NEW ENGLAND LAW REVIEW

VOLUME 37

2002-2003

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Searching for a Calculus of Diversity: Teaching Tolerance*

Samuel C. Damren**

INTRODUCTION

In the University of Michigan Cases,[1] the court was asked to decide whether the University is constitutionally prohibited from utilizing what may be termed a "Diversity Preference" in its admissions policy. In effect, the Diversity Preference favors the admission of certain qualified minorities over white applicants with superior academic credentials to the University's law school and undergraduate program. The majority, minority, and concurring opinions in the Sixth Circuit decision in *Grutter v. Bollinger* focused primarily on whether the "critical mass" of minority students that the University seeks to achieve through its Diversity Preference in law school admissions constitutes an impermissible racial quota, or instead advances a compelling state interest. It is the thesis of this article that, in order to fully address the issues posed by the Diversity Preference, additional factors must be considered in this analysis, and that, where a university's commitment to teaching tolerance through a diverse student body is reflected in its core curriculum, the issue in *University of California Regents v. Bakke*[2] may be reformulated.

To more fully assess the impact of the Diversity Preference on individual applicants, the University, and the University's teaching environment, Section I of this Article highlights aspects of the overall admissions policy of state universities, like Michigan, that were not discussed in the University of Michigan Cases; and, given these additional factors, reevaluates the overall burdens/benefits of an admissions policy with and without the Diversity Preference. Section II reviews precepts founded in the Enlightenment that underlie our modern sense of equality and tolerance, and offers useful insights into a further analysis of the

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1. Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002); Grutter v. Bollinger, 137 F.Supp. 2d 821 (E.D. Mich. 2001); Gratz v. Bollinger, 122 F.Supp. 2d 811 (E.D. Mich. 2000).

2. 438 U.S. 265 (1978).

Diversity Preference. Section III reformulates the issues posed by the Diversity Preference.

I. THE DIVERSITY PREFERENCE

In *Grutter v. Bollinger*, the *en banc* panel of the Sixth Circuit reversed a District Court's determination that the consideration of race and ethnicity by the University's Law School in its admissions process violated the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. In the record developed in the District Court, the Law School identified two general categories of factors that admissions officers take into account when considering individual applicants: first, to assist admissions officers in identifying applicants who are most likely to succeed academically, the Law School creates an "index score" of each of the applicants' undergraduate grade point average and score on the LSAT; second, the Law School considers various "soft" variables, including "the quality of the applicant's essay, residency, leadership and work experience, unique talents or interests, and the areas and difficulty of undergraduate course selection."[3]

Under the University's admissions policy, "[t]here is no combination of grades and test scores below which an applicant will automatically be denied admission, or above which admission is guaranteed."[4] The Law School admits students with lower index scores only if there is either "good reason to be skeptical" of the score as indicia of the academic potential of a particular applicant, or if the student "may help achieve that diversity which has the potential to enrich everyone's education and thus make a law school class stronger than the sum of its parts."[5] This latter factor is hereinafter referred to as the "Diversity Preference." It is designed to promote "racial and ethnic diversity" in the Law School's student body "with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans. . .."[6]

While the Law School did not hold a specific portion of its class open for minority students, it did consciously seek to "enroll a meaningful number, or a 'critical mass,' of under-represented minority students," so that these "minority students do not feel isolated or like spokespersons for their race, and do not feel uncomfortable discussing issues freely based on their

3. *Grutter*, 288 F.3d at 732.
4. *Id.* at 736.
5. *Id.*
6. *Id.* at 737.

personal experiences."[7] In finding against the University, District Court Judge Bernard Friedman, "did not dispute the merits of student body diversity," but applied the constitutional standard of strict scrutiny to the Diversity Preference[8] and held that "achieving a diverse student body cannot be a compelling state interest because the Supreme Court has suggested that the only such interest is remedying specific instances of discrimination."[9] Based in large measure on Justice Powell's opinion in *Regents of the University of California v. Bakke*, a majority of the Sixth Circuit *en banc* panel held that achieving a diverse student body was a compelling state interest.[10]

While the various majority, dissenting, and concurring opinions in the Sixth Circuit Court's decisions in the University of Michigan Cases discuss at length and in great detail whether creating a diverse educational environment is a compelling state interest and whether the means utilized to do so under the University's admissions are "narrowly tailored," the principle difference between the respective judges' views of the University's admissions policy is focused on whether form was favored over substance. To the dissent, the "critical mass" of minority students that the University sought to admit to its student body through the Diversity Preference was, in substance, a constitutionally impermissible "quota."[11] To the majority, and the concurring judges that reversed the District Court's decision, the Diversity Preference amounted to a constitutionally permissible "plus" factor.[12] In this respect, the opinions in the University of Michigan Cases demonstrate that there has been little change in the manner in which the issues surrounding the *Bakke* decision have been formulated and deliberated since that case was decided over twenty-four years ago.[13]

Before undertaking alternative analyses of the constitutional issues posed by the Diversity Preference, aspects of the University's overall admissions process and those of other colleges will be examined in order to provide a more complete picture of that process and to more fully assess

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7. *Id.*

8. When the strict scrutiny standard is applied to a governmental classification based on race "such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

9. *Grutter*, 288 F.2d at 739.

10. 438 U.S. 265 (1978).

11. *Grutter*, 288 F.3d. at 800-03.

12. *See id.* at 748-49.

13. Michael Selmi, Note, *The Life of Bakke: An Affirmative Action Retrospective*, 87 GEO. L.J. 981 (1999).

the impact of the Diversity Preference on a university's admissions process. At the University of Michigan and many other public universities, there are a variety of non-academic preferences afforded to applicants. The following are illustrative of these preferences.

Geographic Preference. More so at the undergraduate than at the graduate level, a state university's admissions policy often prefers in-state residents over non-residents. As might apply to the University of Michigan, the reason for this preference lies in the simple fact that Michigan is a public university supported in substantial part by the taxpayers of the State of Michigan. The desire of Michigan taxpayers to have their children preferred in some respect over the children of out-of-staters cannot realistically be ignored by the University. Out-of-staters, of course, do pay a higher tuition than in-staters, but if they offered to pay even more to neutralize this geographic preference, it would not matter. Out-of-staters are not constituents of Michigan's elected officials and it is those officials who allocate the University's portion of the state budget. When applied to students on the cusp of admission to a state university, the Geographic Preference results in a student body that is less academically credentialed as it might otherwise be if this preference was not a factor.

Alumni Preference. At many state colleges, the children of alumni are accorded a preference over children of non-alumni in the admissions process. The rationale for this preference is as equally pragmatic as the Geographic Preference. A university wants its alumni to support the college long after they graduate, and the Alumni Preference is one demonstrable way in which a university can encourage and acknowledge that support. It also benefits a university in the less tangible, but equally important, task of engendering support for a university across generational lines. However, just as with the Geographic Preference, when applied to students on the cusp of admission, the Alumni Preference results in the selection of a less highly academically qualified student body than would otherwise be selected if only academic credentials were taken into account.

Financial Preference. This preference is not a part of the University of Michigan's admissions policy but exists as a pre-selection factor since students who cannot afford to attend the University and for whom there is inadequate grant support to pay for tuition and room and board simply do not choose to apply to the University. If the applicants are academic superstars, they likely can find scholarship and grant support. However, even though their academic credentials may be better than students with adequate financial support who are on the cusp of admission to the University, poorer students who have adequate academic credentials, but who are not academic superstars, do not apply. As a result, by setting a tuition rate that is higher than other state schools, the University limits the

possible academic credentials of its admitted student body. This is, once again, a pragmatic decision. It costs a great deal of money to operate an institution like the University of Michigan.

Veterans Preference. In this day, no one would seriously dispute the propriety of this preference. Once again, however, when applied to students on the cusp of admission, it works to reduce the overall academic credentials of the student body that is admitted to a state university compared to the student body that might otherwise be admitted.

There may be other preferences that exist in a state-supported university's admissions policy, but the preferences referenced above are sufficient to establish that the admissions process at these universities is not solely designed to secure the highest academically credentialed student body possible. Instead, where there are important benefits to be obtained by selecting one applicant who is on the cusp of admission but has lower academic credentials than another applicant who is also on the cusp, state-supported universities like the University of Michigan will not hesitate to prefer an "in-stater," the child of an alumni, a veteran, or an applicant with sufficient financial resources to attend the university. There is no constitutional infirmity to any of these preferences.

To complete this appraisal of a state university's overall admissions process, the instruments that are utilized to prioritize the academic credentials of applicants must also be examined. With regard to the University of Michigan, there are two types of academic credentials that the University considers: first, high school or college grade point averages (GPA); and, second, aptitude tests (SAT, ACT, LSAT). Although admissions officers may strive mightily to do so, there is no way to compare the high school GPA of a student from school A with the high school GPA of a student from school B without some aspect of an "apples to oranges" comparison coming into play. In fact, comparing one student's GPA with another student's GPA from the same school may also involve elements of an "apples to oranges" comparison as well as depending on the teachers each student had, the classes they took, and so on. For applicants who are on the cusp of admission, these differences may be razor thin and of no utility whatsoever in predicting which applicant will be more successful in their college career. Nevertheless, they are differences.

Scholastic aptitude test scores also suffer a similar inadequacy in truly distinguishing applicants on the cusp of admission from one another.[14] There is no defensible way to suggest that an applicant with an ACT score of 28 will have a better college career than an applicant who has an ACT

14. REBECCA ZWICK, FAIR GAME? THE USE OF STANDARDIZED ADMISSIONS TESTS IN HIGHER EDUCATION (2002).

score of 27. Yet, for applicants on the cusp of admission, these minor differences, however insignificant and bereft of predictive value they are, may be the only differences between rival applicants.

It is tempting to say that, despite the lack of significant statistical and predictive value that attach to relatively minor differences in GPA and test scores, the admissions process is a competition in that, as between two otherwise equally qualified candidates, a student with a higher test score or GPA should be preferred over a student with a lower score. After all, in America, the person with the best score should "win" the competition. If one views the competition to get into college and the university's decision to select its student body as akin to the NFL draft, this may be an appropriate analogy.[15] However, a state university's mission and the role that students play as participants in that mission are not strictly analogous to the competitive mission of an NFL team. Moreover, if test scores were actually regarded as a reliable indicator of future professional performance, then United States Senators would undoubtedly have long ago asked a committee of Congress to devise and administer a Judicial Aptitude Test (JAT) to test applicants for the federal judiciary so that the Senate could more accurately select the best judicial candidates. For any number of reasons, including the inability of the JAT to reliably select a judiciary that might better serve the country, the Senate has never sought to commission, much less apply, such a test. Other factors, including a lawyer's past performance in the profession and their view of the judiciary's role, are of greater value in this process. Although, as many a President and Senator have lamented, they, too, have a substantial element of unreliability in predicting how a particular judge will ultimately decide a particular issue.

The litigants in the University of Michigan Cases all agreed that the Diversity Preference did not result in unqualified applicants being admitted to the University. From this common ground and from the more complete picture of a university's admissions process described above, one can begin to assess the overall benefit/burden of the Diversity Preference to the university's educational mission, individual applicants, and the integrity of its admissions policy.

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15. As even casual observers of professional sports know very well, the ability to predict that one will have a successful professional sports career if selected high in the NFL draft suffers infirmities similar to the utilization of LSAT, ACT, and SAT scores and GPAs to predict which applicants will enjoy a more successful college career. Coincidentally, the University of Michigan provided a recent example of the predictive frailty of the NFL draft. In the 2001 NFL draft, Michigan's quarterback, Tom Brady, was not selected until the sixth round. Nevertheless, as a rookie, he led the New England Patriots to their first ever Super Bowl Championship. His opposite number on the St. Louis Rams, Kurt Warner, who had led the Rams to a Super Bowl Championship the prior year, was not even drafted.

The first question to address in this inquiry is the nature of the threat that the Diversity Preference poses to the integrity of the university's admissions procedure. Since the minor differences in GPAs and scholastic aptitude test scores that differentiate applicants on the cusp of admission do not reliably indicate which individuals will enjoy successful college careers, the university's admissions procedure is akin to a lottery. However, because of certain nonacademic, but constitutionally permissible preferences, such as the Geographic Preference, the Alumni Preference, the Financial Preference, and the Veterans Preference, the admissions procedure is a rigged lottery. While white applicants, who are not admitted, may point to the fact that minority applicants were admitted with less distinguished academic credentials, the fact remains that without the application of the Diversity Preference the white applicants who might take their place may well be admitted as a result of another preference (Geographic, Alumni, Veteran, Financial) that is not related to academic performance. Thus, from a purely institutional perspective, prohibiting a state university from utilizing the Diversity Preference in its admissions policy only protects the integrity of a rigged lottery.

A second factor to consider in this inquiry is the actual hardship to applicants who are on the cusp of admission to a state university, but who may be denied admission as a result of the Diversity Preference. This assessment is extremely speculative. Although it may not be an immediate salve to the sting of being rejected to the University of Michigan Law School, if an applicant is on the cusp of admission to the Law School, in all likelihood she or he will be admitted to another fine law school. And, as practitioners know, after your first job, it really does not matter in most instances where you went to law school. Moreover, while no school trumpets this fact, graduating from a top tier law school is not in any way a guarantee of professional success.

The litigants in the University of Michigan Cases all agreed that diversity provides a definite benefit to the University and its student body. How great a benefit this is cannot be quantitatively measured, but it has been qualitatively assessed as being significant by educators and many of the *amicus curie* briefs submitted, including General Motors'. However, it would be impossible for a court to consider the benefits of a college education with exposure to a diverse student body, as compared to one without such diversity, unless the court substitutes its judgment for that of educators.

While this more comprehensive examination of the benefits/burdens occasioned by the Diversity Preference may be useful in further assessing whether the Diversity Preference constitutes a "compelling state interest," what this examination truly demonstrates is the amorphous nature of the

task. Legal issues posed in this fashion invite subjective conclusions and an "end justifies the means" legal analysis. There is, however, a way in which the issues posed by the Diversity Preference can be reconfigured in a manner that is completely consistent with policies and objectives underlying the Equal Protection Clause, but which, nevertheless, neutralize the application of the strict scrutiny standard and bring greater focus to the seemingly conflicting objectives of educators, jurists, and students in this circumstance.

II. THE EXPANSION OF THE CONCEPT OF TOLERANCE DURING THE ENLIGHTENMENT

As an aid to formulating issues that are both highly contentious and immediate, it is often useful to expand the framework of the analysis to include a historical perspective. Our modern concepts of equality, tolerance, and intolerance for racial and religious prejudice were forged during the Enlightenment. Thus, in identifying an appropriate path through the issues posed by the Diversity Preference, it is instructive to revisit those fundamentals.

At the onset of the Enlightenment, the choices available to religious groups in their behavior toward one another were circumscribed by a foundational belief that if, for example, you were a member of Religion X, it was better to be a member of Religion X than to be a member of any other religion or belief system. Thus, if you were a member of Religion X, it is better to be a member of Religion X than a member of Religion Y, or Religion Z. If it were otherwise, then, a member of Religion X would convert to Religion Y, Z, or whatever was the preferable belief system - or "one true faith." This foundational belief subsumes two assumptions: first, that all human beings are intrinsically capable of becoming converts to Religion X, and, second, that a world in which all human beings are members of Religion X is preferable to a world in which some human beings are not members of Religion X. Given these assumptions and foundational beliefs, the manner in which practitioners of Religion X might choose to relate to practitioners of other religions and non-believers encompasses the following range of possible behaviors:

> (1) Eliminate practitioners of any religious or belief system other than Religion X;
>
> (2) through coercive means, convert all practitioners of religious or belief systems other than Religion X to Religion X;
>
> (3) persecute and subjugate all practitioners of religions or belief systems who will not convert to Religion X by preventing them from

being accorded the same rights and privileges as those accorded to practitioners of Religion X, i.e., regard and treat them as "lesser human beings;"

(4) affirmatively act to persuade practitioners of religious or belief systems other than Religion X to convert to Religion X through means that are not persecutory or subjugating;

(5) tolerate all practitioners of religious or belief systems other than Religion X until they voluntarily convert to Religion X.

Permutation 5 is the most tolerant of these possible permutations, but it is not an expression of complete tolerance because, based on the assumptions previously identified, practitioners of Religion X do not believe that any religion or belief system is equal to, or superior to, Religion X. From this perspective, Permutation 5 is only the most "tolerant" choice in a range of "intolerant" attitudes and conduct. More directly stated, practitioners of Religion X that adhere to Permutation 5 are only tolerant of other religions and belief systems because they believe that, "in the end," they will not have to be. Maintaining this attitude is easier if Religion X dominates other religions and belief systems. It is sorely tested when Religion X is in the minority and retreating in numbers, prestige, and prosperity.

During the Enlightenment, the extent of this spectrum was dramatically altered. This change was first expressed in the New World by Roger Williams and was ultimately contained in the First Amendment of the Bill of Rights to the United States Constitution. By separating religious beliefs from civil/criminal penalties or entitlements, the First Amendment constituted a limitation upon the means by which practitioners of one faith could convince individuals of other belief systems to convert to the "one true faith" or to persecute them for their refusal to do so, i.e., government could not be used to advance this purpose. As a result, during the Enlightenment, the spectrum of choices available along the intolerance-tolerance spectrum expanded to include a new permutation that placed individual freedom of conscience above any particular religious belief. The difference between this new sense of tolerance and the previous range of the intolerance-tolerance spectrum was stridently noted by Thomas Paine in the *Rights of Man*: "[t]oleration is not the *opposite* of intolerance, but is the counterfeit of it. Both are despotisms. The one assumes to itself the right of withholding Liberty of Conscience, and the other of granting it."[16]

16. THOMAS PAINE, RIGHTS OF MAN 55 (Gregory Claeys ed. Indianapolis: Hackett Publishing Company 1992) (1791).

Placing Liberty of Conscience above Religion X was, of course, only possible through a disjunction of religion from government. This disjunction did not require that practitioners of Religion X relinquish their belief in Religion X as the "one true faith." It only required that practitioners of Religion X relinquish government as a means to create a world in which Religion X was practiced as the "one true faith." It was a completely novel concept. Previous to its introduction in the New World, the political, moral, and religious teaching of the Western World were firmly rooted in the idea that no government could properly function without the moral compass provided by an acknowledged religious partner, if not a state-supported religion. It was for this reason that Roger Williams' charter for the colony of Rhode Island was viewed by the English, who granted the charter, as Williams' "livelie experiment."[17]

The story of Roger Williams' commitment to religious freedom is well documented. But it is the extent of his commitment to this principle in the face of the hostile civil and religious authorities that is of particular note. It is one thing to be tolerant if you are in the majority; it is quite another if you are in the minority and forced to live in the wilderness and face life-threatening persecution as a consequence of a commitment to religious tolerance. Williams was born in London in 1603. He was educated at Cambridge, but left England for Boston in 1630 where he began a ministry. Because of differences with Bostonian Puritans over the continuation of their ties to the Church of England,[18] he moved to Salem and then to Plymouth. During this time, he cultivated relationships with various Native American Indian tribes. Based on this experience and coupled with his religious and philosophical beliefs, Williams challenged the right of the English colonies to take title to Native lands by royal decree, rather than by purchase.[19]

As a result of his religious and political views, Williams was exiled and banished from Massachusetts. With his wife and young children, he sought refuge at a place called New Providence and in 1643 returned to England to seek a royal patent to establish Rhode Island as a separate colony in the Americas. Williams, who was regarded as a protégé of Lord Coke, and had influence at court through his relationship with Sir Henry Vane,[20] was granted a patent for Rhode Island in 1647. The patent recognized, for the

17. LEO PFEFFER, CHURCH, STATE & FREEDOM 85 (Boston: Beacon Press 1967) (1953).

18. MARTIN MARTY, PILGRIMS IN THEIR OWN LAND: 500 HUNDRED YEARS OF RELIGION IN AMERICA 76 (1984).

19. PATRICIA RUBERTONE, GRAVE UNDERTAKINGS 8 (2001).

20. JEROME HUYLER, LOCKE IN AMERICAS 183 (Wilson C. McWilliams & Lance Bonning eds., 1995).

first time in the Western World, the separation of church and state. In that same year, the General Assembly of Rhode Island adopted a code of laws which stated that "[a]ll men may walk as conscience persuades them, every one in the name of his God."[21]

In 1663, King Charles II of England confirmed a colonial charter to Rhode Island which contained the following provision:

> No person within the said colony, at any time hereafter, shall be any wise molested, punished, disquieted, or called in question, for any differences in opinion in matters of religion, and do not actually disturb the civil peace of our said colony; but that all and every person and persons may . . . have and enjoy his and their own judgments and consciences, in matters of religious concernments . . .; they behaving themselves peaceably and quietly and not using this liberty to licentiousness and profaneness, nor to the civil injury or outward disturbance of others; any law . . . using or custom of this realm, to the contrary hereof, in any wise, notwithstanding. . . .[22]

Williams' views on the separation of church and state were not so much premised on the belief that this separation would make for a better government; rather, they were founded on Williams' intense desire to keep his "church pure and out of the grasp of civil meddlers."[23] As a result, although recognized as a prominent figure in the historical development of tolerance along with John Locke,[24] Pierre Bayle,[25] Voltaire,[26] and others,[27] Williams' incessant attacks on government and intense belief that Jesus Christ would soon return to earth caused the founders of the Constitution

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21. ALVIN JOHNSON & FRANK YOST, SEPARATION OF CHURCH & STATE 2 (1969) *citing* PROCEEDINGS OF THE FIRST GENERAL ASSEMBLY OF RHODE ISLAND; CODE OF LAWS 50 (1647).

22. THE FEDERAL & STATE CONSTITUTIONS, COLONIAL CHARTERS, & OTHER ORGANIC LAWS OF THE UNITED STATES, 1595-1603, Vol. 2 (1877), *cited in* CONSTITUTIONAL DEBATES ON FREEDOM OF RELIGION 16 (John J. Patrick & Gerald P. Long eds., Connecticut: Greenwood Press 1999).

23. MARTY, *supra*, note 18, at 78.

24. *See* JOHN LOCKE, A LETTER ON TOLERANCE (Oxford: Oxford at the Clarendon Press 1968).

25. *See* PIERRE BAYLE, POLITICAL WRITINGS, (Sally Jenkinson ed., Cambridge: Cambridge University Press 2000). *See also*, Gianluca Mori, *Pierre Bayle, the Rights of the Conscience, the Remedy of Toleration*, 10 RATIO JURIS 45 (1997).

26. *See* VOLTAIRE ON RELIGION: SELECTED WRITINGS (Kenneth Appelgate trans., New York: Frederick Ungar Publishing Co. 1974).

27. *See* DAVID A. J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM (1989); *see also*, DAVID A. J. RICHARDS, TOLERATION AND THE CONSTITUTION, (1986); *see also* LEO PFEFFER, CHURCH, STATE AND FREEDOM (Boston: Beacon Press 1968).

and Bill of Rights to pay him little notice when these documents were authored over a century after the colonial charter for Rhode Island.[28] Nevertheless, along with Jefferson's *Act for Establishing Religion* and Madison's *Memorial and Remonstrance*, Williams' famous letter to the Town of Providence concerning "liberty of conscience" and his pamphlet, *The Bloudy Tenent of Persecution for Cause of Conscience*, are regarded as cornerstones of the American experiment in religious freedoms.[29]

Despite these better known writings, there is a subtlety to Williams' journey along the road to religious tolerance that merits attention. On his voyage back to England in 1643, Williams wrote a pamphlet entitled, *A Key into the Language of America and Elsewhere.* It was intended to introduce not only the language of Native Americans to the Western World, but their customs and attitudes as well. The pamphlet is now recognized as one of the first anthropological works. In the preface, Williams notes "to the reader" that "a little key may open a box, where lies a bunch of keyes."[30] The "key" to which Williams referred had to do with the unity and diversity of humankind:

> Nature knows no difference between Europe and [Native] Americans in blood, birth, bodies & c. God having one blood made all mankind, and all by nature being children of wrath.
>
> More particularly:
>
> Boaft not proud Engliſh, of thy birth and blood, Thy brother Indian is by birth as Good.
>
> Of one blood God made Him, and Thee and All[.][31]
>
> * * *
>
> [Of their Religion]
>
> They have a modeſt Religious perſwaſion not to disturb any man, either Engliſh, Dutch or any in their conscience, and worship and therefore ſay: Peace, hold your peace.[32]

The introduction to this more expansive sense of tolerance in the New

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28. MARTY, *supra*, note 18 at 78-9.
29. PFEFFER, *supra*, note 17 at 86.
30. ROGER WILLIAMS, A KEY INTO THE LANGUAGE OF AMERICA A2 (1971) (1643).
31. *Id.* at 53.
32. *Id.* at 121.

World[33] was the result of a confluence of events. The rivers of Protestant and Catholic blood that flowed in the Thirty Years War prior to the Enlightenment played a part,[34] but there had been even greater rivers spilt over religious intolerance in prior millenniums. The discovery of the New World also played an important role because it permitted this new sense of tolerance to root in virgin soil, which from a Western perspective, was unburdened by centuries of religious conflagration.[35] This new sense of tolerance also received nourishment from the attitude of the indigenous peoples of the New World who, as demonstrated by Williams in *A Key into the Language of America and Elsewhere*, were more accepting of diverse belief systems and did not subscribe to a system wedded to the idea of "one true faith." However, the firmament that permitted the sheering of religion from government was neither a matter of geographic isolation, collective regret, or indigenous practice. Isaac Newton's discoveries lit this firmament, enabling him to successfully traverse a much more daunting journey: proving religion was not the sole path available for humankind to comprehend the truths of nature.

Up until Newton, the only accepted and seemingly viable explanation for "the system of the world" was found in the language of religious scriptures and beliefs. Combined with his discovery of the theory of gravity, calculus provided Newton with a medium that explained the system of the world in a manner more accurate and complete than any previous medium, religious or otherwise. What Newton's discoveries debunked was not religion, but rather what religion dictates about how the universe functions, and in particular, the Catholic Church's persecution and rejection of Copernicus' and Galileo's work on planetary movement. Contrary to the conventional religious doctrine of the time, Newton proved through the language of mathematics that the sun, not the earth, was the center of the planetary system and so explained the true motions of the planets.[36]

As discussed in Section III of this Article, the problems that Newton faced and calculus' solution to these problems parallel, in certain respects, the formulation of the legal issues posed by the Diversity Preference. However, to fully appreciate the intellectual firmament that Newton's

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33. Jean Imbert, *Toleration and Law: Historical Aspects*, 10 RATIO JURIS 13, 18 (1997).

34. Ernesto Garzon Valdos, *On the Concept of Toleration*, 10 RATIO JURIS 127, 137 (1997).

35. Henry Kamen, *Toleration and the Law in the West 1500-1700*, 10 RATIO JURIS 36, 42 (1997).

36. *See* MORRIS KLINE, CALCULUS 613-28 (Dover 1998); THOMAS GOLDSTEIN, DAWN OF MODERN SCIENCE 69-71 (1980).

explanation of the motions of the planets created during the Enlightenment and to understand their parallel to the legal issues posed by the Diversity Preference, the mathematical logjams existing prior to the discovery of calculus require a thumbnail explanation.

One of these logjams was the problem of determining "instantaneous" speed along a continuum of ever-changing speeds. Euclidean-based mathematics could easily deal with the problem of determining "instantaneous" speeds along a continuum of constant speed. For example, if one were to examine the hand sweep of a clock with a circumference of sixty yards that covered that entire circumference in sixty minutes at a constant rate of speed, Euclidean mathematics could easily confirm that the rate of speed of the sweep hand was one yard per minute. But this same system of mathematics was inadequate when it came to the problem of instantaneous speed.[37]

Since humankind's earliest days, we have been "freeze-framing" moments in time as if time could be stopped. From drawings on cave walls to the milliseconds of modern film technology, we live with an illusion that time can be stopped when, in fact, we know it cannot. It is an illusion of reality, but it is also a representation of reality, which permits us to better comprehend and study it. The contradiction upon which this construct is founded becomes clear when the matter of "instantaneous" speed is considered from a pre-calculus perspective. Without the aid of calculus, the mathematician is asked to determine the speed of an object at a particular moment, but to do so without utilizing time as a variable in this equation (since in that freeze-framed moment, time has stopped). In other words, the mathematician is asked to determine velocity without reference to time, i.e., determine the equation of distance divided by time when the denominator (time) is zero. It is a seemingly impossible task.

The difficulty that this problem posed to mathematicians was first identified by Zeno of Elsa in the 5th Century B.C. Zeno argued that when using a system of mathematics as one's *modus operandi*, or "legs" in a particular distance "race," the "runner" could never get to the "finish line." The reason being, with a mathematical function that permitted the "runner" to "halve" the distance between himself and the finish line with each "step" as his "legs," the runner would have to first cover half of the distance and then half of the remaining distance (or one quarter), and so on, and so on $(1/2 + 1/4 + 1/8 + 1/16. . .)$, however, with this methodology as his "legs," the runner would never get to the end of the race course. He would have an infinite number of distances to cover (since by this method, you can never

37. *See* KLINE, *supra*, note 36, at 16-18; *see also* ELLIOT GOOTMAN, Calculus 23-25 (Barron's Educational Series, Inc. 1997).

get to zero) and it would take him an infinite amount of time to cover an infinite distance.[38] Prior to and during the time of the Enlightenment, religious authorities focused on the existence of these infinities as an intrinsic limitation on the mind of man. Man, they held, could never grasp the infinities - neither the largest number (the *maxima infinity* of either the greatest positive or negative distance; or, for example, the end of all time) nor the smallest (the *minima infinity* - the smallest distance this side of zero in Zeno's paradox; or the smallest moment of time before time stops); only God could do so.[39] As such, while it was appropriate for man to utilize mathematics, his ability to do so was necessarily limited because of the "walls" of these infinities that stood at all ends of the mathematical spectrum.

The theory of the limit and the derivative, which is at the foundation of calculus, neatly side steps the problem of the *minima* infinity by, in the words of Sylvanus Thompson, "throwing away its littlest 'bits.'"[40] The explanation of this concept is relatively straight forward. As a *minima* infinite series progresses it approaches zero, but like Zeno's runner, it never reaches zero, e.g., 1/2, 1/4, 1/8, 1/16, 1/32, 1/64. . .. Similarly, if you add the numbers in this series, the sum converges on one, but never quite equals one. In mathematical parlance, "one" is the "limit" of this series. However, in calculus, precisely because the smallest numbers in this progression, which are called "infinitesimals," are infinitely close to zero, they can be ignored in comparing the change in a variable of one series of such infinities with the change in a variable of another series of such infinities. This method of comparison only works with respect to functions that converge and have a limit; however, this is precisely the type of function employed in Zeno's paradox and the type of methodology that one has to utilize to determine instantaneous speed. The comparison permits calculus to assign a number to the rate of change between these variables. In modern calculus, this numerical rate of change is called a "derivative."

To complete this rudimentary exposition of a foundation of calculus, the application of Zeno's paradox to the problem of instantaneous speed can be contrasted by example to the utilization of the derivative to address the same problem.[41] Assume that we want to calculate the speed of a ball

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38. *See* MORRIS KLINE, MATHEMATICS, THE LOSS OF CERTAINTY 349 (Oxford University Press 1980).

39. MICHAEL BLAY, REASONING WITH THE INFINITE 9-10 (M.B. DeBevoise trans., 1998).

40. SILVANUS THOMPSON & MARTIN GARDNER, CALCULUS MADE EASY 21 (1998) (1910).

41. *See* KLINE, *supra* note 36 at 16-31. For a comprehensive discussion of the development of calculus, see CARL B. BOYER, THE HISTORY OF THE CALCULUS (Dover

dropped from a tower four seconds after it first begins to accelerate. The relevant equation[42] to determine the distance an object falls over a period of time is D (Distance in feet) = $16T^2$ where T = seconds. Utilizing the method posited by Zeno's paradox, we would measure the average speed of the object during the interval from 4.0 to 4.1 seconds, and compare it to the average speed at 4.0 to 4.01 seconds, and to speeds of 4.0 to 4.001 seconds. Utilizing this formula, the calculations of distance and speed during these intervals yields the following table:

Time Intervals	**4.0**	**4.1**	**4.01**	**4.001**
Total Distance Traveled	256 ft.	268.96	257.2816	256.128016
Distance Traveled During Interval	—	12.96	1.2816	.128016
Average Feet Per Second (Speed) During Interval	—	129.6 (12.96 ft x 10)	128.16 (1.2816 ft x 100)	128.016 (.128016 ft x 1000)

This calculation demonstrates that, using Zeno's methodology, the speed of the ball converges on 128 feet per second as the elapsed time approaches 4.0 seconds. But we also know that using Zeno's methodology, if we look directly at the fourth second, the picture created by this methodology will go blank because time will "freeze" when the denominator of this equation is zero.

