *not* the Internet restriction, that provides the "adequate deterrence to criminal conduct."[233] This fact alone would be sufficient to conclude that Internet restrictions during supervised release fail to provide adequate deterrence to criminal conduct; the analysis, however, goes deeper.[234]

Without question, the easiest method for offenders to obtain images of child pornography is by using the Internet.[235] Nevertheless, the Internet is *not* the only method.[236] From the time that the creation of child pornography began, more traditional sources—such as magazines—were purchased in order to obtain such images.[237] Even today offenders still use the mail as a means by which to obtain child pornography.[238] Though arguably less anonymous, these methods remain open and available today to those who are willing to use them. This Note in no way intends to endorse either method as the better approach to obtaining such deplorable materials. The point, however, is that depriving an offender of Internet access does not achieve the desired result. Depriving an offender of Internet access prohibits only one method by which he may obtain such materials.[239] This means that any other method—i.e., use of the mail or

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1084, 1086 (11th Cir. 2003) (thirty-three months of incarceration); United States v. Freeman, 316 F.3d 386, 389 (3d Cir. 2003) (seventy months of incarceration and five years of probation); United States v. Sofsky, 287 F.3d 122, 124 (2d Cir. 2002) (one-hundred and twenty-one months of incarceration and three years of probation); United States v. White, 244 F.3d 1199, 1201 (10th Cir. 2001) (twenty-four months of incarceration); United States v. Crandon, 173 F.3d 122, 125 (3d Cir. 1999) (seventy-eight months of incarceration and three years of probation).

231. Joe Mandak, *Inmates Use Intermediaries to Escape to the Internet*, USA TODAY, May 1, 2005, http://www.usatoday.com/tech/news/2005-05-01-inmates-internet_x.htm ("[F]ederal prisons [do not] let inmates use Internet computers behind bars . . . .").

232. *See infra* text accompanying notes 235-243.

233. *See* 18 U.S.C. § 3553(a)(2)(B) (2006).

234. *See infra* text accompanying notes 235-243.

235. *See* Eichenwald, *supra* note 53 (arguing that the Internet made the collection and trading of child pornography easier).

236. *See* WORTLEY & SMALLBONE, *supra* note 43, at 1 (noting that child pornography has been distributed in hard-copy forms such as magazines).

237. *See id.*

238. *See, e.g.*, United States v. Zinn, 321 F.3d 1084, 1086 (11th Cir. 2003) (discussing a law enforcement sting operation conducted after an offender placed a mail order for a child pornography video); United States v. White, 244 F.3d 1199, 1201 (10th Cir. 2001) (same).

239. *See* WORTLEY & SMALLBONE, *supra* note 43, at 1; Eichenwald, *supra* note 53.

purchase of magazines—would be left completely open for offenders should they choose to go that route.[240]

Deprivation of Internet access certainly provides *some* deterrence to possessing child pornography.[241] The deterrence, however, is *inadequate*, and thus fails the consideration set forth in § 3553(a)(2).[242] Because offenders who receive Internet restrictions as a condition of supervised release after being convicted of possessing child pornography are deprived of only *one method* by which they could obtain such materials, Internet restrictions do not "afford adequate deterrence" to engaging in similar activity in the future.[243]

2. The Goals of Supervised Release Can Be Achieved Using Means Less Restrictive Than Prohibiting an Offender from Accessing the Internet.

As noted above, several courts have recognized the importance of the Internet in modern society.[244] In light of that fact, courts should be hesitant to impose restrictions on an offender's access—absent aggravating circumstances.[245] The federal sentencing guidelines, though not obligatory in federal court, indicate that conditions of probation should involve no greater deprivation of an offender's liberty than is reasonably necessary.[246] The availability of less restrictive means to carry out the purpose of supervised release indicates that restrictions on Internet access constitute a greater deprivation of liberty than is reasonably necessary.[247]

The Tenth Circuit was the first to address the availability of less restrictive means than banning an offender's Internet access.[248]

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240. *See supra* text accompanying notes 235-239. This Note does not suggest that using the telephone or mail to purchase child pornography is legal—plainly it is not. This Note merely suggests that such conduct is not expressly prohibited by court-imposed Internet restrictions.

241. *See* United States v. Crandon, 173 F.3d 122, 127-28 (3d Cir. 1999) ("We believe that . . . restricting [the defendant's] Internet access is reasonably related . . . to the goal of deterring him from engaging in further criminal conduct . . . .").

242. *See* 18 U.S.C. § 3553(a)(2) (2006).

243. *See* § 3553(a)(2)(B).

244. *See, e.g.*, United States v. Holm, 326 F.3d 872, 878 (7th Cir. 2003) (noting that life without the Internet would be "exceptionally difficult"); *Crandon*, 173 F.3d at 128 (noting that the Internet has become an "omnipresent aspect of American life"); *see also supra* Part V.A.

245. *See Holm*, 326 F.3d at 878; *supra* Part V.A.

246. 18 U.S.C. § 3583(d)(2).

247. *See* United States v. Lifshitz, 369 F.3d 173, 191-93 (2d Cir. 2004) (discussing alternative methods to restricting an offender's access to the Internet).

248. *See* United States v. White, 244 F.3d 1199, 1206 (10th Cir. 2001).

Specifically, the Tenth Circuit discussed the availability of "filtering software."[249] Filtering software, otherwise known as "Internet content filtering," is:

> accomplished by using a piece of software to compare information about a piece of content . . . on the user's computer monitor. This technology is known as "filtering" . . . because the browser lets only certain content "through" the filter to the person viewing the content. Content that does not meet the criteria is screened by the filter before it reaches the user.[250]

Filtering software is an alternative to imposing a sweeping Internet restriction because such programs interpose a barrier between the web browser of an offender's personal computer and its Internet connection.[251] Presumably, the purpose of restricting an offender's access to the Internet is to prevent the offender from accessing child pornography.[252] Filtering software, however, achieves the same result in a less restrictive manner.[253] Such software prevents an offender from accessing the forbidden websites—which is the purpose of an Internet restriction—and still permits the offender to make proper use of the Internet.[254]

Admittedly, filtering software is not completely effective.[255] Such software only regulates the computer on which it is installed.[256] Therefore, an offender could potentially circumvent the purpose of the program simply by using a different computer in a different location.[257] However, filtering software is not the only option.[258]

Aside from filtering software, there are other available alternatives to Internet restrictions that achieve the same objectives of preventing an

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249. *Id.*

250. Thomas B. Nachbar, *Paradox and Structure: Relying on Government Regulation to Preserve the Internet's Unregulated Character*, 85 MINN. L. REV. 215, 223 (2000).

251. *White*, 244 F.3d at 1206.

252. *See* Correll, *supra* note 190, at 709 ("Internet restrictions as a part of a sexual offender's term of supervised release aim to minimize the possibility that the offender will recommit the same type of crime that landed him in prison in the first place.").

253. *See White*, 244 F.3d at 1206 (noting that the Internet restriction was "overly broad" in light of the fact that filtering software was an available alternative).

254. *See id.* ("[Filtering] programs filter objectionable material either by blacklisting sites and removing them from access, or by whitelisting the sites, blocking access to all sites except those listed on the 'white' list based on categories of content." (citing Nachbar, *supra* note 250, at 224)).

255. *Id.*

256. *Id.*

257. *Id.* at 1206 n.9.

258. *See* United States v. Lifshitz, 369 F.3d 173, 191-93 (2d Cir. 2004).

offender from accessing child pornography via the Internet.[259] As the Second Circuit noted in *United States v. Lifshitz*, there are a "variet[y] of products and techniques currently available" to achieve this objective.[260] These products and techniques vary with respect to their degree of intrusion into an offender's privacy—ranging from more intrusive to less intrusive.[261]

Less intrusive programs rely only upon records from a computer's Internet Service Provider ("ISP"), where an account user's information requests and e-mails are routed.[262] This type of program is conducive to a limited review only of an offender's transmissions mediated by the ISP, such as the websites visited by the offender.[263] One such program has been implemented in Bexar County, Texas, where offenders on probation are required to sign up with a specified Internet provider chosen by the courts and are required to pay the monthly access fee.[264] As part of an agreement with the county, the Internet provider then monitors the offender's online activities.[265] Access to sex-related sites, as well as access to newsgroups, chatrooms, and other online areas that children may visit, is typically prohibited.[266]

More intrusive programs are also available.[267] Such programs are "conducive to investigating all of [an offender's] computer-based activities, including those performed locally without connection to the Internet or any network—such as [an offender's] word processing activities."[268] More comprehensive programs possess the ability to monitor all of an offender's computer usage under what is known as "keystroke" monitoring.[269] Such programs literally have the capability to monitor every activity conducted by an offender on their computer.[270]

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259. *See id.*

260. *See id.* at 191.

261. *See id.*

262. *See id.*

263. *Id.*

264. Ihosvani Rodriguez, *Three Sex Offenders Caught Seeking Internet Porn; Trio Had Agreed to Be Under the Authority of Cyber-Watchdogs*, SAN ANTONIO EXPRESS-NEWS, Dec. 28, 1991, at 1A, *available at* 2001 WLNR 11978137.

265. *Id.*

266. *Id.*

267. *See Lifshitz*, 369 F.3d at 191.

268. *Id.*

269. *See* Matt Richtel, *A Different Type of Computer Monitor*, N.Y. TIMES, Aug. 27, 1998, at G3, *available at* http://www.nytimes.com/1998/08/27/technology/news-watch-a-different-type-of-computer-monitor.html?pagewanted=1 (explaining the workings of "keystroke" monitoring).

270. *See id.*

There are also programs that are slightly less intrusive than "keystroke" monitoring.[271] A program known as Cyber Sentinel is "attuned to detecting [only] specific impermissible activities."[272] Specifically, this program is designed to capture a screenshot of an offender's computer each time it detects that the computer is engaged in suspicious activity.[273] It then saves the data to the computer's hard drive and automatically sends an e-mail to the offender's probation officer.[274] Essentially, the program operates "by monitoring everything that crosses the computer screen and comparing the sites visited and the words appearing on the screen with a database of sexually oriented sites and phrases."[275]

Still, these programs suffer from the same deficiencies as filtering software in that the possibility of circumvention by an offender remains present.[276] However, such deficiencies do not render these alternatives inoperative.[277] To some extent, many conditions of probation carry with them an assumption of good faith on the part of the offender; for instance, when an offender is convicted of drug possession, a standard probationary condition for the offender is that he or she refrains from using drugs.[278] To ensure that such a condition is obeyed by the offender, random drug tests are conducted by the probation department to make sure that the offender is drug-free.[279] These drug testing programs, however, are not fully effective in the sense that circumvention is possible.[280] For example, offenders may still use drugs while on probation and simply purchase detoxification products that clean their system and allow them to appear drug-free even

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271. *See, e.g.*, John Schwartz, *Internet Leash Can Monitor Sex Offenders*, N.Y. TIMES, Dec. 31, 2001, at C1, *available at* http://www.nytimes.com/2001/12/31/business/internet-leash-can-monitor-sex-offenders.html (describing the workings of a program known as Cyber Sentinel).

272. *Lifshitz*, 369 F.3d at 191 n.10.

273. Schwartz, *supra* note 271.

274. *Id.*

275. *Id.*

276. *See supra* text accompanying notes 255-57.

277. *See infra* text accompanying notes 278-85.

278. *See, e.g.*, U.S. Courts, Substance Abuse Treatment, http://www.uscourts.gov/fedprob/treatment/substance.html (last visited May 1, 2010) (explaining that the Substance Abuse Treatment Program of the U.S. Probation and Pretrial Services System provides a framework for supervising offenders with drug problems).

279. *See id.* ("[Drug testing] is key to enforcing the conditions set for [an offender's] release . . . .").

280. *See* How to Pass a Drug Test: Practical Advice & Common Sense Solutions, http://www.howtopassadrugtest420.org/27/how-to-pass-a-urine-test (last visited May 1, 2010) (discussing the methods by which one can falsely pass a drug test and offering a product that "guarantees" success).

when they are not.[281] Notwithstanding the lack of complete effectiveness, drug testing programs as a part of probation are heavily employed throughout the United States.[282]

Likewise, the same approach should be employed with respect to offenders convicted of possessing child pornography.[283] Under circumstances in which an offender has been convicted of possessing child pornography, supervised release typically follows a lengthy period of incarceration.[284] The fact that these offenders have already been deprived of Internet access for a substantial period of time indicates that they, like drug abusers, should be given the benefit of the doubt. Though the discussed alternatives to Internet restrictions suffer from minor infirmities, there is no indication that such alternatives would be ineffective in achieving the desired result.[285] Even though these alternatives may not be effective, they do signify that the desired result of preventing offenders from accessing child pornography via the Internet can clearly be achieved using means less restrictive than completely prohibiting Internet access.[286] Therefore, any restriction of an offender's Internet access constitutes a greater deprivation of liberty than is reasonably necessary.[287]

C. Restricting an Offender's Internet Access Is Unnecessary Because There Are Other Specific Means that May Be Employed to Respond to and Reduce Internet Child Pornography.

Law enforcement has recognized that it is nearly impossible to completely eliminate all forms of child pornography from the Internet.[288]

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281. *See, e.g., id.*

282. *See* THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: CHARACTERISTICS OF ADULTS ON PROBATION, 1995, at 7 (1997) (noting that a 1995 survey indicated "[d]rug testing was required of [thirty-two percent]" of adults on probation).

283. *See infra* text accompanying notes 284-287.

284. *See, e.g.*, cases cited *supra* note 230.

285. *See* PAUL GREENFIELD ET AL., EFFECTIVENESS OF INTERNET FILTERING SOFTWARE PRODUCTS 6 (2001).

286. *See id.* (noting that a very safe Internet would be a very restricted Internet); Correll, *supra* note 190, at 705-06 (describing better-tailored monitoring conditions); Anton L. Janik, Jr., *Combating the Illicit Internet: Decisions by the Tenth Circuit to Apply Harsher Sentences and Lessened Search Requirements to Child Pornographers Using Computers*, 79 DENV. U. L. REV. 379, 392-93 (2002) (describing useful restrictions short of bans).

287. *See* 18 U.S.C. § 3583(d)(2) (2006); *see, e.g.*, United States v. Freeman, 316 F.3d 386, 391 (3d Cir. 2003) (finding restrictions that limited the possession of a computer or use of the Internet without the approval of a parole officer to be a deprivation of liberty); United States v. White, 244 F.3d 1199, 1206-07 (10th Cir. 2001) (finding that an absolute ban on computer and Internet use was greater than necessary).

288. WORTLEY & SMALLBONE, *supra* note 43, at 37.

Nevertheless, "it *is* possible to reduce the volume of child pornography on the Internet[] to make it more difficult or risky to access."[289] This shows that rather than restricting the Internet access of offenders, other strategies may be employed to reduce the prevalence of child pornography on the Internet.[290]

One such strategy is self-regulation of the computer industry.[291] The computer industry can contribute to the reduction of child pornography on the Internet by removing illegal sites immediately after becoming aware of their existence.[292] Additionally, as some members of the computer industry have already done, complaint websites and hotlines can be established to report illegal Internet practices.[293] Lastly, the computer industry can also apply filtering software to its own web browsers and search engines used by their customers to prevent users from accessing the forbidden websites.[294]

Another strategy that can be employed in lieu of restricting an offender's Internet access is by way of legislative regulations.[295] Recently, "there have been calls for increased legislation to compel the computer industry to play a greater role in controlling Internet child pornography."[296] Specifically, some proposals for new legislation include holding ISPs legally responsible for website content and requiring the preservation of business records of ISPs.[297] Additionally, a significant legislative proposal would require ISPs to verify user identification.[298] The ease of creating Internet accounts with false names and addresses has led to a call for ISPs

289. *Id.* (emphasis added). Since 1996, Internet Service Providers have removed approximately 20,000 images of child pornography from websites. *Id.*

290. *See id.*

291. *Id.*

292. *Id.* at 38.

293. *Id.*

294. WORTLEY & SMALLBONE, *supra* note 43, at 38. It should also be noted that filtering software that has the capability of specifically identifying pornographic images is currently under development. *Id.*

295. *See id.*

296. *Id.*

297. *Id.* at 38-39; *see, e.g.*, Declan McCullagh, *FBI, Politicos Renew Push for ISP Data Retention Laws*, CNET, Apr. 23, 2008, http://news.cnet.com/8301-13578_3-9926803-38.html (describing a proposal that would require ISPs to retain records of users' online activities for two years).

298. *See* WORTLEY & SMALLBONE, *supra* note 43, at 39; *see, e.g.*, Online Age Verification and Child Safety Act, H.R. 4059, 111th Cong. § 101 (2009) (requiring websites to employ age verification processes prior to permitting access to certain categories of websites).

to strengthen their procedures with respect to verifying the identities of their account holders.[299]

Related industries can also contribute to the decrease in Internet child pornography.[300] ISPs are not the only companies with a stake in the Internet.[301] For example, credit card companies earn considerable revenue from allowing transactions to commence via the Internet.[302] Notably, offenders who purchase child pornography on the Internet typically do so by paying for it electronically—i.e., with a credit card.[303] Still, little attention is given to the fact that credit card companies are as much at fault for the child pornography crisis as are ISPs.[304] "[C]redit card companies have a duty to not knowingly contribute to illegal acts."[305] As such, a requirement that credit card companies—as much as ISPs—contribute to the prevention of child pornography on the Internet would be another adequate alternative to restricting the Internet access of offenders on supervised release.

Lastly, law enforcement can also respond to the problem of Internet child pornography.[306] Law enforcement can search the Internet to locate offending websites and remove them from general public view.[307] Additionally, law enforcement can conduct undercover sting operations in an effort to catch offenders and bring them to justice.[308] Such operations would prevent potential offenders from publishing child pornography on the Internet due to an increased risk of detection and prosecution.[309] Publicizing crackdowns of Internet child pornography would also create a

299. WORTLEY & SMALLBONE, *supra* note 43, at 39; *see* Anick Jesdanun, *MySpace Case Challenges 'Fake' Online Conduct*, MSNBC.COM, May 16, 2008, http://www.msnbc.msn.com/id/24670474/ ("[P]eople regularly create accounts or post information under aliases for many legitimate reasons, including parody, spam avoidance and a desire to maintain their anonymity or privacy online or that of a child.").

300. *See* WORTLEY & SMALLBONE, *supra* note 43, at 40.

301. *See id.*

302. *See id.*

303. *See id.*

304. *See id.*

305. *Id.*

306. *See* WORTLEY & SMALLBONE, *supra* note 43, at 43.

307. *See id.* at 43-44.

308. *See id.* at 44; *see, e.g.*, Gary Taylor, *Officers Pose as Children to Protect Youthful Web Users*, ORLANDO SENTINEL, Mar. 24, 2010, http://articles.orlandosentinel.com/2010-03-24/news/os-sex-sting-orlando-fla-target-predator-20100324_1_child-pornography-attorney-general-bill-mccollum-veteran-officer (describing the efforts of the Florida Attorney General's task force responsible for making 150 arrests of online sexual predators since 2007).

309. *See* WORTLEY & SMALLBONE, *supra* note 43, at 44.

public perception "among potential offenders that the Internet is an unsafe environment in which to access child pornography."[310]

A brief review of the methods discussed above indicates that the burden of Internet restrictions need not be placed on the offenders. Internet restrictions would be rendered entirely unnecessary if these alternative methods were employed. If ISPs, legislatures, credit card companies, and law enforcement come together to combat Internet child pornography, it would be inaccessible to *anybody*—not just offenders on supervised release. This demonstrates that Internet restrictions would be superfluous if the forbidden sites were inaccessible regardless. As a result, the availability of these adequate alternatives reveals that restricting the Internet access of offenders convicted of possessing child pornography constitutes a greater deprivation of liberty than is reasonably necessary.[311]

CONCLUSION

It is difficult to advocate on behalf of those who commit crimes that inflame one's inner passions.[312] Thus, taking an objective viewpoint on a topic such as Internet restrictions for offenders convicted of possessing child pornography may seem counterintuitive. One point, however, must be stressed: opposing Internet restrictions is not the equivalent of supporting child pornography.[313]

Offenders of this nature typically are sentenced to lengthy periods of incarceration, and rightfully so.[314] They are not, however, sentenced for life.[315] The fact that offenders of this nature are not sentenced to life imprisonment, but instead they are sentenced to periods of incarceration followed by supervised release, indicates the federal government's recognition that rehabilitation is possible and that reintegration into society is inevitable.[316] Given the "'ubiquitous presence' of the internet[,]"[317] it would be anomalous to allow offenders to reenter society but deny them access to one of the cornerstones of its existence.[318] It is the probation

310. *Id.*

311. *See* 18 U.S.C. § 3583(d)(2) (2006).

312. *See supra* note 217 and accompanying text.

313. *But see* United States v. Thielemen, 575 F.3d 265, 277 (3d Cir. 2009) ("[T]here is a significant nexus between restricting . . . access to [poronographic material] and the goals of supervised release . . . .").

314. *See, e.g.*, cases cited *supra* note 230.

315. *See, e.g.*, cases cited *supra* note 230.

316. *See* U.S. Courts, Supervision, http://www.uscourts.gov/fedprob/supervise.html (last visited May 1, 2010) ("In the federal courts, supervision is . . . [a]n opportunity to help offenders reintegrate into the community following a period of incarceration.").

317. United States v. Voelker, 489 F.3d 139, 145 (3d Cir. 2007).

318. *See id.*; WYNNE & COOPER, *supra* note 219.

itself, as well as other standard conditions of supervised release, that keeps a watchful eye over the offender and ensures that he or she properly is reintegrated into society.[319] Therefore, Internet restrictions should play no part in that process because such restrictions simply go too far.

Society must remember that when offenders convicted of possessing child pornography are in federal custody, they do not have access to the Internet.[320] Once released from custody, offenders have already paid their debt to society, and their liberty has already been substantially deprived.[321] The restrictions of imprisonment should not carry over to periods of probation. The availability of adequate alternatives to imposing Internet restrictions on offenders convicted of possessing child pornography leads to the inevitable conclusion that such restrictions constitute a greater deprivation of liberty than is reasonably necessary. The bottom line is clear—when the federal courts act as a toll booth to the information super highway, Internet restrictions *are* too high of a price to pay.

319. *See* U.S. Probation & Pretrial Servs., *supra* note 220.

320. *See* Mandak, *supra* note 231.

321. *See* cases cited *supra* note 230 and accompanying text; *see also* Frederick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 MICH. L. REV. 320, 348-50 (1994) (describing the theory of retributive punishment from which the notion of imprisonment repaying society comes).

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COMMENTS

ALL THE VICE PRESIDENT'S MEN: HOW THE COURT IN *WILSON V. LIBBY* MISINTERPRETED THE PRIVACY ACT AND DENIED A REMEDY FOR THE ILLEGAL DISCLOSURE OF VALERIE PLAME WILSON'S COVERT CIA IDENTITY

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Abstract: On July 14, 2003, Robert Novak's weekly column dismissed Joe Wilson's 2002 report for the CIA, which concluded that an Iraqi purchase of nuclear material was highly unlikely. According to Novak, Wilson's report was considered insignificant, and neither the President of the United States nor the Director of the CIA ever saw the report before American soldiers were sent to Iraq in 2003. Wilson, a former diplomat, had only been put up for the low-level mission due to his wife, Valerie Plame Wilson, a CIA operative. To most reading Novak's column in the Monday morning edition of the Washington Post, the reference to Ms. Wilson was fleeting and hardly noticeable. But to Ms. Wilson, her husband, and the CIA, the significance was both immediately apparent and devastating. Ms. Wilson's status as a covert CIA agent was confidential, and revealing her identity destroyed her career, put her and her family in danger, and compromised important U.S. intelligence.

In a subsequent civil suit against federal officials for constitutional violations and tortious invasion of privacy, the U.S. Court of Appeals for the District of Columbia denied the Wilsons any remedy. After examining the availability

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of relief under the Privacy Act and *Bivens*, this Comment argues that the majority misconstrued precedent relating to *Bivens*, as well as the purpose and extent of the Privacy Act. In refusing to afford the Wilsons any judicial remedy for the violation of vested legal rights, the court wrongfully denied the Wilsons the essential protection of the laws.

INTRODUCTION

In the landmark case *Marbury v. Madison*,[1] Chief Justice John Marshall declared: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."[2] He went on to say, "[t]he government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[3]

Valerie Plame Wilson and her husband Joe Wilson filed a civil suit against federal officials for alleged constitutional violations and tortious invasion of privacy, but they were denied any remedy by the U.S. Court of Appeals for the District of Columbia.[4] The suit stemmed from a newspaper article written by Robert Novak that destroyed Ms. Wilson's covert status as an agent with the Central Intelligence Agency ("CIA").[5] Ms. Wilson alleged that her identity was obtained by Mr. Novak through leaks from the White House.[6] She further alleged that the White House leaked this information to several reporters as retaliation for her husband speaking out against the George W. Bush Administration in an Op-Ed piece.[7] Specifically, Mr. Wilson, a retired diplomat who had gone to Africa on a fact-finding mission, asserted that in an attempt to sell the Iraq War to the American people, the Bush Administration falsely claimed Saddam Hussein had sought major quantities of uranium from Africa.[8] Shortly thereafter, Mr. Novak's article was published.[9] The named officials

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1. 5 U.S. (1 Cranch) 137 (1803).

2. *Id.* at 163.

3. *Id.*

4. *See* Wilson v. Libby, 535 F.3d 697, 710-11 (D.C. Cir. 2008).

5. *See* Robert D. Novak, *Mission to Niger*, WASH. POST, July 14, 2003, http://www.washingtonpost.com/wp-dyn/content/article/2005/10/20/AR2005102000874.html.

6. *See* Amended Complaint at 2, Wilson v. Libby, 535 F.3d 697 (D.C. Cir. 2008) (No. 06-1258) [hereinafter Amended Complaint].

7. *See id.*

8. *See* Joseph C. Wilson IV, Op-Ed., *What I Didn't Find in Africa*, N.Y. TIMES, July 6, 2003, § 4, at 9, *available at* http://www.nytimes.com/2003/07/06/opinion/06WILS.html.

9. Amended Complaint, *supra* note 6, at 2.

allegedly responsible for the disclosure of Ms. Wilson's classified status included former Vice President Richard B. Cheney, former Senior Advisor to the President Karl C. Rove, former Assistant to the President and Chief of Staff to the Vice President I. Lewis "Scooter" Libby, Jr., and former Deputy Secretary of State Richard L. Armitage.[10]

In a resulting criminal case, Libby was convicted of four counts of perjury, obstruction of justice, and making false statements, and was acquitted of one count of making false statements.[11] No one has been formally charged with illegally leaking Ms. Wilson's identity.[12]

In their civil suit, the Wilsons claimed that the actions of the above-named officials violated the U.S. Constitution and that they should be afforded relief under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[13] Specifically, the Wilsons alleged that disclosure of Ms. Wilson's identity resulted in a violation of Mr. Wilson's First Amendment right to free speech, denied both of them equal protection of the laws, and further violated Ms. Wilson's Fifth Amendment rights to privacy and property.[14]

In *Bivens*, the Supreme Court held that damages may be obtained for injuries resulting from constitutional violations by federal officials.[15] In determining whether a *Bivens* remedy is appropriate, the court must conduct a two-step inquiry.[16] First, it must determine "whether any

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10. Wilson v. Libby, 535 F.3d 697, 701 (D.C. Cir. 2008). Karl Rove, Richard Armitage, and Scooter Libby have since been identified as the sources who provided Ms. Wilson's identity to reporters. *See* Robert Novak, *My Role in the Valerie Plame Leak Story*, HUMAN EVENTS, July 7, 2006, http://www.humanevents.com/article.php?id=15988; Joel Seidman, *Plame Was 'Covert' Agent at Time of Name Leak*, MSNBC, May 29, 2007, http://www.msnbc.msn.com/id/18924679/.

11. *See* United States v. Libby, 498 F. Supp. 2d 1, 2 (D.D.C. 2007).

12. Seidman, *supra* note 10. Following a request from the Citizens for Responsibility and Ethics, a federal judge recently ordered the release of Vice President Cheney's interview regarding the leak. Associated Press, *Judge Orders FBI to Release Cheney Interview in Leak Case*, FOX NEWS, Oct. 1, 2009, http://www.foxnews.com/politics/2009/10/01/judge-orders-fbi-release-cheney-interview-leak-case/?test=latestnews. Cheney was unable to recall any key information, including whether he discussed Ms. Wilson with Libby prior to Novak's article, despite evidence at Libby's trial that indicated that Cheney had discussed Ms. Wilson with Libby one month prior to the article. Associated Press, *Cheney Told FBI No Idea Who Leaked Plame ID*, MSNBC, Oct. 30, 2009, http://www.msnbc.msn.com/id/33556198/ns/politics-more_politics/.

13. *See Wilson*, 535 F.3d at 702.

14. *Id.* at 703.

15. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1971).

16. *Wilson*, 535 F.3d at 714 (Rogers, J., concurring and dissenting) (citing Wilkie v. Robbins, 551 U.S. 537, 550 (2007)).

alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages."[17] Second, the court must also consider "special factors counseling hesitation before authorizing a new kind of federal litigation."[18]

A district court judge dismissed the Wilsons' case for lack of jurisdiction, and upon appeal, the U.S. Court of Appeals for the District of Columbia upheld the dismissal.[19] The court found that a comprehensive remedial scheme existed in the Privacy Act and thus precluded relief under *Bivens*.[20] The court further held that the Offices of the President and Vice President were excluded from the Act,[21] and no *Bivens* relief could be afforded due to various other "special factors counseling hesitation."[22]

This Comment argues that the partially dissenting opinion correctly found that the Wilsons' constitutional claims, at least in part, should not have been dismissed because the Privacy Act[23] is an insufficient remedy and does not provide relief for the particular harm done here. The purpose of the Privacy Act is to protect individuals, and the disclosure of the covert status of a CIA agent by senior federal officials certainly was not contemplated at the time the Act was instituted.[24] Moreover, the Act was not meant to create a per se bar to relief for *constitutional* wrongs, which would leave the plaintiffs with no remedy at all.[25] Rather, a *Bivens* remedy would provide the appropriate and necessary relief to the Wilsons.[26]

Part I examines the relevant law, including the Privacy Act and its purpose, as well as *Bivens* and its subsequent application. Part II discusses the court's opinion in *Wilson v. Libby*, its reasoning, and the dissent. Part III.A asserts that the majority opinion in *Wilson* misconstrued precedent relating to *Bivens* as well as the purpose and extent of the Privacy Act. The partially dissenting opinion appropriately argued that the existence of this statute does not entirely preclude relief in situations the statute did not purport to address, such as this one. Finally, Part III.B rejects the court's

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17. *Id.* (internal quotations omitted) (quoting *Wilkie*, 551 U.S. at 550).

18. *Id.* (internal quotations omitted) (quoting *Wilkie*, 551 U.S. at 550) (error omitted).

19. *See id.* at 713 (majority opinion).

20. *See id.* at 710.

21. *Id.* at 707.

22. *See Wilson*, 535 F.3d at 709-10, 714.

23. 5 U.S.C. § 552a (2006).

24. *See generally* S. REP. NO. 93-1183 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6916, 6916 (stating the purpose of the Act is "to promote governmental respect for the privacy of citizens by requiring all departments and agencies of the executive branch and their employees to observe certain constitutional rules").

25. *See generally id.*

26. *See Wilson*, 535 F.3d at 721 (Rogers, J., concurring and dissenting).

finding that, if heard, the case would inevitably involve delving into national secrets and jeopardize national security for several reasons. First, the damage has been done—Ms. Wilson's covert identity was already revealed. Second, even if these proceedings require some examination of confidential information, there are procedural safeguards in place to ensure the utmost care in such situations, as the courts have successfully done on numerous occasions in the past. Thus, the conclusion of the court is pure speculation and should not be considered a "special factor" counseling against judicial relief.

I. Background of Relevant Law: *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* and the Privacy Act

A. Relief for Injuries by Federal Officials: *Bivens*

In *Bivens*, the plaintiff filed suit for damages arising out of his arrest.[27] On November 26, 1965, agents of the Federal Bureau of Narcotics entered Mr. Bivens's home and arrested him on narcotics charges in front of his family and children.[28] In his complaint, Mr. Bivens alleged that the agents arrested him without probable cause or an arrest warrant and used excessive force, which resulted in his humiliation, embarrassment, and mental suffering.[29] The issue for the Supreme Court was whether the lower courts properly dismissed the case for failing to state a cause of action.[30]

In finding that Mr. Bivens had a cause of action under the Fourth Amendment, the Court stated, "[t]hat damages may be obtained for injuries consequent upon a violation of the Fourth Amendment by federal officials should hardly seem a surprising proposition. Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."[31] The Court concluded that where, as here, a federal statute affords a general right to sue for the disregard of legally recognized rights, and there are no "special factors counseling hesitation," the federal courts serve as the proper forum in which to seek relief.[32]

B. Interpreting *Bivens*: Clarifying and Applying the Rule

The Supreme Court later clarified the *Bivens* rule in *Wilkie v. Robbins*.[33] Once it has been established that a "constitutionally recognized

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27. *See* 403 U.S. 388, 389 (1971).
28. *Id.*
29. *Id.* at 389-90.
30. *See id.* at 390.
31. *Id.* at 395.
32. *See id.* at 396.
33. *See* 551 U.S. 537 (2007).

interest" has been invaded by federal officials, a court must engage in a two-step inquiry in determining whether a *Bivens* remedy is proper.[34] The first question is whether a statute or remedial scheme exists that comprehensively and effectively protects the invaded interest of the aggrieved party.[35] If the answer is yes, the court may not afford a remedy under *Bivens*, and the party must seek relief through alternative means.[36] If it is difficult to determine whether the statute "expected the Judiciary to stay its *Bivens* hand, but equally hard to extract any clear lesson that *Bivens* ought to spawn a new claim," the court has the discretion to decide which remedy is best.[37] If, on the other hand, the answer is no, the court must consider whether there are "special factors counseling hesitation," which indicate that a judicial remedy would be inappropriate.[38] Special factors counseling against a judicially imposed remedy include whether Congress is in a better position to provide a remedy and whether there is a lack of judicial manageability of any proposed remedy.[39]

Still, even where there have been special factors counseling hesitation, the Supreme Court has never denied a *Bivens* remedy where an aggrieved party had no alternative remedy at all.[40] Whenever the Court has denied a *Bivens* remedy, there has been a remedial scheme that provided relief, at least in part, for the harm caused.[41]

In one instance, an aerospace engineer filed suit for a *Bivens* remedy against his employer, the director of a space flight center operated by the National Aeronautics and Space Administration, for violating his First Amendment rights allegedly through defamation and retaliatory demotion.[42] The Supreme Court held that a comprehensive remedial scheme, the Civil Service Commission regulations, addressed this situation specifically.[43] Although this remedy did not provide complete relief to the plaintiff, his interests were sufficiently protected to make a *Bivens* remedy

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34. *See id.* at 550.

35. *See id.*

36. *See id.*

37. *See id.* at 554.

38. *See id.* at 550.

39. *See* Wilson v. Libby, 535 F.3d 697, 716 (D.C. Cir. 2008) (Rogers, J., concurring and dissenting).

40. *See id.* at 719; *see also Wilkie*, 551 U.S. at 553, 567-68; Corr. Servs. Corp. v. Malesko, 534 U.S. 61, 72 (2001); Schweiker v. Chilicky, 487 U.S. 412, 428-29 (1988); Bush v. Lucas, 462 U.S. 367, 388-90 (1983). *But see* Chappell v. Wallace, 462 U.S. 296, 304 (1983) (holding that a *Bivens* remedy was improper in an action against military officials despite the lack of a statutory remedy due to the "unique disciplinary structure of the Military Establishment and Congress' activity in the field").

41. *See* cases cited *supra* note 40.

42. *See Bush*, 462 U.S. at 371-72.

43. *See id.* at 388-90.

unnecessary.[44] Similarly, in *Schweiker v. Chilicky*, parties unable to obtain money damages against officials allegedly responsible for unconstitutional conduct leading to the improper denial of their social security disability benefits were still afforded proper relief under the Social Security Act.[45]

C. An Insufficient and Inapplicable Remedy: The Privacy Act[46]

The Privacy Act has been in effect since 1975 and was amended in 2004 due to its vague language and the difficulty courts had in its application.[47] The Privacy Act was enacted in the aftermath of the Watergate scandal, when Congress was particularly concerned with restricting federal agencies from illegal surveillance and investigation of individuals and their private information.[48] The Act purported to protect individuals through several main policy objectives.[49] First, the Act sought to restrict the "disclosure of personally identifiable records maintained by agencies," and second, it aimed "[t]o grant individuals increased rights of access to agency records maintained on themselves."[50] The Act also established "a code of 'fair information practices' which requires agencies to comply with statutory norms for collection, maintenance, and dissemination of records."[51]

The policy objectives provide insight into the purpose and goals of the Privacy Act, indicating that the Act's function was to balance the government's legitimate interest in maintaining informational records with protecting the individual's right to privacy.[52] Specifically, the Privacy Act prohibits government agencies from disclosing an individual's "record which is contained in a system of records" without that individual's consent.[53] A "record" within the meaning of the Act is any documentary

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44. *See id.* at 373.

45. 487 U.S. 412, 424-29 (1988).

46. 5 U.S.C. § 552a (2006).

47. *See* UNITED STATES DEPARTMENT OF JUSTICE, OVERVIEW OF THE PRIVACY ACT OF 1974, at 1 (2004), http://www.usdoj.gov/opcl/1974privacyact.pdf [hereinafter OVERVIEW OF THE PRIVACY ACT].

48. *Id.* at 4.

49. *See id.*

50. *Id.* (emphasis omitted).

51. *Id.* (emphasis omitted).

52. *See id.*

53. 5 U.S.C. § 552a(b) (2006). "Agency" is defined as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the [Federal] Government (including the Executive Office of the President), or any independent regulatory agency." *Id.* § 552a(a)(1). With respect to the meaning of "Executive Office of the President" within the definition of agency, see LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS 2002: COVERING THE FREEDOM OF INFORMATION ACT, THE PRIVACY ACT, THE GOVERNMENT IN THE SUNSHINE

record that contains information with an identifiable link to an individual.[54] Generally, a "system of records" is a compilation of this information that can be accessed through the identifying characteristics and is kept by an agency.[55] Therefore, it follows that only individuals with an agency record may sue for relief under the Privacy Act.[56]

There are several provisions of the Privacy Act relevant to the issue presented in *Wilson v. Libby*. First, the Act creates a private right of action for civil damages "[w]henever any agency . . . fails to comply with any other provision of this section . . . in such a way as to have an adverse effect on an individual."[57] However, the Offices of the President and Vice President are exempted from the meaning of the word "agency" and thus are not within the scope of the Act.[58] Therefore, although Ms. Wilson's identity as an undercover CIA agent was revealed without her consent, those allegedly responsible for the disclosure cannot be held accountable through the Act, as they are members of the Offices of the White House.

II. *Wilson v. Libby*: No *Bivens* Remedy, No Privacy Act Remedy

A. The Majority Opinion: *Bivens* Is Not a Proper Remedy

The Wilsons alleged that the named federal officials were responsible for leaking Ms. Wilson's covert identity as a CIA agent to several reporters, violating their constitutional rights.[59] They filed an action to obtain relief for injuries sustained as a direct result of the officials' actions.[60] The majority opinion held that the Wilsons "failed to state constitutional *Bivens* claims for which relief may be granted" and, further, failed to exhaust the administrative remedies available to them with respect to their tort claim.[61] The court therefore affirmed the district court's

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ACT, AND THE FEDERAL ADVISORY COMMITTEE ACT 199, 310 (Harry A. Hammitt et al. eds., 21st ed. 2002) [hereinafter LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS] (stating that the scope of the term does not include the president or his immediate staff).

54. *See* Jo Ann F. Wasil, Annotation, *What Is "Record" Within Meaning of Privacy Act of 1974 (5 USCS § 552a)*, 121 A.L.R. FED. 465 (1994).

55. *See id.* § 5.5 (Supp. 2009).

56. *See* Wilson v. Libby, 535 F.3d 697, 716 (D.C. Cir. 2008) (Rogers, J., concurring and dissenting).

57. 5 U.S.C. § 552a(g)(1)(D).

58. *See* Kissinger v. Reporters Comm. for Freedom of the Press, 445 U.S. 136, 138 (1980) (holding that the Office of the President is not an "agency"); Schwarz v. U.S. Dep't of Treasury, 131 F. Supp. 2d 142 (D.D.C. 2000), *aff'd*, No. 00-5453, 2001 WL 674636, at *1 (D.C. Cir. May 10, 2001) (holding that the Vice President's office is not an "agency"); LITIGATION UNDER THE FEDERAL OPEN GOVERNMENT LAWS, *supra* note 53, at 199, 310.

59. *See Wilson*, 535 F.3d at 701.

60. *See id.*

61. *Id.* at 713.

dismissal of the case.[62] The court cited two reasons for dismissing the Wilsons' claims and denying a *Bivens* remedy.[63] First, the Privacy Act constituted a comprehensive remedial scheme, which addressed the harm done, and second, the sensitive intelligence information involved in hearing the case counseled against judicial relief.[64]

The Wilsons first argued that the Privacy Act should not be considered a comprehensive remedial scheme because it precludes these particular officials from incurring liability.[65] The court stated that, on the contrary, a comprehensive statute need not provide complete relief to preclude a *Bivens* remedy.[66] In this regard, the court noted that other plaintiffs were denied a *Bivens* remedy where the comprehensive statute did not provide complete relief.[67] Next, the court reasoned that the information the Wilsons claimed was improperly disclosed was within the scope of the Privacy Act provisions.[68] While conceding the fact that the Offices of the President and Vice President are exempted from liability under the Privacy Act, the court still declined to afford a *Bivens* remedy, citing binding precedent.[69] Further, the court noted that they were bound to respect the decision of Congress to intentionally exclude those offices from the Privacy Act.[70]

The Wilsons next argued that, where the Supreme Court denied *Bivens* remedies in the past, there had been alternative remedies available to plaintiffs, whereas they would have no remedy at all.[71] The court stated that even if there was no remedy for Mr. Wilson, Ms. Wilson could still seek relief under the Privacy Act against Richard Armitage, a member of the Department of State,[72] and therefore she had some potential relief.[73] Moreover, the court concluded that affording any remedy at all was not

62. *Id.*

63. *See id.* at 704.

64. *See id.*

65. *See Wilson*, 535 F.3d at 707.

66. *Id.* at 705-06.

67. *See id.* (citing Wilkie v. Robbins, 551 U.S. 537. 562 (2007); Schweiker v. Chilicky, 487 U.S. 412, 429 (1988); Bush v. Lucas, 462 U.S. 367, 390 (1983)).

68. *Id.* at 707.

69. *Id.* at 707-08 (citing Spagnola v. Mathis, 859 F.2d 223, 228 (D.C. Cir. 1988)).

70. *Id.* at 708.

71. *Wilson*, 535 F.3d at 709.