The "infinitesimals" provide two supports to the methodology of calculus that are lacking in Zeno's methodology: first, because of their substance (however small), they permit calculus to hold its "place" in the ascertainment of a specific speed when time is "frozen" at zero; and

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Publications, Inc. 1959).

42. Galileo's law of falling bodies is D = $1/2gt^2$ where *D* = distance, *G* = force of gravity, and *t* = time. *See* BOYER, *supra*, note 41, at 113-14. When *D* is measured in feet and *t* is measured in seconds, the force of gravity on earth is 32 feet per second. *See* KLINE, *supra*, note 36 at 19 and 362-65. In this circumstance, the equation can be simplified from D = $(1/2)32t^2$ to D = $16t^2$. *See* DAVID BERLINSKI, A TOUR OF THE CALCULUS 97 (1997).

second, because of their lack of measurable substance, they can be "thrown away" in the computation of velocity at this purportedly "frozen" moment.

Calculus approaches the problem of instantaneous speed as follows: assume that *d* is the next infinitesimal for the increase in distance after *D* (Distance at 4.0 seconds) and that *t* is the corresponding infinitesimal in the increase in time after *T* (Time at 4.0 seconds). Expressed algebraically, this formula is as follows:

(i) $D + d = 16(4 + t)^2$

(ii) $D + d = 16(16 + 8t + t^2)$

$= 256 + 128t + 16t^2$

To obtain the distance (*d*) traveled in *t* seconds, subtract the distance (*D*) traveled in *T* seconds or 256 ft. (16×4^2) from this amount. The result is:

(iii) $d = 128t + 16t^2$

The average speed traveled during distance *d* may be further determined by dividing *d* by *t*, or

(iv) $d/t = (128t + 16t^2) / t$

Since *t* is not "zero," (iv) may be restated as follows:

(v) $d/t = 128 + 16t$

Since *t* is an infinitesimal, even "16" *t*'s do not amount to anything that requires mathematical attention and may be "thrown away." The result is:

(vi) $d/t = 128$.

In his classic work, *The Philosophy of the Enlightenment*, Ernst Cassirer described the truly stunning effect that the twin discoveries of gravity and calculus had on the Western World:

> In reality it was not the new cosmology which church authorities so vehemently opposed; for as a mere mathematical "hypothesis" they could just as well accept the Copernican as the Ptolemaic system. But what was not to be tolerated, what threatened the very foundations of the Church, was the new concept of truth proclaimed by Galileo. Alongside of the truth of revelation comes now an independent and original truth of nature. This truth is revealed not in God's word but in his work; it is not based on the testimony of Scripture or tradition but is visible to us at all times. But it is understandable only to those who know nature's handwriting and can decipher her text. The truth of nature cannot be expressed in mere words; the only suitable expression lies in mathematical constructions, figures and numbers. And in these

> symbols nature presents itself in perfect form and clarity. Revelation by means of the sacred word can never achieve such brightness and transparency, such precision, for words as such are always varicolored and ambiguous admitting a variety of interpretations. Their meaning must always be given them by man and must therefore be fragmentary. In nature, on the other hand, the whole plan of the universe lies before us in its undivided and inviolable unity, evidently waiting for the human mind to recognize and express it.
>
> And according to the judgment of the eighteenth century such a mind had meantime appeared. What Galileo had called for became reality in Newton.[43]

As explained in Section III of this article, these lessons from the Enlightenment - Roger Williams's expanded sense of tolerance and Isaac Newton's solution to the problem of instantaneous speed - offer useful insights into, and permit a reformulation of, the legal issues presented by the Diversity Preference.

III. REFORMULATING THE ISSUE: TEACHING TOLERANCE

One of the most important qualities for good lawyers to attain and enhance during their careers is the ability to forcefully present a position, and respond to opposing viewpoints in a temperate manner founded on tolerance and civility. In essence, it is a sixth permutation that further extends the spectrum of intolerant to tolerant behavior:

> I will respect your views even though I disagree with them, and I will work with you to try to understand our differences.

Although the emotional makeup of some individuals allows them to more easily acquire and enhance this quality of tolerance, it is a quality that is best learned first hand and improved upon by practice.

As Roger Williams' life and commitment demonstrate, tolerance cannot be truly tested or expanded within the confines of a culturally, racially, and religiously homogenous group. For example, it is one thing to have four WASPs from Grosse Pointe discuss police misconduct in a frank and well-intentioned manner.[44] However, it is another matter entirely, if an African-American from Cincinnati, an Hispanic-American from Los Angeles, a

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43. ERNST CASSIRER, THE PHILOSOPHY OF THE ENLIGHTENMENT 42-43 (Fritz C..A. Koelin & James P. Pettegrove trans., Princeton University Press 1968) (1951). For a more complete discussion of calculus as applied to the motion of the planets, see KLINE, *supra*, note 36, at 613-32.

44. In light of my example, I would note that I am a White Anglo-Saxon Protestant, and I reside in Grosse Pointe, Michigan.

Native-American from the Ojibwe Nation, and an Arab-American from Dearborn, Michigan are included in this discussion, because the dynamics would be completely different. The participants would gain perspectives they never before considered, and they would also find "hot buttons" in their own responses they might never before have known existed. Everyone's capacity for civility in this expanded discussion group will likely be sorely tested and, hopefully, expanded.

As recently noted by Bhikhu Parekh, the Chair of the Commission on the Future of Multi-Ethnic Britain, without the benefit of exposure to a multicultural educational experience the students' risk of becoming "imprisoned within the framework of their own culture"[45] such that their ability to "accept the diversity of values, beliefs, ways of life, and views of the world as an integral part of the human condition" is significantly decreased.[46] According to Parekh, a student in this circumstance tends to feel threatened by the diversity of others, and as a result of "not knowing how to cope with them . . . [he will] resent[ ] others for being different. Since he has little knowledge of other societies and cultures, he is likely to understand them in terms of superficial generalizations and stereotypes and do them grave injustice."[47]

Over thirty years ago, at the initiative of Chief Justice Warren Burger,[48] members of the judiciary and the bar began to seriously address their own lack of tolerance and civility. In an attempt to address the problem, courts promulgated rules and civility codes, and took other initiatives intended to remedy the discord.[49] This approach has since done little to remedy the problem.[50] Temperance, tolerance, and civility, it seems, cannot be enforced by rules of court.

In his 1971 speech to the American Law Institute, Justice Burger emphasized the special role that law professors have in developing civility. His comments could apply with equal force to all college professors:

> [Y]ou have the first and best chance to inculcate in young students of the Law the realization that in a very hard sense the hackneyed phrase

45. BHIKHU PAREKH, RETHINKING MULTICULTURALISM 226 (2000).

46. *Id.*

47. *Id.*

48. Warren E. Burger, The Necessity for Civility, Remarks Before the American Law Institute (May 18, 1971), *in* 52 F.R.D. at 211.

49. Vincent Johnson, *The Virtues and Limits of Codes in Legal Ethics* 14, NOTRE DAME J.L. ETHICS & PUB. POL'Y. 25 (2000).

50. *See* Brenda Smith, *Civility Codes: The Newest Weapons in the "Civil" War Over Proper Attorney Conduct Codes Regulations Miss Their Mark*, 24 U. DAYTON L. REV. 151 (1998).

> "order in the court" articulates something very basic to the mechanisms of justice. Someone must teach that good manners, disciplined behavior and civility - by whatever name - are the lubricants that prevent lawsuits from turning into combat. More than that it is really the very glue that keeps an organized society from flying apart.
>
> Many teachers of law have thought teaching these fundamentals was not the function of law schools and law teachers. Many good friends of mine in the law schools, over the past 20 years or so, have said to me, "We are teaching students to *think* - we are not running a trade school." But civility is to the courtroom and adversary process what antisepsis is to a hospital and operating room. The best medical brains cannot outwit soiled linen or dirty scalpels - and the best legal skills cannot either justify or offset bad manners.
>
> With all deference, I submit that lawyers who know how to think but have not learned how to behave are a menace and a liability, not an asset, to the administration of justice.[51]

This criticism of the limited instructional goals of professors in colleges and law schools remains fair comment.[52] From this perspective, it is not enough to teach students to "think" if you do not teach them how to act civilly in the face of disagreement. Mere lip service to the ideal of tolerance and civility is insufficient to the tasks presented by prejudice, intolerance, and the superficial generalizations to which they lead.

In considering the issue posed by the Diversity Preference, the District Court judges and appellate judges of the Sixth Circuit, who decided the University of Michigan Cases, did not focus on the different missions and purposes underlying the selection process utilized in the university environment, as opposed to selection in other environments such as employment and housing. The distinction is crucial. Whereas the consideration of race with respect to housing and employment smacks of invidious regulations, universities may arguably have legitimate grounds for including race as a factor in the admissions process.

Individuals attend college so that they have the opportunity to learn not just facts and figures and "how to think," but also how to make themselves better people and to enrich the community. While all the litigants and judges in the University of Michigan Cases recognized that this latter set of skills is enhanced by diversity and is an important part of the educational experience, the participants differed as to whether or not the promotion of

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51. Burger, *supra* note 48, at 214-15.

52. Raymond M. Ripple, *Learning Outside the Fire: The Need for Civility Instruction in Law School*, 15 NOTRE DAME J. L. ETHICS & PUB. POL'Y. 359, 374-82 (2001).

these skills through the Diversity Preference was a compelling state interest. In support of the proposition that achieving a diverse student body is a compelling state interest, the University of Michigan and the majority opinion in *Grutter v. Bollinger*[53] principally relied upon Justice Powell's recognition "that a diverse student body promotes an atmosphere of 'speculation, experiment and creation' that is essential to the quality of higher education [and] helps equip its students to be productive members of society."[54] In his dissent, Judge Boggs viewed the University's concern for achieving a "diversity of experience"[55] through the Diversity Preference as a "linguistic term"[56] to disguise the fact that, as applied, it was "a proxy for race."[57] However, the fundamental issue that is posed to educators by the Diversity Preference is more subtle and far less rhetorical.

Colleges across the country have different missions and approaches to the educational process. In defining their mission and educational approach, colleges should have the ability to create an educational environment where civility can be taught through the aid of a real world construct of diversity. In this circumstance, the student body, through its diversity, acts as an instrument in the educational process of teaching itself. However, to the extent a student body is less diverse, it cannot provide this key element to the collegiate educational experience, and a college could not teach tolerance and allow students to practice civility through the aid of this construct. For colleges that are unable to achieve a diverse student body through a race neutral admissions system, the issue in the University of Michigan Cases is not whether creating diversity is a "compelling state interest" or whether the Diversity Preference is just another name for a "quota;" rather, the issue is whether the college should be constitutionally prohibited from composing a diverse student body in order to provide this key element to its educational process.

The seemingly "unacceptable vice" of the Diversity Preference is that it favors one applicant over another because of race.[58] Racial prejudice, no matter how dressed up or sugar-coated, is constitutionally, morally, and viscerally offensive, and is the cause of "powerful resentment."[59] In the

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53. 288 F.3d 732 (6th Cir. 2002).

54. *Id.* at 738.

55. *Id.* at 791.

56. *Id.* at 792.

57. *Id.* at 793.

58. *See*, Antonin Scalia, *The Disease As Cure*, 1979 WASH. U. L.Q. 147, 156 (1979). This article was written when Justice Scalia was a law professor at the University of Chicago.

59. Cynthia L. Estlund, *Working Together: The Workplace, Civil Society and the Law*, 89 GEO. L. J. 1, 93 (2000).

University of Michigan Cases, intervenors argued that the Diversity Preference was constitutionally justified as a remedy to past racial discrimination at the University.[60] In support of their position, they noted that federal courts have long held that affirmative action programs are constitutionally justified where they *remedy past* racial discrimination.[61] However, in its presentation of the issues, the University did not assert that the Diversity Preference was intended to remedy past racial discrimination.[62] Nevertheless, if one considers affirmative action an appropriate *remedy* to *past* racial discrimination, then the inverse formulation of that proposition - that the Diversity Preference is an appropriate instrument to *prevent future* discrimination - may be equally valid. This is the analytical key to reconfiguring the issues posed by *Regents of the University of California v. Bakke*[63] and the University of Michigan Cases.

One usually assumes, and it is a fair assumption, that classifications based on race necessarily involve an element of racial animus. However, in the unique circumstance of a college that utilizes a diverse student body as a key element to teach tolerance and civility, and where attendance, unlike in primary and secondary school, is not mandatory, the use of the Diversity Preference to compose a diverse student body for this purpose is the antithesis of racial prejudice. Here, discriminatory animus is not the impetus for the distinction between minority and majority applicants. Instead, the aim of the Diversity Preference is to prevent future racial prejudice by teaching college students tolerance and civility through the aid of a construct of real-world diversity that better enables students to learn, practice, and enhance these skills.

Calculus' solution to Zeno's paradox offers a useful model to reframe the legal issues posed by the Diversity Preference. Within the confines of our constitutional prohibitions, adding an element of race to the selection equation of a college's admissions process may, at first blush, seem just as insensible as placing a zero in the denominator of an equation designed to compute instantaneous speed. Calculus' solution to the problem of computing instantaneous speed was to neutralize the "zero" in the denominator of the equation through the utilization of the infinitesimals. The analogous "zero" in the University of Michigan's admissions equation is the racial classification that is inherent to the Diversity Preference. Unlike calculus' solution, however, the neutralization of the "zero" in an

60. *Grutter*, 288 F.3d at 735.

61. *Grutter*, 137 F.Supp.2d at 868-69.

62. *Grutter*, 288 F.3d at 788.

63. 438 U.S. 265

admissions equation that utilizes the Diversity Preference is based upon the recognition that while almost all racial classifications are synonymous with an element of racial animus and thus are equivalent to "zero" in this analogy, the Diversity Preference is not.

Unlike a "zero" in the denominator of an equation to determine instantaneous speed, the Diversity Preference holds its "place" in a constitutionally legitimate admissions equation because, if fully implemented, its purpose is to prevent future racism, not to practice it. For this reason, even though it contains a racial classification, the inclusion of the Diversity Preference in a college's admissions equation is not functionally equivalent to the "zero" in the denominator of an equation to compute instantaneous speed. As such, a Diversity Preference should not subject the college's admission procedure to the constitutional requirements of proving that their means are "narrowly tailored" to a "compelling state interest."

This is not to say that the Diversity Preference, as a governmental racial classification, should not be subject to "strict scrutiny" as the Supreme Court held in *Adarand Construction v. Pena*,[64] rather, the first step in that analysis should be determining whether the particular racial classification at issue is premised upon, or designed to produce, racial animus. If it is not, as here, where the purpose of the Diversity Preference is to teach tolerance and civility through the use of a construct of real-world diversity and to reduce future racial and religious discrimination—then the racial classification at issue need not satisfy the further requirements of the "compelling state interest" and "narrowly tailored means" test.[65]

This formulation of the issues posed by the Diversity Preference should only apply to colleges that include the teaching of tolerance and civility, as a part of their core curriculums. It should not be available to colleges whose diversity programs find little or no expression in their students' formal educational experience, for securing a diverse student body is only the first step toward teaching tolerance and civility. If the members of a diverse student body are not required to engage one another through curriculum, course, and other educational devices, but are instead permitted to huddle in their own homogeneous grouping, then racial and religious politics, not tolerance, are being taught. In response to this requirement, colleges that utilize a Diversity Preference may be required to revise their core curriculum. Professors may, likewise, be required to expand their instructional goals beyond teaching students "how to think." Indeed, just as "throwing away" the infinitesimals provided calculus with a solvent to the

64. *Adarand*, *supra*, note 8.

65. *Id.*

problem of instantaneous speed, the linkage of core curriculum, diversity, and the teaching of tolerance and civility is essential to leech any possibility of racial and religious animus or racial and religious politics from an admissions equation that includes a Diversity Preference. The motives of colleges that balk at this requirement should rightly be held suspect for their commitment to teaching tolerance and civility through diversity may amount to nothing more than window dressing for different agendas.

CONCLUSION

Roger Williams had high hopes that the recognition and appreciation of the unity and diversity of humankind would lead to a better world. He was an idealist. However, no amount of modern day cynicism should prevent us from pursuing similar ideals and objectives. Today, in contrast to the period of the Enlightenment, there is no New World in which the seeds of tolerance can begin to root. We can, however, plant these seeds in our young adults at the first available opportunity - in higher education. By utilizing the Diversity Preference as a part of a curriculum-driven methodology to teach tolerance and civility at our colleges and professional schools, we may find that it is one of the "little keys" which, in Roger Williams's words, might "open a box, where lies a bunch of keys."

Courts, Courses, and Controversies: The Constitutional and Procedural Challenges to Rules of Court Requiring Attendance at Parenting Seminars

Russell Fowler*

I. INTRODUCTION

Since 1994, there has been a dramatic increase in the number of courts requiring all divorcing parents to attend a parenting educational seminar. Between 1994 and 1998, states with such programs increased fourfold.[1] The authority for such rules has been based on statutory sanction, judicial rulemaking, or both. As of 2001, twenty-eight states had enacted legislation or statewide court rules creating such programs.[2] Of the other twenty-two states, about seven jurisdictions have local court rules for divorce education programs.[3] Therefore, the legal method of establishment varies among others, as do the program names, educational content, and penalties for noncompliance.[4] Nevertheless, all these programs seek to help parents recognize the effects of divorce on children, instruct them on how to work together to fulfill parenting responsibilities, and in general teach them how to prevent and resolve conflict. As a result, the intended beneficiaries of these endeavors are parents, children, and courts.

The motives behind these programs are unquestioned, but the value and results of set syllabus courses have been challenged. As has been observed: "Studies, however, fail to indicate that general parent education programs improve poor parental relationships or affect relitigation patterns. High

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1. Debra A. Clement, *1998 Nationwide Survey of the Legal Status of Parent Education*, 37 FAM. & CONCILIATION CTS. REV. 219, 219 (1999).

2. Solveig Erickson & Nancy Ver Steegh, *Mandatory Divorce Education Classes: What do the Parents Say?*, 28 WM. MITCHELL L. REV. 889, 895 (2001).

3. *Id.* at 895-96.

4. *See id.* at 898-99. The most common penalty is contempt of court. Other sanctions include withholding or delaying entry of the final decree and denial of "shared parental responsibility or visitation." *Id.* at 899.

conflict parents need more specialized programs." [5] This article will not address the efficacy of the classes, but will examine the five legal challenges mounted in Tennessee, Ohio, Oklahoma, Pennsylvania, and Kentucky, and will suggest ways for judges and legislators to avoid becoming embroiled in litigation and controversy.

II. TENNESSEE: SEPARATION OF POWERS, IMPROPER DELEGATION OF LEGISLATIVE AUTHORITY, AND LACK OF UNIFORMITY

The first case challenging a court rule requiring divorcing parties to submit to a parenting seminar arose amid controversy in Memphis, Shelby County, Tennessee.[6] The Chancery Court chancellors and Circuit Court judges of the Thirtieth Judicial District of Tennessee at Memphis adopted the local court rule in 1993.[7] Tennessee maintains separate courts of law and equity, [8] however, both courts hear divorces.[9] The Chancery Court's version of the rule, Rule 15(g), read in part as follows:

> Pursuant to the inherent powers of this Court, and in order to provide for the speedy, efficient and inexpensive resolution of disputes, to avoid injury to minor children of divorcing parties caused by unnecessary litigation and harmful behavior in connection therewith; and in the public interest, the following rule is adopted:
>
> COUNSELING FOR DIVORCING PARENTS OF MINOR CHILDREN
>
> 1. This rule applies to all parties in all divorce, separate maintenance, change of custody, visitation, removal from the state, and all other domestic relation actions (excluding domestic violence and contempt actions) filed after the date of this Order *in which the interest of children under 18 years of age are involved.*

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5. Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 532 (2001) (citing Nancy Thoennes & Jessica Pearson, *Parent Education in the Domestic Relations Court: A Multisite Assessment*, 37 FAM. & CONCILIATION CTS. REV. 195, 213-15 (1999)).

6. Church v. Church, No. 02A01-9312-CH-00266, 1994 Tenn. App. LEXIS 36 (Tenn. Ct. App. Feb. 3, 1994). Subsequently, in 1994, there was a successful but unreported Illinois challenge at the trial court level to a local court rule creating a mandatory parenting seminar program because a state statute only authorized a discretionary program. Schulp v. Mackoff, No. 94 CH 3853 1994 WL 525526 (Ill. Cir., 1994).

7. Lead Editorial, *Divorce Rule, Judges Out of Bounds in Counseling Order*, THE COMMERCIAL APPEAL (Memphis), Feb. 14, 1994, at A6.

8. TENN. CONST. art. VI, §§ 1, 4.

9. TENN. CODE ANN. § 16-10-108 (1994).

2. Each party to the action shall be required to attend and complete a program or seminar designed to advise parents of the effects of divorce on children so as to minimize the harm to the children. The program or seminar must be one meeting the standards of and approved by this Court.

3. The seminar shall be successfully completed within 30 days of service of the original pleading upon the original defendant. It shall not be a sufficient compliance with this rule to have attended such a program during a previous divorce or previous separate proceeding in another case.

4. Upon any party's failure to successfully complete the seminar pursuant to this rule, the Court may take the appropriate action, including, but not limited to, actions for contempt and refusal to hear the case.[10]

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10. Church v. Church, No. 02A01-9312-CH-00266, 1994 Tenn. App. LEXIS 36, at *3-4 (Tenn. Ct. App. Feb. 3, 1994). The Circuit Court had an identical rule, Circuit Court of Shelby County, Tennessee Rule 29, reprinted in Tennessee Rules of Court (West 1993) (state court edition)[hereinafter Chancery Ct. R. 15(g)]. The remainder of Rule 15(g) read as follows:

5. The Clerk shall bring this Rule to the attention of any person or attorney filing a proceeding that is described above, or who appears in the case, and shall furnish said person with a copy of this Rule and a list of approved programs, either in person or by mail.

6. Upon successful completion of the aforesaid program, the parties shall file with the Clerk, and be prepared to exhibit to the Court, at the time of this hearing, a certificate or other satisfactory evidence thereof.

7. Any such program, in order to be approved by the Court,

(a) Shall not charge in excess of $30.00 per person for attendance at the entire program.

(b) Shall waive all the attendance fees upon the showing of indigence in accordance with the court clerk's procedures after the current affidavit of indigence has been filed.

(c) Shall focus upon the hardship upon children caused by divorce and custody disputes and shall furnish examples of harmful conduct by parents involved in such proceedings.

(d) Shall comply with all applicable federal, state and local laws and regulations.

(e) Shall employ personnel from the ethnic makeup of the local community so that litigants can empathize with the information given.

(f) Shall not result in a profit to any organization or individual above reasonable salaries for services.

Subsequent to the rule's adoption, the presiding judge of the judicial district, who was also a chancellor of the Chancery Court, appointed a committee of seven lawyers and two laypersons to investigate and evaluate the rule and program.[11] After conducting research on the legality and functioning of the seminars and hearing from witnesses on the program's operation and constitutionality,[12] the committee's unanimous report concluded that "the counseling rule is constitutionally flawed because it is a judicial attempt to usurp the role of the legislative branch of government, even though it may be an 'instrument of good.'"[13] In addition to separation of powers problems,[14] the report found violations of the Tennessee Constitution's uniformity of divorce law requirement,[15] and "open courts" or due process provisions.[16] In conclusion, the committee recommended:

> In order to prevent further constitutional violations and alleviate the other problems reported, the committee most respectfully recommends that Circuit Rule 29 and Chancery Rule 15(g) be immediately repealed and this social program abolished. The courts should return to the former procedure whereby on an individual, as needed basis, counseling is ordered at the request of the lawyers, litigants, or on the court's initiative, but only within specific cases based upon the facts. To continue to maintain the counseling rule and program, in the face of such constitutional infirmities and others problems, can only be considered as adversely affecting the administration of justice within

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(g) Fees for the program shall be paid directly to the administrator of the program or programs in question.

(h) Programs seeking approval of the Court shall file a written application with the Clerk and the Court shall indicate its approval by an Order signed by all Chancery Court Chancellors. Such approved program shall render an annual written report to the Court, which shall be filed with the Clerk and include, but not be limited to, the names and addresses and educational achievements and certifications of all persons administering and presenting said programs, the compensation to each of the personnel, and reporting all receipts and expenditures by said program and the fee schedule established and numbers of persons attending the programs, indicating the numbers of paid and indigent attendees.

8. The Court may, for good cause shown, waive attendance at such a program by written Order of the Court.

11. *See* Unanimous Report and Recommendations of the Committee on the Counseling Requirement of the Circuit Court Rule 29 and Chancery Court Rule 15(g) [hereinafter Committee Report] (unpublished report on file with author).

12. *See id.* at 1.

13. *See id.* at 8.

14. *See id.* at 2-9.

15. *See id.* at 9-11 (citing TENN. CONST. art. XI, § 4).

16. *See id.* at 11-12 (citing TENN. CONST. art. I, § 17).

the Thirtieth Judicial District.[17]

The Memphis trial judges refused to follow the committee's recommendations and a challenge was lodged in the presiding judge's court, the Chancery Court.[18]

In the case of *Church v. Church*, a plaintiff mother filed a complaint for divorce in the Chancery Court against her husband, Robert Church.[19] The Church's had two minor children, a twelve-year-old girl and a fifteen-year-old boy, and thus Mr. Church was served with a copy of Rule 15(g) with the summons and complaint.[20] The chancellor found that Mrs. Church was entitled to a divorce on "grounds of inappropriate marital conduct, unrelated to parenting or the children."[21] The chancellor went on to find that "with the exception of the [appellant's] refusal to comply with Rule 15(g), the parties were cooperative and wanted the court to grant them a divorce."[22] The court, nonetheless, refused to grant the divorce and held Mr. Church in contempt, sentenced him to one day of incarceration and imposed a fine of fifty dollars.[23] The contempt sanctions were stayed pending appeal.[24]

The chancellor's opinion admitted that the court had "serious and profound reservations and concerns about the legality, constitutionality, scope and need of Rule 15(g),"[25] but the chancellor decided to err on the side of constitutionality.[26] On appeal to the Tennessee Court of Appeals, Mr. Church, like the committee, argued that the rule violated several provisions of the Tennessee Constitution and the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution.[27] Yet the appellate court only deemed it necessary to address the first constitutional challenge, the separation of powers argument,[28] and in so doing the three-judge panel unanimously found the rule

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17. *Id.* at 19.

18. Lead Editorial, *supra* note 8, at A6.

19. *See* Church v. Church, No.02A01-9312-CH-00266, 1994 Tenn. App. LEXIS 36, at *1 (Tenn. Ct. App. Feb. 3, 1994).

20. *See id.*

21. *Id.* at *2.

22. *Id.*

23. *See id.* at *1

24. *See* Church v. Church, No. 02A01-9312-CH-00266, 1994 Tenn. App. LEXIS 36, at *1 (Tenn. Ct. App. Feb. 3, 1994).

25. *Id.* at *2.

26. *See id.*

27. *See id.* at *2 n.1.

28. *See id.* at *2-*10.

unconstitutional.[29]

Mr. Church first asserted that the adoption of the rule violated specific separation of powers provisions of the Tennessee Constitution contained in Article 2:

> Sec. 1. Division of powers.—The powers of the Government shall be divided into three distinct departments: the Legislative, Executive, and Judicial.
>
> Sec. 2. Limitation of powers.—No person or persons belonging to one of the three departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.[30]

The Court of Appeals commenced by recognizing that the doctrine of separation of powers "is a fundamental principle of American constitutional government."[31]

The appellate court first took issue with the rule's preamble that claimed the rule was promulgated "[p]ursuant to the inherent powers of this Court...."[32] Although recognizing that "[c]ourts have an inherent power to promulgate necessary procedural rules,"[33] they cannot "enact laws governing substantive rights as such would be an invasion by the judiciary of the legislative function."[34] The court went on to explain that "inherent powers" refers "to powers included within the scope of a court's jurisdiction which the court possesses irrespective of specific grant by constitution or legislation."[35] The court stated, "Such powers can neither be taken away

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29. *See* Church v. Church, No. 02A01-9312-CH-00266, 1994 Tenn. App. LEXIS 36, at *10 (Tenn. Ct. App. Feb. 3, 1994).

30. *Id.* at *2-3; TENN. CONST. art. II, §§ 1, 2.

31. Church v. Church, 1994 LEXIS 36, at *3 (citing Town of South Carthage v. Barrett, 840 S.W.2d 895, 897 (Tenn. 1992), which cites Underwood v. State, 529 S.W.2d 45, 47 (Tenn. 1975)).

32. *Id.* at *6 (citing Chancery Ct. R. 15(g), *supra* note 11).

33. *Id.* at *7 (citing Haynes v. McKenzie Memorial Hospital, 667 S.W.2d 497, 498 (Tenn. App. 1984)).

34. *Id.* (quoting *Haynes*, 667 S.W.2d at 498).

35. *Id.* at *7 (quoting In Re Adoption of Rule of Court, Etc., 479 S.W.2d 225, 227 (Tenn. 1972)). The Court of Appeals pointed out that:

> [t]he Legislature has provided in T.C.A. § 16-3-402 (Tenn. 1980) that the Supreme Court shall have the power to prescribe by general rules the practice and procedure of the courts of Tennessee, provided however that such rules do not abridge, enlarge, or modify any substantive right and are consistent with the Constitution. The Legislature provided in T.C.A. §16-3-407 (1980) that courts other than the Supreme Court may adopt additional or supplementary rules of practice and procedure not inconsistent with or in conflict with those rules

nor abridged by the legislature,"[36] but "inherent powers" cannot "increase its jurisdiction ... [for] *they are limited to such powers as are essential to the existence of the court and necessary to the orderly and efficient exercise of its jurisdiction.*"[37] In utilizing the inherent powers doctrine, the court asserting the power must establish reasonable necessity by "clear, cogent and convincing proof."[38] In applying this standard, the appellate court found, "[t]he evidence that Rule 15(g) is reasonably necessary to the orderly and efficient exercise of the Shelby County Chancery Court's jurisdiction is not clear and convincing because there is no evidence in the record outside of the preamble to the rule itself."[39]

Even more irreparable than a lack of evidence of necessity, the Court of Appeals stated:

> The function of court rules is to regulate practice of the court and facilitate the transaction of its business, but no court rule can enlarge or restrict jurisdiction or abrogate or modify substantive law.[40] The Tennessee General Assembly has authorized the judiciary to grant divorces for causes which the legislature has specified at T.C.A. §§ 36-4-101-104 (1991); See Tenn. Const., Art. XI, § 4. Rule 15(g) modifies the substantive law enacted by the legislature at T.C.A. §§ 36-4-101-104 (1991) by effectively conditioning the parties' right to a divorce as provided by those sections on their submission to counseling. Further, we believe that the question of whether divorcing parties should be required to obtain counseling is a matter of public policy for the Tennessee legislature to decide, not the judiciary.[41]

In reversing the Chancery Court, the Court of Appeals concluded, "We find that Rule 15(g) violates the separation of powers doctrine as provided

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prescribed by the Supreme Court.

Id. at *7 n.3.

36. *Id.* (quoting In Re Adoption of Rule of Court, Etc., 479 S.W.2d at 227 (Humphreys, J., concurring)).

37. Church v. Church, No. 02A01-9312-CH-00266, 1994 Tenn. App. LEXIS 36, at *7 (Tenn. Ct. App. Feb. 3, 1994) (quoting In Re Adoption of Rule of Court, Etc., 479 S.W.2d at 227 (emphasis in original)).

38. *Id.* at *8. (quoting Anderson County Quarterly Court v. Judges of the 28th Judicial Circuit, 579 S.W.2d 875, 881 (Tenn. App. 1978)).

39. *Id.*

40. *Id.* at *9. (citing Brewer v. State, 187 Tenn. 396, 215 S.W.2d 798 (Tenn. 1948); Adcox v. Southern Ry. Co., 182 Tenn. 6, 184 S.W.2d 37 (Tenn. 1944); State v. Johnson, 673 S.W.2d 877 (Tenn. Crim. App. 1984); Richie v. Liberty Cash Grocers, Inc., 63 Tenn. App. 311, 471 S.W.2d 559 (Tenn. App. 1971)).