72. Because Armitage was not a member of the Executive Office of the President, Ms. Wilson was not precluded from seeking a remedy under the Privacy Act, according to the court. *Id.*

73. *See id.*

required, citing to *Wilkie v. Robbins*[74] and its own decision in *Spagnola v. Mathis*.[75]

Finally, the court stated that even if it was inclined to provide a *Bivens* remedy despite its above reasoning, the sensitive nature of the classified information in the case would constitute a "special factor counseling hesitation" and preclude the court from doing so.[76] Hearing the Wilsons' claims on their merits would have inevitably involved delving into national secrets, which would have impaired current intelligence gathering and operations.[77]

B. The Dissent: A *Bivens* Remedy Is Proper and No Special Factors Counseling Hesitation Exist

The partially dissenting opinion of Judge Rogers argued that, in calling the Privacy Act a comprehensive remedial scheme, the majority read into the Act a purpose the drafters never intended.[78] He pointed out that the issue was "not whether any individual may obtain some relief regarding information that is protected under the Act, but whether the Wilsons [were] to be afforded an opportunity to obtain relief for alleged constitutional violations against which the Act provides no protection."[79] Thus, the majority misconstrued the Act's scope and purpose because it was meant to protect individual privacy but did not provide protection for constitutional violations, such as this.[80] Further, exemption of the Offices of the President and Vice President from the remedial scheme did not suggest that remedies for constitutional violations available outside the Privacy Act were precluded.[81]

Next, the dissent argued that the majority incorrectly interpreted and misapplied *Bivens* precedent.[82] Specifically, the dissent noted that the Supreme Court had never denied a *Bivens* remedy where there was no alternative remedy available.[83] Contrary to what the majority concluded, there has always been at least a partial remedy in cases where a *Bivens* remedy was denied.[84] For example, although a *Bivens* remedy was denied

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74. 551 U.S. 537, 550 (2007).

75. *See* 859 F.2d 223, 228 (1988) (holding that the Supreme Court implied in *Bush v. Lucas* that a *Bivens* remedy can be denied even where there is no alternate remedy at all).

76. *See Wilson*, 535 F.3d at 710.

77. *Id.*

78. *See id.* at 713 (Rogers, J., concurring and dissenting).

79. *Id.*

80. *See id.*

81. *See id.*

82. *Wilson*, 535 F.3d at 714 (Rogers, J., concurring and dissenting).

83. *See supra* note 40 and accompanying text.

84. *See supra* note 40 and accompanying text.

in *Wilkie*, the plaintiff "had some procedure to defend and make good on his position, including the means to be heard, through an administrative, and ultimately a judicial, process."[85] *Spagnola* is distinguishable from this case because there was "little doubt that Congress had brought the plaintiffs' claims within the statute's ambit as it . . . technically accommodated their constitutional challenges."[86]

Additionally, the Supreme Court held in *Davis v. Passman* that although Congress exempted certain members of Congress from liability under the particular act's provisions, the plaintiff could still bring her constitutional claims.[87] The D.C. Circuit Court of Appeals itself held that where a statute provides no protection for constitutional violations and there is nothing to suggest that Congress intended to preclude such suits, a *Bivens* remedy is possible.[88]

Finally, the dissent noted that Ms. Wilson's undercover identity had already been revealed; thus, there likely was no issue regarding the difficulty of reviewing classified information in court proceedings.[89] Further, even if litigation required an inquiry into sensitive information, the courts are well-equipped for this undertaking because there are procedural safeguards in place for just this situation, such as evidentiary rules and the immunity defense.[90] Therefore, the potential for reviewing classified information is not a special factor that precludes litigation.[91]

III. Advocating a *Bivens* Remedy and the Lack of Special Factors Counseling Hesitation

A. Analyzing the Constitutional Claims Under *Bivens*

The Wilsons should have been afforded relief under *Bivens* because their claims satisfied the rule's requirements. First, constitutionally recognized interests in privacy and equal protection were invaded by federal officials.[92] Second, the Privacy Act is not a comprehensive remedial scheme because it excluded the federal officials in this action from liability, and there is no indication from the drafters that this was meant to preclude

85. *Wilson*, 535 F.3d at 715 (Rogers, J., concurring and dissenting) (alterations omitted) (internal quotations omitted) (quoting Wilkie v. Robbins, 551 U.S. 537, 552-53 (2007)).

86. *Id.* (alterations omitted) (internal quotations omitted) (quoting Spagnola v. Mathis, 859 F.2d 223, 229 (D.C. Cir. 1988)).

87. *See* 442 U.S. 228, 247-48 (1979).

88. *See* Ethnic Employees of Library of Cong. v. Boorstin, 751 F.2d 1405, 1415-16 (D.C. Cir. 1985).

89. *See Wilson*, 535 F.3d at 713 (Rogers, J., concurring and dissenting).

90. *Id.*

91. *See id.*

92. *See* Amended Complaint, *supra* note 6, at 18-21.

constitutional claims relating to violations of the Act from any remedies at all.[93] Finally, there were no special factors counseling hesitation against a judicial remedy because the court could easily accommodate litigating sensitive issues as it has done so in the past.[94]

The majority was correct in stating that the disclosure of information from which the Wilsons brought these claims was all information protected by the Privacy Act.[95] However, beyond Ms. Wilson's classified position as a CIA agent falling within the Act's protected information, the majority's reasoning was convoluted and misinterpreted both precedent and the Privacy Act itself.

1. The *Bivens* Rule: Invasion of a Constitutionally Protected Interest

The first question under the *Bivens* rule is whether a constitutionally protected interest has been invaded.[96] Ms. Wilson alleged that several constitutionally recognized and protected interests were invaded by government officials and that she suffered direct and proximate injuries as a result.[97] First, Ms. Wilson alleged that she suffered a violation of her Fifth Amendment right to equal protection of the laws because revealing her undercover status as a CIA agent was different treatment than that afforded to others in her same position.[98] Second, Ms. Wilson alleged that her Fifth Amendment right to privacy was violated contrary to the prohibition against government officials disclosing personal information.[99] Finally, Ms. Wilson alleged that her Fifth Amendment right to property was violated when her identity was revealed, causing her to be unable to continue her position as a covert agent at the CIA.[100]

Mr. Wilson alleged that his First Amendment right to freedom of speech was violated when the named officials acted in retaliation to his article criticizing the Bush Administration by revealing his wife's identity.[101] Next, Mr. Wilson contended that his Fifth Amendment right to

93. *See* 5 U.S.C. § 552(a) (2006); OVERVIEW OF THE PRIVACY ACT, *supra* note 47, at 4. *See generally* S. REP. NO. 93-1183 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6916.

94. *See infra* Part III.A.3.

95. *Wilson*, 535 F.3d at 707.

96. *See* Wilkie v. Robbins, 551 U.S. 537, 550 (2007); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 405 (1971) (Harlan, J., concurring).

97. *See* Amended Complaint, *supra* note 6, at 18-21.

98. *See id.* at 19.

99. *See id.* at 20.

100. *See id.*

101. *See id.* at 18-19.

equal protection of the laws was also violated because this subjected him to different treatment than other writers in his position.[102]

As support for these claims, the Wilsons stated that the injuries they suffered included their family's subjection to heightened risks because the nature of Ms. Wilson's position rendered them a target for those hostile toward the United States.[103] Further, Ms. Wilson was unable to continue in her position at the CIA in the same capacity, as her employment depended on her identity remaining classified.[104] Clearly, the Wilsons alleged constitutionally protected interests and provided support for how those interests had been violated.[105] The majority did not offer an argument to the contrary.[106] Therefore, the first aspect of the *Bivens* test was satisfied.

2. No Comprehensive Remedial Scheme Equals a *Bivens* Remedy

The next issue under the *Bivens* rule is whether there is any alternative, existing process that protects the constitutional interest and "amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages."[107] Restated, it must be determined whether there is a comprehensive remedial scheme providing relief for the harm done.[108] A statute may be considered insufficient "when it is comprehensive for some claims but not for others," or if a plaintiff alleges "a harm that the statute does not purport to address."[109] However, if "a statute omits remedies for government officials' harm, its mere existence is an unconvincing reason to deny a *Bivens* remedy."[110]

The majority opinion argued that the Privacy Act was a complete remedial scheme in this situation, and the fact that it did not provide complete relief to the Wilsons was of no consequence.[111] To support this conclusion, the majority pointed to precedent showing that failing to provide complete relief does not negate the comprehensiveness of a remedial scheme.[112] On the contrary, the exemption of the Offices of the President and Vice President precluded the Wilsons from any relief at all.

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102. *See id.* at 19.
103. *See* Amended Complaint, *supra* note 6, at 18.
104. *See id.*
105. *See id.* at 18-21.
106. *See* Wilson v. Libby, 535 F.3d 697, 704-11 (D.C. Cir. 2008).
107. *See* Wilkie v. Robbins, 551 U.S. 537, 550 (2007).
108. *See id.*
109. *Wilson*, 535 F.3d at 717 (Rogers, J., concurring and dissenting).
110. *Id.*
111. *See id.* at 707-08 (majority opinion).
112. *See id.* at 705-06.

A close examination of the precedent reveals that the Supreme Court has never denied a *Bivens* remedy where the plaintiffs would be left with no redress for their injuries at all.[113]

For example, where an aerospace engineer brought suit against the director of a space flight center operated by the National Aeronautics and Space Administration for defamation, the Court in *Bush v. Lucas* denied a *Bivens* remedy because the plaintiff's specific claim was covered under the Civil Service Reform Act, which provided a partial remedy.[114] The Court further stated that this was not a situation where the wrong would be without redress; rather, the statute was "an elaborate remedial system that has been constructed step by step, with careful attention."[115] In *Schweiker v. Chilicky*, the Court found that Congress had provided a remedy for the plaintiff's particular harm in the Social Security Act.[116] Although plaintiffs who had suffered the discontinuation of their social security benefits could not receive money damages, the Court found that a *Bivens* remedy was inappropriate because the plaintiffs had already had their benefits reinstated, and Congress had purposely omitted the potential for such damages from the Social Security Act.[117]

In *Correctional Services Corp. v. Malesko*, the Supreme Court also declined to extend a *Bivens* remedy to a corporation, a new species of defendant, in part because the plaintiff had "alternative remedies [that were] at least as great, and in many respects greater, than anything that could be had under *Bivens*."[118] The plaintiff, a prisoner who had been injured in a fall, had a remedy in tort and access to other remedial mechanisms established by the Board of Prisoners.[119] The Court emphasized that *Bivens* remedies were reserved for plaintiffs with no other remedy for constitutional violations by federal officials.[120] Similarly, in *Wilkie v. Robbins*, the Supreme Court's most recent denial of a *Bivens* remedy, although there was no single elaborate remedial scheme, a process was available to the plaintiff for each of his claims by which his injuries could be adequately rectified.[121] In these instances where a *Bivens* remedy was denied due to the existence of an alternate remedial scheme, it was clear that Congress "considered the rights of persons situated as were the

113. *See supra* note 40 and accompanying text.
114. *See* 462 U.S. 367, 388-90 (1983).
115. *See id.* at 388.
116. 487 U.S. 412, 425 (1988).
117. *See id.* at 417-18, 423, 429.
118. *See* 534 U.S. 61, 72 (2001).
119. *See id.* at 64, 74.
120. *See id.* at 67-68.
121. *See* 551 U.S. 537, 552-55 (2007).

plaintiffs."[122] Thus, when a plaintiff's specific situation has not been contemplated by Congress in enacting a statute, it follows that a *Bivens* remedy is appropriate.

Unlike the plaintiffs in those cases, Ms. Wilson and her husband did not even have a partial remedy.[123] The majority's contention that the Wilsons still had a partial remedy under the Privacy Act, because Richard Armitage was not exempt from incurring liability as an official of the Department of State, was insufficient to deny a *Bivens* remedy.[124] The majority should not have relied on this fact to justify holding the Privacy Act comprehensive enough to preclude a *Bivens* remedy because this ignores the other claims and other defendants.[125] Even if Ms. Wilson had a claim against Mr. Armitage, the statute remained unable to address her other claims and thus was not a proper bar to *Bivens* damages.[126] Moreover, since Mr. Wilson did not have an agency record, he did not have standing under the Privacy Act, effectively leaving him with no remedy at all.[127]

The Wilsons' situation is much more closely analogous to cases where the Supreme Court has afforded a *Bivens* remedy.[128] For example, in *Davis v. Passman*, the plaintiff, a former congressional staff member who had been fired from her position as Deputy Administrative Assistant, filed suit against a U.S. Congressman for sexual discrimination in contravention of the Fifth Amendment.[129] The lower court held that Title VII, section 717 of the Civil Rights Act of 1964, which sought to protect federal employees from discrimination but failed to extend protection to congressional employees, was an explicit congressional prohibition against judicial remedies for plaintiffs like Ms. Davis.[130] The Supreme Court reversed, stating that a judicial remedy is the proper means of redress for invasion of personal interests, and furthermore, the exemption does not "foreclose the judicial remedies of those expressly unprotected by the statute."[131] The Court held that a *Bivens* remedy was proper because the plaintiff had no

122. *See* Wilson v. Libby, 535 F.3d 697, 719 (D.C. Cir. 2008) (Rogers, J., concurring and dissenting) (alterations omitted) (internal quotations omitted) (quoting Schweiker v. Chilicky, 487 U.S. 412, 425 (1988)).

123. *See id.* at 707-08 (majority opinion) ("Thus, even if the Wilsons can prove their allegations . . . they will not be remunerated for them.").

124. *See id.* at 721 (Rogers, J., concurring and dissenting).

125. *See id.*

126. *See supra* notes 108-110 and accompanying text.

127. *See Wilson*, 535 F.3d at 716 (Rogers, J., concurring and dissenting).

128. *See generally* Carlson v. Green, 446 U.S. 14 (1980); Davis v. Passman, 442 U.S. 228 (1979); Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971).

129. *See Davis*, 442 U.S. at 230-31.

130. *See id.* at 247.

131. *See id.* at 245-47.

other remedy, stating, "[f]or Davis, as for Bivens, 'it is damages or nothing.'"[132]

In *Carlson v. Green*, a mother brought a suit on behalf of her son, alleging that he suffered injuries resulting in death while in the care of prison officials.[133] The Supreme Court held that the plaintiff could obtain a *Bivens* remedy for her claims under the Constitution, despite the fact that she could bring them under the Federal Torts Claim Act ("FTCA").[134] The Court again reasoned that Congress had not expressly declared that the FTCA's applicability to a claim exclusively confined a plaintiff to a FTCA remedy.[135]

Therefore, where a plaintiff was faced with either an insufficient remedy or no remedy at all for constitutional violations by federal officials, as the Wilsons face here, the Supreme Court has afforded a *Bivens* remedy.[136] That Congress contemplated the disclosure of a CIA agent's classified identity by senior government officials in the White House at the time the Privacy Act was drafted cannot honestly be concluded.[137] There is nothing in the legislative history that remotely indicates that Congress considered this situation in its drafting.[138] Further, with respect to judicial remedies, "[s]uch silence is far from the clearly discernable will of Congress."[139] As the Supreme Court in *Carlson* notably stated, absent an explicit declaration by Congress, there is no basis for determining that individuals who had constitutionally recognized interests violated by federal officials may not recover money damages.[140]

Therefore, the Privacy Act is not comprehensive and does not preclude relief for the Wilsons because Congress did not provide for their situation in its provisions.[141] The exemption of the Offices of the Vice President and President was not meant to preclude these particular plaintiffs in this particular situation and all alternative remedies available to them by law.[142] The purpose of the Act was to add to individuals'

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132. *Id.* at 245 (quoting *Bivens*, 403 U.S. at 410 (Harlan, J., concurring)).

133. *See Carlson*, 446 U.S. at 16.

134. *See id.* at 20.

135. *See id.* at 19, 23.

136. *See* Wilson v. Libby, 535 F.3d 697, 714-15, 721 (D.C. Cir. 2008) (Rogers, J., concurring and dissenting).

137. *See Wilson*, 535 F.3d at 713; *supra* note 24 and accompanying text.

138. *See Wilson*, 535 F.3d at 718; OVERVIEW OF THE PRIVACY ACT, *supra* note 47, at 4; *see generally* S. REP. NO. 93-1183 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6916.

139. Davis v. Passman, 442 U.S. 228, 247 (1979) (internal quotations omitted) (quoting Davis v. Passman, 571 F.2d 793, 800 (5th Cir. 1978)).

140. *See Carlson*, 446 U.S. at 19.

141. *See* 5 U.S.C. § 552a (2006).

142. *See Wilson*, 535 F.2d at 718 (Rogers, J., concurring and dissenting).

protection, not to subtract from it.[143] The Act was simply not meant to create a per se bar to relief for constitutional wrongs by federal officials, leaving the Wilsons with no remedy at all.[144] This is expressed in the legislative history of the Privacy Act, which explicitly states the Act "should not be construed as a final statement by Congress on the right of privacy and other related rights as they may be developed or interpreted by the courts."[145] In light of this, there was no basis for denying the Wilsons a remedy on account of the Privacy Act.

3. Policy Reasons the Wilsons Should Be Afforded a *Bivens* Remedy

The Wilsons should not have been denied a *Bivens* remedy for the additional policy reason that the government officials who illegally disclosed classified information should be held accountable. Since several reporters have actually confirmed Scooter Libby, Richard Armitage, and Karl Rove as their sources, there is little doubt of their role.[146] Thus far, only Scooter Libby has faced criminal charges, which did not even extend to the illegal leaking; the other culpable officials will likely be let off without any consequences.[147] This sends the message that their actions were acceptable and disclosing national security secrets will be met with impunity. As the Court in *Davis* noted, "[o]ur system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law: No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity."[148] This language from the *Davis* Court and the reasoning from the *Carlson* Court demonstrate that accountability is a consideration in determining whether a *Bivens* remedy should be afforded.[149] For example, deterrence was one of the main reasons the Supreme Court in *Carlson* decided to award the plaintiff *Bivens* damages, despite that she could have also brought her claims under the FTCA.[150] The Court stated that holding the responsible officials individually accountable under *Bivens* would show that such actions do not go unpunished and would also serve to deter other officials from mistreating prisoners.[151] Similarly, holding the

143. *See id.*

144. *See id.* at 718-19.

145. S. REP. NO. 93-1183, at 15 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6916, 6930.

146. *See* Novak, *supra* note 10; Seidman, *supra* note 10.

147. *See supra* notes 11-12 and accompanying text; *see generally* United States v. Libby, 498 F. Supp. 2d 1 (D.D.C. 2007).

148. Davis v. Passman, 442 U.S. 228, 246 (1979) (internal quotations omitted).

149. *See* Carlson v. Green, 446 U.S. 14, 20-21 (1980); *Davis*, 442 U.S. at 246.

150. *See Carlson*, 446 U.S. at 20-21.

151. *See id.*

federal officials responsible for leaking Ms. Wilson's identity would send the message that they are not above the law and that such dangerous and illegal actions are not condoned.

B. The Second Prong: No Special Factors Counseling Hesitation Against Judicial Relief Exist

There are two potential issues that arise in determining whether there are any special factors counseling hesitation: the *Totten*[152] doctrine and the Intelligence Identities Protection Act ("IIPA").[153] The majority in *Wilson* acknowledged that neither of these issues precluded litigation of this case.[154] While the IIPA provides for criminal prosecution for intentional disclosure of a classified agent's identity, it does not provide for civil damages in the event that its provisions are violated.[155] Where a statute does not provide for both criminal and civil remedies, the Supreme Court has allowed a supplemental *Bivens* remedy.[156] Therefore, a *Bivens* remedy for the Wilsons would properly supplement the IIPA's remedial scheme, as the Supreme Court similarly permitted in *Carlson*.[157]

The *Totten* doctrine bars litigation involving the employment of a covert CIA agent.[158] Because Ms. Wilson's status as an agent was no longer secret, the *Totten* doctrine did not apply, and litigation could have proceeded.[159] Despite the absence of any established barriers to litigating the Wilsons' claims, the majority, in an inventive analysis, nevertheless held that the sensitive intelligence information involved barred a judicial remedy.[160] Without citing any basis for its conclusion, the majority reasoned that claims such as the Wilsons' will undoubtedly involve classified information relating to national security and intelligence.[161] On the contrary, since Ms. Wilson's identity was already compromised, the only inquiry was into who was responsible. An investigation into the roles

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152. The *Totten* doctrine precludes litigation involving a currently covert CIA agent. *See* Totten v. United States, 92 U.S. 105, 107 (1875).

153. The IIPA makes it illegal for anyone to disclose a covert agent's identity. 50 U.S.C. § 421 (2006).

154. Wilson v. Libby, 535 F.3d 697, 710 (D.C. Cir. 2008).

155. *Id.* at 720 (Rogers, J., concurring and dissenting); *see* 50 U.S.C. § 421 (2006).

156. *See, e.g.*, *Carlson*, 446 U.S. at 20 (holding that the plaintiff could obtain a *Bivens* remedy for her claims under the Constitution, despite the fact that she could also bring them under the Federal Torts Claim Act ("FTCA"), because punitive damages were unavailable under the FTCA).

157. *Cf. id.*

158. *See* Totten v. United States, 92 U.S. 105, 107 (1875).

159. *See Wilson*, 535 F.3d at 720 (Rogers, J., concurring and dissenting).

160. *See id.* at 710 (majority opinion).

161. *See id.*

of the named officials in revealing Ms. Wilson's identity would likely only involve already revealed information.[162] Further, even if the court must review classified information, there are procedural safeguards in place that address the information's sensitive nature.[163]

Courts have litigated sensitive intelligence in the past and are quite able to do so without compromising national security.[164] Procedural devices that help to resolve any potential problems include in camera judicial review, appointing a master who has been granted security clearance to determine which classified documents can be produced for discovery, and statements admitting the relevant facts that the classified documents would tend to prove.[165] However, since the Wilsons had not indicated how and through what evidence they intended to prove their case, the majority's dismissal of the case based on speculation that litigation might have required some review of classified information was both conclusory and premature.[166]

CONCLUSION

In conclusion, the D.C. Circuit Court of Appeals should not have dismissed the Wilsons' constitutional claims because the *Bivens* requirements were satisfied. The first prong was satisfied when the Wilsons' constitutionally recognized interests were invaded by federal officials.[167] The facts the Wilsons alleged surrounding the disclosure of Ms. Wilson's identity certainly provide sufficient ground for claims of First and Fifth Amendment violations.[168]

The second factor of the *Bivens* rule is similarly satisfied because there is no comprehensive remedial scheme that provides sufficient or effective relief. The Privacy Act, which the majority claims precludes relief, is entirely inadequate and does not provide for the particular harm at issue in this case. There is no indication in the Act itself or its legislative history that Congress intended the Act to act as a per se bar to outside remedies for constitutional claims.

Finally, there are no special factors counseling hesitation against a judicial remedy. There are no established barriers that preclude relief based

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162. *See id.* at 721 (Rogers, J., concurring and dissenting).

163. *See id.*

164. *See id.* at 720-21; *see, e.g.*, Boumediene v. Bush, 128 S. Ct. 2229, 2276 (2008); Webster v. Doe, 486 U.S. 592, 604 (1988); *In re* Sealed Case, 494 F.3d 139, 149-150 (D.C. Cir. 2007).

165. JANINE M. BROOKNER, PIERCING THE VEIL OF SECRECY: LITIGATION AGAINST U.S. INTELLIGENCE 145 (2003).

166. *See Wilson*, 535 F.3d at 721 (Rogers, J., concurring and dissenting).

167. *See* Amended Complaint, *supra* note 6, at 18-21.

168. *See id.*

on concerns regarding disclosure of sensitive intelligence information. Mere conclusory speculation that litigation of the Wilsons' claims could involve review of classified information is inadequate to deny an aggrieved party relief. In the absence of any other available relief, it follows logically and necessarily from precedent that the Wilsons should have been afforded a *Bivens* remedy. When the Wilsons were refused any judicial remedy for the violation of their vested legal rights, they were wrongfully denied the essential protection of the laws. At that moment, at least for the Wilsons, the government of the United States became a government of men, and not of laws.

EMBRACING THE ALTERNATIVE: *CABLE CONNECTION, INC. V. DIRECTV, INC.* PUTS THE ALTERNATIVE BACK INTO ALTERNATIVE DISPUTE RESOLUTION

Rachel S. Portnoy[*]

Abstract: Parties with a legal cause of action do not always wish to spend their valuable resources engrossed in publicly accessible litigation. Congress recognized the demand for alternative, party-driven means to resolve legal disputes when it passed the Federal Arbitration Act ("FAA"). The FAA and the similarly drafted California Arbitration Act ("CAA") provide that arbitration agreements are "valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract"; accordingly, both Acts contain very limited grounds for judicial review of an arbitration award. However, this Comment acknowledges that parties are not always satisfied with the outcome of their arbitration proceedings and sometimes believe that the arbitrator has committed legal error. In seeking a different, less formal forum to resolve a legal dispute, parties should not have to surrender their right to appeal an award.

This Comment argues that the Supreme Court of California honored the party-driven foundation upon which arbitration was established and truly embraced the alternative by ruling in *Cable Connection* that parties may choose to contract beyond statutory provisions in the CAA so as to allow for expanded judicial review. Such a judicial decree should be heralded as it enhances the arbitral process and puts the alternative back into Alternative Dispute Resolution.

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INTRODUCTION

When faced with a legal dispute, individuals often cringe at the idea of spending their valuable time and money engrossed in publicly accessible litigation.[1] The mere thought of legalistic formalities, such as endless discovery and complicated rules of evidence, may cause a person to abstain from seeking justice.[2] Congress recognized the demand for alternative, party-driven means to resolve legal disputes when it passed the Federal Arbitration Act ("FAA") in 1925.[3] Two years later, California enacted the California Arbitration Act ("CAA"), which adopted nearly identical substantive terms to the FAA.[4] Although arbitration,[5] one of the many forms of Alternative Dispute Resolution ("ADR"),[6] is not appropriate for all parties and conflicts,[7] it has succeeded beyond Congress's expectations as an alternate path to resolution.[8]

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1. *See Experts Compare the Advantages and Disadvantages of Litigation and ADR*, THE METROPOLITAN CORP. COUNS., Aug. 2006, at 34, *available at* http://www.metrocorpcounsel.com/ (follow "Annual Index" hyperlink; then follow "Previous Issues" hyperlink; then follow "2006, August Issue" hyperlink) [hereinafter *Experts Compare*]. In an interview with multiple experts who practice both litigation and ADR methods, Curtis Brown, Vice President of the National Arbitration Forum, stated, "[t]he average contract-based lawsuit takes approximately two years to resolve in court. The average duration of similar cases in arbitration can be as short as five or six months." *Id.* Another expert added that, "[a]ll forms of ADR . . . are less costly than litigation . . . . Litigation costs consume about two thirds of the total expense of resolving a conflict in the courts." *Id.* at 60.

2. *See infra* Part III.B.1 (discussing the public policy of empowering the parties in a legal dispute so as to permit them to control their course to resolution).

3. 9 U.S.C. §§ 1-16 (2006); *see infra* Part I.A.1. For a discussion of some of the most popular reasons why parties may choose to arbitrate, see STEVEN C. BENNETT, ARBITRATION: ESSENTIAL CONCEPTS 6-8 (2002).

4. *See* Roger Alford, *Report to Law Revision Commission Regarding Recommendations for Changes to California Arbitration Law*, 4 PEPP. DISP. RESOL. L.J. 1, 1-2 (2003); *infra* Part I.A. *Compare* CAL. CIV. PROC. CODE §§ 1280-1294.2 (West 2007), *with* 9 U.S.C. §§ 1-16.

5. Arbitration is defined as "a form of Alternative Dispute Resolution (ADR) . . . [in which parties submit] disputes to resolution before a private tribunal or decision-maker." BENNETT, *supra* note 3, at 4, 9.

6. CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT 6-9 (2d ed. 1996) (providing a broad overview of ADR processes).

7. *See* Roger J. Patterson, *Dispute Resolution in a World of Alternatives*, 37 CATH. U. L. REV. 591, 592, 599-604 (1988) (providing a discussion of dispute resolution as an alternative to litigation and when such alternatives may or may not be appropriate); *see also* JOHN W. COOLEY & STEVEN LUBET, ARBITRATION ADVOCACY 8-9 (1997) (providing a chart comparing the advantages and disadvantages of court adjudication and arbitration).