41. Church v. Church, No. 02A01-9312-CH-00266, 1994 Tenn. App. LEXIS 36, at 7 (Tenn. Ct. App. Feb. 3, 1994) (citing Smith v. Gore, 728 S.W.2d 738 (Tenn. 1987); Estrin v. Moss, 430 S.W.2d 345, 350 (Tenn. 1968)).

in Article 2, Sections 1 and 2 of the Tennessee Constitution and thus we need not address appellant's other constitutional challenges to Rule 15(g)."[42]

Demonstrating the level of adverse publicity and controversy suffered by the trial courts in Memphis caused by the rule, involvement in a public policy debate, and refusal to heed the review committee's warnings, the following lead editorial appeared in Memphis' *The Commercial Appeal* newspaper:

> Divorce Rule
> Judges Out of Bounds in Counseling Order
>
> SCORE ONE for the folks who think government messes around too much in private lives. The state Court of Appeals came down against a local requirement that forces all divorcing parents in Shelby County to get counseling at one of two specially designated centers.
>
> The cheers from those who treasure personal freedom and resent courts treating them like children surely will drown out the moans of any lawyers and counselors facing an income hit.
>
> This ruling backed Chancellor Neal Small's insistence that the court rule adopted last spring requiring $30, four-hour sessions for divorcing parents was unconstitutional in that divorce law should be established by the legislature. The ruling does not keep judges from requiring counseling when conditions warrant.
>
> Even if the practice had been found constitutional, strong arguments could be made against such a blanket requirement.
>
> A committee appointed by Small last year to study the counseling program found that "most divorces, perhaps as high as 90 percent, are congenial, uncontested matters where issues of custody, visitation and support are maturely resolved by the parents. However, these conscientious parents are treated the same as the deficient, negligent or abusive ones."[43]
>
> Why mandate such a waste of time and money when it's not called for?
>
> Small's committee of lawyers and lay members set off a major

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42. *Id.* at *10. *See generally* Eugene L. Shapiro, *Separation of Powers and the Inherent Powers of the Judiciary Under the Tennessee Constitution*, 61 TENN. L. REV. 691 (1994).

43. Lead Editorial, *supra* note 8, at A6 (quoting Committee Report, *supra* note 12, at 16).

> explosion among his fellow civil judges who handle divorces. Senior Judge James M. Tharpe said Small, who held the more or less honorary position of presiding judge at the time, failed to consult the other judges before appointing his committee. Tharpe also said there was concern that Small might make changes harmful to the court system without consulting the others.
>
> Some judges praised the counseling program, including Circuit Court Judge Wyeth Chandler, who was presiding judge when it was adopted at the suggestion of the Exchange Club's Child Abuse Prevention center in Whitehaven. Either that facility or the Parenting Center of Memphis at Prescott Memorial Baptist Church had to be used under the court-ordered program.
>
> To test the rule's constitutionality, Small held in contempt of court a man who had refused to attend counseling, fined him $50, sentenced him to a day in jail, and refused to grant his divorce. The jail time was delayed until the appeal ran its course.
>
> Small, who resigned as presiding judge during the furor, did the community a service by questioning a court mandate that went too far, that injected the judiciary too deeply into the personal affairs of divorcing parents.
>
> Such parents indeed should give serious consideration to the effect their actions will have on minor children. A judge can always suggest counseling, or require it when the need is clear.
>
> But a blanket order was out of bounds.[44]

Soon after this article was printed, a bill was introduced in the Tennessee Senate that would authorize "a majority of domestic relations judges of each judicial district to adopt a local rule requiring parties to domestic relations proceedings involving minor children to attend an education awareness program."[45] Under the bill, any such rule would be required to address the type of domestic actions to which it applied and resolve who would present the program, fees, and fee waiver for indigents.[46] However, the Chancellor in the *Church* case requested a formal opinion from the Tennessee Attorney General addressing questions concerning the constitutionality of the bill.[47] Once again the Chancellor's concerns were

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44. *Id.*
45. Op. Tenn. Att'y Gen. 94-032, 2 (Mar. 15, 1994).
46. *See id.*
47. *See id.* at 8.

well founded. The Attorney General declared it an unconstitutional delegation of legislative power:

> In SB2334, the Legislature does not decide that it is in the public interest to require parties to domestic relations proceedings involving minor children to attend an educational awareness program and then authorize the local courts to adopt rules implementing this policy. Rather, the Legislature leaves it to each judicial district to determine whether such a generalized rule should be adopted in the district. Under the Court's analysis in *Church, supra*, such a requirement, if enacted in a particular judicial district, would be substantive, not procedural. Thus, it is the opinion of this Office that SB2334 improperly delegates to each judicial district the power to decide the general question of whether parties to domestic relations proceedings involving minor children must attend an educational awareness program.[48]

Next the Chancellor inquired as to whether the bill would violate Article XI, Section 4 of the Tennessee Constitution, which requires that divorce laws be general and uniform throughout the state.[49] This provision states: "The Legislature shall have no power to grant divorces, but may authorize the Courts of Justice to grant them for such causes as may be specified by law; but such laws shall be general and uniform in their operation throughout the State."[50]

Considering this constitutional restriction, the Attorney General found the measure risky and stated that "a rule similar to Rule 15(g) would modify the substantive causes for divorce by 'effectively conditioning the parties' right to divorce' on their attendance to this type of program . . . . In such a situation, a court could conclude that SB2334, as applied, violates Article XI, Section 4 of the Tennessee Constitution."[51]

The Attorney General, however, did not find federal due process or equal protection problems with the bill "on its face."[52] Since marriage and divorce are fundamental rights,[53] the Attorney General recognized that the "restrictive 'compelling state interest test'"[54] applied. In reviewing the wording of the bill, the Attorney General said that the "compelling state interest apparently is to eliminate potential conflicts and problems that arise

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48. *Id.* at 5.

49. *See id.* at 1, 5.

50. TENN. CONST. art. XI, § 4.

51. Op. Tenn. Att'y Gen. 94-032, *supra* note 47, at 6.

52. *Id.* at 8 n.1.

53. *See id.*

54. *Id.* at 7 (citing Knowlton v. Board of Law Examiners, 513 S.W.2d 788, 790 (Tenn. 1974)).

55. *See id.*

from domestic relations proceedings involving minor children."[56] Yet, the opinion warned: "To the extent that a substantive rule were adopted that affected such litigant's rights in an intrusive fashion, such rule would have to be examined against the standards articulated in the *Boddie* line of cases."[57]

The bill was amended to allow Tennessee judges to require parties to attend an educational program on an individual, "case by case basis,"[58] thus curing the constitutional defects earlier detected by the Attorney General.[60] However, this bill would not create a mandatory program or authorize a blanket court rule covering all divorcing parents with minor children. As amended, the measure was nothing new. It simply codified the practice Tennessee divorce courts already exercised in ordering counseling, whether a class or individual therapy, in a particular case when viewed in the best interest of the child.[61]

In 2000, the Tennessee General Assembly adopted legislation requiring a parenting seminar for all divorcing parents statewide. [62] However, the Memphis trial judges could feel no belated vindication. In fact the opposite was the case, for, unlike their ill-fated effort, the new program had legislative legitimacy and the statute expressly mandated that "[n]o court shall deny the granting of a divorce from the bonds of matrimony for failure of a party or both parties to attend the educational session."[63]

III. OHIO: IMPROPER NOTICE

The next, but far less dramatic, challenge to a trial court's parenting class

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56. *Id.* (citing Boddie v. Connecticut, 401 U.S. 371, 376 (1971)); *see, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

57. Tenn. Op. Att'y Gen., *supra* note 1, at 8 (citing Boddie v. Connecticut, 401 U.S. 371(1971)). The Attorney General reasoned that the parenting seminar requirement proposed in the bill "is distinguishable from the unconstitutional requirement that parties must pay fees and costs before they can proceed in a divorce action." *Id.* at 7. The Attorney General pointed out that in *Boddie*, "the United States Supreme Court found that Connecticut's refusal to admit individuals seeking a divorce to its courts was the equivalent of denying them an opportunity to be heard upon their claim of divorce." *Id.* In *Boddie*, the Supreme Court stated: "Our cases further establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question." *Boddie*, 401 U.S. at 379.

58. TENN. CODE ANN. § 36-6-101(e) (2001).

59. *See* Op. Tenn. Att'y Gen. U94-79 (Apr. 15, 1994).

60. *See* Op. Tenn. Att'y Gen. U94-79 (Apr. 15, 1994).

61. *See* Committee Report, *supra* note 12, at 19.

62. TENN. CODE ANN. § 36-6-408 (2001).

63. TENN. CODE ANN. § 36-6-408(c) (2001).

requirement took place in Ohio in 1994. In the case of *Richardson v. Richardson*,[64] a defendant father, Lloyd Richardson, was unrepresented by counsel. Accordingly, he was entitled to written notice of the trial setting pursuant to Ohio Rule of Civil Procedure 75(K).[65] The notice he received from the trial court read in part as follows:

> This matter is hereby set for a Pre-Trial on the 1st day of November 1993, at 1:00 p.m., before Judge/Referee of the Domestic Relations Court in the Greene County Courthouse, 45 North Detroit Street, Xenia, Ohio. In the event that both parties of a non-contested divorce have complied with Local Rule 3.08 and attended the parenting seminars, such date shall be used as a final hearing. No continuance shall be granted unless for good cause shown upon proper motion to the court.[66]

Mr. Richardson deliberately failed to attend the course in the belief that, pursuant to the wording of the court's notice, failure to attend would prevent the final hearing and hence the divorce.[67] The plaintiff mother also did not attend the session.[68] The Ohio Court of Appeals made its reasoning redundantly clear:

> We agree with Mr. Richardson that the only reasonable construction of the notice is that no final hearing would occur November 1, 1993, absent the parties having attended parenting seminars. It follows that the parties should have been able to assume that the trial court would not conduct a final hearing absent a demonstration that both parties had attended parenting seminars. The trial court's notice of September 20, 1993, was not effective because by its terms either party could prevent the occurrence of the final hearing on November 1, 1993, by not attending the parenting seminars. Mr. Richardson, in effect, claims that the notice was defective because he thought that there would be no final hearing on November 1, 1993, if he did not attend the parenting seminars. We agree with this contention because the September 20, 1993, notice gives that very impression.[69]

Therefore, due to the misleading notice and other procedural errors, the trial court was reversed and the final decree set aside.[70]

IV. OKLAHOMA: EQUAL PROTECTION, DUE PROCESS, IMPROPER NOTICE, IMPROPER DELEGATION OF LEGISLATIVE AUTHORITY, LACK OF

64. No. 94 CA 14, 1994 LEXIS 4348, slip op. (Ohio Ct. App. Sept. 30, 1994).
65. *Id.* at *1.
66. *Id.* at *2.
67. *Id.* at *2-3.
68. *Id.* at *3.
69. *Id.* at *2-3.
70. No. 94 CA 14, 1994 LEXIS 4348, slip op. 4 (Ohio Ct. App. Sept. 30, 1994).

UNIFORMITY, AND ENCROACHMENT ON JUDICIAL INDEPENDENCE

The penalty visited upon the father for failure to attend a parenting session in the case of *Nelson v. Nelson*[71] was coercive indeed, resulting in one of the most wide-ranging challenges to mandated parental seminars and one that reached a sharply divided Oklahoma Supreme Court in 1998.

In a default proceeding, the District Court of Nowata County, Oklahoma, denied a father, Richard Nelson, visitation with his two minor children for failure to complete a seminar entitled, "Helping Children Cope with Divorce."[72] Attendance was required pursuant to an "Administrative Order"[73] establishing a local rule. An Oklahoma statute authorizing the education[74] was enacted *after* promulgation of the rule and the rulings of

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71. 954 P.2d 1219 (Okla. 1998).

72. *Id.* at 1222.

73. *See id.* at 1221 n.1. In pertinent part, Administrative Order CV-95-1 reads:

> Section 1. This rule applies to all parties in all divorce, separate maintenance, guardianship, paternity, custody or visitation actions; or any modifications or enforcement of a prior court order in these actions, excluding domestic violence actions, filed on or after June 1, 1995, where the interests of children under 18 years of age are involved. The rule may be applied to all cases pending as of June 1, 1995 at the judge's discretion.
>
> Section 2. All parties to such action shall successfully complete the seminar entitled 'Helping Children Cope with Divorce'. . . .
>
> Section 5. Upon a party's failure to successfully complete the seminar pursuant to this rule, the judge assigned to the case may take appropriate action, including but not limited to the following:
>
> a. The Court may decline to hear the petition, application, motion or other request for relief of the party who fails to attend;
>
> b. The Court may consider a party's failure to attend as a factor in determining the best interest of the child; and
>
> c. The Court may hold the party who fails to attend in contempt. . . .

Id. at 1221 n.1.

74. *See id.* at 1223 (citing OKLA. STAT. tit. 43, § 107.2 (Supp. 1997)). This statute reads as follows:

> A. In all actions for divorce, separate maintenance, guardianship, paternity, custody, or visitation, including modifications or enforcements of a prior court order, where the interest of a child under eighteen (18) years of age is involved, the Court may require all adult parties to attend an educational program concerning, as appropriate, the impact of separate parenting and coparenting on children, the implications for visitation and conflict management, development of children, separate financial responsibility for children and such other instruction as deemed necessary by the Court. The program shall be educational in nature and not designed for individual therapy.

the trial court.[75] This order stated that the "Court may consider a party's failure to attend as a factor in determining the best interest of the child ...."[76] The trial court also granted the plaintiff mother the divorce, set child support, divided marital property, and awarded her $5,000 as part of the property division.[77]

Mr. Nelson filed a motion to vacate in the trial court arguing that since the mother's petition sought "reasonable visitation"[78] for the father, and he believed the parties were in the process of resolving all disputes, he did not retain counsel or file an answer.[79] Mr. Nelson further contended that the child support awarded exceeded state guidelines, the property division was inequitable, and the decision to deny visitation for failure to attend the class "violated his right of association with his children and was not based on a consideration of the children's best interest."[80] Mr. Nelson, therefore, requested that all determinations be set aside, except for the granting of the divorce.[81]

At the hearing on the motion to vacate, Mr. Nelson admitted that he knew of the educational requirement and had completed the course after the default was taken. But despite these contentions and admissions, his effort to have the court consider his evidence of the value of the marital property was denied. The court did allow proof of Mr. Nelson's actual income, but did not consider it in adjusting child support payments to conform to Oklahoma guidelines.[82] The trial court did not revisit the issue of visitation. Mr. Nelson appealed, and, in doing so, challenged the constitutionality of the administrative order and statute mandating parenting classes.[83]

In dealing with Mr. Nelson's equal protection challenge, the Oklahoma Supreme Court recognized that the United States Constitution and the Oklahoma Constitution have the same equal protection component. It also acknowledged that there is a strong presumption favoring the constitutionality of statutes and that statutes are unassailable if the reason for the differential treatment is "neither arbitrary nor capricious and it bears

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B. Each Judicial district may adopt its own local rules governing the program.

Id. at 1221 n.2.

75. *See id.* at 1229.

76. Nelson v. Nelson, 954 P.2d 1219, 1221 n.1 (Okla. 1998).

77. *See id.* at 1221.

78. *Id.* at 1222 (quoting wife's petition).

79. *See id.*

80. *Id.*

81. *See id.*

82. *See* Nelson v. Nelson, 954 P.2d 1219, 1223 (Okla. 1998).

83. *See id.* at 1223.

a reasonable relationship to a legitimate aim."[84] The court went on to state that "[u]nless a classification jeopardizes the exercise of a fundamental right or it makes a classification on an inherently suspect characteristic, a classification which rationally furthers a legitimate state interest will withstand an equal protection challenge." [85] Unlike the Tennessee Attorney General, the court did not address whether the act involved the "fundamental right" of marriage or dissolution of marriage in its equal protection analysis.

In focusing on the seminar requirement, the court defined the classification specifically as "parents, or persons standing in the parental role, who invoke the jurisdiction of the court in an action which will alter the character of the parental unit may be required to take an educational course intended to lessen the impact of the change on minor children ...."[86] The court felt it important to add that "neither the statute nor the administrative order provide that failure to attend the course will result in visitation or custody being denied."[87] Therefore, in fulfilling its "strong, traditional interest in setting the terms of and procedures for marriage and divorce,"[88] the enactment "reasonably relates to the government's legitimate concern that the best interests of minor children of divorcing families be served."[89] Hence there were no equal protection infirmities.[90] It is again important to observe that the court considered the state's interest "strong" and "traditional" in governing marriage and divorce,[91] but did not ponder if the educational scheme impacted the fundamental right of marriage and divorce addressed in *Boddie* and its progeny.

Mr. Nelson launched a two-pronged due process attack, procedural and substantive. Although the Oklahoma Supreme Court admitted that Mr. Nelson received no notice that his visitation rights were endangered and that a party cannot be penalized without notice, the court found no procedural due process violations contained in the act or administrative order themselves.[92] The opinion reasoned that "this Court will not assume that simply because here the husband did not receive adequate notice that parties generally will not be advised of the obligation to complete the

84. *Id.* at 1224 (citing City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985)).

85. *Id.*

86. *Id.*

87. *Id.*

88. Nelson v. Nelson, 954 P.2d 1219, 1224 (Okla. 1998).

89. *Id.* at 1225.

90. *Id.*

91. *Id.* at 1224.

92. *Id.* at 1225.

educational courses."[93] Thus, even though the statute and order contained no notice provisions and the party at bar received no notice, the court refused to take the step of assuming that no notice would be given to those whose rights and obligations are affected.

As for substantive due process, Mr. Nelson argued that the state cannot interfere with the parent-child relationship without some evidence that the lack of education endangers the health or safety of children.[94] But instead of addressing a showing of harm or danger of harm, or a showing that the classes might actually prevent harm, the court focused on the test applied.

The court responded by recognizing "that the relationship of parents to their children is a fundamental, constitutionally protected right."[95] The court applied a balancing test, weighing its perception of the individual rights of the parents against the interests of society, or, as the court viewed it, an indistinguishable balancing of the liberty interests of the parent and the best interests of the child.[96] The court, therefore, presumed that the parent's interest or right is their self-interest in not being inconvenienced.[97] On the other hand, it assumed that the child's interest and that of the state are one. As if these presumptions were not enough to dispatch Mr. Nelson's contention, the court added that the child's interest is always "paramount,"[98] and this supreme child-state interest is weighed against the parent's mere convenience interest.[99] Moreover, the parent's interest contains a "counterpart"[100] which requires that the parent fulfill the child's best interest.[101] Accordingly, the child's best interest and the parent's rights and responsibilities can never truly be adverse. Thus, by this reasoning, neither the state's interest nor that of a good parent can be in conflict.

Considering the state's "constitutional right"[102] to set policy regarding marriage and divorce, the very enactment of the counseling requirement recognizes the impact of divorce "socially, emotionally and economically"[103] on children, and therefore the rationale for the program. On this basis, the court rejected Mr. Nelson's assertion that the seminar

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93. Nelson v. Nelson, 954 P.2d 1219, 1225 (Okla. 1998).

94. *Id.*

95. *Id.* (citing Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Cleveland Bd. of Educ. V. LaFleur, 414 U.S. 632, 639 (1974); Matter of Guardianship of S.A.W., 856 P.2d 286, 289 (Okla. 1993); Matter of Chad S., 580 P.2d 983, 986 (Okla. 1978).

96. *See id.* at 1225-26.

97. *See id.* at 1226.

98. Nelson v. Nelson, 954 P.2d 1219, 1226 (Okla. 1998).

99. *See id.*

100. *Id.*

101. *See id.*

102. *Id.*

103. *Id.*

requirement must be shown to alleviate danger to children in order to stand. The fact that the legislature and trial court adopted it was sufficient in and of itself. Therefore, the child's welfare and the state's corresponding interests won the balancing test.[104] As for Mr. Nelson's claim that the requirement violated his right of association with his children, the court simply stated that it did not.[105]

Mr. Nelson lastly relied on a separation of powers argument, asserting that the statute was an unauthorized delegation of legislative authority to courts,[106] for each court, as the statute read, "may require"[107] the seminars, and courts "may adopt"[108] local rules "governing the program."[109] However, the Supreme Court found this "unpersuasive"[110] because the statute provides standards for the type of educational course and "merely authorizes the courts to implement local rules governing the program the legislature *has required*."[111] But to the contrary, the Oklahoma legislature did not "require" it. It granted courts the *discretion* to adopt and implement a certain type of program. When the discretionary element is recognized, the Oklahoma Supreme Court's reasoning is in opposition to the Tennessee Attorney General's opinion that a bill authorizing courts to adopt such a rule, but not mandating it statewide for all judicial districts, would improperly delegate to judges the authority to determine a general public policy question of whether parties in domestic relations proceedings should attend parenting courses.[112] As will be seen, this dimension would not be lost on the dissenters.

All was not lost for Mr. Nelson. The majority noted the disfavor of default judgments,[113] and, more importantly, returned to the fact that Mr. Nelson did not receive notice that his visitation rights were endangered. The court recognized that due process includes more than just the right to be heard. It includes the right to notice of "*the nature of the relief sought*."[114] Although Mr. Nelson knew of the course requirement, he was not informed that failure to submit could cost him visitation,[115] nor did he

104. *See* Nelson v. Nelson, 954 P.2d 1219, 1226 (Okla. 1998).

105. *See id.*

106. *See id.*

107. *Id.* at 1222 n.1.

108. *Id.*

109. Nelson v. Nelson, 954 P.2d 1219, 1222 n.1 (Okla. 1998).

110. *Id.* at 1226.

111. *Id.* (emphasis added).

112. *See* Op. Tenn. Att'y Gen. 94-032 *supra* note 47, at 2.

113. *See Nelson*, 954 P.2d at 1228 (citing Singleton v. LePak, 425 P.2d 974, 977 (Okla. 1967); Morrell v. Morrell, 149 Okla. 187, 299 P. 866, 868 (1931)).

114. *Nelson*, 954 P.2d at 1227 (emphasis in the original).

115. *See id.*

have constructive notice by the existence of the Administrative Order as argued by the mother.[116] Although there is language in the order that failure to attend may be "a factor" in determining the child's best interest, there was nothing of record indicating that Mr. Nelson "should have expected that his right to visitation would be barred. Husband's fitness as a parent was never questioned."[117] Accordingly, the trial judge abused discretion in refusing to vacate the judgment. This judicial act constituted a violation of Mr. Nelson's due process rights and the divorce decree was reversed insofar as it denied visitation.[118]

Six justices concurred in full with the majority opinion written by the chief justice. One justice dissented without written opinion, and two justices dissented in part and filed an opinion.[119] Focusing on the fact that the statute did not mandate seminars statewide and left adoption discretionary with local courts, these two justices cited Article 5, Section 46 of the Oklahoma Constitution; "[t]he Legislature shall not, except as otherwise provided in the Constitution, pass any *local or special law* authorizing ... regulating the practice or jurisdiction of ... in judicial proceedings or inquiry before the courts ... or tribunals...."[120] The dissenting opinion also noted Article 5, Section 59 of the Oklahoma Constitution that states; "[l]aws of a general nature shall have a uniform operation throughout the State, and where a general law can be made applicable, no special law shall be enacted."[121]

The dissenters asserted that the statute is a local law violating the Section 46 bar against "procedural rules which do not operate statewide,"[122] and argued:

> Art. 5, § 46 mandates in absolute terms *statewide procedural uniformity* for an entire class of similarly situated persons or things. Its relevant terms *expressly prohibit* the legislature from regulating *judicial procedure* or inquiry before the courts by special or local law. A countywide (or districtwide) rule of civil procedure is *per se* offensive to the notion of territorial (statewide) uniformity so absolutely imposed by § 46. Although directed to the legislature, the terms of §§ 46 and 59 are equally binding on the courts. Our own jurisprudence no less than the legislature's enactments, must faithfully conform to the fundamental

116. *See id.*

117. *Id.* at 1227-28.

118. *See id.* 1228.

119. *See* Nelson v. Nelson, 954 P.2d 1219, 1229 (Okla. 1998).

120. *Id.* at 1229 n.3 (quoting OKLA. CONST. Art. V, § 46) (emphasis added by the dissenters).

121. *Id.* at 1230 n.8 (quoting OKLA. CONST. Art. V, § 59).

122. *Id.* at 1229-30 (Opala, J., dissenting in part).

> law's prohibition against disuniform (or non-uniform) laws on prohibited subjects.[123]

Aside from offending "the constitutionally mandated single regime of procedure,"[124] an analogous and beneficial uniformity of procedural rules promoted at the federal level by the ABA,[125] the dissenters felt the legislature delegated to the local courts powers reserved to the Supreme Court.[126] The statute, according to the dissenters, offends the separation of powers of the Oklahoma Constitution contained in Article 7, Section 6 that states: "General administrative authority over all courts in this State, including the temporary assignment of any judge to a court other than that for which he was selected, is hereby vested in the Supreme Court and shall be exercised by the Chief Justice in accordance with its rules. . . ."[127] The dissenters believed that the legislature's invitation to local courts to adopt local procedural rules on an issue requiring statewide uniformity, delegation of powers of judicial administration belonging to the Oklahoma Supreme Court, and the Supreme Court's approval of the same, "destroys the very fabric our fundamental law inexorably commands."[128] Interestingly, the mandate was too *substantive* to the Tennessee Court of Appeals in *Church v. Church*,[129] but too *procedural* to the Oklahoma Supreme Court dissenters.

Finally, the dissenters contended the measure violates a "norm"[130] pronounced in the Oklahoma Supreme Court decision of *Yelloweyes By and Through Gold v. Blevins*,[131] a ruling "that an individual judge's decision-making independence is protected from invasion effected by court rule."[132] In other words, the statute not only unconstitutionally assumes power vested in the Supreme Court and grants it to trial judges, it violates separation of powers by removing judicatory discretion from trial judges.

In *Yelloweyes*, the court struck down a local court rule that "bound *all Oklahoma County district court judges* by a ruling (upon a novel point of law) earlier made by *one of them*. The mandatory character of the rule was

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123. *Id.* at 1230 (emphasis in the original).

124. Nelson v. Nelson, 954 P.2d 1219, 1233 (Okla. 1998).

125. *See Id.* at 1232 at n.28.

126. *Id.* at 1233.

127. *Id.* at 1229-30 n.5 (quoting OKLA. CONST. art. VII, § 6).

128. *Id.* at 1233.

129. *See Church*, No. 02A01-9312-CH-00266, slip op. at 8 n.3 (Tenn. App. 1994) (Opala, J., dissenting).

130. Nelson v. Nelson, 954 P.2d. 1219, 1233 (Okla. 1998).

131. *Id.* (citing Yelloweyes By and Through Gold v. Blevins, 696 P.2d 1026, 1027 (Okla. 1985)).

132. *Id.*

condemned as an impressible restriction on the independence of judicial decision-making process."[133] The dissenters reasoned that under *Yelloweyes*, each trial judge must be free to determine if particular parties before the court need a course; yet the mandatory scope of the statute, once adopted as a rule in a district, covering all divorcing parents, invades decision-making independence.[134]

The majority responded that it was not persuaded that independence of judicial decision-making is affected by the statute or rule, for "failure to complete the seminar does not determine the outcome of the cause or the custody of the child,"[135] and it does not supplant the trial judge's obligation to evaluate the child's best interest.[136] The dissenters replied: "In response to the court's notion that the rule's mandatory character is harmless because it does not determine the outcome of the cause (or the custody of the child), suffice it to say that adverse legal consequences do attach to a party's failure to knuckle under the rule's *ukase*."[137] In conclusion, the dissenters assured that their objections would in no manner preclude lower courts from ordering parenting education when based on need detected in an individual case.[138]

V. PENNSYLVANIA: IMPROPER PROMULGATION

In the 1998 decision of *Kline v. Kline*,[139] a mother, Carlyn Kline, was sentenced to imprisonment by the Court of Common Pleas of Beaver County, Pennsylvania, for her refusal to attend a parenting seminar as required by an "administrative order" of April 18, 1994.[140] The parties had been involved in "often-bitter litigation"[141] over custody for years following their divorce in 1991, but by 1993 they had resolved their disputes and entered into a consent order awarding Mrs. Kline primary physical custody.[142] The Superior Court of Pennsylvania, the state's intermediate court of appeals, noted that "the dispute is now between appellant and the trial court."[143]

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133. *Id.* at 1233 (emphasis in the original) (quoting Yelloweyes By and Through Gold v. Blevins, 696 P.2d 1026, 1027 (Okla. 1985)).

134. *See id.*

135. Nelson v. Nelson, 954 P. 2d 1219, 1225 n.24 (Okla. 1998).

136. *See id.*

137. *Id.* at 1234 (Opala, J., dissenting) (emphasis in original).

138. *Id.*

139. 708 A.2d 503 (Pa. Super. Ct. 1998).

140. *Id.* at 504.

141. *Id.*

142. *See id.*

143. *Id.*

The administrative order in part states: "Failure of a party to successfully complete the Seminar will result in sanctions by the court, including contempt."[144] On June 6, 1994, the trial judge sua sponte ordered the parties to go to the parenting class.[145] On November 21, 1994, the court sua sponte entered an order to show cause for both parents for failure to attend.[146] In response, Mr. Kline took the course, but Mrs. Kline was "steadfast" in refusing and filed an answer objecting as follows: "1) there was no pending action at the time of the order, 2) there was no dispute between the parties as to custody, 3) she attended equivalent counseling, and 4) the order interferes with her sincerely held religious beliefs."[147]

On April 11, 1996, Mrs. Kline also moved that the cause be transferred to Butler County, the county where she, her ex-husband, and the children had relocated.[148] The judge, on May 16, 1996, denied all relief sought and again ordered Mrs. Kline to attend the course.[149] On November 18, 1996, the judge entered another show cause order requiring Mrs. Kline to appear for failure to submit to the May 16, 1996, order. Mrs. Kline filed another answer similar to the first. Without a hearing, the judge found Mrs. Kline in contempt on January 3, 1997.[150] After a hearing on her answer on March

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144. Kline v. Kline, 708 A.2d 503, 504 (Pa. Super. Ct. 1998) (quoting Administrative Order of the Court of Common Pleas of Beaver County, Penn. (April 18, 1994)). The full text of the Administrative Order reads as follows:

> All parties to divorce and custody actions filed on or after June 1, 1994, where the interests of children under the age of eighteen (18) are involved, shall, unless excused by the court, complete a program which we have the Educational Seminar for Divorcing Parent (the "Seminar"). Parties to support actions may be required by the court to complete the Seminar. Parties to pending actions may also be ordered to complete the Seminar.
>
> All parties shall register for the first available Seminar after the date the defendant has been served with process. Counsel for the plaintiff shall require the plaintiff to register for the Seminar and shall have a copy of the attached notice and registration form served on the defendant at the same time as the complaint.
>
> Failure of a party to successfully complete the Seminar will result in sanctions by the court, including contempt.
>
> Every complaint in divorce or custody shall set forth in a separate attached statement, the names, addresses and phone numbers of the parties, and the names and ages of all children under eighteen (18).

Id.

145. *See id.* at 504.

146. *See id.*

147. *See id.*

148. *See id.* at 504-05.

149. *See* Kline v. Kline, 708 A.2d 503, 505 (Pa. Super. Ct.).

150. *See id.* at 504-05.

27, 1997, Mrs. Kline was sentenced to incarceration.[151] To be purged of contempt, the judge mandated that she register and attend the course. Once again, Mrs. Kline refused and sought a supersedeas from the trial judge, but this was denied and she was placed in the Beaver County Jail.[152] The United States District Court for the Western District of Pennsylvania granted a writ of habeas corpus the following day requiring Mrs. Kline's immediate release, and the Superior Court of Pennsylvania granted supersedeas pending appeal on March 31, 1997.[153] On appeal, the American Academy of Matrimonial Lawyers, Pennsylvania Chapter and the Family Mediation Council of Western Pennsylvania appeared as amicus curiae supporting the trial court's educational mandate.[154]

The Superior Court found that the administrative order was not promulgated pursuant to Pennsylvania Rule of Civil Procedure 239.[155] Under this state rule of procedure, the Superior Court explained:

> In order to be effective and enforceable, Rule 239 requires all local rules to be in writing, with seven copies filed with the Administrative Office of Pennsylvania Courts, two copies filed with the Legislative Reference Bureau for publication in the Pennsylvania Bulletin, and in this case, one copy filed with the Domestic Relations Committee.[156]

The trial court admitted that Rule 239 promulgation procedures were not followed, but urged that the administrative order was not a "local rule."[157] The appeals court disagreed stating: "A 'local rule'" according to the appeals court, "includes '*every* rule, regulation, directive, policy, custom, usage, form or order of general application, however labeled or promulgated, which is adopted and enforced by a court of common pleas to govern civil practice and procedure.'"[158] Nevertheless, the trial court and the amici curiae contended that because the order only affects parties in divorce, custody, and child support cases, Rule 239 is inapplicable, for these cases "are not really matters of civil practice and procedure."[159] Again the Superior Court disagreed saying these domestic matters are civil and within the purview of the Pennsylvania Rules of Civil Procedure,

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151. *See id.*

152. *See id.*

153. *See* Kline v. Kline, 708 A.2d 503, 504-05 (Pa. Super. Ct.).

154. *See id.* at 505 n.1.

155. *See id.* at 505.

156. *Id.*

157. *See id.*

158. Kline v. Kline, 708 A.2d 503, 505 (Pa. Super. Ct. 1998). (quoting Penn. R. Civ. P. 239).

159. *Id.*

because chapters can be found "relating to all facets of civil law,"[160] including rules dealing with divorce, custody, and support.[161] Unless decisional law or the Pennsylvania Supreme Court adopts exceptions, which it has done in the past, such causes are covered by "the general rules applicable to all civil matters."[162] Not stopping there, the Superior Court concluded that even if the local rule was duly promulgated, the rule's own language is inapplicable to Mrs. Kline since "[t]here was no pending action when the trial court, *sua sponte*, ordered the parties to attend the seminar."[163] As the decision noted, "[t]he rule states it applies to 'all parties to divorce or custody actions filed on or after June 1, 1994.' The parties were divorced August 6, 1991. The last custody order was entered March 25, 1994."[164] Even though custody decisions are never final in that modification is possible for cause, nothing regarding the parties was in the court when the administrative order and order to comply were issued.[165]

The appellate court also explained that the local rule requires attendance of all parties in divorce and custody cases "unless excused by the Court."[166] Although not reaching Mrs. Kline's reasons for relief from responsibility to attend, the appeals court said that "if legitimate facially sufficient grounds for excusing attendance are not given reasonable consideration, the rule appears too broad."[167] And, touching the scope and substance of the seminar itself, the appellate court said, "[a]n abundance of caution may be appropriate, but not every party in every domestic case will necessarily benefit from a fixed-syllabus counseling seminar."[168]

The Superior Court conceded that the parties "were prime candidates for intervention,"[169] and that there was every indication that they would be back in court, but such does not empower a trial judge to "pull people back to the courthouse when all litigation is resolved."[170] The trial court did not have jurisdiction.[171] According to the decision, trial courts can order parties to counseling without a rule of court, but that is not the issue despite assertions from the trial judge to the contrary. Courts have the power, in pending cases, to require counseling in furtherance of the aims of

160. *Id.* at 505-06.
161. *See id.* at 506.
162. Kline v. Kline, 708 A.2d 503, 506 (Pa. Super. Ct. 1998).
163. *Id.*
164. *Id.*
165. *See id.*
166. Kline v. Kline, 708 A.2d 503,505 n.6 (Pa. Super. Ct. 1998).
167. *Id.*
168. *Id.*
169. *Id.* at 506.
170. Kline v. Kline, 708 A.2d 503, 506 (Pa. Super. Ct. 1998).
171. *See id.* at 508.

"domestic relations laws."[172] In summary, the appeals court held that because "the Rule was improperly promulgated, it cannot be enforced. Furthermore, as there was no pending case at the time of its initial order, the court was without authority to direct appellant to attend the seminar."[173] The Superior Court saw no need to consider the other issues presented by appellant.[174]

VI. KENTUCKY: ESTABLISHMENT CLAUSE

In 1998, a novel challenge was launched against a Kentucky trial court's parenting education requirement in federal court. In the case of *Kagin v. Kopowski*,[175] the Circuit Court judges of Campbell County appeared in the United States District Court for the Eastern District of Kentucky in a suit alleging violation of the Establishment Clause of the First Amendment of the Constitution of the United States and seeking an injunction, declaratory judgment, and attorney fees.[176]

In 1993, the Campbell County judges entered an order, which was subsequently amended by the Supreme Court of Kentucky in 1997, establishing the seminar requirement.[177] This program, entitled "Parents are

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172. *Id.*

173. *Id.* at 506-07.

174. *See id.* at 505.

175. 10 F. Supp. 2d 756 (E.D. Ky. 1998).

176. *See id.* at 757.

177. *See id.* The General Order as amended reads as follows:

> IT IS HEREBY ORDERED that all parents with minor children who are parties to a dissolution (divorce) or legal separation in Campbell and Kenton Counties shall attend a two-hour divorce education seminar acceptable to the Court within 45 days of the filing of this action. The purpose of the seminar is to educate and sensitize parents to their own needs and the needs of their child(ren) during and after the divorce. It is hoped that this parental education will increase parents' abilities to cope with the stress of divorce, to constructively resolve problems related to their child(ren) and the breakup of the marriage, and to facilitate adjustment of the divorce for the child(ren).
>
> The attorney representing the petitioner shall notify his or her client of this obligation and shall attached [sic] a copy of the brochure "Parents are For Good" to the summons and petition in order that the respondent receives notification of this obligation. The brochures entitled "Parents are For Good" are located in the Circuit Clerk's Office and will explain how to reregister. A similar program with the same goals and objectives may be utilized by the parties, either by agreement or court Order.
>
> This Order applies only to those couples with a child or children of the marriage. A couple may request exemption from this Order by submitting separation agreement which fully resolves custody, visitation and child support in

For Good," was presented by Catholic Social Service's Family Conciliation Program and requires a fee of $15.00.[178] The agency asserted that the fees did not provide for the entire funding for the program and no fees went "to any religious purpose."[179]

Elizabeth Oldiges filed for divorce in August of 1996 in the Circuit Court and was represented by Edwin Kagin. Since no custody agreement had been realized, Mrs. Oldiges was required to go to the parenting class.[180] At that time, the order had not been revised to permit other educational providers; therefore the only program recognized was that administered by Catholic Social Services.[181] However, the Circuit judge allowed Mrs. Oldiges to go to another provider as long as it was "a two hour divorce education seminar within 45 days of filing the action, an alternative being 'Helping Children Cope With Divorce' sponsored by the Aring Institute."[182] The divorce was subsequently settled in October of 1997.[183]

The District Court observed that the classes were conducted by laity "who may or may not be Catholic,"[184] and, without dispute from the plaintiffs, discerned "no evidence of any presentation of Catholic doctrine, nor any efforts at conversion."[185] The plaintiffs further conceded that the classes benefit the "mental health"[186] of parents and children and serve the state interests of "promoting family harmony and minimizing litigation."[187] Nevertheless, the plaintiffs' objections centered not on the Catholic Church's "equal footing with nonsectarian organizations,"[188] an equality they would have no problems with, but with the "exalted"[189] and "special

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conjunction with an Agreed Order to waive the divorce education seminar for the reasons that all issues surrounding the child(ren) have been amicably resolved. Other requests for exemption shall be granted upon a showing of compelling reason.

Id. at 757-58.

178. *See id.* at 758.

179. Kagin v. Kopowski, 10 F. Supp. 2d 756, 758 (E.D. Ky. 1998).

180. *See id.*

181. *See id.* at 758 n.1.

182. *Id.* at 758 (quoting the trial court).

183. *See id.*

184. Kagin v. Kopowski, 10 F. Supp. 2d 756, 758 (E.D. Ky. 1998).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 759 (quoting Plaintiffs' brief).

189. Kagin v. Kopowski, 10 F. Supp. 2d 756, 759 (E.D. Ky. 1998) (quoting Plaintiffs brief).

status"[190] granted to the Catholic Church by the judges.[191] Plaintiffs argued that even though the course content is secular,[192] the recognition of the Church "affects both the weight the audience may give to the message and the import it draws from judicial favoritism to the Catholic Church."[193]

The District Court reviewed the *Lemon* Test: "First the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."[194] The court said that in the recent United States Supreme Court decision of *Agostini v. Felton*,[195] which cited approvingly the more analogous *Bowen v. Kendrick*[196] Supreme Court opinion, where grants were provided to religious organizations to conduct sex education, the High Court modified the *Lemon* Test "by combining the 'entanglement' prong . . . with the 'effects' prong."[197] Accordingly, in applying this scrutiny, a court should look to "the 'character and purpose of the institutions benefited (e.g., whether the religious institutions were predominantly religious)' and whether the aid provided is neutral and non-ideological."[198] Using this analysis, the District Court said the Supreme Court had made it clear "that it is improper to assume that a provider of services, such as a teacher, will ignore instruction to the contrary and engage in subtle indoctrination of religion just because there is some connection between the services and religion."[199] Without evidence to the contrary, it should not be concluded that there is "religious indoctrination."[200] Plaintiffs' admissions as to the purpose and benefits of the program satisfied the first prong of the *Lemon* Test, and there was no evidence "that the primary effect of the program is to advance religion, or, indeed, that it advances religion at all."[201] The seminars, accordingly, passed the traditional *Lemon* Test and the newer *Agostini* Test.[202]

The court next focused on the *Bowen* sex education decision, in which

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190. *Id.* (quoting Plaintiffs brief).

191. *See id.* (quoting Plaintiff's brief).

192. *See id.*

193. *Id.* (quoting Plaintiffs brief).

194. Kagin v. Kopowski, 10 F. Supp. 2d 756, 759 (E.D. Ky. 1998) (quoting Agostini v. Felton, 521 U.S. 203, 218, 117 S.Ct. 2001 (1997)).

195. 521 U.S. 203 (1997).

196. 487 U.S. 589 (1988).

197. *Kagin*, 10 F. Supp. 2d at 759 (quoting *Agostini*, 117 S.Ct. at 2015).

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.* at 760.

202. *See id.*

most of plaintiffs' objections were also made,[203] and noted the Supreme Court's cognizance of "the long history of cooperation and interdependency between government and charitable or religious organizations"[204] and that "charitable organizations with religious affiliations historically have provided social services . . . without controversy."[205] The Supreme Court had said there is no establishment problem unless the agency is "pervasively sectarian."[206] Neither the educational program in *Bowen*, according to the District Court, nor the program here violates the standard.[207] Nor did the District Court find a problem with the "nominal"[208] fees charged, for the fees and the cooperation between the government and the agency do not create an unconstitutional "symbolic link."[209] Finally, the step a party must take to gain permission to use a different agency is "minimal"[210] and does not offend *Lemon* or affect an endorsement of the Catholic Church in the eyes of a "reasonable observer,"[211] considering the course subject and common knowledge that Catholic Social Services "engages in social work activities."[212] The defendant judges were granted summary judgment accordingly.[213]

VII. CONCLUSION

The cases challenging court-ordered parenting seminars demonstrate that rules and statutes creating programs are subject to a variety of serious attacks. Judges and legislators contemplating an educational requirement should be mindful of the vulnerabilities and proceed with care; especially knowing that "fundamental rights" are arguably involved, including the fundamental right of marriage and dissolution of marriage as recognized by the Tennessee Attorney General[214] in the wake of *Church v. Church*[215] and the right of a "parents relationship to their children" as recognized in *Nelson v. Nelson*.[216]

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203. Kagin v. Kopowski, 10 F. Supp. 2d 756, 760 (E.D. Ky. 1998).

204. *Id.* (citing Bowen v. Kendrick, 487 U.S. 589, 609 (1988)).

205. *Id.* (citing *Bowen*, 487 U.S. at 609).

206. *Id.* at 760 n.9.

207. *See id.*.

208. Kagin v. Kopowski, 10 F. Supp. 2d 756, 760 n.10 (E.D. Ky. 1998).

209. *Id.* at 760 (quoting *Bowen*, 487 U.S. at 613-14).

210. *Id.* at 761.

211. *Id.*

212. *Id.*

213. Kagin v. Kopowski, 10 F. Supp. 2d 756, 761 (E.D. Ky. 1998).

214. *See* Op. Tenn. Att'y Gen. 94-032, *supra* note 45, at 7.

215. No. 02A01-9312-CH-00266, 1994 Tenn.App. LEXIS 36 (Tenn. Ct. App. Feb. 3, 1994).

216. 954 P.2d 1219, 1225 (Okla. 1998).

Legislators should not abdicate their responsibility of deciding if the seminars should be mandated by leaving it to judges to determine if classes should be imposed in their separate jurisdictions. If education is needed, it is needed uniformly. Codifying the requirement, as well as imposing all the penalties for failure to comply, would reduce, if not completely prevent, litigation over uniformity, improper delegation of legislative authority, lack of notice and due process, and the range and severity of sanctions. Yet legislation should grant trial judges the discretion to waive the requirement so that courts may consider reasonable grounds for excuse from the requirement so as not to be "too broad" as suggested in *Kline v. Kline*,[217] and to not expose the law to allegations of invading judicial independence, as noted by the dissenters in *Nelson v. Nelson*.[218] Measures also should provide for substitution or a multitude of providers, as approvingly noted in *Kagin v. Kopowski*,[219] and, of course, permit the waiver of fees for indigents to not entail *Boddie*-type problems.

Aside from any peculiar limitations in state constitutions, statutes, and rules of procedure, judges need to consider their traditional role, which is tied to general separation of powers values. Legal scholar Robert H. Birkby has written:

> The courts have no "self-starter." This phrase, coined by Justice Robert H. Jackson, simply means that judges have to wait for problems to be brought to them; they do not, despite occasional appearances to the contrary, have a roving commission to go out and cure whatever ills they consider worth eradicating. If there is no controversy, there is no litigation. If there is no litigation, there is no judicial policymaking even though a judge might wish to make law in the issue area. On the other hand, a legislature and executives can identify and define a problem, devise a solution for it, and adopt the solution without any request from an outside source. Legislatures and executives may take the initiative; courts may not.
>
> The courts decide on specific issues shaped both by demands made by the litigants and the technical rules of the judicial process. Lawsuits are normally presented to the courts in specific, concrete, and particularized form. The judge is forced to take the particular set of facts and a specific plea for relief and make a rule that will resolve the immediate problem. That rule may or may not be applicable to other situations. Sometimes the facts are so idiosyncratic that the decision is pertinent only to the litigants of the moment. Other times the facts are sufficiently unusual for later litigants to assert that a different or contrary decision is

217. 708 A.2d 503, 506 n.6 (Pa. Super. 1988).

218. *See* 954 P.2d 1219, 1233 (Okla. 1998).

219. *See* 10 F. Supp. 2d 756, 758 n.1 (E.D. Ky. 1998).

> warranted by them. A legislature, on the other hand, starts with rules of general application that are broad enough to cover a wide spectrum of similar but not identical facts. The reasoning and policymaking processes are different; the former is inductive and the later deductive.[220]

Other than formal separation of powers constraints, as defended in *Church v. Church*,[221] more practical reasons lead to the conclusion that judges should limit local rulemaking to local housekeeping procedures and defer such substantive, prospective legal requirements to the legislative and executive branches. Legislators' mode of selection, contact with the people, and institutional structure, better equip them to develop legal criteria for programs. Legislators have the benefit of statutory drafting experience, the testing of ideas through debate, the gathering of information through the committee hearings, the assistance of legislative staff, the input of administrative branch agencies, the review by a coordinate house of the legislature, and the pause occasioned by the knowledge that the executive and judiciary can block or hinder implementation thorough checks and balances.

As for the executive branch, it is better able to approve providers, evaluate course content, investigate complaints, assure financial responsibility, and recommend changes. The legislative and executive branches are also able to compile a record of need and effectiveness, and hence need not attempt to rely on the verbiage of the enactment itself to provide a reviewer with rational for the act. If adopted, the overtly political branches are better situated to engage in public discourse and defend their position without damaging their offices' integrity. This does not mean that judges cannot be involved. They can communicate any justification for a program, such as to prevent disputes from clogging the courts, through their judicial conferences, administrative offices of the courts, and appearance before legislative committees where permissible. However, establishing a record of need for parenting education seminars may become all the more difficult if the evidence continues to mount of their ineffectiveness in preventing disputes.

More importantly, if judges draft, approve, implement, interpret, and enforce a rule of court requiring parenting education, they may lose objectivity when assuring compliance. There is an inherent and maladroit conflict in the lawmaker being the judge of the law's validity, applicability, and enforcement. Having invested their court's prestige, and possibly personal reputations and egos, in the success and validity of their mandate, some judges may be more resolute in vindicating their creation than in

220. ROBERT H. BIRKBY, THE COURTS AND PUBLIC POLICY, p.2 (1983).

221. No 02A01-9312-CH-00266, slip op. at 6-10 (Tenn. Feb. 3, 1994).

protecting the rights of a defiant party. This may, in addition, tempt judges to be inflexible and immoderate in defense of their publicly declared policy agenda and in imposing penalties, penalties that can be the most sever meted out by the state, such as the loss of contact with a child as in *Nelson v. Nelson*[222] or imprisonment as in *Kline v. Kline*.[223] Establishing a program can also immerse judges in the spectacle of public policy debates and press criticism, such as the Memphis judges in *Church v. Church*, or ensnare them in litigation as in *Kagin v. Kopowski*. These controversies distract busy trial judges from normal court business, sully judicial dignity, and blur the courts' indispensable image of objectivity and neutrality.

222. 954 P.2d 1219, 1222 (Okla. 1998).

223. 708 A.2d 503, 505 (Pa. Super. 1998).

An Attorney's Duty to Non-Clients*

Edward S. Cheng**

I. INTRODUCTION

Anecdotally, it appears that there is a trend in Massachusetts decisions that increase an attorney's potential liability to non-clients. At issue is the development of cutting-edge theories that arguably impose upon an attorney for an entity (like corporations or partnerships) fiduciary duties to constituents of the entity. This article addresses an odd divergence between malpractice and fiduciary duty law determining the set of non-clients to whom an attorney owes a duty, and proposes the adoption of a single test under both theories. Attorneys, after all, should be able to reliably determine to whom they owe a duty to, whether it is a duty of care or a fiduciary duty.

The leading case in Massachusetts expanding an attorney's liability to non-clients is *Cacciola v. Nellhaus*.[1] This case illustrates the maxim that bad facts can make bad law. In *Cacciola*, the widow of one of four brothers, who were partners in a real estate investment, sued the partnership's lawyer when she learned that he had surreptitiously represented a second brother in his purchase of the partnership share of a third brother at a substantial discount upon that brother's death. The Superior Court dismissed the case on the grounds that there was never an attorney-client relationship between the plaintiff (or her husband) and the attorney. The Appeals Court upheld the dismissal of the malpractice claim for want of an attorney-client relationship, but inferred a count in the complaint for breach of fiduciary duty (though none was pleaded), reasoning that the defendant attorney may have owed the widow's husband a fiduciary duty arising from his representation of the partnership.[2] The problem with *Cacciola* is that the law of negligence and the law of fiduciaries now arguably impose inconsistent obligations upon an attorney to a non-client under the same facts and circumstances. This article analyzes the Appeals Court's decision and proposes a roadmap to

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1. 733 N.E.2d 133 (Mass. App. Ct. 2000).
2. *See id.* at 750-52 (This case has been settled by the parties).

developing consistent standards in malpractice and fiduciary law.

II. DUTIES ARISING FROM AN EXPRESS ATTORNEY-CLIENT RELATIONSHIP

A. The Ordinary Attorney-Client Relationship

The threshold issue of any legal malpractice lawsuit (i.e. negligence) is whether the attorney owes the plaintiff a duty of care, usually arising from an attorney-client relationship. "It is the general rule that an attorney's liability for malpractice is limited to some duty owed to a client. . . . Where there is no attorney-client relationship, there is no breach or dereliction of duty and therefore no liability."[3] A relationship is easily categorized as a traditional attorney-client relationship if the attorney provides legal services under a written or oral contract in exchange for payment. Other relationships, discussed below, are more difficult to categorize.

B. Representation of Partnerships, Corporations and Other Entities

As a general rule, Massachusetts Courts have been reluctant to extend the attorney-client relationship beyond the attorney's immediate client, even where the attorney represents an entity such as a partnership or corporation. As discussed above, the Appeals Court in *Cacciola* upheld the trial court's dismissal of the widow's malpractice claim on the ground that an attorney for a partnership does not owe a duty to the individual partners of the partnership arising solely from representation of the partnership. Therefore, an attorney who represents a partnership (or corporation) does not have an attorney-client relationship with the constituents of that entity such as the partners or shareholders.[4] Similarly, counsel for a limited

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3. DeVaux v. American Home Assur. Co., 387 Mass. 814, 817 (1983).

4. *See* 3 Ronald E. Mallen & Jeffrey M. Smith, Legal Malpractice § 25.8, at 761 n.1 (5th ed. 2000) and cases cited therein. Moreover, an attorney does not enter into an attorney client relationship with subpartners of one of the partners to the partnership, even if an attorney who represents a partnership also represents the individual partners. "A subpartnership is a partnership formed between a member of a preexisting partnership and a third person for a division of the profits coming to the contracting member from the original partnership enterprise." 59A AM. JUR. 2d *Subpartnership* §38, 254 (1987). "[S]ubpartners are partners as between themselves" *id.* at 255, because a "subcontract . . . between one member of a firm and a stranger, does not make the stranger, as between him and the firm, their copartner." Fitch v. Harrington, 13 Gray 468, 474 (Mass. 1859); Lovejoy v. Bailey, 214 Mass. 134, 150 (1913); *see* Burnet v. Leininger, 285 U.S. 136, 139-41 (1932); Morrison v. Dickey, 50 S.E. 175, 177 (Ga. 1905); Rogers v. M.O. Bitner Co., 738 P.2d 1029, 1036-37 (Utah 1987) (Zimmerman, J., concurring). Thus, a subpartner does not stand in the same place as a partner in relation to an attorney for the original partnership.

partnership does not owe a duty of care directly to general partners[5] or to limited partners.[6]

With respect to corporations, corporate counsel does not owe a duty of care to stockholders, directors, officers, employees, or other representatives of the corporation,[7] even when the attorney represents closely-held corporations.[8] There is no reason to believe that Massachusetts courts would rule differently for entities like professional corporations or limited liability corporations.

C. Representation of Fiduciaries

Similarly, representation of a fiduciary does not give rise to a concurrent attorney-client relationship (or fiduciary relationship) with persons to whom the fiduciary owes a fiduciary duty.[9] Massachusetts courts have recognized that the potential for conflict between the interests of the fiduciary and the persons to whom he owes a fiduciary duty precludes such an expansion of the attorney-client relationship.[10] Nonetheless, the attorney may still be liable if he aids and abets a breach of fiduciary duty.[11]

III. THE DEVAUX TEST - IMPLIED RELATIONSHIPS ARISING FROM CONDUCT

Notwithstanding the absence of an express attorney-client relationship, such a relationship can be established through the parties' conduct. Massachusetts courts recognize that there are situations where a *de facto* attorney-client relationship arises even in the absence of an explicit agreement. Accordingly, Massachusetts courts have recognized an implied relationship when: "(1) a person seeks advice or assistance from an attorney; (2) the advice or assistance sought pertains to matters within the

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5. *See* 3 MALLEN, *supra* note 6, at 763.

6. *See e.g.*, R.I. DEPCO v. Hayes, 64 F.3d 22, 27 (1st Cir. 1995) (applying Rhode Island law); Rose v. Summers, Compton, Wells & Hamburg, P.C., 887 S.W.2d 683, 686 (Mo. Ct. App. 1994); Wanetick v. Mel's of Modesto, Inc., 811 F. Supp. 1402, 1409 (N.D. Cal. 1992); Morin v. Trupin, 711 F. Supp. 97, 103-04 (S.D.N.Y. 1989); Quintel Corp., N.V. v. Citibank, N.A., 589 F. Supp. 1235, 1241-42 (S.D.N.Y. 1984); *see also*, S.J.C. Rule 3:07, Rules of Professional Conduct, Rule 1.13, cmt.1 (1998).

7. *See* Robertson v. Gaston Snow & Ely Bartlett, 404 Mass. 515, 525 n.5 (1989).

8. *See* Schaffer v. Cohen, Rosenthal, Price, Mirkin, Jennings & Berg, P.C., et al., 405 Mass. 506, 512-13 (1989).

9. *See, e.g.*, Spinner v. Nutt, 417 Mass. 549, 552-54 (1994) (attorney for trustee does not owe a duty to the beneficiaries); Kurker v. Hill, 44 Mass. App. 184, 187 (1998) (attorney for a shareholder in close corporation did not owe a fiduciary duty to other shareholder even though the shareholders owed each other a fiduciary duty).

10. *See Spinner*, 417 Mass. at 554.

11. *See id.* at 556-57; *see also Kurker*, 44 Mass. App. at 190 n.5.

attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance."[12] In addition, an "individual's subjective, unspoken belief" that there is an attorney-client relationship is not enough,[13] rather, the belief must be (1) "objectively reasonable under the totality of circumstances"[14] and (2) the attorney must be aware of the belief.[15] Where there is an implied attorney-client relationship, the attorney owes the implied client the same duty of care as if there were an express relationship, because the relationship is the same whether it arises from a contract or from a course of conduct.

Plaintiffs rarely prevail, however, on an implied attorney-client relationship theory. For example, in *Sheinkopf v. Stone*, where an investor sued an attorney's former law firm claiming that he had been defrauded in connection with investment advice by the attorney, the United States Court of Appeals for the First Circuit concluded that no attorney-client relationship could be implied between the investor and the firm where there was no preexisting attorney-client relationship, no retainer, no agreement for legal services, no legal advice given, and where the client was regularly represented by other counsel.[16] Similarly, in *Robertson v. Gaston Snow & Ely Bartlett*, where a former corporate officer sued the corporation's attorneys for their role in a reorganization that resulted in the plaintiff's loss of employment, the Supreme Judicial Court of Massachusetts did not recognize an implied relationship even where the plaintiff had subjectively believed that the defendant law firm represented him, asked the firm about his employment, and requested and received a sample employment agreement.[17] The Court reasoned that there was "little basis to imply . . . an attorney-client relationship" because the client never explicitly asked for representation, was never billed, and did not discuss the sample employment agreement with the firm.[18]

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12. DeVaux v. American Home Assur. Co., 444 N.E.2d 355, 357 (Mass. 1983) (quoting Kurtenbach v. TeKippo, 260 N.W.2d 53, 56 (Iowa 1977). Malpractice claim against attorney dismissed for want of attorney-client relationship where attorney misplaced letter from would-be client seeking his help on tort claim until after the statute of limitations had run. *Id.*

13. Sheinkopf v. Stone, 927 F.2d 1259, 1265 (1st Cir. 1991); *see also* Dolan v. Hickey, 431 N.E.2d 229, 230 (Mass. 1982).

14. *Sheinkopf*, 927 F.2d at 1265.

15. *See DeVaux*, 444 N.E.2d at 359.

16. *See Sheinkopf*, 927 F.2d at 1264-68.

17. *See Robertson*, *supra* note 9, at 522-23.

18. *Id.*; *see also R.I. DEPCO.*, 64 F.3d at 27-28 (applying Rhode Island law, the court held that there was no implied relationship between attorney for limited partnership and a limited partner where the limited partner sought separate counsel when transaction went

IV. DUTY OF CARE TO NON-CLIENTS ARISING FROM RELIANCE

Even absent any attorney-client relationship, express or implied under *DeVaux,* an attorney can still be liable for malpractice to a third party under a narrow set of circumstances. According to the "reliance doctrine," an attorney may owe a duty of care to a non-client "who the attorney knows will rely on the services rendered."[19] The reliance doctrine, however, has been less readily applied to lawyers than to other service providers, e.g., surveyors and accountants."[20]

Recent cases suggest that a non-client must prove that the attorney intended to supply the information for the benefit of the non-client rather than merely that the attorney reasonably should have foreseen the non-client's reliance.[21]

If the attorney's duties to his actual client, however, conflict with any duty to the non-client claiming reliance, "the court will not impose a duty of reasonable care."[22] The mere potential of a conflict is sufficient to defeat the non-client's malpractice claim.[23] Whether a potential conflict exists turns, in part, on whether the attorney's duty of confidentiality to the client conflicts with a duty to the non-client.[24] Further, an isolated "identity of interests" between the client and non-client for a specific transaction or legal service is not enough to overcome the rule against imposing conflicting duties to clients and non-clients – there must be an identity of "the entire legal representation."[25]

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sour, and attorney billed partnership directly and was paid exclusively out of partnership funds).

19. DaRoza v. Arter, 416 Mass. 377, 382 (1993); *Robertson,* 404 Mass. at 524.

20. Kirkland Construction Co. v. James, 39 Mass. App. Ct. 559, 562, *rev. denied,* 422 Mass. 1104 (1996).

21. *See* NYCAL Corp. v. KPMG Peat Marwick LLP, 426 Mass. 491, 495 (1998) (discussing duty of auditors to non-clients and adopting Restatement (Second) of Torts § 552 (1977)). *Cf.* Kirkland Construction Co. v. James, 39 Mass. App. 559, 563, n.6 (1995), *rev. denied,* 422 Mass. 1104 (1996) (contrasting Restatement (Second) of Torts, §552(2)(b) and the "less demanding" standard of "reasonably foreseeable reliance").

22. Lamare v. Basbanes, 418 Mass. 274 (1994); *see also DaRoza,* 416 Mass. at 383; *Robertson,* 404 Mass. at 524.

23. *See* One National Bank v. Antonellis, 80 F.3d 606, 609 (1st Cir. 1996).

24. *Id.* at 610-11 (holding that there was no duty to the non-client plaintiff arising from foreseeable reliance because the attorney owed a conflicting duty of confidentiality to the client not to disclose the information at issue to the plaintiff).

25. *Id., citing* RONALD E. JALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 7.11, at 387 (3rd ed. 1989).

V. FIDUCIARY DUTY TO NON-CLIENT CONSTITUENTS OF A CLIENT ENTITY.

Although legal malpractice law (as discussed above) is not a beacon of clarity, it at least provides an attorney with discrete tests to determine to whom he owes a duty of care. This is true even when he represents an entity, because absent unusual circumstances, he owes a duty of care solely to the entity itself and not to its constituents. Accordingly, an attorney could avoid malpractice claims so long as he fulfilled his duty of care to his client corporation or partnership.

This clarity may have changed with *Cacciola v. Nelhaus*. *Cacciola* showed that even though an attorney for an entity could defeat, as a matter of law, malpractice claims brought against him by non-client constituents of the entity, it remains unclear whether he can similarly defeat a breach of fiduciary duty claim that arises from the same facts and circumstances and essentially mimics the malpractice claim (under a different heading). While the duty of care and a fiduciary duty do not impose the same set of obligations upon an attorney in the context of a non-client lawsuit, the threshold issue under either theory is usually whether a duty is owed in the first place.[26]

The roots of this inconsistency first arose in *Shaeffer v. Cohen, Rosenthal*.[27] In *Shaeffer*, where a former fifty-percent shareholder of a closely held corporation sued the corporation's counsel for concurrently representing the corporation and the other shareholder, the Supreme Judicial Court recognized the "logic" of the argument that "even though counsel for a closely held corporation does not by virtue of that relationship alone have an attorney-client relationship with the individual shareholders, counsel nevertheless owes each shareholder a fiduciary duty."[28]The Court, however, did not decide the issue, and upheld the trial court's ruling on the ground that, because plaintiff was no longer a shareholder and the action was properly a derivative action, plaintiff lacked standing to bring the action.[29]*Cacciola* went one step further and held that an attorney for a partnership *may* owe a fiduciary duty to each of its partners even though there is no attorney-client relationship between the attorney and the individual partners. Accordingly, the *Shaeffer* and *Cacciola* opinions arguably opened the door to the concept that counsel to an entity *may* owe a fiduciary duty to the constituents of the entity even in the absence of an

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26. The duty of care requires an attorney to perform legal services with a reasonable degree of skill, while the fiduciary duty requires an attorney to represent a client with undivided loyalty and to preserve the client's confidences.

27. 541 N.E.2d 997 (Mass. 1989).

28. *Id.* at 1002.

29. *Id.*

attorney-client relationship.

Neither *Cacciola* nor *Schaeffer*, however, explain when such a fiduciary duty arises. The answer may be found in *Van Brode Group, Inc. v. Bowditch & Dewey*.[30] This case supports the proposition that the *DeVaux* test, which determines the existence of an implied attorney-client relationship, can also determine whether there is a fiduciary duty under the same circumstances. In *Van Brode*, the trial judge instructed the jury on implied attorney-client relationships under *DeVaux*, but failed to instruct the jury separately on a breach of fiduciary duty claim. The Appeals Court held that the trial court had not erred by omitting a separate fiduciary duty instruction because the *DeVaux* instruction had "covered the subject matter of the fiduciary duty count."[31] The Court reasoned that whether the defendant attorney owed a duty of care or fiduciary duty to the plaintiff turned on whether plaintiff ever relied upon defendant attorney. Accordingly, it held that the trial judge's use of a single instruction was sufficient to address both theories.