8. *See* Bradford D. Kaufman & Jon A. Jacobson, *What Happens in Arbitration, Stays in Arbitration*, *in* 1615 PRACTISING LAW INSTITUTE: CORPORATE LAW AND PRACTICE,

Once parties decide to submit their dispute to arbitration, the CAA, like the FAA, provides that arbitration agreements are "valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract."[9] Courts are only involved in such agreements to the extent that they "provide teeth to private arbitration by enforcing contractual arbitration clauses and by converting the resulting awards into enforceable judgments."[10] The reinforcement role of the court is evidenced by provisions in the FAA and the similarly drafted CAA.[11] A plain text reading of such statutory provisions yields the conclusion that there are very limited grounds for judicial review of an arbitration award;[12] but what if a party is not satisfied with the outcome of their arbitration proceedings, or believes that the arbitrator has committed legal error?[13]

> [A]rbitrators are not perfect—and they are certainly not more perfect than courts (in which parties have a right to meaningful appeal). In those rare instances when the arbitral process breaks down and the arbitrators issue an award that seems to come out of left field, the parties have little or no right to judicial review.[14]

This Comment acknowledges that in seeking a different, less formal forum to resolve a legal dispute, parties should not have to surrender their right to appeal an unsatisfactory award that is potentially wrought with legal error.[15] Although expediency and low-cost are at the forefront of arbitration, "policies favoring [such] efficiency . . . must sometimes yield to its fundamentally contractual nature, and to the attendant requirement that arbitration shall proceed *as the parties themselves have agreed.*"[16] Therefore, where parties explicitly indicate in their pre-dispute arbitration agreement that either party may opt to leave a private tribunal and enter the courtroom in search of judicial review, they should be entitled to do just

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SECURITIES ARBITRATION 2007: ARBITRATORS AND MEDIATORS-WINNING THEIR HEARTS AND MINDS 749, 751 (David E. Robbins ed., 2007).

9. CAL. CIV. PROC. CODE § 1281 (West 2007); 9 U.S.C. § 2; *see infra* Part I.

10. Derek Scott, Notes and Comments, *The Zen of Arbitration: Contracting for Judicial Review of Arbitration Awards*, 29 WHITTIER L. REV. 743, 746 (2008); *see infra* Part I.

11. *See* 9 U.S.C. §§ 10(a), 11; CAL. CIV. PROC. CODE §§ 1286.2(a), 1286.6; *infra* Part I.

12. *See infra* Part I.A. (providing a plain text interpretation of the FAA and CAA by looking only within the four corners of the two Acts).

13. *See infra* Part III.B.2 (discussing how the holding in *Cable Connection* will make arbitrators more accountable for the awards that they issue).

14. Kaufman & Jacobson, *supra* note 8, at 770-71.

15. *See infra* Part III.B.1 (discussing the public policy of empowering parties by allowing them to sign an arbitration agreement including a clause that entitles them to expanded judicial review).

16. Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586, 602 (Cal. 2008) (quoting Vandenberg v. Superior Court, 982 P.2d 229, 238 (1999) (internal quotations omitted).

that.[17] This Comment argues that the Supreme Court of California honored the party-driven foundation upon which arbitration was established and truly embraced the alternative by ruling in *Cable Connection, Inc. v. DIRECTV, Inc.* ("*Cable Connection*") that parties may choose to contract beyond statutory provisions so as to allow for expanded judicial review.[18]

Part I of this Comment provides legal background in a plain text explanation of the FAA and CAA. This examination of the four corners of the two Acts details their narrow statutory provisions for judicial review. A discussion illustrating the application of the FAA and the application of the CAA prior to *Cable Connection* follows. Part II then presents the facts of *Cable Connection* and the Supreme Court of California's innovative interpretation of the state's statutory provisions governing judicial review of arbitration proceedings. This section includes a discussion of an important distinction between the interpretation of the pertinent provisions from a plain text and contract law standpoint, drawing from the U.S. Supreme Court case *Hall Street Associates, L.L.C. v. Mattel, Inc.* ("*Hall Street*").[19] Part III concludes this Comment with an analysis of the California Supreme Court's trailblazing holding in *Cable Connection* which found unyielding support in contract law principles, public policy considerations of empowering parties, and holding arbitrators accountable for their awards. Ultimately, this Comment concludes that other jurisdictions should follow California's lead and endorse the alternative nature of ADR by allowing for expanded judicial review of arbitration awards.

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17. *See id.*

18. *See id.* at 589; *see also infra* Part III (analyzing the holding in *Cable Connection*). The California Court of Appeal for the Fourth District reiterated *Cable Connection*'s party-driven approach to arbitration agreements less than one year later in *Christensen v. Smith*:

> [W]hile the statutory grounds for correction and vacation of arbitration awards do not ordinarily include errors of law, contractual [agreements] . . . can alter the usual scope of review. [Pursuant to the precedent established in *Cable Connection*,] an expanded scope of review [is] available under a clause specifically tailored for that purpose. [In effect, such a clause would] take [the parties] out of the general rule that the merits of [an] award are not subject to judicial review, [so long as] the parties . . . clearly agree[d] that legal errors are an excess of arbitral authority that is reviewable by the courts.

90 Cal. Rptr. 3d 57, 61 (Cal. Ct. App. 2009) (internal citations omitted) (internal quotations omitted).

19. *See infra* Part I.B.1; *see generally* Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576 (2008).

I. Legal Background: Federal Arbitration Act Versus the California Arbitration Act, Both Acts Provide Limited Grounds for Judicial Review of Arbitration Awards

A. Plain Text Explanation: The Four Corners of the Federal Arbitration Act and California Arbitration Act Provide Limited Grounds for Judicial Review of Arbitration Awards

An examination of the plain text of the FAA and CAA reveals narrow statutory provisions for judicial review of arbitration awards. Based on such a strict reading, an arbitration award under either Act will be final and binding.

1. Limited Grounds for Judicial Review of Arbitration Awards Under the Federal Arbitration Act

Parties that submit their legal dispute to arbitration under the governing FAA law will find that courts grant "an extraordinary level of deference" to their resulting award.[20] "The FAA [only] provides four statutory grounds [in § 10] under which a court may vacate an arbitration award."[21] These grounds include:

> (1) where the award was procured by corruption, fraud, or undue means; (2) where there was evident partiality or corruption in the arbitrators . . . ; (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy . . . ; or (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.[22]

As opposed to vacating an award entirely, the FAA also grants courts the power to modify an award based on the following grounds in § 11:

> (a) [w]here there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property . . . [;] (b) [w]here the arbitrators have awarded upon a matter not submitted to them . . . [; or] (c) [w]here the award is imperfect in matter of form not affecting the merits of the controversy.[23]

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20. Mitchell H. Rubinstein, *Altering Judicial Review of Labor Arbitration Awards*, 2006 MICH. ST. L. REV. 235, 243 (2006).

21. *Id.* at 243-44.

22. 9 U.S.C. § 10(a) (2006).

23. § 11.

However, the judiciary is generally unwilling to "engage in searching review of such awards" as the FAA's limited provisions for review implicitly require that courts "operate on a presumption of correctness" on the part of the arbitrators.[24] "It is often said that 'mere error of fact or law' is not sufficient to vacate an arbitration award."[25]

Furthermore, the private nature of arbitration proceedings makes it particularly difficult for courts to deeply scrutinize arbitration awards.[26] It is usually not necessary for arbitrators to publish an opinion of the case or even provide a statement of their reasoning.[27] Therefore, although grounds for *vacatur*[28] and modification[29] are provided, the lack of a published opinion makes it impractical for courts to review arbitration decisions and assess the need to invoke the FAA's curative provisions.[30]

2. Limited Grounds for Judicial Review of Arbitration Awards Under the California Arbitration Act

The CAA also "set[s] forth [limiting] grounds for vacating and correcting arbitration awards"[31] in sections 1286.2 and 1286.6, respectively.[32] In order for a court to vacate an award granted under the CAA, it must find that:

> (1) [t]he award was procured by corruption, fraud or other undue means[;] (2) [t]here was corruption in any of the arbitrators[;] (3) [t]he rights of the party were substantially prejudiced by misconduct of a neutral arbitrator[;] (4) [t]he arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted[;] (5) [t]he rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the

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24. BENNETT, *supra* note 3, at 26; *see* Christopher R. Drahozal, *Codifying Manifest Disregard*, 8 NEV. L.J. 234, 237 (2007) (concluding that parties rarely succeed in challenging an arbitration award).

25. BENNETT, *supra* note 3, at 26.

26. *Id.* at 6, 26.

27. *Id.* at 26; ELKOURI & ELKOURI, HOW ARBITRATION WORKS 571 (Alan Miles Ruben ed., 6th ed. American Bar Association 2003) (1952) ("The award and opinion are the arbitrator's work product, but not the arbitrator's property. They 'belong' to the parties in the arbitration proceeding and must be treated as confidential unless a statute requires or the parties jointly agree to publication.").

28. § 10(a).

29. § 11.

30. *See* BENNETT, *supra* note 3, at 26.

31. Crowell v. Downey Cmty. Hosp. Found., 115 Cal. Rptr. 2d 810, 815 (Cal. Ct. App. 2002).

32. *See* CAL. CIV. PROC. CODE §§ 1286.2(a), 1286.6 (West 2007).

> hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title[; or] (6) [a]n arbitrator making the award . . . failed to disclose . . . a ground for disqualification of which the arbitrator was then aware[,] or . . . was subject to disqualification upon grounds specified [herein].[33]

In regard to correcting an award, the CAA mandates that a court find that:

> (a) [t]here was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award; (b) [t]he arbitrators exceeded their powers but the award may be corrected without affecting the merits of the decision upon the controversy submitted; or (c) [t]he award is imperfect in a matter of form, not affecting the merits of the controversy.[34]

On the face of the aforementioned provisions, it is evident that "[n]one of the grounds for vacating or correcting an award suggest[] that a court can review the merits of an award for errors of law or lack of adequate supporting evidence."[35] Such a plain text reading of these provisions reveals the binding nature of arbitration awards granted pursuant to the CAA in light of the narrow statutory options for judicial review.[36]

B. Case Law Examines Whether the Plain Text of the Federal Arbitration Act and California Arbitration Act Provide Exclusive Grounds for Judicial Review of Arbitration Awards, or Whether They Permit an Expanded Scope of Review.

1. Federal Arbitration Act: The U.S. Supreme Court Rejects an Expanded Scope of Judicial Review of Arbitration Awards in *Hall Street Assocs. v. Mattel, Inc.*

In the case of *Hall Street*,[37] the U.S. Supreme Court employed a highly textual analysis of the FAA and decided in March 2008 that "the statutory grounds to vacate or modify an arbitration award . . . 'are

33. *Id.* § 1286.2(a).

34. *Id.* § 1286.6.

35. *Crowell*, 115 Cal. Rptr. 2d at 815.

36. *See* §§ 1286.2(a), 1286.6.

37. Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576 (2008). In regard to a lease dispute between landlord and tenant, the U.S. Supreme Court agreed with the Ninth Circuit Court of Appeals and refused to enforce the parties' arbitration agreement, including a clause for expanded judicial review. *Id.* at 580-81.

exclusive.'"[38] Accordingly, it rejected the notion that parties may "expand those grounds by drafting an arbitration agreement that calls for heightened judicial review."[39] This "much-anticipated decision"[40] resolved a circuit split among the federal courts in favor of those who held that "the recitations are exclusive, [while rebuffing] others [who] regard[ed] them as mere threshold provisions open to expansion by agreement."[41]

The *Hall Street* majority's ruling came as a surprise to many.[42] The U.S. Supreme Court previously indicated that the primary purpose of the FAA was to "ensur[e] that private agreements to arbitrate are enforced according to their terms. . . . [as] parties are generally free to structure their arbitration agreement as they see fit."[43] Contrary to the Court's prior promotion of realizing parties' expectations and enforcing the terms of their agreement,[44] it "brushed aside policy considerations";[45] instead, the Court concentrated on whether "the FAA has textual features at odds with enforcing a contract to expand judicial review following the arbitration."[46] This plain text inquiry of the Act greatly deviates from the U.S. Supreme Court's past outlook that "[a]fter all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that . . . arbitration agreements, like other contracts, 'are enforced according to their terms,' and according to the

38. John Fellas & Hagit Elul, *Supreme Court Says "No" to Contractual Expansion of FAA Judicial Review*, 63 DISP. RESOL. J. 5, 5 (2008).

39. *Id.*

40. *Id.*

41. *Hall St.*, 552 U.S. at 583. For a detailed discussion of the circuit split prior to *Hall Street* in which "the 9th and 10th Circuits [held] that parties may not contract for expanded judicial review . . . and the 1st, 3rd, 5th and 6th Circuits [held] that they can," Fellas & Elul, *supra* note 38, at 12, see Margaret Moses, *Can Parties Tell Courts What to Do? Expanded Judicial Review of Arbitral Awards*, 52 U. KAN. L. REV. 429, 432-44 (2004); Rubinstein, *supra* note 20, at 246-54.

42. *See* Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586, 598 (Cal. 2008) ("Before *Hall Street*, we would have had no difficulty concluding that enforcing agreements for judicial review on the merits is consistent with the fundamental purpose of the FAA."); *see also* Fellas & Elul, *supra* note 38, at 12 n.2 ("The Court's textual approach is strikingly different from that of the federal courts of appeal.").

43. Volt Info. Scis., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).

44. *Id.* at 478-79.

45. *Cable Connection*, 190 P.3d at 598.

46. *Id.* at 598-99 (quoting *Hall St.*, 552 U.S. at 586).

intentions of the parties."[47] Nonetheless, the Court "grounded its decision in a close reading of [§§] 10 and 11 of the FAA."[48]

In arriving at its conclusion of FAA exclusivity, the U.S. Supreme Court acknowledged that the Act only contemplates the need for judicial review in the event of "egregious departures from the parties' agreed-upon arbitration."[49] As such, allowing "review for just any legal error"[50] would "open[] the door to the full-bore legal and evidentiary appeals that can render informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process."[51] Ultimately, the U.S. Supreme Court chose not to "fight[] the text," and instead asserted a "national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway."[52]

2. California Arbitration Act: Prior to *Cable Connection, Inc. v. DIRECTV, Inc.*, California's Appellate Court Rejected an Expanded Scope of Judicial Review of Arbitration Awards

The question of whether parties may contract for expanded judicial review following arbitration first appeared before California's Court of Appeal in *Crowell v. Downey Community Hospital Foundation* ("*Crowell*") in 2002.[53] Based on a plain text reading of the CAA[54] and the Supreme Court of California's previous discussion of "the scope of judicial review of arbitration awards"[55] in *Moncharsh v. Heily & Blase* ("*Moncharsh*"),[56]

47. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 947 (1995) (internal citations omitted).

48. Fellas & Elul, *supra* note 38, at 12.

49. *Hall St.*, 552 U.S. at 586. Congress contemplated "egregious" behavior including "'corruption,' 'fraud,' 'evident partiality,' 'misconduct,' 'misbehavior,' 'exceed[ing] . . . powers,' 'evident material miscalculation,' 'evident material mistake,' [and] 'award[s] upon a matter not submitted[]'" as grounds for judicial review in drafting §§ 10 and 11. *Id.* at 586; 9 U.S.C. §§ 10(a), 11 (2006).