Using the same *DeVaux* test to determine the scope of an attorney's duty of care and a fiduciary duty to constituents of an entity makes sense on several levels of analysis. First, uniform application of the *DeVaux* test ensures that an attorney owes a duty of care and a fiduciary duty to the same set of people, which avoids thorny conflicts of duty issues. For example, an attorney's obligation to keep certain communications confidential because of an attorney-client relationship with the entity might conflict with his duty to disclose those communications to a non-client shareholder to whom he owes a fiduciary duty. There would be no such conflict if the attorney was in an attorney-client relationship with the same people that he owed a fiduciary duty to.

Second, uniform application of the *DeVaux* test would reflect the logic that unless an attorney acts in a fiduciary role other than as an attorney (for example, an escrow agent), his scope of duty, whether under malpractice law or fiduciary law, should arise directly from the provision of legal advice and services. After all, what other aspect of an attorney's conduct as an attorney gives rise to a fiduciary duty?[32]

Third, the *DeVaux* test effectively encompassed any meaningful definition of a fiduciary duty. In *Fassihi v. Sommers, Schwartz, Silver,*

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30. 633 N.E.2d 424 (Mass. App. Ct. 1994).

31. *Id.* at 516.

32. In fact, *In the Matter of the Discipline of Two Attorneys*, 660 N.E.2d 1093 (Mass. 1996), cited in *Cacciola*, supports this proposition. In this case, the defendant attorney *acted as an escrow agent*, and the Supreme Judicial Court held that the defendant attorney, in his capacity as an escrow agent, owed a fiduciary duty to the parties to the escrow. The opinion did not impose a fiduciary duty upon the attorneys to non-clients arising from their provision of legal services or advice. *Id.*

Schwartz & Tyler, P.C.,[33] cited by *Schaeffer* and *Cacciola*, the Court of Appeals of Michigan reasoned that a fiduciary relationship arose when one reposed "faith, confidence, and trust in another's judgment and advice."[34] Massachusetts fiduciary law imposes an additional requirement, that the defendant knew that the plaintiff was relying upon him.[35] The *DeVaux* test incorporates these general rules by asking whether the non-client has sought advice within the expertise of the attorney, whether the attorney has given the sought-after advice, and whether the attorney is aware of the relationship.

The bottom line is that if a breach of fiduciary claim arising from the same facts as a malpractice claim is allowed to survive even when there is no express or implied attorney-client relationship, the breach of fiduciary duty claim threatens to subsume and render the *DeVaux* test meaningless. Common sense dictates that the same test should be used to determine the scope of both an attorney's duty of care as well as fiduciary duties under the same circumstances.

VI. CONCLUSION

Massachusetts courts have established clear tests to determine the scope of an attorney's duty of care to implied and express clients. *Cacciola*, however, suggests that an entity's attorney may owe a fiduciary duty to its constituents even if the attorney is not in an attorney-client relationship with those constituents and does not owe them a duty of care. But *Cacciola* does not explain how an attorney determines whom he owes a fiduciary duty to.

This state of inconsistency and uncertainty is patently unfair to attorneys who represent entities because they cannot reliably determine whom they owe duties to. Accordingly, Massachusetts courts should adopt clear standards for an attorney's fiduciary duty to non-clients that are consistent with malpractice law. The *DeVaux* test used to determine implied attorney-client relationships is the choice candidate to also determine the scope of an attorney's fiduciary duty to non-clients. As the Appeals Court reasoned in *Van Brode Group, Inc. v. Bowditch & Dewey*,[36] the *DeVaux* test effectively encompasses the elements required to find a fiduciary duty. With essentially one test to determine whether an attorney owes any duty to a non-client, an attorney can then act accordingly and avoid being ambushed by a non-client lawsuit.

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33. 309 N.W.2d 645 (Mich. Ct. App. 1981).

34. *Id.* at 648.

35. *See, e.g.*, Patsos v. First Albany Corp., 741 N.E.2d 841, 850-51 (Mass. 2001).

36. 633 N.E.2d 424 (Mass. App. Ct. 1994).

COMMENTS

LPA, Inc. v. Herman's* Unanswered Question: Is the Clinton Administration's Birth and Adoption Unemployment Compensation Regulation Consistent with the Federal Unemployment Tax Act?

INTRODUCTION

On June 13, 2000, the United States Department of Labor[1] issued a final rule, which became Part 604 of the Department's Rules and Regulations.[2] Entitled "Birth and Adoption Unemployment Compensation,"[3] this regulation allows states to implement programs whereby individuals on leave from work following the birth or adoption of a child may collect unemployment benefits.[4]

Even before the rule was finalized it encountered considerable resistance from the business community.[5] Immediately upon its promulgation, the regulation was challenged in federal court by a coalition of business associations and individual small businesses.[6] While this challenge would

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* The Bush Administration's Secretary of Labor, Elaine L. Chao, was substituted for the original named defendant in this case, former President Clinton's Labor Secretary Alexis M. Herman, when Judge Paul L. Friedman of the District Court for the District of Columbia issued his Order and Memorandum Opinion on July 24, 2002. *See* LPA Inc. v. Chao, 211 F.Supp.2d 160, 160, n.1 (D.D.C. 2002). However, except when directly citing Judge Friedman's opinion in this matter, this Comment will refer to this case by its original name, *LPA, Inc. v. Herman*, as that is the name that appears in the caption of all documents filed with the court.

1. Hereinafter the Department or DOL.

2. *See* Birth and Adoption Unemployment Compensation, 65 Fed. Reg. 37,210 (June 13, 2000) (codified at 20 C.F.R. pt. 604) [hereinafter Final Rule].

3. *Id.* [hereinafter BAA-UC].

4. *See* 20 C.F.R. § 604.1 (2001).

5. *See Expect a Bigger Battle Over Jobless Fund Use*, HR WIRE, March 6, 2000.

6. *See* Complaint for Declaratory, Injunctive and Other Relief, LPA, Inc. v. Herman, (No. 00-01505 (PLF)) (D.D.C. Jun. 26, 2000) [hereinafter Plaintiffs' Complaint]. *See also* Margaret Clark, *SHRM, LPA and COFC Poised to Sue Labor Department Over "Baby UI"*, HR WIRE, June 26, 2000; Margaret Clark, *Small Employers In Maryland, and*

be dismissed for lack of standing, the question of whether the regulation was a valid use of rulemaking authority remains an unanswered question.[7]

With a different administration in Washington, speculation has mounted that the BAA-UC regulation may eventually be rescinded.[8] Moreover, with the onset of a recession, the depth of which is still uncertain, states will likely be reluctant to expand eligibility for unemployment benefits. However, activists continue their crusade for paid leave for new parents.[9] In fact, California recently became the first state in the nation to mandate paid family leave.[10] Though the California legislation is not funded with unemployment insurance funds,[11] as long as the BAA-UC regulation remains in effect, the use of available funds remains an option for states that are contemplating similar legislation.

Opinions on the BAA-UC regulation are divided on both legal and public policy grounds; this Comment will discuss both areas of disagreement. However, the primary focus of this Comment will be on the legal issues raised by the coalition that challenged the BAA-UC regulation in court.[12]

Part I of this Comment discusses the relevant background issues necessary to understanding this dispute. Part I (A) of this paper provides an explanation of the paid family leave issue in general. Part I (B) discusses

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Massachusetts Join Business Coalition in "Baby UI" Suit, HR WIRE, July 3, 2000; Diane E. Lewis, *Groups File to Overturn Paid Leave for New Parents*, THE BOSTON GLOBE, June 27, 2000, at E2.

7. *See* LPA Inc. v. Chao, 211 F.Supp.2d 160, 164 (D.D.C. 2002). The court found that the plaintiffs could not meet the requirements of the "injury in fact" prong of the standing test. *See id.*

8. *See* Jerry Ackerman, *AFL-CIO Pushes for Paid Leave for Parents: Several Work Issues Before Legislature*, THE BOSTON GLOBE, Dec. 31, 2000, at G1. *See also* Todd F. Gaziano, *The Use and Abuse of Executive Orders and Other Presidential Directives*, 5 TEX. REV. L. & POL. 267, 307 (2001).

9. *See* Tiffini Theisen, *Mothers Dream of Paid Leave; the Family-Leave Act Doesn't Help Most Workers, Activists Say. They Want New Parents to Collect at Least Part of Their Paychecks While Taking Time Off*, THE ORLANDO SENTINEL, Sept. 12, 2001, at F1:

> With unemployment up, the economy down and a Republican in the White House, advocates of paid family leave face a hard fight. But [Lissa] Bell [senior policy associate with the National Partnership for Women & Families] says that with more and more women entering the work force, the movement has more momentum than ever.

Id.

10. *See* Kimberly Edds, *Calif. Adopts Family Leave; Law Mandates Paid Time Off*, THE WASHINGTON POST, Sept. 24, 2002, at A3.

11. *See id.* (The California program will be entirely employee funded through payroll deductions averaging $27 per year.)

12. *See* Plaintiffs' Complaint, *supra* note 6.

the genesis of the BAA-UC proposal. Part I (C) provides an understanding of the structure and scope of the regulation as promulgated by DOL. Part I (D) discusses the federal court challenge to the BAA-UC regulation made by a coalition of business associations and individual small businesses. Part I (E) discusses the history and the structure of federal unemployment law.

Part II of this Comment analyzes the four theories presented by those who sued DOL over the BAA-UC regulation. Part II (A) looks at whether the BAA-UC guidelines conflict with the Federal Unemployment Tax Act (FUTA). Part II (B) evaluates the question of whether the regulation violates the Family and Medical Leave Act (FMLA). Part III (C) discusses whether DOL's rule is arbitrary and capricious under the Administrative Procedures Act (APA). Part III (D) questions whether DOL followed the dictates of the Regulatory Flexibility Act (RFA) when promulgating the rule.

Part III briefly discusses some of the policy concerns that have been raised regarding the BAA-UC regulation. Part III (A) outlines the debate over what the cost of implementing the BAA-UC by the states would be. Part III (B) looks at whether unemployment funds are an appropriate source of revenue for paid family leave. Finally, Part IV provides a summary and offers concluding thoughts on these matters.

Furthermore, the BAA-UC regulation and the court challenge to it raise fundamental questions about the relationship between the Executive, Legislative and Judicial branches of government. How much discretion does an agency have in interpreting the statutes that it is charged with administering? Can an executive agency engage in creative, outcome-based, statutory interpretation so as to achieve the result that the President desires but for political reasons cannot obtain by legislative means? Are agencies free to discard decades-old statutory interpretations at will? What is the proper role of the Judiciary in reviewing an agency's interpretation of a statute? This Comment will attempt to determine how a federal court would rule on the legitimacy of the BAA-UC regulation; if the question was presented in a case in which standing and ripeness were not at issue. It is also hoped, that in the process, some light can be shed on these important questions.

I. BACKGROUND

A. The Question of Paid Family Leave

Much of the impetus behind the family leave movement comes from the evolution of the workforce, from a male-dominated domain, to one in

which women and men shoulder increasingly equal burdens.[13] From this development has come a set of related concerns. One concern has been that since society still looks to women to be the primary caregiver for young children and aging parents, the interruptions in workforce participation resulting from such duties results in women having decreased earning ability.[14] A second concern has been the effect that absent mothers may have on children in their early formative years.[15] Additionally, there are concerns about the stresses put on family life in general when both parents work, and whether these stresses have led to increased divorce rates.[16]

To address some of these concerns, Congress passed the Family and Medical Leave Act (FMLA) in 1993.[17]. The Act allowed individuals to take up to twelve weeks of unpaid leave from work for a serious health condition suffered by them or a family member, or for the birth or adoption of a child.[18] Since its passage, an estimated twenty-four million Americans have taken advantage of the FMLA benefits.[19] However, the United States remains virtually the only industrialized nation that does not have a form of "paid family leave."[20] The lack of paid leave has undoubtedly resulted in fewer people taking family leave than may otherwise be eligible.[21]

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13. *See* Sylvia Law, *Families and Federalism*, 4 WASH. U. J.L. & POL'Y 175, 196 (2000). *See also* Patricia A. Shiu, *Work and Family: Policies for the Working Poor*, 26 HARV. J. ON LEGIS. 349, 350 (1989).

14. *See* Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 387 (2001).

15. *See* ANITA U. HATTIANGADI, PAID FAMILY LEAVE AT WHAT COST? 10 (Employment Policy Foundation, 2000).

16. *See id.* at 10-11.

17. 29 U.S.C. §§ 2601-54 (2001).

18. *See id.* § 2612(a)(1) (2001). It should be noted that under FMLA coverage is not universal, as only the employees of companies with fifty or more employees are included in the definition of "eligible employee." *Id.* § 2611(2)(B) (2001).

19. *See* HATTIANGADI, *supra* note 15, at iii.

20. *See* Jane Waldfogel, *Family-Friendly Policies for Families with Young Children*, 5 EMPLOYEE RTS. & EMP. POL'Y J. 273, 293 (2001). *See also* Meryl Frank & Edward F. Zigler, *Family Leave: A Developmental Perspective, in* CHILDREN, FAMILIES, AND GOVERNMENT: PREPARING FOR THE TWENTY-FIRST CENTURY 117, 122 (Edward F. Zigler, et al., eds., 1996).

21. *See* COMMISSION ON FAMILY AND MEDICAL LEAVE, U.S. DEP'T OF LABOR, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES 99 (1996). The Commission found that between January 1, 1994 and the summer of 1995, 20.2% of employees wished to take leave for a reason permitted by the FMLA. *See id.* at 92. However, only 16.8% of employees actually took leave. *See id.* Nearly two-thirds of those employees who wanted to take leave but did not cited a lack of money as the reason they did not take leave from work. *See id.* at 99-100.

For some time now, many in the United States have advocated European-style paid family programs.[22] However, these plans have met with great resistance from the business community, who believe that such plans are inappropriate in the United States because such programs decrease labor market flexibility (traditionally one of the greatest strengths of the American economy).[23] In addition, there is concern that such programs place a substantial burden on small businesses, which make up a much greater portion of the employer community than is the case in other industrial nations.[24] Moreover, American traditions of independence, individualism and resistance to government intervention have made it less than fertile ground for promoters of grand universal entitlement schemes.[25]

Though it would be a step in the direction of the European-style leave policies, even if the BAA-UC regulation were implemented in all fifty states, it would still be a conservative cousin to the extravagant entitlements European nations lavish upon their countrymen.[26] France gives mothers sixteen weeks off after childbirth, Germany allows for fourteen weeks and Italy twenty weeks, all at full pay.[27] Finland goes further and provides for thirty-five weeks of leave at 100 percent of regular pay.[28] Japan is more parsimonious; it provides only twelve weeks of paid leave at sixty percent of regular pay.[29] Closer to home, Canada amended its Employment Insurance Act,[30] effective December 31, 2000, to allow mothers to receive fifteen weeks of pregnancy benefits, and mothers and fathers to share a total of thirty-five weeks of parental benefits, for a total of fifty weeks of paid leave per family.[31] In Canada, parents receive fifty-

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22. *See, e.g.*, Emily A. Hayes, *Bridging the Gap Between Work and Family: Accomplishing the Goals of the Family and Medical Leave Act of 1993*, 42 WM. & MARY L. REV. 1507, 1536-37 (2001). *See also* RONALD D. ELVING, CONFLICT AND COMPROMISE: HOW CONGRESS MAKES THE LAW 27-28, 40 (1995). Most of the original proponents of the FMLA were in favor of paid leave but chose to pursue only unpaid leave out of political pragmatism. *See id.* at 39.

23. *See* HATTIANGADI, *supra* note 15, at 69-70.

24. *See* Patricia McGovern et al., *The Determinants of Time Off Work After Childbirth*, 25 J. HEALTH POL. POL'Y & L. 527, 533 (2000).

25. *See id.* at 557-58.

26. *See* WAYNE VROMAN, COMPENSATING AMERICAN FAMILIES FOR BIRTHS AND ADOPTIONS, (Urban Institute rev. ed. April 2001) at 5, *at* http://www.urban.org/pdfs/BAAUC.pdf (last visited Sept. 15, 2002).

27. *See* BETTY HOLCOMB, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, WHY AMERICANS NEED FAMILY LEAVE BENEFITS AND HOW THEY CAN GET THEM, 5 (n.d.).

28. *See* Frank, *supra* note 20, at 122 Table 7.1.

29. *See id.*

30. Employment Insurance Act, R.S.C. ch. 23, §§ 22-23 (1996) (Can.).

31. *See* Pierre Crichton, *Changes to the Pregnancy and Parental Leave Provisions of the Employment Insurance Act and Employment Standards Legislation*, 10 E.L.L.R. 97

five percent of their average weekly wage, up to a maximum of C$413 per week.[32] In contrast, unemployment benefits in the United States, which the BAA-UC regulation would allow states to provide workers following the birth or adoption of a child, average only $212 a week.[33]

B. The Origin of the BAA-UC Regulation

The idea behind the BAA-UC regulations first appeared in Vermont in 1997.[34] In February of that year, Vermont State Senators Jan Backus and Susan Bartlett introduced S. 143, which would have allowed individuals taking leave under Vermont's Family and Parental Leave Act[35] to collect unemployment benefits.[36]

However, in response to an inquiry from the Vermont Department of Employment and Training, the regional office of the U.S. Department of Labor stated that this legislation was contrary to federal law in that it allowed individuals who were not "able and available for work" to collect benefits.[37] Shortly thereafter, U.S. Senator Patrick Leahy (D-Vermont)

(2000) C.E.L.L.R. Lexis 42.

32. *See* Soma Ray, *Pregnancy, Parental Leave Extended*, THE LAWYERS WEEKLY (Canada) Feb. 23, 2001. *See also* Lori Seymour, *New Moms Welcome Extended Leave*, THE LONDON FREE PRESS (Ont.), Dec. 30, 2000, at A2.

33. *See* BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: THE NATIONAL DATA BOOK 350 tbl. 536 (121st ed. 2001) (1999 data). In 1999, Massachusetts and Minnesota were tied for highest average benefit in the US at $279 per week. *See id.* Mississippi, on the other hand, had the lowest average benefit of any state week at only $153 per week. *See id.*

34. *See* Cheye Calvo & Jennifer Jones, *Parental Leave as Unemployment*, ST. LEGISLATURES, Denver, Colo., Oct./Nov. 2000, at 26.

35. VT. STAT. ANN. tit. 21, §§ 470-74 (2001).

36. *See* S. 143 (Vt. 1997). The functional portion of this legislation consisted of a single sentence, which provided that an individual out of work on family leave would "be deemed able and available for work ...." *Id.* § 2. The requirement that an individual be "able and available for work" is discussed below. *See infra* Part II(A).

37. *See* letter from Walter Baran, Regional Compliance Officer for Unemployment Insurance, Department of Labor, writing for Gail Backus, Regional Director for Unemployment Insurance, Department of Labor, to Susan D. Auld, Commissioner, Vermont Department of Employment and Training (1997) (on file with author) [hereinafter Baran Letter]:

> We are concerned that this bill is inconsistent with Federal law requirements for the UC program.
>
> ...
>
> Those provisions of Federal UC law requiring payment of UC through public employment offices and limiting withdrawals from a State's unemployment fund to payments of UC have long been interpreted to permit payments only to individuals who are able and available for work.

wrote directly to the acting Secretary of Labor to ask that the Department change its view on this matter.[38] While S.143 was not acted upon by the Vermont legislature,[39] it was reintroduced in 1999.[40] By this time, similar legislation had also been introduced in Maryland, Massachusetts and Washington.[41] Again, Senator Leahy wrote the Secretary of Labor to ask that the Department change its view on this subject.[42]

It appears that this time the Senator, and other supporters of this proposal, were more successful, as on May 23, 1999, at a commencement address at Grambling State University, President Clinton stated that he was directing the Department to issue a rule to allow states to extend unemployment benefits to parents on employment leave after the birth or adoption of a child.[43]

President Clinton's directive to DOL was in many ways an extraordinary intervention in the rulemaking process.[44]

Ever since the advent of the modern administrative state, Presidents have

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Id.

38. *See* letter from Sen. Patrick Leahy to the Honorable Cynthia Metzler, acting Secretary of Labor (April 11, 1997) (on file with author):

> [T]he DOL position undermines the goal of this Administration to promote greater access to family and medical leave, especially for those working families who are left without protection because they cannot afford to take unpaid leave. Accordingly, I strongly urge the DOL to review its position and allow the State of Vermont to move forward for the benefit of working families.

Id.

39. *See* The Vermont Legislative Bill Tracking System, Current Status of a Specific Bill or Resolution, 1997-1998 Legislative Session, S.0143, *at* http://www.leg.state.vt.us/database/status/summary.cfm (last visited Sept. 15, 2002).

40. *See* S.179 (Vt. 1999).

41. *See* Sonya Ross, *President Proposes Family Aid*, BURLINGTON FREE PRESS (Vt.), May 24, 1999, at A2.

42. *See* letter from Sen. Patrick Leahy to the Honorable Alexis Herman, Secretary of Labor, (April 12, 1999) (on file with author). "Giving states the flexibility to provide unemployment compensation benefits for employees on family leave would strengthen the Administration's commitment to working families ...." *Id.*

43. *See* Commencement Address at Grambling State University in Grambling, Louisiana, 1 PUB. PAPERS 836, 839 (May 23, 1999). *See also* Memorandum on New Tools to Help Parents Balance Work and Family, 1 PUB. PAPERS 841 (May 24, 1999) ("I hereby direct the Secretary of Labor to propose regulations that enable States to develop innovative ways to using the Unemployment Insurance (UI) system to support parents on leave following the birth or adoption of a child.")

44. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2283-85 (2001). Prof. Kagan used the BAA-UC rulemaking process as an example of the Clinton Administration's unique and controversial approach to regulation. *See id.* ("Clinton publicly entered a rulemaking ... not with the announcement of a proposed regulation, but before there was any proposal to speak of."). *Id.* at 2283-84.

attempted to gain control over the regulatory process.[45] For example, President Nixon reacted to the burgeoning administrative state by creating a "counter-bureaucracy" within the office of the White House, which was charged with reviewing major rules before they were published in the Federal Register.[46] President Reagan issued Executive Order 12,291, which among other things required agencies to conduct "cost-benefit" analysis of "major" rules.[47] President Bush continued the advance of Presidential regulatory review by creating the Council on Competitiveness, headed by Vice President Quayle, which reviewed agency rules and established regulatory reform proposals.[48]

Many of these initiatives were highly controversial. Some critics considered President Reagan's executive orders to be an unconstitutional transfer of power to the President.[49] President Bush's Council on Competitiveness was criticized for its secrecy.[50] However, the initiatives of Presidents prior to Clinton were supervisory in nature, whereas President Clinton went further with initiatives like the BAA-UC regulation by actually *directing* agencies to pursue specific policy results.[51] As one commentator has noted:

> President Clinton treated the sphere of regulation as his own, and in doing so made it his own, in a way no other modern President had done. Clinton came to view administration as perhaps the single most critical—in part because the single most available—vehicle to achieve

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45. *See* Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 11 (1995).

46. *See id.* at 13.

47. *See id.* at 15.

48. *See id.*

49. *See, e.g.*, Morton Rosenberg, *Presidential Control of Agency Rulemaking: An Analysis of Constitutional Issues That May Be Raised by Executive Order 12,291*, 23 ARIZ. L. REV. 1199, 1221 (1981) (arguing that Executive Order 12,291 was, in effect, an amendment to the Administrative Procedure Act, and thus unconstitutional without Congressional approval.)

50. *See* Thomas O. Sargentich, *The Administrative Process in Crisis—The Example of Presidential Oversight of Agency Rulemaking*, 6 ADMIN. L.J. 710, 718-19 (1993). *See also* Cass R. Sunstein, *The Myth of the Unitary Executive*, 7 ADMIN. L.J. 299, 301 (1993).

51. *See* Kagan, *supra* note 44, at 2285. Even before the advent of the BAA-UC regulation commentators remarked on the irony of President Clinton's aggressive claim of authority over the administrative state. *See* Pildes, *supra* note 45, at 26-27, ("Indeed, many Democrats had vigorously complained that Presidents Reagan and Bush had displaced authority vested by law in the relevant agency head. It would be ironic if President Clinton successfully asserted the very authority that had been so controversial in the hands of his predecessors.").

his domestic policy goals.[52]

Pursuant to President Clinton's directive, the Department of Labor announced a proposed rule to allow states to use unemployment funds for paid family leave in cases of the birth or adoption of a child.[53] The Department utilized standard notice and comment rulemaking procedures.[54] The Department received over 4,300 pieces of

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52. Kagan, *supra* note 44, at 2281-82. The Clinton Administration's brand of agency oversight raises weighty Constitutional issues, which are substantially beyond the scope of this Comment. *See id.* at 2319-21, (pointing out that Presidential control over agency rulemaking appears to be in direct conflict with Justice Hugo Black's opinion in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952), which stated that "the President's power to see that the laws are faithfully executed refutes the idea that he is a lawmaker."). Aside from Constitutional considerations, this degree of Presidential control over the rulemaking process may constitute the death knell for the traditional justification for deference to agency decision-making, namely, agency expertise. *Cf.* Sargentich, *supra* note 50, at 712-15. As previously noted, in the present case the "experts" in the Department had ruled that the BAA-UC legislation was contrary to the principles of federal UI law. *See* Baran Letter, *supra* note 37. If a rule such as the BAA-UC regulation, which was so clearly the product of political considerations, is to be afforded deference, this deference derives from a political theory of legitimacy rather than an expertise theory of legitimacy. *Cf.* Sargentich, *supra* note 50, at 714-15.

53. *See* Notice of Proposed Rulemaking on Birth and Adoption Unemployment Compensation, 64 Fed. Reg. 67,972 (proposed Dec. 3, 1999) (to be codified at 20 C.F.R. pt. 604) [hereinafter NPRM].

54. The Department claims that the BAA-UC regulation is strictly an interpretive rule and thus did not require the normal procedures necessary in so-called "informal rulemaking." *See* Memorandum of Points and Authorities in Support of Defendant's Motion to Dismiss at 4, LPA, Inc. v. Herman, (No. 00-01505 (PLF)) (D.D.C. Sept. 25, 2000) [hereinafter Defendant's Memorandum], *citing* 5 U.S.C. § 553 (2001). "DOL concluded that it would benefit from public participation in the decision-making process. Accordingly, although not required under the Administrative Procedure Act (APA), DOL elected to engage in notice-and-comment rulemaking." *Id.* This is a rather disingenuous statement. It is true that DOL often issues statements referred to as "Unemployment Insurance Program Letters," which interpret FUTA, but do not go through notice-and-comment rulemaking procedures. *See* Cabais v. Egger, 690 F.2d 234, 236 (D.C. Cir. 1982). These "interpretive rules" fall under the exception to notice-and-comment rulemaking found in 5 U.S.C. § 553(b)(3)(A) (2001). *See id.* at 238. However, courts do not give the same deference to interpretive rules as they do to rules that are the product of notice-and-comment procedures. *See* Christensen v. Harris County, 529 U.S. 576, 587 (2000) ("Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.") (*Chevron* deference is discussed below in Part III(A)). Thus, "DOL letters may be relied on as agency interpretations of the statutes to which some deference may be accorded, however, 'the courts have the reserve of power to substitute their own judgment on all questions of statutory interpretation.'" Cosby v. Ward, 843 F.2d 967, 981 (1986), *quoting* Doe v. Reivitz, 830 F.2d 1441, 1447 (7th Cir. 1987).

correspondence on the proposed rule before and during the rule's official comment period.[55] According to the Department, these comments were nearly evenly divided between those supporting the rule and those opposing it.[56] However, before the comment period on this new regulation had even closed, President Clinton began speaking of them as a done deal.[57]

On June 13, 2000, the Department issued its final rule, which became Part 604 of the Rules and Regulations of the Department.[58] This rule was substantially unchanged from what the Department originally proposed.[59] While no state has yet taken advantage of the BAA-UC regulations,[60] 2001 and 2002 saw implementing legislation introduced in numerous states.[61]

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55. *See* Final Rule, *supra* note 2, at 37,211. The department received about 500 of these comments before the proposed rule was even published in the Federal Register. About 3,800 comments were received during the actual comment period. *See id.*

56. *See id.*

57. *See* The President's Radio Address, 1 PUB. PAPERS 238, 238 (Feb. 12, 2000).

58. *See* Final Rule, *supra* note 2.

59. *Compare* NPRM, *supra* note 53, *with* Final Rule, *supra* note 2.

60. *See* Laurent Belsie, *In workplace, a shift toward leave for mothers*, THE CHRISTIAN SCIENCE MONITOR, Dec. 5, 2001, at 3. *See also* LPA Inc. v. Chao, 211 F.Supp.2d 160, 164-65 (D.D.C. 2002).

61. *See, e.g.*, H.B. 2458 (Ariz. 2001); S.B. 1059 (Ariz. 2001); H.B. 1245 (Fla. 2001); S.B. 500 (Fla. 2001); H.B. 30 (Haw. 2001); S.B. 390 (Ill. 2001); S.B. 2144 (Ill. 2002); H.B. 1783 (Ind. 2001); S.F. 2028 (Iowa 2002); H.B. 2232 (Kan. 2001); H.B. 1572 (La. 2001); H.B. 933 (Md. 2001); H.B. 593 (Md. 2002); H.B. 744 (Mass. 2001); S.F. 1597 (Minn. 2001); H.F. 1866 (Minn. 2001); L.B. 370 (Neb. 2001); A.B. 3049 (N.J. 2001); A.B. 228 (N.J. 2002); H.B. 528 (N.M. 2001); A.B. 6163 (N.Y. 2001); A.B. 7455 (N.Y. 2001); S.B. 241 (Or. 2001); H.B. 3310 (Or. 2001); H.B. 2418 (Or. 2001) (as amended); H.B. 1690 (Penn. 2001); H.B. 240 (Tex. 2001); S. 161 (Vt. 2001). In addition to BAA-UC implementing legislation, a number of other bills were introduced in 2001 and 2002, which were designed either to create a form of paid family leave or encourage businesses to provide it. *See, e.g.*, S.B. 1661 (Cal. 2002) (as passed, the legislation allows for six weeks of paid leave after the birth or adoption of a child, and for the employee's own illness or that of a family member); H.B. 5860 (Conn. 2001) (would require employers to let employees use accrued paid sick leave as paid family leave); H.B. 342 (Ga. 2001) (would allow employees separated from work by "undue family hardship" to collect unemployment insurance benefits); S.B. 165 (Haw. 2001) (would establish a tax credit for employers who offer paid family leave to employees); L.D. 2058 (Me. 2002) (authorizes the continuation of a committee established in 2001, which was designed to study the costs and benefits of paid family leave); H.B. 4005 (Mass. 2001) (would provide for twelve weeks of temporary disability benefits following the birth or adoption of a child, and up to twenty-six weeks of disability benefits for the employees own illness); H.B. 4491 (Mass. 2001) (Governor Swift's plan for a means-tested paid parental leave benefit); H.B. 4670 (Mass. 2001) (would give tax credits to employers that give employees paid family leave); H.F. 1623 (Minn. 2001) (would encourage employers to allow paid family leave by creating a reimbursement program); H.B. 744 (N.H. 2001) (as introduced, this legislation would allow up to twenty-

The state that has come the closest to passing BAA-UC enabling legislation is Massachusetts.[62] In Massachusetts, BAA-UC legislation passed both chambers of the legislature, when in the closing hours of the 2000 legislative session, amendments adopting BAA-UC provisions were added to an appropriations bill by a veto-proof majority.[63] However, the Governor, invoking an unusual aspect of the Massachusetts Constitution,[64] returned the amendments for further consideration after the legislative session ended.[65]

C. Structure and Scope of the BAA-UC Regulation

The final rule and model state legislation were published in the Federal Register on June 13, 2000.[66] A substantial amount of supplementary information was also published, much of which was designed to address the criticisms the proposal engendered during the comment period.[67]

Under the approved rule, eligibility for BAA-UC leave would begin in the week in which the child is born or placed with the family for adoption, and would last for one year.[68] The weeks preceding the birth or placement of the child and the weeks following the end of the one-year period would not be compensable under the rule.[69] The rule does not specify a length for which leave could be taken, however, the model state legislation recommends a 12-week period.[70] Eligible employees under BAA-UC would be any and all employees that would qualify for regular unemployment insurance benefits.[71]

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six weeks of paid leave, for any FMLA approved purpose, to be funded with a payroll deduction); A.B. 7453 (N.Y. 2001) (would amend worker compensation law to award disability benefits to individuals out of work under the federal FMLA); S.B. 5420 (Wash. 2001) (would provide five weeks of paid family leave to be funded through new taxes).

62. *See* Daniel Barbarisi, *Celluci Rejects Parental Leave Bill*, THE BOSTON GLOBE, Aug. 11, 2000, at B5. Several states have had implementing legislation make it through one legislative chamber, only to have it die in the other chamber. For example, a compromise version of BAA-UC legislation passed the Vermont Senate when the lieutenant governor voted for the bill breaking a 15-15-tie vote. *See* Calvo, *supra* note 34, at 28. However, the legislation later died in the Vermont House of Representatives when it was learned that by means-testing the benefit, the Senate compromise had violated federal law. *See id.*

63. *See* Barbarisi, *supra* note 62, at B5.

64. *See* MASS. CONST. Amend. art. LVI (conferring upon the Governor the right to return bills to the legislature with recommended amendments).

65. *See* Barbarisi, *supra* note 62, at B5.

66. *See* Final Rule, *supra* note 2.

67. *See id.*

68. *See* 20 C.F.R. § 604.21 (2001).

69. *See id.*

70. *See* Final Rule, *supra* note 2, at 37,225.

71. *See* 20 C.F.R. § 604.20 (2001).

It should be noted that, according to the Department, BAA-UC and FMLA are "legally unrelated to each other."[72] While an individual may qualify for both FMLA and BAA-UC, the leave programs are not coextensive and an individual must qualify for each leave program separately.[73] Unlike FMLA, the model state legislation contains no requirement that employees notify their employers before taking BAA-UC leave.[74] Another important distinction between BAA-UC and FMLA leave is that under BAA-UC leave there is no guaranteed job retention.[75] Finally, BAA-UC leave, in only covering parents after the birth or adoption of a child,[76] is far less comprehensive than FMLA leave.[77] Despite these differences, critics of the BAA-UC rule view it as an attempt to expand FMLA without Congressional authorization.[78]

Another surprising aspect of BAA-UC leave is that according to the

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72. Final Rule, *supra* note 2, at 37,212. This is in one sense a surprising statement considering that much of the impetus behind the proposal stemmed from the belief that individuals were not taking advantage of FMLA leave because they lacked the financial resources. *See* Memorandum on New Tools to Help Parents Balance Work and Family, 1 PUB. PAPERS 841 (May 24, 1999). *See also* The President's Radio Address, 1 PUB. PAPERS 238, 238 (Feb. 12, 2000). *See also* The President's Radio Address, 1 PUB. PAPERS 1115 (June 10, 2000). On the other hand, if the Department had tied BAA-UC directly to FMLA, this would clearly have violated Congressional intent to make FMLA unpaid leave. *See, e.g.*, 139 CONG. REC. E2010 (daily ed. Aug. 5, 1993) (statement of Rep. Schroeder) ("The leave is unpaid, so your paycheck will stop. There is no federal government compensation such as unemployment.").

73. *See* Final Rule, *supra* note 2, at 37,212.

74. *Compare* 20 C.F.R. pt. 604 (2002), *with* 29 U.S.C. § 2612(e) (2001).

75. *Compare* Final Rule, *supra* note 2, at 37,225, *with* 29 U.S.C. § 2614(a) (2001).

76. *See* 20 C.F.R. § 604.1 (2002).

77. *See* 29 U.S.C. § 2612 (2001). Employees are entitled to leave under FMLA for the following reasons:

> (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.
> (B) Because of the placement of a son or daughter with the employee for adoption or foster care.
> (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.
> (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

Id.

78. *See* letter from Sen. Judd Gregg to the U.S. House of Representatives Human Resources Subcommittee of the House Ways and Means Committee (Mar. 9, 2000), *at* http://www.saveui.org/gregg_letter.html (last visited Nov. 12, 2002). "This thinly veiled back door FMLA expansion circumvents the legislative process and violates the constitutionally protected rights of citizens that we, as elected officials, represent." *Id.*

Department, "BAA-UC is not a new program."[79] According to the Department, the rule allows the birth or adoption of a child to be a new basis of eligibility for the existing unemployment program.[80] In some sense the Department appears to be correct. For example, while not required by the rule, the model legislation assumes that a state will impose the same earnings and employment criteria on individuals seeking BAA-UC benefits as it does regular unemployment benefits.[81] Additionally, though again not required by the rule, the model legislation assumes that individuals on BAA-UC leave will receive the same weekly benefit amount as individuals who qualify for unemployment benefits via traditional means.[82] Moreover, the rule requires a state's BAA-UC implementing legislation to cover all employees who meet the earnings requirements necessary to qualify for benefits under the state's unemployment program.[83]

However, the new basis of eligibility that the BAA-UC rule creates is in many ways substantially different than traditional unemployment, leading some to conclude that it must be considered a new program.[84] When testifying against the rule before the Human Resources Subcommittee of the House Ways and Means Committee, Eric Oxfeld, President of UWC – Strategic Services on Unemployment & Workers' Compensation,[85] identified a number of the differences between traditional unemployment and BAA-UC leave.[86]

(1) Voluntary quit disqualification is eliminated

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79. Final Rule, *supra* note 2, at 37,212. This comment was particularly irritating to some opponents of the BAA-UC regulation. *See* Jerry Laws, *More Mumbo Jumbo*, 69 OCCUPATIONAL HEALTH & SAFETY, Sept. 1, 2000, *available at* 2000 WL 10135010. "DOL also addresses what it calls the commentators' 'misconception' that this is a new program. Of course it is – but the department can't admit that. New is perilous; it triggers congressional scrutiny, OMB review, and pestering questions from panels of small-business owners." *Id.*

80. *See* Final Rule, *supra* note 2, at 37,212.

81. *See id.* at 37,225.

82. *See id.*

83. *See id.* at 37,226. For example the rule will not permit states to limit BAA-UC based upon the size of an employer. *See id.*

84. *See* Eric Oxfeld, President of UWC – Strategic Services on Unemployment and Workers' Compensation, testimony before the Human Resources Subcommittee of the House Ways and Means Committee (Mar. 9, 2000), *at* http://www.saveui.org/testimony_oxfeld_mar9.html (last visited Nov. 12, 2002) [hereinafter Oxfeld Testimony]. "The proposed regulations and the model state law included with the proposed rule consistently demonstrate that BAA-UC is a disparate benefit for a disparate class of recipients which is functionally and legally different from legitimate 'unemployment compensation.'" *Id.*

85. UWC is a business association specializing in public policy advocacy on unemployment and workers compensation. *Id.* at 1.

86. *See id.* at 7.

(2) Availability for work eligibility is eliminated
(3) Ability to work eligibility requirement is eliminated
(4) Refusal of suitable work eligibility requirement is eliminated
(5) Work Search test is waived
(6) BAA-UC benefit duration is recommended for 12 weeks and may be up to 1 year, unlike the 26 weeks of regular UI benefits ....[87]

Finally, the Department views the BAA-UC as an experiment, the purpose of which is to test whether paid family leave promotes attachment to the workforce.[88] However, the rule itself has no termination date,[89] thus calling into question whether it truly was intended to be an experiment. Still, the Department states that when four states have implemented BAA-UC legislation and have operated such a program for three years, the Department will evaluate their success and determine whether the initiative should be retained, expanded or scrapped.[90]

D. LPA, Inc. et al. v. Herman

Shortly after its promulgation, three business associations and two small businesses challenged the lawfulness of the BAA-UC regulation.[91] LPA, Inc.,[92] the Society for Human Resource Management,[93] the Chamber of Commerce of the United States of America,[94] CounterPulsation, Inc.,[95] and Danneman's Auto Service, Inc.[96] sued the Department for declaratory and

87. Oxfeld Testimony, *supra* note 84. *See also* Vroman, *supra* note 26, at 8 (chart 1).

88. *See* Final Rule, *supra* note 2, at 37,218-19.

89. *See generally* 20 C.F.R. pt. 604 (2002).

90. *See* Final Rule, *supra* note 2, at 37,219.

91. *See* Plaintiffs' Complaint, *supra* note 6. *See also* Margaret Clark, *Small Employers in Maryland, Massachusetts Join Business Coalition in "Baby UI" Suit*, HR WIRE, July 3, 2000.

92. *See* Plaintiffs' Complaint, *supra* note 6, ¶¶ 12-14. Founded in 1939, LPA, Inc. is a non-profit association made up of two hundred large American companies, which together make up 12% of the nation's private sector workforce. LPA lobbies for employer friendly labor and employment policy positions in Washington DC. *See id.*

93. The Society for Human Resource Management (SHRM) is a non-profit association of human resource professionals. *See id.* ¶¶ 17-19. SHRM has over 140,000 members nationwide. SHRM is extensively involved with lobbying Congress and the Executive Branch on matters that concern human resource managers. *See id.*

94. The Chamber of Commerce of the United States of America is the world's largest non-profit business association. The U.S. Chamber of Commerce has a membership of over three million businesses and organizations. *See id.* ¶¶ 23-24. The Chamber lobbies Congress and the Executive Branch on a wide range of issues that impact the business community. *See id.*

95. CounterPulsation, Inc., is a small Framingham, Massachusetts business that provides high-tech medical equipment to hospitals and clinics. *See id.* ¶ 28.

96. Danneman's Auto Service, Inc. is a small business in Laurel, Maryland, which

injunctive relief in the U.S. District Court for the District of Columbia, claiming that the regulation was an unlawful use of administrative discretion.[97]

In their complaint, the plaintiffs put forth four theories to support their case.[98] First, they claimed that the regulation violated the Federal Unemployment Tax Act (FUTA)[99] in that it authorized payment of unemployment benefits to individuals who were not unemployed.[100] Second, they submitted that the regulation violated the Family and Medical Leave Act (FMLA)[101] in that, by encouraging states to provide a form of paid family leave, the Department ignored Congress' intention that family leave be unpaid.[102] Third, the plaintiffs stated that the regulation violated the Administrative Procedure Act (APA)[103] by being "arbitrary and capricious."[104] Finally, the business coalition submitted that the regulation violated the Regulatory Flexibility Act[105] since the Department failed to consult small businesses about the effects of the regulation, and failed to conduct a regulatory flexibility analysis.[106]

Shortly after the complaint was filed, the Department moved to dismiss, arguing that the plaintiffs lacked standing, and that the issue was not "ripe for judicial review."[107] Both arguments arose from the fact that no state has passed the legislation envisioned by the regulation.[108] The Department argued that since no state has enacted the required legislation, the plaintiffs

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specializes in repairing and servicing Saabs and Volvos. *See id.* ¶ 34.

97. *See* Plaintiffs' Complaint, *supra* note 6.

98. *See id.* ¶ 3.

99. 26 U.S.C. §§ 3301-11 (2001).

100. *See* Plaintiffs' Complaint, *supra* note 6, ¶ 3(a).

101. 29 U.S.C. §§ 2601-54 (2001).

102. *See* Plaintiffs' Complaint, *supra* note 6, ¶ 3(b).

103. 5 U.S.C. §§ 551-808 (2001).

104. Plaintiffs' Complaint, *supra* note 6, ¶ 3(c).

105. 5 U.S.C. §§ 601-12 (2000).

106. *See* Plaintiffs' Complaint, *supra* note 6, ¶ 3(d).

107. *See* Defendant's Motion to Dismiss, LPA, Inc. v. Herman, (No. 00-01505 (PLF)) (D.D.C. June 26, 2000).

108. *See* Defendant's Memorandum, *supra* note 54, at 8. According to information compiled by the Society for Human Resource Management, it continued to be true that no state has enacted such legislation, despite the fact that it has been introduced in twenty-one states. *See* Society for Human Resource Management, Family and Medical Leave Compensation: Legislation in the States, *at* http://www.workingforthefuture.org/pdf/statelegislation_091502.pdf (last visited Oct. 14, 2002). Again, the legislation recently enacted by California will be funded entirely by employee payroll deductions. *See* McKenna Long and Aldridge, LLP, California Enacts Legislation for Paid Family Leave, Sept. 23, 2002, *at* http://www.mckennacuneo.com/articles/article_detail.cfm?559 (last visited Oct. 14, 2002).

could not have suffered an "injury in fact" and thus lacked standing to bring their suit.[109] Additionally, the Department argued that the plaintiffs' suit would only be ripe when a state has enacted BAA-UC legislation.[110] According to the Department, without actual state legislation, the plaintiffs' suit amounts to "abstract disagreements over administrative policies," which is exactly the type of dispute that the ripeness doctrine is designed to avoid.[111]

In response to the Department, the plaintiffs argued that standing was sufficiently established by the "likelihood" that states would enact BAA-UC legislation in the near future.[112] Furthermore, they argued that they had suffered an injury since they were expending money to lobby against BAA-UC legislation at the state level, which they would not have spent if the Department had not promulgated the regulations in question.[113] The plaintiffs additionally argued that they had been injured by certain procedural violations committed by the Department when promulgating the regulation.[114] Finally, the plaintiffs argued that their case was ripe for the simple fact that the regulation in question had been finalized.[115]

Oral arguments were heard on the Department's motion to dismiss in December 2000.[116] Amazingly, the presiding judge in the case would not issue a decision on this motion until July 24, 2002, some nineteen months later.[117] When he finally did issue a decision, he granted the Department's motion to dismiss based on a lack of standing.[118] The court first found that standing could not be based on the likelihood that states would enact BAA-UC legislation, as not only was this "pure speculation," but it had been

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109. *See* Defendant's Memorandum, *supra* note 54, at 9 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).

110. *See id.* at 14-15.

111. *Id.* at 15 (quoting Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 732-33 (1998)).

112. *See* Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss the Complaint at 2, LPA, Inc. v. Herman, (No. 00-01505 (PLF)) (D.D.C. June 26, 2000) (citing Dep't of Commerce v. United States House of Representatives., 525 U.S. 316, 333 (1999)); Clinton v. City of New York, 524 U.S. 417, 432-33 (1998).

113. *See* Plaintiffs' Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss the Complaint at 2, LPA, Inc. v. Herman, (No. 00-01505 (PLF)) (D.D.C. June 26, 2000).

114. *See id.* at 2.

115. *See id.* at 3.

116. *See* Margaret M. Clark, Esq., *Baby UI's Back: Oral Arguments Address the Fundamentals*, HR WIRE, Dec. 4, 2000.

117. *See* LPA Inc. v. Chao, 211 F.Supp.2d 160, 160 (D.C.C. 2002).

118. *See id.* at 162.

proven wrong by the passage of time.[119] The court rejected, out-of-hand, the plaintiffs' argument that their increased lobbying expenditures constituted an "injury in fact" as being contrary to existing case law.[120] Finally, the court concluded that procedural standing was inapplicable, as any procedural violations that may have been committed by the Department resulted in general rather than "particularized" injury to the plaintiffs.[121]

With the case dismissed, the substantive issues of law raised by the plaintiffs in *LPA, Inc. v. Herman* remain unanswered. The relevance of these issues will continue as long as the BAA-UC regulation is still on the books, and will be open to future litigation, should any state ever adopt implementing legislation.

E. History and Structure of the Unemployment Compensation System

Anyone attempting to analyze the lawfulness of the BAA-UC regulation must begin with an understanding of the history and basic structure of the Federal Unemployment Tax Act (FUTA).[122] On January 17, 1935, President Franklin D. Roosevelt presented to Congress recommendations for a comprehensive economic security plan.[123] The proposal was the work of Roosevelt's Committee on Economic Security.[124] Among the several historic initiatives presented to Congress that day was a program for providing relief to unemployed workers.[125] That same day, Senator Robert Wagner and Representatives David Lewis and Paul Doughton introduced these proposals in Congress.[126] The legislation passed both Houses of Congress by huge majorities.[127]

FUTA was designed as a cooperative federal-state program of benefits

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119. *See id.* at 164-65 ("Apparently, no state has passed such legislation yet despite the passage of 22 months ....").

120. *See id.* at 165.

121. *See id.* at 165-66.

122. 26 U.S.C. §§ 3301-11 (2001).

123. *See* Kenneth M. Casebeer, *Unemployment Insurance: American Social Wage, Labor Organization and Legal Ideology*, 35 B.C. L. REV. 259, 314 (1994).

124. *See id.* The Committee was created by Exec. Order No. 6757 (June 29, 1934), *reprinted in* EDWIN E. WITTE, THE DEVELOPMENT OF THE SOCIAL SECURITY ACT 201 (1963). The Committee's broad charge was to "study problems relating to the economic security of individuals" and develop recommended proposals to "promote greater economic security." *Id.*

125. *See* WITTE *supra* note 124, at 117-18.

126. *See* Casebeer, *supra* note 123, at 314.

127. *See id.*

for unemployed workers.[128] The structure of the unemployment insurance program is a product of the era in which it was enacted.[129] In 1934 and 1935, when the legislation was being formulated, few if any thought that the federal government had the Constitutional authority to enact an entirely federal system of unemployment compensation.[130] This was in large part due to the fact that prior to 1937, the Supreme Court took a narrow view of the reach of the Commerce Clause.[131] At the time the unemployment program was being debated, the Supreme Court was in the process of striking down a number of New Deal initiatives as beyond the reach of Congress to enact.[132] As such, Congress decided to use its taxing power,[133] and its spending power,[134] as a means of inducing states to enact their own unemployment programs.[135]

Congress enacted a statute that imposed a somewhat punitive tax on employers, and then allowed the states to avoid the brunt of this tax if they

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128. *See* Wimberly v. Labor and Indus. Relations Comm'n of Missouri, 479 U.S. 511, 514 (1987). *See also* Carmichael v. S. Coal & Coke Co., 301 U.S. 495, 526 (1937) (describing the unemployment system as "a cooperative legislative effort by state and national governments, for carrying out a public purpose common to both, which neither could fully achieve without the cooperation of the other.").

129. *See* Edwin E. Witte, *Development of Unemployment Compensation*, 55 YALE L.J. 21, 21 (1945).

130. *See id.* at 29.

131. U.S. CONST. art. I, § 8, cl. 3. In 1937, the Supreme Court decided the case of the *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) which, in upholding the constitutionality of the National Labor Relations Act, greatly expanded the reach of Congress's Commerce Clause authority.

132. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (holding that provisions of the National Industrial Recovery Act were unconstitutional because activities regulated under the Act had only an indirect effect on interstate commerce). *See, e.g.*, Railroad Retirement Board v. Alton R.R. Co., 295 U.S. 330 (1935) (holding that a mandatory pension system for interstate railroads was unconstitutional as it was not sufficiently related to interstate transportation). "[B]etween January of 1935 and May of 1936 a total of eight New Deal programs were declared unconstitutional." ARTHUR J. ALTMEYER, THE FORMATIVE YEARS OF SOCIAL SECURITY 20 (1966). The Supreme Court's decision on the Railroad Retirement Act was issued on May 6, 1935, just a few days after the Senate Finance Committee began discussions on the Social Security Act, of which the unemployment insurance system was a part. *See* FRANCES PERKINS, THE DEVELOPMENT OF THE SOCIAL SECURITY ACT 100 (1962).

133. *See* U.S. CONST. art. I, § 8 (stating "Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises ....").

134. *Id.* (stating that Congress has the power to "pay the debts and provide for the common defence and general welfare of the United States ....").

135. *See* Witte, *supra* note 129, at 32. *See also* New Hampshire Dep't of Employment Sec. v. Marshall, 616 F.2d 240, 241 (1st Cir. 1980), *cert. denied*, 449 U.S. 806 (1980).

enacted statutes which were in conformance with the federal act.[136] Additionally, a large portion of the tax that the federal government actually did collect would be returned to states with approved programs in the form of administrative grants.[137] This method of inducing the states to action proved resoundingly successful: since Illinois' adoption of an unemployment system on June 30, 1937, all U.S. states and territories have had programs in place.[138] While initially most states adopted legislation that closely matched the model legislation offered by the Social Security Board,[139] over time substantial differences in state systems have evolved.[140]

While the precise provisions of federal unemployment insurance law have evolved over the years, the basic system has remained untouched.[141] Currently, under FUTA, an "excise tax" of 6.2% of the first $7,000 of wages paid per employee is imposed on all covered employers.[142] However, if the state in which the employer operates has an unemployment insurance program that is in conformance with FUTA, 5.4% of this tax is forgiven.[143] Additionally, a state with a conforming program will receive

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136. *See* WILLIAM HABER AND MERRILL G. MURRAY, UNEMPLOYMENT INSURANCE IN THE AMERICAN ECONOMY: AN HISTORICAL REVIEW AND ANALYSIS 82-83 (1966).

137. *See id.* at 84-85.

138. *See id.* at 106.

139. *See* Gladys Harrison, *Statutory Purpose and "Involuntary Unemployment,"* 55 YALE L.J. 117, 118 (1945).

140. *See* HABER, *supra* note 136, at 107.

141. *See* New Hampshire Dep't of Employment Sec. v. Marshall, 616 F.2d 240, 241 (1st Cir. 1980), *cert. denied*, 449 U.S. 806 (1980).

142. *See* 26 U.S.C. § 3301 (2000) (establishes the tax rate as being 6.2% of total wages). *See also* 26 U.S.C. § 3306(b)(1) (2000) (excluding from the definition of wages all remuneration in excess of $7,000). This dollar figure is referred to as the "taxable wage base." *See* HABER, *supra* note 136, at 358-59. Originally, federal unemployment taxes were paid on all wages. However, in 1939, in an effort to simplify tax returns, Congress enacted the first cap on taxable wages in order to match an identical provision of the Social Security tax. *See id.* at 359-60.

143. *See* 26 U.S.C. § 3302 (2000). 26 U.S.C. § 3302(a) allows for taxes paid to a state unemployment program, which is in conformance with the provisions of § 3304, to be credited against the tax imposed by the federal government in § 3301. 26 U.S.C. § 3302(b) allows for additional credits against the federally imposed tax if the state program is in conformance with the federal requirements provided in § 3303. These additional tax credits under § 3302(b) are to be equal to either the difference between the amount that the employer actually paid in state unemployment taxes and the highest unemployment tax rate possible in the state in which the employer does business, or 5.4%, whichever is lower. The provisions of § 3303(a)(1) require states to only reduce an employer's unemployment tax rates based on the employer's experience with unemployment. Section 3302(c) states that the combined total of credits allowed for under § 3302(a) and § 3303(b) is not to exceed 90% of the federal tax. To further complicate things, § 3302(d) states that the calculation in

federal funds to administer its unemployment insurance program.[144]

The Secretary of Labor, under FUTA, reviews state unemployment programs to determine whether or not they conform with the requirements of the Act.[145] Among the "fundamental standards"[146] imposed by federal law on state unemployment programs are the requirements that: all benefits be paid through "public employment offices;"[147] all funds collected via state unemployment taxes must be deposited in an Unemployment Trust Fund established by the U.S. Treasury;[148] and funds withdrawn from a state's unemployment fund must be used solely for the purpose of paying unemployment benefits.[149] The Supreme Court has described these requirements as being designed to ensure that state programs are unemployment programs "in substance as well as in name."[150]

II. LEGAL ANALYSIS OF THE BAA-UC REGULATIONS

LPA, Inc. and its fellow plaintiffs claimed the BAA-UC regulation was unlawful because it violates, (1) the Federal Unemployment Tax Act (FUTA), (2) the Family and Medical Leave Act (FMLA), (3) the Administrative Procedure Act (APA), and (4) the Regulatory Flexibility Act.[151] This Comment will now analyze each of these issues.

A. Does the BAA-UC Regulation Violate FUTA?

1. Are Individuals on Family Leave "Unemployed?"

Central to the business coalition's argument that the BAA-UC regulation

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§ 3302(c) is to be based on a federal tax of 6.0%, not 6.2%, which is the actual level of the current tax. In summary, if an employer is in a state with an unemployment insurance program, which conforms with the provisions of both § 3303 and § 3304, that employer gets credit for 5.4% of the federal tax (i.e. the employer only pays a federal tax of 0.8%). *See* 26 U.S.C. §§ 3302-04 (2000).

144. *See* 42 U.S.C. §§ 501-503 (1994 & Supp. V 1999). Additional grants to conforming states are available for employment services, such as recruiting and job search programs. *See* 29 U.S.C. §§ 49-49k (1994 & Supp. IV 1999).

145. *See* 26 U.S.C. § 3304 (2000).

146. Steward Machine Co. v. Davis, 301 U.S. 548, 594 (1937).

147. This condition is found in both 26 U.S.C. § 3304(a)(1) and in 42 U.S.C. § 503(a)(2). 26 U.S.C. § 3304 and its subparts list the requirements which a state's program must meet in order for its employers to have the benefit of the tax credits found in 26 U.S.C. § 3302(a). 42 U.S.C. § 03 and its subparts list the requirements that a state's program must meet in order to receive administrative grants.

148. *See* 26 U.S.C. § 3304(a)(3) (2000). *See also* 42 U.S.C. § 503(a)(4) (2000).

149. *See* 26 U.S.C. § 3304(a)(4) (2000). *See also* 42 U.S.C. § 503(a)(5) (2000).

150. *Steward Machine Co.*, 301 U.S. at 575.

151. *See* Plaintiffs' Complaint, *supra* note 6, ¶ 3.

violated FUTA, is the fact that individuals on leave from work after the birth or adoption of a child are not "unemployed" in any normal sense of the word.[152]

The terms "unemployed" and "unemployment" are not directly defined by FUTA.[153] This was in fact an intentional omission on the part of the legislation's drafters, as from the beginning it was determined that states would have great leeway in designing their own unemployment systems.[154] However, traditionally the term "unemployment" has been interpreted as requiring, at an irreducible minimum, a three-part test.[155] "[C]laimants must be: (1) [W]ithout a job; (2) [I]nvoluntarily unemployed; and (3) [A]ble and available for work."[156]

The requirements that a benefit recipient be "able to work and available for work" are known as the so-called "A&A" requirements.[157] While a person taking family leave is obviously out of work (albeit temporarily), they are not without a job, just away from it.[158] Additionally, while an employee on leave may or may not be "involuntarily" out of work, they are clearly not "available" for work.[159]

In promulgating the BAA-UC regulation, the Department claimed not to be abandoning the A&A requirement, but instead merely reinterpreting the requirement.[160] However, as will be discussed below, upon closer review, the Department's position begins to look a lot like a semantic shell game.

2. Scope of the Department of Labor's Authority

As the agency charged with administering FUTA, DOL's interpretation

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152. *See id.* ¶ 77.

153. *See* 23 U.S.C. § 3306 (2001).

154. *See* Ohio Bureau of Employment Services v. Hodory, 431 U.S. 471, 483 (1977):

> The Report [of the Committee on Economic Security] recognized that federal definition of the scope of coverage would probably prove easier to administer than individualized state plans, but it nonetheless recommended the form of unemployment compensation scheme that exists today, namely, federal involvement primarily through tax incentives to encourage state-run programs.

Id. (citation omitted).

155. *See* Oxfeld Testimony, *supra* note 84, at 3.

156. *Id. See also* letter from Deron Zeppelin, Director of Governmental Affairs, Society for Human Resource Management to Ms. Grace Kilbane, Director of Unemployment Services, (Feb. 2, 2000), at 3, *at* http://www.shrm.org/government/regulatory/ default.asp?page=0200 fmla.htm (last visited Sept. 17, 2002).

157. Final Rule, *supra* note 2, at 37,210.

158. *See* Baran Letter, *supra* note 37.

159. *Id.* An individual cannot be "able and available" for work when "the individual continues to cause his or her unemployment by remaining on leave." *Id.*

160. *See* Final Rule, *supra* note 2, at 37,211.

of that statute is clearly owed a great deal of deference.[161] However, "an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."[162] DOL's principle grant of authority under FUTA and relevant portions of the Social Security Act, is the power to "approve" state laws found to be in conformance with the dictates of FUTA.[163] Yet, in the present case, the Department seems to make the case that it somehow has a kind of "super-charged" grant of authority to interpret FUTA however it deems necessary.[164]

The Department, in the supplementary information accompanying the BAA-UC final rule, claimed to have the ability to interpret around the A&A requirement to meet changing "economic and societal concerns."[165] In a sense, the Department appeared to argue that FUTA is a kind of "living document" which it is free to adapt to changing times.[166] Having essentially stated that FUTA had no set meaning, the Department proceeded to reverse its previous interpretation of the statute and declare that the A&A requirement was met by individuals on leave after the birth or adoption of a child.[167] The Department writes:

> Under [the Department's] authority to interpret Federal UC law and consistent with its broad oversight responsibility, we interpret the

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161. *See* Chevron v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984).

162. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000).

163. *See* 26 U.S.C. §§ 3303-04 (2000), *and* 42 U.S.C. §§ 501-03 (2000). The Department's rulemaking authority is found at 42 U.S.C. § 1302(a) (1994):

> The Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health and Human Services, respectively, shall make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter.

164. *See* Final Rule, *supra* note 2, at 37,211.

165. *Id.*

166. *Id.* at 37,213. "[O]ur new interpretation is part of an evolving interpretation of the Federal A&A requirements that recognizes practical and economic realities." *Id.*

167. *See id.* at 37,212-13. "We acknowledge that this is a reversal of our position taken in 1997, denying the State of Vermont's proposal to use UC in this manner to pay individuals on family and medical leave." *Id.* at 37,213. Prior to *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984) the fact that DOL had changed its interpretation would have weighed heavily on the amount of deference that the reviewing court would have given DOL's decision. *See* David M. Gossett, *Chevron, Take Two: Deference to Revised Agency Interpretations of Statutes*, 64 U. CHI. L. REV. 681, 681 (1997) *citing, e.g.*, Watt v. Alaska, 451 U.S. 259, 273 (1981). "[T]he Department of Interior interpreted the amendments when passed .... The Department's contemporaneous construction carries persuasive weight .... The Department's current interpretation, being in conflict with its initial position, is entitled to considerably less deference." *Watt*, 451 U.S. at 272-73.

> Federal A&A requirements to include this voluntary experiment for examining the use of the UC program to provide partial wage replacement to employees who take approved leave or who otherwise leave employment to be with their newborns or newly-adopted children.[168]

To support its espousal of this broad authority, the Department listed four areas in which it claimed to have previously employed such power: "approved training, illness, jury duty and temporary layoffs."[169] However, upon closer examination, none of these examples appear to support the Department's claim of broad power to abrogate the A&A requirement.

Approved Training: In 1970, Congress amended FUTA so as to require states to allow individuals in approved training programs to collect unemployment benefits.[170] Since the Department had allowed and encouraged states to treat individuals in training programs as though they were "able and available" for work, prior to this section's enactment, the Department uses this as an example of its broad interpretive authority.[171] However, the fact that Congress amended FUTA to reflect the Department's position effectively ratified this position, thus making it irrelevant whether the Department's action was initially authorized.[172]

An example of legislative ratification is presented by the case of *EEOC v. Westinghouse Electric Corp.*[173] In that case the Equal Employment Opportunity Commission (EEOC) had brought an action against Westinghouse to enforce the Equal Pay Act.[174] However, since the congressional act which had transferred the authority to enforce the act from the DOL to the EEOC contained a legislative veto provision, the district court trial judge found the act unconstitutional in light of the Supreme Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983).[175] Therefore, the judge dismissed the suit, as the EEOC had no valid authority to bring the action.[176] While the case was on appeal Congress passed a statute that retroactively ratified the earlier reorganization plan and all

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168. Final Rule, *supra* note 2, at 37,211.

169. *Id.*

170. *See* 26 U.S.C. § 3304(a)(8) (2000). "[C]ompensation shall not be denied an individual for any week because he is in training with the approval of the State agency ...." *Id.*

171. *See* Final Rule, *supra* note 2, at 37,211.

172. *See* 2 AM. JUR. 2D *Administrative Law* § 57 (1994) ("When the legislature ratifies the act it becomes the act of the legislature, eliminating any question of delegation.")

173. 765 F.2d 389 (3d Cir. 1985).

174. *See id.* at 390.

175. *See id.*

176. *See id.*

actions (such as enforcement actions) taken pursuant to such plans.[177] The Appeal Court reinstated EEOC's suit, as it found that the ratification of otherwise unauthorized agency action could be given retroactive effect: "It is clearly within Congress' power to enact retroactive legislation ratifying actions that when undertaken may have been unauthorized."[178]

Thus, even if the DOL's creation of an approved training exception to the A&A requirement was not authorized at the time it was first made, Congress' ratification of the exception rendered the question moot. In fact, Congress' decision to codify the approved training exception may be taken as evidence that it felt the exception was not a firmly rooted interpretation of FUTA. In the present case, if Congress wished to do so, it could pass legislation authorizing the BAA-UC regulation and any issue of DOL's initial authority would be moot. However, Congress has taken no such action.