50. *Hall St.*, 552 U.S. at 586.

51. *Id.* at 1405 (internal quotations omitted).

52. *Id.*

53. *See generally* Crowell v. Downey Cmty. Hosp. Found., 115 Cal. Rptr. 2d 810 (Cal. Ct. App. 2002). As a matter of first impression, the court agreed with the defendant that it did not have to submit to arbitration. *Id.* at 817. The parties' agreement was "void and unenforceable as a matter of law" due to the contract's authorization of expanded judicial review. *Id.* at 812.

54. For a discussion on the plain meaning of the CAA, see *id.* at 815-17.

55. *Id.* at 813.

56. 832 P.2d 899 (Cal. 1992).

the *Crowell* court proscribed review beyond that which is provided for in the four corners of the CAA.[57]

In *Crowell*, California's Court of Appeal reiterated the California Supreme Court's concerns previously expressed in *Moncharsh* that "[p]ermitting parties to expand [the exclusive statutory basis for] review by agreement would undermine the benefits of arbitration and the goals of the Act to reduce expense and delay in resolving disputes."[58] It granted maximum weight to the public policy of "arbitral finality" by minimizing the possibility of judicial intervention.[59] Furthermore, the *Crowell* court looked to the high court's survey in *Moncharsh* of approximately 150 years of legal history surrounding the implementation of arbitration in California.[60] The survey results led to the realization in *Crowell* that arbitrators are not "ordinarily constrained to decide according to the rule of law."[61] Thus, "it is the general rule [of arbitration] that '[t]he merits of the controversy between the parties are not subject to judicial review.'"[62] In this way, California's application of the CAA, prior to *Cable Connection*, paralleled the U.S. Supreme Court's application of the FAA in its later decision in *Hall Street*.[63]

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57. *See Crowell*, 115 Cal. Rptr. 2d at 817.

58. *Id.* at 815.

59. *Crowell*, 115 Cal. Rptr. 2d at 814 (quoting *Moncharsh*, 832 P.2d at 903).

60. *Crowell*, 115 Cal. Rptr. 2d at 814 (citing *Moncharsh*, 832 P.2d at 904).

61. *Id.*

> The rules in litigation are designed for all cases. In arbitration, the parties may choose the rules and procedures that they believe will best achieve a fair and efficient resolution of their dispute. The arbitrator also generally enjoys great discretion to fashion a process that best meets the needs of the parties, and the case.

BENNETT, *supra* note 3, at 7. Accordingly, arbitrators may fashion "[o]utside the box" solutions. *Experts Compare*, *supra* note 1, at 60.

62. *Crowell*, 115 Cal. Rptr. 2d at 814 (quoting *Moncharsh*, 832 P.2d at 904). "Many arbitration proceedings are conducted without any stenographic record, and it is not unusual for an arbitrator to issue an award without any statement of the reasons for the decision." BENNETT, *supra* note 3, at 88. In the absence of a record of the proceedings and a written opinion of the arbitrator's decision, judicial review is virtually impossible. *See id.* For a discussion that weighs the public policy consideration of keeping arbitration proceedings private against the competing public policy consideration of allowing parties to contract for a record of the proceedings and a written opinion of the resulting decision in order to facilitate later judicial review, see Part III.B.2.

63. *Compare Crowell*, 115 Cal. Rptr. 2d at 810, *with* Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 578 (2008) (concluding that the governing arbitration acts do not allow parties to contract for expanded judicial review).

II. *Cable Connection* Expands the Scope of Judicial Review of Arbitration Awards.

In March 2008, the Supreme Court of California examined the same question the California Court of Appeal did in *Crowell*: whether parties may include a valid clause in arbitration agreements allowing for expanded judicial review following completion of arbitration proceedings.[64] Specifically, the court considered whether parties should be able to contract the right to seek judicial review of legal error potentially committed by an arbitrator.[65] The ruling in *Cable Connection* was highly anticipated as it came only a few months after the U.S. Supreme Court decided the same issue in *Hall Street*.[66] However, the issue to be determined was the only thing these two cases had in common as the California high court took an alternate route from the U.S. Supreme Court in determining the holding in *Cable Connection*.[67]

A. Factual Background of *Cable Connection*

The Supreme Court of California examined an arbitration agreement between defendant, DIRECTV, Inc., who utilized satellites to broadcast television programming nationwide, and plaintiff, retail dealers who provided DIRECTV, Inc.'s customers with the necessary equipment to receive its satellite signal.[68] Following a controversial ruling made by an arbitration panel,[69] DIRECTV, Inc. petitioned to vacate the panel's decision mandating that DIRECTV, Inc. submit to classwide arbitration.[70] The panel made its decision based on past precedent rather than on the specific contract between the parties that stated that arbitration be conducted on an individual basis.[71] The defendant successfully appealed to the trial court that the panel majority exceeded its authority as arbitrators, and in the alternative, that their award consisted of legal error making it subject to judicial review.[72]

On appeal, the trial court's decision was reversed.[73] Although the permissibility of expanded judicial review was not raised by the plaintiffs at the trial level, the California Court of Appeal deemed it to be a crucial

64. *See generally* Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586 (Cal. 2008).

65. *Id.* at 589.

66. *Compare id.* at 586, *with Hall Street*, 552 U.S. at 576.

67. *See Cable Connection*, 190 P.3d at 589.

68. *Id.* at 590.

69. *See id.* at 590-91.

70. *See id.* at 591.

71. *See id.*

72. *Id.*

73. *Cable Connection*, 190 P.3d at 591.

public policy concern and vital to the court's review of the case.[74] Thus, its basis for reversal was two of the court's prior decisions, including *Crowell*, which held such provisions in arbitration agreements unenforceable.[75] The Court of Appeal concluded that the expanded judicial review portion of the arbitration agreement was severable and ordered the trial court to confirm the arbitration panel's award for the plaintiffs in accordance with the CAA.[76] DIRECTV, Inc. petitioned for review which the Supreme Court of California granted.[77]

B. The Holding and Rationale of *Cable Connection* Expand the Scope of Judicial Review of Arbitration Awards.

1. Preemption as a Threshold Issue: Whether *Cable Connection* Was Preempted by *Hall Street*

The Supreme Court of California considered the threshold issue of whether the case was preempted by the U.S. Supreme Court's *Hall Street* decision.[78] This inquiry was answered in the negative.[79] The Supreme Court of California concluded that the U.S. Supreme Court did

> not purport to say that they exclude more searching review based on authority outside the [FAA] statute .... The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable.[80]

As such, the *Hall Street* decision left the door open for state courts to rule otherwise, and California was the first to walk right through.[81]

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74. *Id.*

75. *Id.*; *see* Crowell v. Downey Cmty. Hosp. Found., 115 Cal. Rptr. 2d 810, 811 (Cal. Ct. App. 2002) ("[P]arties cannot expand the jurisdiction of the court to review arbitration awards beyond that provided by statute ...."); Oakland-Alameda County Coliseum Auth. v. CC Partners, 124 Cal. Rptr. 2d 363, 365 (Cal. Ct. App. 2002) ("Applying the primary holding in *Crowell*, [the court refused to] review the arbitrator's decision for errors of law.").

76. *Cable Connection*, 190 P.3d at 591.

77. *Id.*

78. *Id.* at 595-99.

79. *Id.* at 599.

80. *Id.* at 596 (quoting Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 590 (2008)).

81. *Id.*

2. Legislative and Statutory Basis for Permitting Parties to Contract for Expanded Judicial Review of Arbitration Awards

The Supreme Court of California reviewed the legislative and statutory history of the FAA and CAA before arriving at the decision that parties should be permitted to contract for expanded judicial review.[82] The court found that the limiting statutory provisions for judicial review were predicated on "an anachronistic judicial hostility to agreements to arbitrate, which American courts had borrowed from English common law."[83] Congress felt it was necessary to compel the courts to confer deference upon arbitration awards because "there was once a time when courts refused to enforce private arbitration agreements—viewing them as dubious intrusions into what they deemed to be their own rightful jurisdiction."[84]

In *Cable Connection*, however, California's high court focused on the CAA's statutory provision that allows courts to examine arbitrators' awards in the event that "[t]he arbitrators exceeded their powers."[85] Accordingly, the court concluded that a loose construction of this provision authorizes parties to contractually agree, prior to arbitration, to expanded judicial review of arbitrators' awards, i.e., a review for potential legal error.[86] In a day and age where arbitration is a widely recognized and utilized form of ADR,[87] the Supreme Court of California found initial legislative intent and strict statutory interpretation, aimed at promoting and building respect for the arbitration process, to be less compelling than a more lenient interpretation of the CAA enabling parties to agree to expanded judicial review.[88]

3. Contractual Basis for Permitting Parties to Contract for Expanded Judicial Review of Arbitration Awards

The Supreme Court of California also relied upon the rules of contract law in arriving at the decision in *Cable Connection* that parties should be permitted to contract for an expanded scope of judicial review.[89] The *Cable*

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82. *See Cable Connection*, 190 P.3d at 591-95.

83. *Id.* at 592 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 n.14 (1985)).

84. *See* Kaufman & Jacobson, *supra* note 8; *supra* text accompanying note 10.

85. CAL. CIV. PROC. CODE §§ 1286.2(a)(4), 1286.6(b) (West 2007); *Cable Connection*, 190 P.3d at 589.

86. *See Cable Connection*, 190 P.3d at 589.

87. *See* Kaufman & Jacobson, *supra* note 8.

88. *See Cable Connection*, 190 P.3d at 589, 591.

89. *See id.* at 589.

Connection court continually cited its earlier decision in *Moncharsh* for a thorough examination of the role that contract law plays in reviewing arbitration agreements.[90] The parties' agreement in *Moncharsh* did not include a provision for expanded judicial review,[91] so a textual analysis of the agreement led to the decision that the court could not read something into the parties' contract that did not exist.[92] As such, the Supreme Court of California held that "[t]he powers of [the] arbitrator [were] limited and circumscribed by the agreement or stipulation of submission" and refused to allow a broader scope of judicial review.[93] In the later case of *Crowell*, the California Court of Appeal focused on the surface of the holding in *Moncharsh*, rejecting the parties' agreement for expanded judicial review, and inferred that the agreement in *Crowell* should be invalidated as well.[94] *Cable Connection* provided the Supreme Court of California with the opportunity to restore the court's focus on the contractual nature of parties' arbitration agreements and to allow an expanded scope of judicial review where parties have contracted that right in advance.[95]

The different nature of the California Supreme Court's interpretation of arbitration agreements in *Moncharsh* facilitated the *Cable Connection* court's alternative route from the U.S. Supreme Court's restrictive

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90. *See id.* at 599-603; *see also* Moncharsh v. Heily & Blase, 832 P.2d 899, 902-03 (Cal. 1992).

91. *Cable Connection*, 190 P.3d at 599; *see also Moncharsh*, 832 P.2d at 901 n.1.

92. *See Cable Connection*, 190 P.3d at 599; *see also Moncharsh*, 832 P.2d at 903-04.

93. *Moncharsh*, 832 P.2d at 902 (quoting O'Malley v. Petroleum Maint. Co., 308 P.2d 9, 11 (Cal. 1957)).

94. *See* Crowell v. Downey Cmty. Hosp. Found., 115 Cal. Rptr. 2d 810, 813-15 (Cal. Ct. App. 2002).

95. *See Cable Connection*, 190 P.3d at 589-90; *infra* Part II.B.3 (providing a more elaborate discussion of the contractual nature of arbitration agreements); *infra* Part III.A (analyzing how *Cable Connection* restored the contractual nature of arbitration agreements by allowing parties to contract in advance for expanded judicial review). The case of *Christensen v. Smith*, a California Court of Appeal case decided less than one year after *Cable Connection*, serves as a testament to *Cable Connection*'s ultimate warning that parties must "'*expressly* provide for an expanded scope of review' to distinguish their agreement from 'the usual expectations of parties to arbitration agreements, who accept the risk of legal error in exchange for the benefits of a quick, inexpensive, and conclusive resolution.'" 90 Cal. Rptr. 3d 57, 62 (Cal. Ct. App. 2009) (quoting *Cable Connection*, 190 P.3d at 604). The court found that the following provision in the parties' arbitration agreement was ambiguous and thus insufficient to contravene the general rule of arbitral finality: "the arbitrator shall be a retired judge or justice, or an attorney with at least [five] years of residential real estate law experience, unless the parties mutually agree to a different arbitrator, who shall render an award in accordance with substantive California Law." *Id.* at 61-62 (emphasis omitted). Accordingly, the court determined that there was no basis for expanded appellate review. *Id.* at 62.

interpretation of such agreements.[96] Rather than looking to the plain text of the pertinent arbitration statute, as the U.S. Supreme Court did in *Hall Street*,[97] the *Cable Connection* court based its decision on the plain text of the parties' agreement.[98] In doing so, the court noted the premise in *Moncharsh* that "[t]he scope of arbitration is . . . a matter of agreement between the parties."[99] Building upon this foundation, the court's opinion in *Moncharsh* stated that

> [i]f the parties constrain the arbitrators' authority by requiring a dispute to be decided according to the rule of law, *and* make plain their intention that the award is reviewable for legal error, the general [statutory] rule of limited review [in the CAA] has been displaced by the parties' agreement.[100]

Therefore, the court in *Cable Connection* was able to look deeper than the general recognition of parties' freedom to contract and find that the efficiency of private arbitration "must sometimes yield to its fundamentally contractual nature, and to the attendant requirement that arbitration shall proceed *as the parties themselves have agreed*."[101]

III. Putting the Alternative Back into Alternative Dispute Resolution: An Analysis of the Holding in *Cable Connection*

A. *Cable Connection* Restores the Contractual Nature of Arbitration Agreements by Permitting Parties to Contract for Expanded Judicial Review of Arbitration Awards.

The Supreme Court of California restored the contractual nature of arbitration agreements by allowing parties to contract in advance for either party's right to seek expanded judicial review following arbitration proceedings.[102] Although the previous case of *Crowell* dealt with this same issue and rejected the parties' agreement for expanded judicial review based on statutory, historical, and public policy considerations,[103] the

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96. *See Cable Connection*, 190 P.3d at 599-600.

97. *See* Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 586-87, 592 (2008).

98. *See Cable Connection*, 190 P.3d at 606.

99. *Id.* at 600 (internal quotations omitted) (quoting Moncharsh v. Heily & Blase, 832 P.2d 899, 902 (Cal. 1992)).

100. *Id.* (discussing the Supreme Court of California's reasoning in *Moncharsh*).

101. *Id.* at 602 (internal quotations omitted).

102. *See id.* at 589 ("We adhere to our holding in *Moncharsh*, recognizing that contractual limitations may alter the usual scope of review. The California rule is that the parties may obtain judicial review of the merits by express agreement.").

103. *See* Crowell v. Downey Cmty. Hosp. Found., 115 Cal. Rptr. 2d 810, 811 (Cal. Ct. App. 2002); *supra* text accompanying notes 58-61.

California Court of Appeal overlooked crucial contract law principles that the Supreme Court of California addressed in *Moncharsh*.[104]

The *Crowell* Court mistakenly declined to look beyond the surface of the holding in *Moncharsh*, rejecting expanded judicial review and failing to notice that the issue presented in *Moncharch* was actually the converse of the issue presented in *Crowell*.[105] In *Moncharsch*, the Supreme Court of California decided that it would not review an arbitration award in the absence of the parties' agreement allowing them to do so.[106] The question in *Crowell* was whether the opposite was true: whether the reviewing powers of a court may be expanded by agreement.[107] In so aligning itself with the *Moncharsh* court, the *Crowell* court should have deduced a positive response to such an inquiry.[108] Whereas the *Moncharsh* court was compelled to enforce the parties' agreement, which was devoid of any clause providing for such a greater scope of review,[109] a positive response should have similarly compelled the *Crowell* court to enforce the parties' pertinent clause providing for expanded judicial review.[110]

The logical reasoning above illustrates that the *Crowell* court failed to recognize that the Supreme Court of California's decision in *Moncharsh* "centered not on statutory restriction of the parties' contractual options, but on the parties' intent and the powers of the arbitrators as defined in the agreement."[111] Accordingly, the California Appellate Court's rejection of an expanded scope of judicial review of arbitration awards in *Crowell* may have been founded on statutory, historical, and public policy considerations,[112] but it neglected competing public policy considerations of the parties' intent as manifested by contractual agreement.[113]

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104. *See Cable Connection*, 190 P.3d at 589 ("We adhere to our holding in *Moncharsh*, recognizing that contractual limitations may alter the usual scope of review.").

105. *Compare Crowell*, 115 Cal. Rptr. 2d at 811, *with* Moncharsh v. Heily & Blase, 832 P.2d 899, 902 (Cal. 1992).

106. *See Moncharsh*, 832 P.2d at 902-04.

107. *Compare id.* at 902, *with Crowell*, 115 Cal. Rptr. 2d at 811.

108. *See Cable Connection*, 190 P.3d at 600 ("Our reasoning in *Moncharsh* centered not on statutory restriction of the parties' contractual options, but on the parties' intent and the powers of the arbitrators as defined in the agreement. These factors support the enforcement of agreements for an expanded scope of review.").

109. *See Moncharsh*, 832 P.2d at 900.

110. *See Cable Connection*, 190 P.3d at 600.

111. *Id.*

112. *See Crowell*, 115 Cal. Rptr. 2d at 811-12.

113. *See Cable Connection*, 190 P.3d at 600.

B. Public Policy Considerations Support *Cable Connection*'s Holding that Parties May Contract for Expanded Judicial Review of Arbitration Awards.

1. Empowering the Parties: *Cable Connection* Allows Parties to Control the Course to Resolution of Their Legal Dispute by Permitting Them to Contract for Expanded Judicial Review of Arbitration Awards

The Supreme Court of California's ruling in *Cable Connection* imparts greater freedom to parties by allowing them to decide the fate of their legal dispute.[114] The CAA's "comprehensive statutory scheme regulating private arbitration .... [is meant] to encourage persons ... wish[ing] to avoid delays incident to a civil action to obtain an adjustment of their differences by a tribunal of their own choosing."[115] Although past California decisions thought this tribunal to be that of private arbitration,[116] the *Cable Connection* Court clarifies that the "tribunal of their own choosing" refers to any that the parties choose.[117] In other words, if parties desire to enter an agreement that will allow them to bypass the expensive and lengthy burdens of the courtroom, but then return to such a traditional venue in the event that either party seeks judicial review, then so be it.[118]

In allowing parties to contract the right to seek expanded judicial review following an arbitration award, California's high court has affirmed the contractual core of arbitration agreements.[119] In regard to the FAA, the

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114. *See id.* at 606 ("[T]he drafters of the CAA established the statutory grounds for judicial review with the expectation that arbitration awards are ordinarily final and subject to a restricted scope of review, but that parties may limit the arbitrators' authority by providing for review of the merits in the arbitration agreement.").

115. Moncharsh v. Heily & Blase, 832 P.2d 899, 902-03 (Cal. 1992) (internal quotations omitted).

116. *See Crowell*, 115 Cal. Rptr. 2d at 814-15 (explaining the importance of arbitral finality and preventing judicial intervention so as not "to deprive the parties ... of the very advantages the process is intended to produce").

117. *See Cable Connection*, 190 P.3d at 599-600.

118. *See id.*

119. *See id.*

> [T]he legitimacy of arbitration depends on the agreement of the parties to a dispute .... [I]n the period preceding the adoption of the FAA and related [state] statutes [such as the CAA], there was some question whether parties could, by contract, choose arbitration to the exclusion of judicial processes for dispute resolution. The modern view ... is that arbitration contracts are as effective and binding as other types of contracts.

BENNETT, *supra* note 3, at 59.

U.S. Supreme Court previously expressed the elemental principle that the Act "does not require parties to arbitrate when they have not agreed to do so[,] . . . nor does it prevent parties who do agree to arbitrate from" carrying out that intention.[120] In the absence of an agreement, "binding arbitration cannot occur because it involves the decision to waive fundamental constitutional rights, including the right to trial by jury."[121] As such, "[p]rivate arbitration is a matter of agreement between the parties [that] is governed by contract law[,]" and therefore agreements to arbitrate should "be construed like other contracts to give effect to the intention of the parties."[122]

Cable Connection's holding does not allow every agreement to pass judicial muster.[123] There will certainly be instances where an arbitration agreement will not be enforceable in light of its terms and how it impacts the parties and the courts.[124] For example, "it would be inappropriate for the parties to stipulate that the court act or decide a case in a manner inconsistent with normal standards of judicial conduct, i.e., deciding a case by flipping a coin or studying the entrails of a dead fowl,"[125] or by having the parties engage in "trial by combat."[126] However, where sophisticated parties, such as those in *Cable Connection*, agree that either is entitled to appeal an award following arbitration proceedings, their agreement should withstand judicial criticism.[127]

One significant criticism of allowing parties to contract in this nature is that "a parallel private court system with all the lengthy proceedings and expenses of the public one" will result.[128] What proponents of this criticism forget is that at least parties will have chosen this alternative route without being thrust into the grueling process by way of litigation.[129] Furthermore, "[t]he most costly and time-consuming aspects of litigation could be handled by an arbitrator, with the courts merely providing an oversight function."[130] Permitting parties to settle a legal dispute in this manner not

120. THOMAS E. CARBONNEAU, ARBITRATION IN A NUTSHELL 29 (2007).

121. *Crowell*, 115 Cal. Rptr. 2d at 827 (Nott, J., dissenting).

122. *Id.*

123. *See id.* at 825.

124. *Id.*

125. *Id.* (internal quotations omitted).

126. BENNETT, *supra* note 3, at 59.

127. *See Crowell*, 115 Cal. Rptr. 2d at 825 (Nott, J., dissenting).

128. *Recent Proposed Legislation: Arbitration—Congress Considers Bill to Invalidate Pre-Dispute Arbitration Clauses for Consumers, Employees, and Franchisees.—Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007)*, 121 HARV. L. REV. 2262, 2267 (2008) [hereinafter *Arbitration Fairness Act*].

129. *See supra* text accompanying notes 1-8.

130. Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586, 594 (Cal. 2008).

only allows them to dictate their course to resolution, it provides relief to court systems with overcrowded court dockets.[131]

This alternative method of dispute resolution promoted in *Cable Connection* is highly preferable to the way in which the *Crowell* court dealt with a previously unenforceable agreement to expand the scope of judicial review.[132] There, the majority held the entire contract to be invalid because it would not sever the unenforceable clause.[133] A dissenting judge reacted to such a harsh result by saying that the majority had "throw[n] 'the baby out with the bath water'" by forcing parties who had agreed to arbitration to go through full court litigation.[134] Similarly, in the *Hall Street* dissent, Justice Stevens, joined by Justice Kennedy, criticized the majority for not recognizing "the broader purpose of the FAA . . . as a shield meant to protect parties from hostile courts, not a sword with which to cut down parties' 'valid, irrevocable and enforceable' agreements to arbitrate their disputes subject to judicial review for errors of law."[135] In light of these dissenting judges' poignant counter-arguments to those who strike down agreements for expanded judicial review, it is clear that the Supreme Court of California has furthered arbitration's goals not only by empowering the parties and allowing them to contract freely, but also by honoring arbitration's alternative nature as a method of ADR.

2. Accountable Arbitrators: *Cable Connection* Enhances the Arbitral Process and Makes Arbitration More Attractive by Permitting Parties to Contract for Expanded Judicial Review of Arbitration Awards

The hostility with which the courts treated arbitration proceedings prompted the passage of the CAA.[136] The CAA lends protection to the arbitral process by means of the provision that arbitration agreements are to be deemed "valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract."[137] This provision was necessary to fend off "hostile and meddlesome courts."[138] Since the first quarter of the

131. *Crowell*, 115 Cal. Rptr. 2d at 827 (Nott, J., dissenting).

132. *Compare Cable Connection*, 190 P.3d at 600, *with Crowell*, 115 Cal. Rptr. 2d at 817 (majority opinion).

133. *Crowell*, 115 Cal. Rptr. 2d at 817.

134. *Id.* at 827-28 (Nott, J., dissenting).

135. Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 595 (2008) (Stevens, J., dissenting).

136. *See Cable Connection*, 190 P.3d at 606.

137. *See* CAL. CIV. PROC. CODE § 1281 (West 2007).

138. *Cable Connection*, 190 P.3d at 596 n.11.

twentieth-century, "arbitration has become big business";[139] now it seems that a mechanism is needed to protect arbitration from itself.[140]

Due to arbitrators' sizeable earnings, a genuine concern has emerged that arbitrators may become partial to those parties capable of providing continual business.[141] "Given this risk and the arbitrator's broad authority, some parties may fear arbitrating to obtain the benefits of speed and reduced expense without some assurance that these benefits will not be obtained" at a higher cost.[142] Arbitration would be a more attractive ADR method to those who fear a capricious arbitration award if they know that arbitrators will be held accountable for their decisions by means of judicial review.[143] The Supreme Court of California's endorsement of arbitration agreements permitting parties to seek a broader scope of judicial review is exactly the mechanism needed to keep the arbitration process in check.[144]

In order to facilitate judicial review, private arbitration proceedings would need to give way to public scrutiny so that a reviewing court may understand an arbitrator's findings, reasoning, and resulting award.[145] While published arbitration opinions have value,[146] they undermine the confidential nature of ADR proceedings.[147] As long as parties contracting for expanded judicial review understand the consequence of their choice to include such a clause in an arbitration agreement, it shall remain their

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139. *Crowell*, 115 Cal. Rptr. 2d at 827 (Nott, J., dissenting).

140. *See id.* ("Arbitrators are paid handsomely for their services. There exists the perception, if not the actual risk, that arbitrators may become biased in favor of parties and large law firms able to provide them with an ongoing volume of business.").

141. *Id.*

142. *Id.*

143. *Id.*

144. *See* Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586, 606 (Cal. 2008).

145. *See supra* text accompanying notes 26-30.

146. L. Lawrence Schultz, the former Director of the Office of Arbitration Services for the Federal Mediation and Conciliation Service, "itemized the following 'values' of published arbitration awards":

> (1) They constitute a key portion of the current news that makes up the collective bargaining arena. (2) They serve as guidelines for the parties in their continuing relationship and provide information for them to use in resolving their grievances prior to arbitration. (3) They fashion the industrial common law of the shop, which is repeatedly referred to by the highest court of the land. (4) They provide arbitrators with an indication of where others are going in similar situations. And (5) they furnish a complete or partial response to a question he frequently hears—Who is this arbitrator?

ELKOURI & ELKOURI, *supra* note 27, at 568.

147. *See supra* text accompanying notes 26-27.

choice to determine the fate of their legal dispute and hold arbitrators accountable for their decisions.[148]

C. The Future of Arbitration Proceedings and Their Awards Now That Parties May Contract for Expanded Judicial Review Under the CAA.

As California's Supreme Court demonstrated, the U.S. Supreme Court's ruling in *Hall Street* did not preempt all options for parties seeking judicial review of their arbitration awards.[149] The California high court also revealed a critical need for allowing such review as the public policy considerations of empowering the parties and holding arbitrators accountable for their awards rise above the competing public policies of efficiency and cost.[150] Although California was the first to rule in this respect, it is inevitable that further debate will lead to more state supreme courts deciding the issue by either aligning with the U.S. Supreme Court's *Hall Street* strict statutory reasoning or the Supreme Court of California's strict contractual reasoning.[151] Additionally, Congress may amend the FAA to incorporate certain protections regarding due process and judicial review as "[n]umerous proposals have been advanced for improving the arbitral process."[152] The future of arbitration proceedings and their awards is uncertain, but to be sure, it is an ever-developing legal arena.[153]

CONCLUSION

The groundbreaking decision in *Cable Connection*, allowing parties in California to contract for expanded judicial review of arbitration awards, honors the party-driven foundation upon which arbitration was established and truly embraces the alternative.[154] While affirming the desirable aspects of arbitration,[155] *Cable Connection* also restores the contractual nature of arbitration agreements, empowers parties, and holds arbitrators accountable for the awards that they grant thereby enhancing the arbitral process. It remains to be seen how state courts nationwide and Congress will receive the U.S. Supreme Court's *Hall Street* decision, but California has taken its stance and put the alternative back into Alternative Dispute Resolution.

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148. *See supra* Part III.B.1 (discussing the importance of empowering parties by allowing them to dictate the course to resolution of their legal dispute); *supra* text accompanying notes 141-144.

149. Samuel Estreicher & Joseph J. Bernasky, *Signal of Greater Judicial Review of Arbitration Awards?*, N.Y. L.J., Oct. 22, 2008.

150. Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586, 602 (Cal. 2008).

151. *See* Fellas & Elul, *supra* note 38, at 13.

152. *Arbitration Fairness Act*, *supra* note 128.

153. *See id.*

154. *See Cable Connection*, 190 P.3d at 606.

155. *See supra* text accompanying notes 1-8.

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