The approved training exception can be additionally distinguished from parental leave, as claimants participating in training programs are endeavoring to further their marketability in the workplace. Two of the provisions which are cited as supporting the existence of the A&A requirement are 26 U.S.C. § 3304(a)(1) and 42 U.S.C. § 503(a)(2), both of which require that compensation only be paid through "public employment offices." The purpose of such offices is to find people jobs.[179] Therefore, there does not appear to be an inconsistency in saying that participation in a job-training program approved by a public employment office, designed to help the claimant find work, makes one "able and available for work."[180] Moreover, it is still the case that a worker's refusal to make himself available for training disqualifies him from receiving benefits.[181]

Illness and Layoff: These exceptions to the A&A requirement appear to be an even weaker precedent in support of the broad powers espoused by the Department. According to the Department, twelve states with Department-approved U.I. programs allow individuals who initially qualify for benefits, to continue to qualify for benefits if they become ill while they are unemployed.[182] Additionally, workers who are laid off for short periods of time need only meet a limited availability test, in that they may not refuse to be recalled by their employer.[183] However, in both of these cases the worker is still disqualified if they refuse a suitable offer of

177. *See id. See also* Pub. L. No. 98-532, 98 Stat. 2705 (1984).

178. *See Westinghouse Elec. Corp.*, 765 F.2d at 391.

179. *See* Final Rule, *supra* note 2, at 37,213.

180. *See* Oxfeld Testimony, *supra* note 84, at 5.

181. *See id.*

182. *See* Final Rule, *supra* note 2, at 37,211.

183. *See id.*

employment.[184] In the case of illness, the worker is simply not required to search for employment while they are ill, and in the case of layoff, only the recalling employee is considered to provide "suitable employment."[185] Additionally, Congress has expressly recognized that states can legally suspend the "availability test" for extended benefits if a worker is hospitalized.[186]

Jury Duty: This final DOL example can be reconciled with the able and available test. Unlike parental leave, when a worker is called for jury duty the government itself has compelled the worker's removal from employment, thus the separation is involuntary.[187] Most states, in fact, do not provide UI benefits to compensate workers on jury duty;[188] again however, Congress has expressly recognized that states can legally pay unemployment benefits to an employee out of work because of jury duty.[189]

The Department's claim to an extraordinary grant of authority appears to be mere puffing.[190] The examples that the Department gives do not provide clear support for its proposition that it has broad power to set aside the A&A requirement. Moreover, the Department cites no case law or broad statutory grant of authority to justify this proposition. Finding that Congress has given DOL no exceptional grant of authority, we will proceed to analyze the BAA-UC regulation under the standards normally applicable to agency actions.

3. Review of Agency Rulemaking Under *Chevron*

The lead case on court review of an agency's interpretation of a statute that it administers is *Chevron v. Natural Resources Defense Council.*[191] In that case, the Clean Air Act Amendments of 1977[192] required States that had not achieved the national air quality standards to establish a stringent permit program for the regulation of "new or modified major stationary sources" of air pollution.[193] The EPA's implementing regulations allowed

184. *See id.*

185. *See* Oxfeld Testimony, *supra* note 84, at 5-6.

186. *See* Federal-State Extended Unemployment Act of 1970, § 202(a)(3)(A)(ii)(II).

187. *See* Oxfeld Testimony, *supra* note 84, at 6.

188. *See id.*

189. *See* Federal-State Extended Unemployment Act of 1970, § 202(a)(3)(A)(ii)(I).

190. "Puffing. 1. The expression of an exaggerated opinion – as opposed to a factual representation – with the intent to sell a good or service." BLACK'S LAW DICTIONARY 1247 (Deluxe 7th ed. 1999).

191. 467 U.S. 837 (1984).

192. Pub. L. No. 95-95, 91 Stat. 685.

193. *See* Chevron v. Natural Resources Defense Council, 467 U.S. 837, 840 (1984) (quoting 42 U.S.C. § 7502(b)(6)).

States to use a plant-wide definition of "stationary source," whereby a single existing plant with multiple polluting sources could modify or install individual pieces of equipment without meeting the permit conditions, as long as the changes did not increase the plant's overall emission level.[194]

The question for the Supreme Court was, whether the EPA's regulation constituted a reasonable statutory interpretation of the term "stationary source."[195] To answer this question, the Court established a two-step test for reviewing an Agency's interpretation of a statute: (1) if congressional intent is clear it must be followed; and (2) if congress failed to clearly address the precise question, the Agencies interpretation will be allowed to stand, so long as it is a "permissible construction of the statute."[196] Using this test, the Court found that Congress had not directly addressed what the term "stationary source" meant, and that the EPA's regulation was a permissible construction of the term.[197]

4. Congressional Intent

The first question in our analysis is whether Congress has directly addressed the issue of whether States may allow individuals on leave from work, after the birth or adoption of a child, to collect unemployment benefits.

In applying *Chevron*, courts are more deferential to agencies under step two than they are under the first step of this test.[198] Therefore, it goes without saying that an agency, in defending a rule, will look to prove that congressional intent is ambiguous so that its rule can survive the first step of the test. Thus, the key question is how to determine congressional intent. Unfortunately, the Supreme Court has not been clear on this matter. In some cases it has employed a "plain meaning" test which looks only to the statute itself.[199] In other cases the Court has relied on the legislative history

194. *See id.* at 840-41.

195. *See id.* at 840.

196. *See id.* at 842-43.

197. *See id.* at 851, 866.

198. *See* Orin S. Kerr, *Shedding Light on* Chevron: *An Empirical Study of the Chevron Doctrine in the US Courts of Appeals*, 15 YALE J. REG. 1, 31 (1998). In a review of relevant U.S. Appeals Court cases issued in 1995 and 1996, it was found that when the court resolved the issue at step one, the Agency was upheld 29 times and reversed 40 times. *Id.* at 30-31. When the statute was found to be ambiguous, and step two was employed, the Agency was upheld 100 times and reversed 12 times. *Id.* at 31. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 385-91 (1999), is the only case in which the Supreme Court found an agency's interpretation of an ambiguous statute unreasonable under step two of the *Chevron* test. *See* Scott H. Angstreich, *Shoring Up* Chevron: *A Defense of* Seminole Rock *Deference to Agency Regulatory Interpretations*, 34 U.C. DAVIS L. REV. 49, 66 n.67 (2000).

199. *See, e.g.*, K Mart Corp. v. Cartier, Inc., 486 U.S. 281, 291-92 (1988):

and other tools of statutory construction to determine whether a statute evinces a congressional intent.[200]

This Comment will approach the question of "ambiguity" in FUTA, from two interpretive directions: a plain meaning approach; and a legislative history approach. Regardless of which method of statutory interpretation is employed, Congress' intent that unemployment benefits only go to individuals who are "able and available" for work shines through.

a. "Able and Available" and the Plain Meaning of the Word "Unemployment"

Although no explicit able and available requirements are stated in the federal law,[201] the Department and its predecessors (the Social Security Board and the Federal Security Agency) have interpreted certain provisions of Federal law as requiring claimants meet the A&A requirement.[202] The principle provisions are 26 U.S.C. § 3304(a)(1), which states, "all compensation is to be paid through public employment offices or such other offices as the Secretary of Labor may approve,"[203] and 26 U.S.C. § 3304(a)(4), which reads in part, "all money withdrawn from the unemployment fund of the State shall be used solely in the payment of unemployment compensation ...."[204]

> In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole. If the statute is silent or ambiguous with respect to the specific issue addressed by the regulation, the question becomes whether the regulation is a permissible construction of the statute.

Id.

200. *See, e.g.*, Dole v. United Steelworkers of America, 494 U.S. 26, 35 (1990). This approach was also taken in *Chemical Manufacturers Assoc. v. National Resources Defense Council, Inc.*, in which the Court wrote that it would defer to the Agency "unless the legislative history or the purpose and structure of the statute clearly reveal a contrary intent on the part of Congress." 470 U.S. 116, 126 (1985).

201. According to the Department, the term "able and available" has its origins in the contemporaneous British Unemployment Insurance Act, which required a claimant be "capable of and available for work." *See* Defendant's Memorandum, *supra* note 54, at 6 n.4 (quoting the British Unemployment Insurance Act, 1935, 25 Geo. V, c.8 § 24(1)).

202. *See* Final Rule, *supra* note 2, at 37,212.

203. 26 U.S.C. § 3304(a)(1) (2001) is substantially mirrored by 42 U.S.C. § 503(a)(2) (2001) which again requires that the "[p]ayment of unemployment compensation [be made] solely through public employment offices or such other agencies as the Secretary of Labor may approve ...."

204. 26 U.S.C. § 3304(a)(4) (2001) is mirrored by 42 U.S.C. § 503(a)(5) (2001), which reiterates that "all money withdrawn from an unemployment fund ... [is to be used] in the payment of unemployment compensation."

Reading these sections together, we find that unemployment funds may only be used to pay unemployment benefits; that unemployment benefits are to be paid out only through the public employment system; and since the stated purpose of the public employment system is to find people jobs,[205] the payment of benefits is thus tied to an individual's search for employment and to his or her ability to work and availability for work.[206] This alone may be sufficient evidence of congressional intent for jurors who tend to take a "strict constructionist" view when reading statutes.[207]

However, other provisions of federal labor law can also be helpful in this case. When asking whether Congress has specifically addressed an issue, the court does not have to operate with blinders on, only reviewing the specific statutory provision in question.[208] The term unemployed is not defined within FUTA; however, it is defined elsewhere in a related area of federal labor law, namely 29 U.S.C. § 2801(47):

> Unemployed individual—The term "unemployed individual" means an individual who is without a job and who wants and is available for work. The determination of whether an individual is without a job shall be made in accordance with the criteria used by the Bureau of Labor Statistics of the Department of Labor in defining individuals as unemployed.

This definition was included in the "Workforce Investment Act of 1998."[209] It is not part of FUTA, and is in Title 29 "Labor" rather than Title 26 "Internal Revenue Code" (where FUTA can be found). However, unemployment compensation and employment training are very much intertwined. Again the traditional definition of unemployment for FUTA purposes is: 1) without a job; 2) involuntarily out of work; and 3) "able and available" for work.[210] Since the Workforce Investment Act was concerned

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205. *See* 29 U.S.C. §§ 49-49k (2001).

206. *See* Final Rule, *supra* note 2, at 37,213.

207. *Cf.* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 521 (1989) (stating that he usually is able to divine a clear intent from the statute itself, and rarely finds statutes to be ambiguous). "The Court now rarely defers to an agency's construction of ambiguous statutory language because a majority of [j]ustices have now begun to use textualist methods of construction that routinely allow them to attribute 'plain meaning' to statutory language that most observers would characterize as ambiguous or internally inconsistent." Richard J. Pierce, Jr., *The Supreme Court's New Hypertextualism: An Invitation to Cacophony and Incoherence in the Administrative State*, 95 COLUM. L. REV. 749, 752 (1995).

208. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132 (2000).

209. Pub. L. No. 105-220, Title I, § 101, 112 Stat. 939, 945 (1998).

210. *See* Oxfeld Testimony, *supra* note 84, at 3. *See also* Zeppelin, *supra* note 156, at 3.

with job training programs,[211] not the distribution of unemployment benefits, 29 U.S.C. § 2801(47) does not require that a person be "involuntarily" out of work or currently be "able" to work, only that the person "wants" to work and is "available" for work.

The criteria used by the Bureau of Labor Statistics (BLS) and referenced in 29 U.S.C. § 2801(47) above reads as follows:

> Unemployed persons—Persons 16 years and over who had no employment during the reference week, were available for work, except for temporary illness, and had made specific efforts to find employment sometime during the 4-week period ending with the reference week. Persons who were waiting to be recalled to a job from which they had been laid off need not have been looking for work to be classified as unemployed.[212]

BLS clearly had the understanding of what "unemployed" means under FUTA when composing this definition. Not only is the "availability" requirement included, but also three of the four exceptions to the A&A requirements listed by the DOL in its Final BAA-UC rule: approved training, illness, and temporary layoffs, only the most marginal exception of jury duty is missing.[213] From these definitions we can conclude that at least the requirement of "availability for work" is fundamental to an understanding of what Congress considers unemployed to mean.[214]

Finally, for good measure, we will turn to *Webster's Dictionary*.[215] "[U]nemployment: *specif*: involuntary idleness of a worker seeking work at prevailing wages."[216] Again the notion of availability is implicit in the definition of unemployment. If one is seeking work, one presumably is available for work. As individuals away from work on family leave are by definition not "available for work" they cannot be considered "unemployed" under the plain meaning of the term.

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211. *See* 29 U.S.C. § 2811 (2001).

212. BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, *BLS Glossary*, *at* http://www.bls.gov/bls/glossary.htm (last visited Nov. 12, 2002).

213. *Compare id. and* Final Rule, *supra* note 2, at 37,212-13.

214. *See* Casebeer, *supra* note 123, at 321 ("The underlying requirement for unemployment compensation eligibility is that the claimant be available for work."). "The availability requirement in unemployment compensation is universal as an inevitable result of a program which compensates wage loss." RALPH ALTMAN, AVAILABILITY FOR WORK: A STUDY IN UNEMPLOYMENT COMPENSATION 2 (1968) (1950).

215. *See, e.g.*, Toyota Motor Mfg., Ky., Inc. v. Williams, 122 S.Ct. 681, 691 (2002) (defining "substantially"); TRW Inc. v. Andrews, 122 S.Ct. 441, 449 (2001) (defining "arise"); New York Times Co., Inc. v. Tasini, 533 U.S. 483, 500 (2001) (defining "revision").

216. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2493 (1986).

b. Legislative History and the "A&A" Requirement

If a reviewing court were to look to the legislative history of FUTA and the statute's object and purpose, it would find it clear that the BAA-UC regulation violates the unemployment system's Congressional intent.

A review of the Congressional debate on the Social Security Act, which included the original unemployment provisions, lends credence to the position that implicit in the term "unemployed" is an A&A requirement. The year being 1935, near the height of the Great Depression, it is not surprising that everyone understood what the term "unemployed" meant.[217] Some Congressmen criticized the unemployment insurance program for not providing work,[218] while others blamed unemployment on labor saving technology.[219] However, no one appeared to ask what constituted unemployment. When the Supreme Court upheld the constitutionality of the unemployment insurance tax in *Steward Machine Co. v. Davis*,[220] it stated that the number of unemployed between 1929 and 1936 ranged from 10 million to 16 million.[221] It appears that, at least in 1935, the Congressional intent was that unemployment benefits were to go to, as one

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217. The Congressional Record gives various estimates as to the degree of unemployment America was experiencing at the time. "It is estimated that at present 10,000,000 wage earners are unemployed ...." 79 CONG. REC. 5,468 (April 11, 1935) (statement of Rep. Doughton). "The more or less expert estimate the number of unemployed variously at from 10 to 12 millions or even higher." 79 CONG. REC. 5,672 (April 15, 1935) (speech made by Secretary Ickes, entered into the record by Rep. Patman). "Many of the outstanding leaders of labor groups tell us there are more than 11,000,000 workers unemployed in this country." 79 CONG. REC. 5,695 (April 15, 1935) (statement by Rep. Robinson).

218. *See, e.g.*, 79 CONG. REC. 5,705 (April 15, 1935) (statement of Rep. Dickstein: "The only satisfactory cure for unemployment is work ...."). *See, e.g.*, 79 CONG. REC. 5,910 (April 17, 1935) (statement of Rep. Zioncheck: "The remedy for this depression is not unemployment insurance. Employment is the only solution ....").

219. *See, e.g.*, 79 CONG. REC. 5,705 (April 15, 1935) (statement of Rep. Hoeppel: "For instance, we have the steam shovel, which displaces the labor of from 25 to 50 men. We have the glass-manufacturing machine, which displaces hundreds of men. We have the vitaphone, which displaces thousands of musicians. We have television, where ere long, may displace even the movies."); 79 CONG. REC. 5,910 (April 17, 1935) (statement of Rep. Zioncheck: "Labor saving devices and machinery today are displacing workers by the thousands, and, according to those who have studied this problem, if we were to increase our production to that of 1929 we would still have six to eight million unemployed.").

220. 301 U.S. 548 (1937).

221. *See id.* at 586. "During the years 1929 to 1936, when the country was passing through a cyclical depression, the number of the unemployed mounted to unprecedented heights. Often the average was more than 10 million; at times a peak was attained of 16 million or more." *Id.*

Congressman put it "workers, out of work, and who cannot get work."[222] Implicit in the term "unemployed" as used in the debates, was that the worker was looking for work and would be available for work if given the opportunity.[223]

Clearly, however, as the unemployment system has been amended numerous times in the decades since it was originally passed, [224] the search for Congressional intent must go beyond the original debates. In 1976, Congress adopted a number of amendments to FUTA.[225] The purpose of several of these amendments was to extend benefits to previously uncovered workers.[226] Among these amendments was 26 U.S.C. § 3304(a)(12),[227] which reads: "no person shall be denied compensation under such State law solely on the basis of pregnancy or termination of pregnancy."[228]

The legislative history of this provision indicates that Congress continued to presume the existence of an A&A requirement under FUTA. The Senate report's discussion of this provision stated:

> In order to qualify for unemployment compensation benefits, a worker must be able to work, be seeking employment, and be available for employment .... The committee bill includes, without modification, the provision of the House bill which would prohibit States from continuing to enforce any provision which denies unemployment compensation benefits solely on the basis of pregnancy (or recency of pregnancy). Pregnant individuals would, however, continue to be required to meet generally applicable criteria of availability for work and ability to work.[229]

Consistent with the legislative history, this provision was interpreted by the Supreme Court in *Wimberly v. Labor and Industrial Relations*

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222. 79 CONG. REC. 5,696 (April 15, 1935) (statement of Rep. Robinson).

223. *See, e.g.*, 79 CONG. REC. 5,672 (April 15, 1935) (speech made by Secretary Ickes, entered into the record by Rep. Patman). "[I]n order to pull ourselves out of this depression we must give people who are able and willing to work an opportunity to do so." *Id.*

224. *See* New Hampshire Dep't of Employment Sec. v. Marshall, 616 F.2d 240, 241 (1st Cir. 1980), *cert. denied*, 449 U.S. 806 (1980).

225. Unemployment Compensation Amendments of 1976, Pub. L. No. 94-566, 90 Stat. 2667 (1976) (codified as amended in scattered sections of 26 U.S.C.).

226. *See* Note, *Denial of Unemployment Benefits to Otherwise Eligible Women on the Basis of Pregnancy: Section 3304(a)(12) of the Federal Unemployment Tax Act*, 82 MICH. L. REV. 1925, 1931 (1984). State and municipal workers, farm workers, and domestic help, were not covered by FUTA prior to the 1976 amendments. *See id.* at 1931 n.43.

227. *See id.* at 1932.

228. 26 U.S.C. § 3304(a)(12) (1976).

229. S. REP. NO. 94-1265, at 19, 21 (1976).

Commission of Missouri,[230] as meaning that a state could not disqualify a pregnant worker from collecting unemployment benefits by creating a conclusive presumption that pregnant women were unable to work.[231] The provision was not viewed as changing the requirement that pregnant women be able and available for work in order to receive benefits.[232]

The existence of 26 U.S.C. § 3304(a)(12) and the *Wimberly* decision provide at least one explanation as to why the Department limited BAA-UC benefits to the first year following the birth of a child.[233] However, the result is illogical.[234] If it is now settled that Congress did not wish to exempt pregnant women from the A&A requirement, how is it that following the birth of the child an exception is allowed?[235]

Furthermore, we should look beyond the legislative history of FUTA to the history of another relevant Congressional act, such as the Family and Medical Leave Act (FMLA).[236] While as discussed below, the BAA-UC regulation should be considered a violation of the FMLA,[237] the fact that Congress created an unpaid leave program is evidence that Congress did not intend unemployment benefits to go to individuals on family leave.[238] "[W]e must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."[239] That Congress would leave such a major issue to be resolved by DOL is simply

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230. 479 U.S. 511 (1987).

231. *See id.* at 516-17.

232. *See id.* at 518. The Court referred to legislative history, which had noted that nineteen states had special disqualification provisions related to pregnancy, many of which automatically defined pregnant women as "unavailable for work." *See id.* at 519 (quoting H.R.REP. NO. 94-755, at 7 (1975). From this, the Court concluded that Congress intended to eliminate "special disqualification provisions pertaining to pregnancy" not exempt pregnant women from traditional disqualifications).

233. *See* 20 C.F.R. § 604.21 (2001).

234. *See* Oxfeld Testimony, *supra* note 84, at 13-14. "Nothing in the BAA-UC proposal provides any legal authority or rational explanation for qualifying a worker to receive BAA-UC benefits after giving birth when the same worker cannot receive UI benefits because she is unable to work and unavailable for work during the pregnancy itself." *Id.* at 15.

235. *See id.* at 5-6.

236. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000) ("[T]he meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.").

237. *See infra* Part II (B).

238. *See Brown & Williamson Tobacco Corp.*, 529 U.S. at 133 (where the Court held jurisdiction to regulate can be limited when Congress has directly spoken to the issue).

239. *Id.*

illogical.[240]

Another important point is that while FUTA was designed to give states a great deal of discretion in matters such as eligibility, reasons for disqualification, waiting periods, benefit levels, etc., states are nonetheless required to maintain systems that are fundamentally unemployment programs, rather than social welfare programs.[241] The distinction between an unemployment insurance program and a social welfare program is of fundamental importance and was recognized from the inception of FUTA.[242]

Sometimes this distinction is based on the fact that unemployment compensation is available to all individuals evincing a substantial attachment to the workplace, while welfare is available only through means testing.[243] However, the most important distinguishing feature of unemployment insurance is that it was designed to remedy a particular economic problem: "The objective of Congress was to provide a substitute for wages lost during a period of unemployment not the fault of the employee."[244] The unemployment system was additionally designed to be a counter-cyclical program whereby money could be infused into the economy in times of economic downturn, thereby preventing a further deterioration of economic conditions.[245] Additionally, the program is intended to match unemployed workers with available jobs and to increase

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240. *See id.*

241. *See* Brief for Respondents at 20-21, Wimberly v. Labor and Industrial Relations Commission of Missouri, 479 U.S. 511 (1987) (No. 85-129). Speaking in the context of the previously discussed provision addressing disqualification on the basis of pregnancy (26 U.S.C. § 3304 (12) (2000)), the respondents in Wimberly case noted:

> [I]f a specific class of unemployed persons, specifically pregnant or formally pregnant women, are to receive benefits without regard to the provisions of state laws which require unemployment and the work place to be inextricably entwined, the unemployment compensation program will move in a direction entirely inconsistent with the original aims of F.U.T.A.: that is, toward a relief or social welfare program, providing in essence a form of employer-financed and state-operated health insurance for this limited class of claimants.

Id. at 21.

242. *See* S. REP. NO. 74-628, at 13 (1935) (cited by Baker v. General Motors Corp., 363 N.W.2d 602, 636 (Mich. 1984)). "Except for a few standards which are necessary to render certain that the State unemployment compensation laws are genuine unemployment compensation acts and *not merely relief measures*, the States are left free to set up any unemployment compensation system they wish, without [direction] from Washington." *Id.* (emphasis added).

243. *See* Gillian Lester, *Unemployment Insurance and Wealth Redistribution*, 49 UCLA L. REV. 335, 341 (2001).

244. California Dep't of Human Res. Dev. v. Java, 402 U.S. 121, 130 (1971).

245. *See* Lester, *supra* note 243, at 342. *See also Java*, 402 U.S. at 132.

labor market attachment.[246] Social welfare programs, simply serve different goals than these.

The goals of family leave programs, promoting gender equality, providing time for family bonding, and relieving family stress,[247] are simply not the ones that the unemployment system was designed to meet. Proponents of the BAA-UC regulation point to the fact that the economy has changed markedly since the 1930s to support the notion that the unemployment program must change to serve new purposes.[248] Whatever truth there may be to that statement, it does not change the fact that under our Constitutional system of government, it is the Congress that is charged with making and changing the law,[249] not executive agencies.

B. Does the BAA-UC regulation violate the FMLA?[250]

The second argument the plaintiffs made was that the BAA-UC regulation violates the FMLA[251] by encouraging states to provide a form of paid family leave when Congress intended that family leave be unpaid.[252] However, as previously noted, the Department went to great lengths in its final rule to distinguish BAA-UC from FMLA.[253]

It is clear that President Clinton's chief reason for proposing BAA-UC, was his belief that people were not taking advantage of FMLA because they could not afford to.[254] However, motive alone is unlikely to create a conflict with the FMLA, as the two programs appear to be sufficiently different.

For example, the model BAA-UC legislation contains no requirement that employees notify their employers before taking leave.[255] In contrast,

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246. *See* Marc Baldwin, *Beyond Boom and Bust: Financing Unemployment Insurance in a Changing Economy, National Employment Law Project*, New York, NY, Apr. 2001, at 4, *at* http://www.nelp.org/ui/boomandbust.htm (last visited Nov. 12, 2002).

247. *See infra* notes 13-16 and accompanying text.

248. *See, e.g.*, Adam Pertman, *Parental Leave at Issue Family Bonding, Tax Hikes Weighed*, THE BOSTON GLOBE, July 5, 2000, at B1 (in which University of Massachusetts Boston professor of economics Randy Albeda points out that two-earner households are now the majority).

249. *See* U.S. CONST. art. I, § 8, cl. 18.

250. 29 U.S.C. §§ 2601-54 (1994 & Supp.).

251. *Id.*

252. *See* Plaintiffs' Complaint, *supra* note 6, ¶ 3(b).

253. *See* Final Rule, *supra* note 2, at 37,212.

254. *See* Memorandum on New Tools to Help Parents Balance Work and Family, 1 PUB. PAPERS 841 (May 24, 1999). *See also* The President's Radio Address, 1 PUB. PAPERS 238, 238 (Feb. 12, 2000); The President's Radio Address, 1 PUB. PAPERS 1115 (June 10, 2000).

255. *Compare* 20 C.F.R. pt. 604 (2001), *with* 29 U.S.C. § 2612(e) (1994 & Supp.).

the FMLA states that if leave is foreseeable, the employee is to give at least thirty days notice before the leave begins, and consult with the employer to make a reasonable effort to schedule the leave so as not to unduly disrupt the operations of the business.[256] If the employee does not give thirty days notice for a foreseeable leave, and no reasonable excuse is given, the employer may delay the leave up until thirty days after the time the employee gave the notice.[257]

Additionally, the BAA-UC and FMLA differ in regards to job restoration. The FMLA requires that upon return from leave, an employee must be restored to his or her original job, or to an equivalent job with equivalent pay, benefits and other terms and conditions of employment.[258] An employer does not have to reinstate an employee upon returning from leave if they can prove that the employee would have been terminated or laid off for reasons unrelated to the leave.[259] Additionally, the FMLA provides that employers may deny job restoration to "key employees."[260] Key employees are defined as salaried employees among the highest paid 10% of employees within a seventy-five mile radius of the employee's work-site.[261] In contrast, "BAA-UC does not guarantee job retention."[262]

Finally, BAA-UC leave is only available for the weeks following the birth or adoption of a child.[263] Under FMLA leave is available:

> (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.
> (B) Because of the placement of a son or daughter with the employee for adoption or foster care.
> (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.
> (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.[264]

The legislative history of the FMLA[265] and the act itself,[266] clearly show

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256. *See* 29 U.S.C. § 2612(e)(1)-(2). *See also* 29 C.F.R. 825.302 (2000).

257. *Cf.* 29 U.S.C. § 2612(e) (employee must provide thirty days notice as is practicable).

258. *See id.* § 2614(a).

259. *See id.* § 2614(a)(3).

260. *See id.* § 2614(b)(2).

261. *See id.*

262. Final Rule, *supra* note 2, at 37,225.

263. *See id.*

264. 29 U.S.C. § 2612(a)(1) (1994).

265. Statements were repeatedly made throughout the debates on the FMLA that the

that Congress intended the leave available under the act to be unpaid. However, the plaintiff's argument is undermined by the fact that it is highly doubtful that Congress wished to prohibit states from enacting paid leave statutes. Thus even if the BAA-UC regulation was to encourage states to provide paid leave, this would probably not violate Congressional intent in passing the FMLA.

In fact, even before the BAA-UC regulation, some states had already taken steps in the direction of paid leave. For example, for some time now, California,[267] Hawaii,[268] New Jersey,[269] New York[270] and Rhode Island[271] have had Temporary Disability Insurance (TDI) programs that offer partial wage replacement to workers out of work for medical reasons, including pregnancy and childbirth.[272] Additionally, Minnesota recently expanded its "At-Home Infant Care Program" which pays low-income parents who stay home with infants in their first year of life.[273] It is not likely that Congress intended to preempt such state initiatives when it enacted the FMLA.

C. Does BAA-UC Violate the Administrative Procedures Act (APA)[274] by being Arbitrary and Capricious?

The plaintiffs' third charge was that the BAA-UC regulation violated the

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leave was to be unpaid. *See, e.g.*, 139 CONG. REC. S1,345 (daily ed. Feb. 4, 1993) (statement of Sen. McCain) ("Mr. President, for those who are concerned about mandated paid leave, let me again emphasize that this bill only establishes criteria for unpaid leave."); 139 CONG. REC. E293 (daily ed. Feb. 3, 1993) (statement of Rep. Huffington) ("The limitations in this bill are critical. Small business must be kept exempt. And demands for paid leave must be restrained. Given the boundaries in the legislation before us, I believe the bill is worthy of our support. I therefore encourage my colleagues to join me in passing this legislation.").

266. *See* 29 U.S.C. §§ 2612(c)-(d) (1994) (specifically referring to leave under the act as "unpaid leave").

267. *See* Cal. Unemp. Ins. Code § 2626 (2001). Legislation recently signed by Governor Gray Davis, amends the state disability insurance program to include a new family disability insurance benefit. *See* S.B. 1661 (Cal. 2002). This benefit will provide partial wage replacement for "any individual who is unable to work due to the employee's own sickness or injury, the sickness or injury of a family member, or the birth, adoption, or foster care placement of a new child ...." *Id.* § 2.

268. *See* Haw. Rev. Stat. § 392 (1993 & Supp. 2001).

269. *See* N.J. Stat. Ann. §§ 43:21-29 (2001).

270. *See* N.Y. Workers' Comp. Law §§ 200-42 (2001).

271. *See* R.I. Gen. Laws §§ 28-41-8 thru 28-41-32 (2000).

272. *See* FAMILY LEAVE BENEFITS: A MENU OF POLICY MODELS FOR STATE AND LOCAL POLICY LEADERS, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, 5 (Sept. 2001).

273. *See* Laurent Belsie, *In Workplace, a Shift Toward Leave for Mothers*, THE CHRISTIAN SCIENCE MONITOR, Dec. 5, 2001, at 3.

274. 5 U.S.C. § 551-808 (2000).

APA by being arbitrary and capricious.[275] A court will strike down a rule promulgated by an agency if the court finds it to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[276] "[A] reviewing court may not set aside an agency rule that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by the statute."[277] However, a court will carefully scrutinize whether the agency itself took "a hard look at the range of evidence, arguments, and alternatives relevant to [the] issue" at hand.[278] Additionally, an agency's actions may be arbitrary and capricious if the agency makes its decision based on factors that Congress did not intend to be considered.[279]

The *State Farm Case* stemmed from the National Highway Traffic Safety Administration's (NHTSA) revocation of a safety standard, which had insisted that carmakers install either airbags or automatic seatbelts in new vehicles.[280] The NHTSA had argued that under the original rule, manufacturers had invariably opted for installing automatic seatbelts rather than airbags, and since the driver often detached the seatbelts, the rule had essentially failed its purpose.[281] The Court found that NHTSA acted arbitrarily in failing to give any consideration to the alternatives of retaining an airbag standard alone or modifying the seatbelt standard to require non-detachable seatbelts.[282] In essence, the majority opinion in *State Farm* insists that agencies are supposed to be made up of experts and thus they should act like experts and consider all of the facts and all of the options.[283]

In their complaint, the plaintiffs listed a number of reasons why BAA-UC should be considered arbitrary and capricious.[284] Their first argument was that the Department reversed a longstanding policy, based on the hypothesis that payment of unemployment benefits to individuals on parental leave would increase long-term labor force attachment, but did not actually find that such payments would in fact increase long-term attachment to the labor force.[285] Since Congress has never delegated to

275. *See* Plaintiffs' Complaint, *supra* note 6, ¶ 3(c).

276. 5 U.S.C. § 706(2)(A) (2000).

277. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983).

278. Kagan, *supra* note 44, at 2380.

279. *See State Farm Mut. Auto. Ins. Co.*, 463 U.S. at 43.

280. *See id.* at 36-38.

281. *See id.* at 38-39.

282. *See id.* at 46.

283. *See* Kagan, *supra* note 44, at 2381.

284. *See* Plaintiffs' Complaint, *supra* note 6, ¶¶ 88(a)-(h).

285. *See id.* ¶ 88(a).

DOL the authority to authorize the use of unemployment funds to test unproven means of increasing long-term attachment to the workforce, DOL's failure to find that such payments would in fact increase labor market attachment was fatal.[286] However, this seems to be more of an *ultra vires* argument than a arbitrary and capricious argument.

Additionally, the plaintiffs argued that DOL offered no basis for limiting BAA-UC only to new parents, rather than to individuals on leave for other reasons.[287] The Department's stated reason for limiting BAA-UC to new parents was that: "Because BAA-UC is an experimental effort, there must be limitations, as with any experiment."[288] However, the Department also noted that new parents are an easily identifiable group of individuals,[289] thus its decision does not appear to be entirely without basis.

The plaintiffs' complaint also argued that DOL, while stating that it based its decision upon "practical and economic realities," did not in fact balance the competing economic realities of all affected groups, specifically, the DOL did not take the interests of small businesses into consideration.[290] However, the supplemental information accompanying the Department's final rule does respond to a number of comments from the business community.[291] True, these comments were later dismissed, but they do seem to have been at least perfunctorily addressed.

In summary, the arbitrary and capricious argument is a difficult one to make in the present case. Arbitrary and capricious review looks more to the decision-making process that an agency utilizes, than to the substance of the decisions it makes. Unlike the *State Farm* case discussed above, the record in the present case shows that the agency at least responded to the criticism and alternatives that were available. DOL's reasons for acting the way it did may in fact be pretextual; given the political pressures that were the real force behind the rule. However, the extreme deferential nature of arbitrary and capricious review, breathe life into pretextual reasoning.

D. Did the Department Violate the Regulatory Flexibility Act?[292]

The business coalition's final charge was that the Department did not comply with the Regulatory Flexibility Act (RFA),[293] as it did not consult

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286. *See id.* ¶¶ 88(a)-(b).

287. *See id.* ¶ 88(d).

288. Final Rule, *supra* note 2, at 37,217.

289. *See id.*

290. *See* Plaintiffs' Complaint, *supra* note 6, ¶ 88(c).

291. *See* Final Rule, *supra* note 2, at 37,211-21.

292. 5 U.S.C. §§ 601-12 (2000).

293. *See* Pub. L. No. 96-354, 94 Stat. 1154 (codified at 5 U.S.C. § 601-12 (2000)). In 1996, Congress amended a number of the RFA's provisions; the most significant was to

small businesses about the effects of the regulation, and failed to conduct a regulatory flexibility analysis.[294] The RFA requires government agencies to develop and analyze regulatory alternatives in order to minimize adverse impacts to small businesses.[295] The premise behind the RFA is that agencies traditionally write rules with large firms in mind, while the overwhelming majority of American businesses are small.[296] Accordingly, the comparative cost of compliance with regulations by small businesses is much greater than it is for big businesses, which have the advantage of economies of scale.[297]

The requirements of the RFA are entirely procedural; meaning that even if a regulation has a profoundly onerous impact on small businesses, it will still comply with the RFA as long as the required analyses were performed.[298] The remedies for violating the RFA generally include the remand of the rule to the agency for corrective action, and an injunction against the enforcement of the rule until such corrective action is taken.[299] Of course, in the present case, a remand to the agency could constitute a total victory, as it is unlikely that the Bush Administration would re-promulgate the Clinton Administration's rule.

Under the RFA, an agency is required to conduct and publish in the Federal Register, an initial regulatory flexibility analysis which includes: the reasons that the agency is acting; a statement on the objective of the

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provide for judicial review of agency compliance with the Act. *See* Small Business Regulatory Enforcement Fairness Act [SBREFA] of 1996, Pub. L. No. 104-121, 110 Stat. 857 (codified at 5 U.S.C. § 611(a)(3)(A) (2000)). Even with the changes made to the RFA by the SBREFA, many commentators continue to view the RFA as a paper tiger. *See* Eric D. Phelps, *The Cunning of Clever Bureaucrats: Why the Small Business Regulatory Enforcement Fairness Act Isn't Working*, 31 PUB. CONT. L.J. 123, 132 (2001) ("Despite the changes made as amendments in the RFA by the SBREFA and the optimism with which its enactment was greeted, clever bureaucrats in federal regulatory agencies have found a variety of ways to circumvent the increased protections of the SBREFA.") (citation omitted).

294. *See* Plaintiffs' Complaint, *supra* note 6, ¶ 3(d), 93-97.

295. *See* 5 U.S.C. §§ 603-04 (2000).

296. *See* Barry A. Pineles, *The Small Business Regulatory Enforcement Fairness Act: New Options in Regulatory Relief*, 5 COMM. L. CONSPECTUS 29, 31 (1997). For interesting counterviews see Richard J. Pierce, *Small is Not Beautiful: The Case Against Special Regulatory Treatment of Small Firms*, 50 ADMIN. L. REV. 537, 542 (1998) (arguing that Congress and administrative agencies consistently give small businesses special treatment, even exemptions, from regulatory schemes).

297. *See* Pineles, *supra* note 296, at 31.

298. *See* Jeffrey J. Polich, *Judicial Review and the Small Business Regulatory Enforcement Fairness Act: An Early Examination of When and Where Judges Are Using Their Newly Granted Power Over Federal Regulatory Agencies*, 41 WM. & MARY L. REV. 1425, 1436 (2000).

299. *See* 5 U.S.C. § 611(4) (2000).

rule; an estimate of the number and kind of small businesses that will be subject to the rule; an explanation of the reporting requirements that the rule will entail; and a list of any duplicative regulations.[300] Additionally, the initial analysis must include a list of "any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule ...."[301]

Once the initial analysis is concluded, the agency must then conduct a final regulatory analysis, which includes a summary of the comments received on the initial analysis, and a discussion of whether any of these comments were incorporated into the final rule.[302] Furthermore, the agency must detail each significant alternative to the final rule and explain why it was discarded.[303] However, this flexibility analysis is not required if the agency "certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."[304]

When the Department issued its notice of proposed rulemaking, it certified to the Chief Counsel for Advocacy of the Small Business Administration that the regulation would not have a significant economic impact on small businesses.[305] The Department's reasoning was that the BAA-UC regulation was not subject to the RFA since it was not regulating small businesses directly but was regulating states which choose to implement legislation providing unemployment benefits to individuals on family leave.[306]

In the past, courts have allowed agencies to avoid compliance with the FRA, by distinguishing between "direct" and "indirect" regulations.[307] This dichotomy arose from the fact that a regulatory flexibility analysis under the RFA requires estimates of "the number of small entities to which the proposed rule *will apply* and the classes of small entities which will be *subject to the requirement*."[308] Based on these provisions, courts have reasoned that the RFA does not obligate agencies "to conduct a small entity

300. *See id.* § 603(a)-(b).

301. *Id.* § 603(c).

302. *See id.* § 604(a).

303. *See id.* § 604(a)(5).

304. *Id.* § 605(b).

305. *See* NPRM, *supra* note 53, at 67,967.

306. *See id. See also* Final Rule, *supra* note 2, at 37,221 (citing Am. Trucking Ass'n v. Envtl. Prot. Agency, 175 F.3d 1027, 1044 (D.C. Cir. 1999)).

307. *See, e.g.*, Cement Kiln Recycling Coalition v. Envtl. Prot. Agency, 255 F.3d 855, 869 (D.C. Cir. 2001); United Distribution Cos. v. Fed. Energy Regulatory Comm'n, 88 F.3d 1105, 1170 (D.C. Cir. 1996); Mid-Tex Electric Coop., Inc. v. Fed. Energy Regulatory Comm'n, 773 F.2d 327, 342 (D.C. Cir. 1985).

308. 5 U.S.C. § 603(b)(3)-(4) (2001) (emphasis added).

impact analysis of effects on entities which it does not regulate."[309]

An example of this dichotomy is presented by the *Mid-Tex* case, which involved appeals by wholesale customers of electric utilities whose rates the Federal Energy Regulatory Commission (FERC) regulated.[310] FERC had finalized a rule allowing electric utilities to recoup in their base rates, "fifty percent of their investments in construction work in progress."[311] Among other objections, the petitioners argued that FERC violated the RFA by not considering the economic effects that its rule would have on the small businesses that purchased electricity from the utilities.[312] However, in an opinion by Judge Bork, the court found the language of 5 U.S.C. § 603 to imply that regulatory flexibility analyses were only required for the "small entities subject to the proposed regulation," not all small businesses who might ultimately be effected by the regulation.[313] Since virtually none of the entities that FERC regulated could be considered small businesses, FERC was not required to conduct such an analysis.[314]

While the *Mid-Tex* case was prior to the amendments made to the RFA by the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996,[315] its holding was reaffirmed in *American Trucking Association v. EPA*.[316] That case involved the EPA's decision to revise national ambient air quality standards (NAAQS).[317] The EPA certified that the revised regulation did not have a significant impact on small businesses, as small businesses were affected only indirectly.[318] The directly regulated entities were the states, which had discretion in determining the means by which they would comply with the EPA's mandate.[319] The court found that the rule of *Mid-Tex* was still good law, as the SBREFA had not amended the relevant provision of the RFA, namely, 5 U.S.C. § 603.[320]

The plaintiffs in *LPA, Inc. v. Herman* argued in their complaint that the Department's certification stating that the rule would not have a substantial

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309. Motor & Equip. Mfrs. Ass'n v. Nichols, 142 F.3d 449, 467 & n.18 (D.C. Cir. 1998) (quoting *United Distribution Cos.*, 88 F.3d at 1170).

310. *See Mid-Tex Electric Coop., Inc.*, 773 F.2d at 330.

311. *Id.*

312. *See id.* at 340.

313. *Id.* at 342.

314. *See id.* at 341-42.

315. Pub. L. No. 104-121, 110 Stat. 857.

316. *See* 175 F.3d 1027, 1045 (D.C. Cir. 1999), *rev'd on other grounds sub nom* Whitman v. Am. Trucking Ass'n, Inc., 531 U.S. 457 (2001).

317. *See id.*

318. *See id.* at 1045.

319. *See id.* at 1044.

320. *See id.* at 1045.

effect on small business was improper, and the appropriate remedy was for the court to order the withdrawal of the rule and enjoin the Department from relying on it.[321] They complained that since the rule was designed to encourage states to enact BAA-UC legislation, it would have a substantial impact on small businesses operating in those states that do so.[322] Additionally, the plaintiffs claimed that since the rule is designed to test whether BAA-UC benefits will increase workforce attachment, the regulation necessarily entails new paperwork requirements with which small businesses would be forced to comply.[323] However, since the BAA-UC regulation is directed at state unemployment insurance administrators, and not small businesses directly, it is unlikely that a trial court would find the RFA to be applicable in this case.

III. POLICY CONCERNS WITH USING UNEMPLOYMENT FUNDS TO PAY FOR FAMILY LEAVE

A. The Cost of Implementing Paid Family Leave

Estimates of the cost to implement BAA-UC leave vary dramatically.[324] When the Department issued its notice of proposed rulemaking, it estimated the annual cost of BAA-UC to be from zero to $68 million per year, assuming that no more than a small number of states would enact the enabling legislation.[325] This estimate was increased in the final rule to zero to $196 million, based on the possibility that more states would participate.[326] The Employment Policy Foundation, however, estimated that if every state enacted BAA-UC legislation and every eligible parent took twelve weeks of leave, the total cost to the UI system would be $13.1 billion annually.[327]

The Urban Institute estimates that if BAA-UC were enacted nationally it would cost $2.69 billion per year, which would amount to an increase in benefit payouts of 13.3 percent.[328] According to this study, costs could vary dramatically from state to state; Alaska would see its benefit payouts increase by only 4.8 percent, while South Dakota's would increase by 37.1 percent.[329] Variations are due to a number of factors including: the number

321. *See* Plaintiffs' Complaint, *supra* note 6, ¶¶ 93-97.
322. *See id.* ¶ 94.
323. *See id.*
324. *See* Vroman, *supra* note 26, at 11.
325. *See* NPRM, *supra* note 53, at 67,975.
326. *See* Final Rule, *supra* note 2, at 37,215.
327. *See* HATTIANGADI, *supra* note 15, at 61.
328. *See* Vroman, *supra* note 26, at 17.
329. *See id.*

of births and adoptions; the "take up rate" i.e. the percentage of parents that actually take advantage of the program; average duration of leave; and the average weekly benefit amount.[330]

However, the fact is that it is essentially impossible to make any kind of accurate cost prediction for BAA-UC. For example, the Urban Institute's study assumed, based on experience in Europe, that very few men will take advantage of BAA-UC leave.[331] Whether this would be the case in the U.S. is impossible to tell without some experience, which as of yet has not been forthcoming.

California's recent enactment of a paid family leave law will likely provide the first hard evidence of what such a program will cost. California's legislation provides for six weeks of paid leave at 55% of regular earnings, to be taken following the birth or adoption of a child, or to care for a sick relative.[332] The legislation was enacted under the presumption that the program could be fully funded through employee payroll deductions averaging $26 per employee, per year.[333] However, many in the California business community remain highly skeptical that such estimates will hold up in practice.[334]

B. Are Unemployment Insurance Funds an Appropriate Source of Revenue for Paid Leave

Aside from the policy issues raised by paid family leave generally, the BAA-UC regulation also raises the issue of whether the use of funds earmarked for unemployment benefits is a proper funding mechanism for paid family leave.[335] To paid leave supporters, the fact that BAA-UC uses an existing source of revenue is an appealing aspect of the proposal.[336] However, some businesses and business groups worry that using unemployment funds for other purposes will endanger the solvency of unemployment reserve funds, and force payroll taxes to be increased as an

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330. *See id.* at 12.

331. *See id.* at 13.

332. *See* Greg Jones, *Davis to Sign Bill Allowing Paid Family Leave Benefits: Measure Grants Most Workers Time Off to Care for a New Child or Sick Family Members. Supporters See It As a Model for the Nation*, THE LOS ANGELES TIMES, Sept. 23, 2002, at A1.

333. *See id.*

334. *See, e.g.*, Bob Franz, *letter-to-the-editor, Do the Math: Family Leave Bill Won't Work*, THE LOS ANGELES TIMES, October 6, 2002, at B19 ("You don't really believe this number will cover it do you? There hasn't been a liberal program that cost anywhere near the initial estimates. Prime examples are Medicare, Social Security and welfare.").

335. *See* Hayes, *supra* note 22, at 1535.

336. *See id.* at 1534, 1536.

inevitable result.[337]

During the recession of the early 1980s thirty-three states were forced to borrow a total of $33 billion from the federal government to pay unemployment benefits when their reserve funds dried up.[338] During the much milder recession of the early 1990s over a third of the states depleted their reserves to the point that they were again forced to borrow federal funds.[339] While most state unemployment insurance funds are currently healthy, this is not universally true.[340]

The most commonly applied solvency standard is referred to as the Average High Cost Multiple (AHCM).[341] A state with the recommended AHCM of 1.0 has reserves sufficient to fund benefits at the level of its most recent deep recession for one year.[342] At the end of the third quarter of 2001, twenty-three states had AHCMs below 1.0.[343] Among those with the lowest reserves were four of the largest states in the country: California,

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337. *See, e.g.*, Rene LaBerge, President of Personnel Department Inc., *It's My Turn: Unemployment Funds Should Not be Misdirected*, BURLINGTON FREE PRESS (Vt.), June 22, 1999, at A11.

> [T]here is the very real question of whether Vermont could afford such a major expansion in eligibility without it being at the expense of people who have lost their jobs .... During the recession of the early 1980s ... the state was forced to borrow funds from the federal government, payroll taxes had to be increased, and benefit levels had to be frozen for two years.

Id.

338. *See Wrong Prescription – President Clinton Wants to Let Parents Draw on State Unemployment Insurance When They Take Time Off Work to Have a Kid. Good Idea? Economists Don't Think So.* INVESTOR'S BUSINESS DAILY, Feb. 14, 2000, at A8. "1982 was a terrible year. The US lost 1.4 million manufacturing jobs, the Grammy Award for Best Album went to 'Toto IV,' and the unemployment rate hit a post-War high of 9.7%. But perhaps most important, almost half the states in the country (22) had to borrow federal funds to pay unemployed workers." *See* Baldwin, *supra* note 246, at 11.

339. *See* Zeppelin, *supra* note 154.

340. *See* Baldwin, *supra* note 246, at 19.

> Nationwide, the trust funds have grown substantially since the 1992 recession. This is almost unavoidable given the remarkable economic expansion, sustained low unemployment, and UI eligibility restrictions of the past 20 years .... A few states have built the scale of reserves which one might expect given US economic performance. Yet a sizeable number of states remain well below recognized solvency standards.

Id.

341. *See id.* at 16.

342. *See id.*

343. *See* U.S. Department of Labor, "UI Data Summary," Third Quarter 2001, *at* http://workforcesecurity.doleta.gov/unemploy/content/data_stats/datasum01/3rdqtr/sum.asp #fin (last visited Nov. 12, 2002).

0.78; Texas, 0.26; New York, 0.31; and Illinois, 0.48.[344] "These states pose the question: how on earth can so many states be so far from overwhelmingly flush given the best economic performance in over fifty years?"[345]

The answer is that many state legislatures reduced unemployment payroll taxes by rather dramatic amounts in the boom years of the 1990s.[346] Maurice Emsellem of the National Employment Law Project has noted that some in the business community opposing BAA-UC may be guilty of hypocrisy: "Business can't have it both ways. They can't have huge tax cuts and then claim that we can't afford relatively smaller levels of expansion to cover family leave and other UI reform."[347] While there is no convincing evidence that the BAA-UC would represent a "relatively small" expansion of unemployment insurance, it is undeniable that state legislatures and business advocates in some states have acted to reduce payroll taxes during the 1990s in an irresponsible manner.

However, it must be noted that unemployment insurance payroll taxes change by two means. First, legislatures may change the rates through legislation, and secondly, most state systems have built in triggers, which reduce or increase unemployment insurance taxes automatically when reserves reach certain levels.[348] In the 1990s payroll taxes were reduced via both means.[349] For a state's payroll taxes to come down simply because the reserves have reached a sufficient level, is much different then legislative intervention to force rates down, irrespective of the level of trust fund solvency.

Before any state determines that it wishes to enact BAA-UC enabling legislation, it should take a hard look at its unemployment compensation trust fund balance. States like California, Texas, New York and Illinois, with their low balances should not actively consider BAA-UC.

IV. CONCLUSIONS

It cannot be denied that the workforce has changed dramatically since

344. *See id.* For example, New York, which now has one of the lower reserve levels in the country, reduced its taxes by $420 million in 1998. *See id.*

345. Baldwin, *supra* note 246, at 19.

346. *See id.* at 22-23.

347. Calvo, *supra* note 34, at 28. *See also*, Eric Convey, *Jobless Fund Bills on Hill – Unions Oppose Measures that Would Let Employers Pay Less*, THE BOSTON HERALD, April 11, 2001, at 38 (quoting Sarah Nathan, spokeswoman for the Massachusetts AFL-CIO as saying "If there's enough money to cut insurance rates, why isn't there a discussion around paid family leave.").

348. *See, e.g.*, VT. STAT. ANN. tit. 21, § 1326(e) (2001); ME. REV. STAT. ANN. tit. 26, § 1221(4)(B)-(C) (West 2001); IND. CODE ANN. § 22-4-11-3 (Michie 2001).

349. *See* Baldwin, *supra* note 246, at 22.

1935, and that these changes have had major social and economic consequences for our society. Undoubtedly, some of these consequences require legislative solutions. However, people still lose their jobs through no fault of their own, and still need the security of an unemployment check while they search for new endeavors. That has not changed.

An additional change since 1935 has been the rise of the administrative state. As society has become more complex, the need for more and more specialized agencies has advanced. The decisions of these agencies are owed deference; to hold otherwise would rob them of the power and flexibility they need to accomplish their directives. However, deference must have limits.

The Department of Labor, as the agency charged with administering FUTA is owed a certain degree of deference in its decision-making. However, it has no more power to turn individuals on family leave into individuals who are unemployed, than it has to turn dogs into cats. The word "unemployed" is not an ambiguous term. It's meaning was understood when Congress originally passed the Social Security Act, and its meaning remains clear today.

The unemployment system has served America well for almost seventy years. Its success is in large part due to the fact that it was built to address an important but narrow problem, i.e. providing partial wage replacement to individuals who are involuntarily out of work, and who are able and available for work. By maintaining this focus, the system has become possibly the most successful of the New Deal programs. Being a member of that truly rare breed, the successful government program, it should be left well enough alone.

However, if it is to change, it is Congress' job to make the changes. That has not changed as well.

Curtis Carpenter

The *GE/Honeywell* Merger: Catalyst in the Transnational Conglomerate Merger Debate

I. INTRODUCTION

"It's a long way from Chicago to Brussels."[1] At least that is what Deputy Assistant Attorney General for International Antitrust, William J. Kolasky, claimed in a speech given to the George Mason University Symposium on European Union Law.[2] Kolasky was referring to the ideological gap between European Union and United States antitrust authorities, regarding the negative effects of conglomerate mergers.[3] There has been a great deal of disagreement between the United States and the European Union authorities over whether conglomerate mergers ought to be prohibited when they produce a powerful conglomerate with strong competitive ability in a number of markets.[4]

Over the past few years, tension between antitrust authorities in Europe and those in the United States has been attributed to a number of factors.[5] For instance, there are structural differences between the governmental systems, differences in definition of statutory terms, and even accusations

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1. William J. Kolasky, Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels, Address Before the George Mason University Symposium (November 9, 2001) at 1, *at* http://www.usdoj.gov/atr/public/speeches/9536.pdf (last visited Sept. 21, 2002).

2. *See id.*

3. *See id.* at 3. A conglomerate merger is one in which the merging entities do not directly compete in the production of one good and one in which one entity is not producing a good, the sole purpose of which is as a component in a good produced by the other business entity. *See also* ALISON JONES & BRENDA SUFRIN, EC COMPETITION LAW, TEXT, CASES, AND MATERIALS 767 (2001).

4. *See* Kolasky, *supra* note 1, at 3. *See also Europe's Merger Morass*, THE ECONOMIST, Sept. 23, 2000, at 73-74. In this article, Mario Monti referred to an attempt by Microsoft to merge with a British cable television company, saying: "Market power ... can be leveraged from one market to another." The reporter remarked: "Judging by those words, there will be many more such regulatory interferences in the future." *See id.*

5. *See* Deborah Platt Majoras, GE-Honeywell: The U.S. Decision, Remarks Before the Antitrust Law Section State Bar of Georgia (November 29, 2001) at 12-13, *at* http://www.usdoj.gov/atr/public/speeches/9893.pdf (last visited Sept. 21, 2002). Majoras offers a few possible "readily remediable" explanations: that the European Union authorities need a larger staff, the ability to compel documents, more efficient timing and processing requirements, and more effective judicial review of its decisions. *See id.* at 15-16.

of merger review in the European Union being used to further the political objectives of European businesses.[6] The differences can certainly no longer be blamed on lack of cooperation. Since the agreement approved by the European Parliament in 1996, there has been an unprecedented level of information and opinion sharing across the ocean.[7] While differences in the above areas may be corrected and refined with relatively little bruising to the economic philosophy of either party, the authorities' positions on the antitrust dangers of conglomerate mergers are in simple opposition and will not be solved by good intentions alone.[8]

The conglomerate merger conflict may be based on an inherent philosophical difference between antitrust authorities in the two regions.[9] Current United States antitrust policy has its foundations in the Chicago School of Economics, emphasizing dependence on the natural correction of the market.[10] Modern European antitrust policy, however, seems to be the product of a blend of long-term competitive concerns and a protective attitude towards European citizens and businesses against large conglomerates.[11] United States authorities make much of the maxim that United States antitrust enforcement is designed to protect consumers and that European antitrust enforcement is designed to protect competitors,[12]

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6. *See id. See also Europe's Merger Morass*, *supra* note 4, at 74.

7. *See* Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, Sept. 23, 1991, 30 I.L.M. 1491, *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,504.

8. *See* Majoras, *supra* note 5, at 16. "A ... decidedly less optimistic, possible explanation is that we may have a fundamentally different view about the comparative ability of markets vs. government regulators to get it right. In the United States, we have much greater faith in markets than we do in regulators." *Id.*

9. *See id.*

10. *See* Walter Adams & James W. Brock, *Antitrust, Ideology, and the Arabesques of Economic Theory*, 66 U. COLO. L. REV. 257, 282 (1995). This view postulates that "[e]conomic power poses no significant social problems so long as liberty of contract and free markets—both defined as an absence of government interference—are allowed to function in an untrammeled fashion." *Id.* In a speech given on November 9, 2001, Kolasky claimed that "[a]s the Chicago School taught us[,] the central importance of consumer welfare and efficiency in antitrust analysis, [theories of competitive harm resulting from conglomerate mergers] faded away." Kolasky, *supra* note 1, at 1.

11. *See Monti Discusses EU Merger Control, Competition Policy After GE/Honeywell* 81 Antitrust & Trade Reg. Rep. (BNA) No. 2016, at 40 (July 13, 2001). "The commission's goal in its competition policy, [Monti] asserted, is to protect consumer welfare by 'maintaining a high degree of competition in the Common Market.' ... [T]he commission will 'oppose mergers that, without creating efficiencies, could raise barriers for competitors and lead, eventually, to reduced consumer welfare.'" *Id.*

12. *See* Majoras, *supra* note 5, at 12. "It is well-established under U.S. law that the antitrust laws do not protect competitors from mergers that will make the merged firm more efficient, even if they fear they may as a result be forced from the market." *Id.* at 12. *See*

but European authorities actively equate competitor welfare with eventual improvement of conditions for consumers.[13]

This disagreement has been catapulted into the public consciousness by the European Union's recent decision to prohibit the merger of two substantial American corporations, General Electric Company (GE) and Honeywell International Incorporated (Honeywell).[14] Although this is only the second time that a merger between two United States based corporations has been blocked by the European antitrust authority, there have also been instances when European authorities extracted considerable divestitures from American corporations before the merger was approved.[15]

The highly public nature of the disagreement between the trans-atlantic antitrust regimes has inspired a wave of determination towards a Global Competition Network, which would foster agreement on antitrust policies and give corporations a measure of security, since filing with antitrust authorities in several countries can be expensive and unrewarding when the likelihood of prohibition changes dramatically in each country.[16] United States authorities seem optimistic and look forward to this forum, but its success is not set in stone.[17]

American antitrust authorities have as much faith in the efficacy and value of their current policies as European authorities have in theirs.[18]

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also Kolasky, *supra* note 1, at 4. "[I]n its conglomerate merger decisions, the EU prohibits mergers because they will make the merged firm a stronger competitor that may ultimately be able to drive rivals from the market." *Id.*

13. *See Monti Discusses EU Merger Control*, *supra* note 11, at 40. Monti stated that competition "should lead to lower prices, a wider choice of goods, and technological innovation, all in the interest of the consumer." *Id.*

14. *See generally,* Commission Decision, Case No. COMP/M.2220, General Electric/Honeywell (2001) (decision not yet published), *at* http://europa.eu.int/comm/competition/mergers/cases/ decisions/m2220.en_pdf [hereinafter Commission Decision].

15. *See Europe's Merger Morass*, *supra* note 4, at 73. In 2000, the European authorities rejected the merger between MCI WorldCom and Sprint. *See id.* In 1997, they extracted divestitures before allowing a merger between Boeing and McDonnell Douglas to continue. *See Boeing/MDC Merger Cleared (With Notable Conditions)*, EURECOM, July 1997, at 1, *at* http://www.eurunion.org/news/eurecom/1997/ecom0997.htm.

16. *See* Charles A. James, International Antitrust in the 21st Century: Cooperation and Convergence, Address Before the OECD Global Forum on Competition (October 17, 2001) at 7-11, *at* http://www.usdoj.gov/atr/public/speeches/9330.pdf (last visited Sept. 21, 2002). "In my view, the GCN should be a venue where senior antitrust officials from developed and developing countries formulate and develop consensus on proposals for procedural and substantive convergence in antitrust enforcement." *Id.* at 9.

17. *See id.*

18. *See id.* at 6. *See also* Mario Monti, The Future for Competition Policy in European Union, Address at Merchant Taylor's Hall, London (July 9, 2001), *at* http://europa.eu.int/comm/competition/speeches/index_speeches_by_the_commisioner.html.

Although a Global Competition Network will result in a more cohesive antitrust policy for corporations, it will also require compromises and policy sacrifices that neither party seems willing to undertake.[19]

This Comment outlines the sources and current state of merger review in the United States and Europe, particularly in regards to the review of conglomerate mergers. It analyzes the recent decision by European antitrust authorities to prohibit the merger of General Electric, Co. and Honeywell International and compares this decision with the United States' decision to allow the merger.[20] Finally, this Comment proposes that the Global Competition Network envisioned by antitrust authorities should adopt some limited form of conglomerate merger review, but only with the substantial limitation and clarification that it currently lacks in the European Union.[21]

II. EUROPEAN UNION MERGER LAW

The European Union has developed an extensive body of competition law and, in a relatively small period of time, created a sophisticated system to deal with threats to the liberalization of its market.[22] Traditionally, mergers, or "concentrations," were reviewed under Articles Eighty-One and Eighty-Two of the European Community Treaty.[23] Since 1990, they have been dealt with largely under the European Commission's Merger Regulation,[24] which falls under the direction of the European Competition Commissioner, Mario Monti.[25] Within the structure of the Competition Directorate, a Merger Task Force has responsibility for reviewing notified mergers and for evaluating their potential effect on the Common Market.[26] A brief overview of the mechanisms under which the European Union addresses mergers will facilitate a discussion of the criteria that the Commission uses to determine whether a merger is compatible with the Common Market.

A. Articles Eighty-One and Eighty-Two of the European

19. *See infra* Part VI.

20. *See* Commission Decision, *supra* note 14.

21. *See infra* Part VI.

22. *See generally* VALENTINE KORAH, EC COMPETITION LAW AND PRACTICE (7th ed. 2000).

23. *See* JONES & SUFRIN, *supra* note 3, at 707.

24. *See* Council Regulation 4064/89, recital 1, 1989 O.J. (L395/1), *corrigendum* 1990 O.J. (LL257/14), *as amended by* Council Regulation 1310/97 1997 O.J. (L180/1) [hereinafter Council Regulation], *reprinted in* JONES & SUFRIN, EC COMPETITION LAW 1116 (2001).

25. *See* Monti, *supra* note 18.

26. *See* KORAH, *supra* note 22, § 11.2.7.

Community Treaty

The European Community Treaty made no initial provisions dealing specifically with merging corporations and business organizations.[27] The Treaty addressed competition law more generally with two articles, Eighty-One and Eighty-Two.[28] Both of these articles have been held to apply to mergers.[29]

Decisions enforcing Articles Eighty-One and Eighty-Two functioned as a "catalyst" for the Commission's long rebutted attempts to form some sort of regulation based merger policy for the Union.[30] The increased numbers of mergers that crossed Member State and European Community borders made it necessary for the European Council to adopt some uniform system of merger review, despite the understandable tentativeness of Member States to give up the familiarity with and authority over their own national policies.[31]

Modern merger enforcement has largely shifted away from Articles Eighty-One and Eighty-Two to the Merger Regulation, which has current authority to review mergers that come within European Community jurisdiction.[32] Although the Commission has been considering a significant revision of the regulation that enforces Articles Eighty-One and Eighty-Two, this modernization will largely affect enforcement mechanisms, as opposed to substantive policy.[33]

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27. Treaty Establishing the European Community, Nov. 10, 1997, O.J. (C 340) 3 (1997) art. 81-82 [hereinafter EC Treaty] *reprinted in* JONES & SUFRIN, *supra* note 3, at 1082. Article Eighty-One controls agreements that "have as their object or effect the prevention, restriction, or distortion of competition within the common market." *Id.* The Treaty's Article Eighty-Two also prohibits "any abuse ... of a dominant position ... in so far as it may affect trade between Member States." EC Treaty, arts. 81-82.

28. *See id.*

29. *See* Case 6/72, Cont'l Can v. Comm'n, 1973 E.C.R. 215, ¶ 26 (holding that Article Eighty-Two could be used to prevent a merger when a firm that had a dominant position in the market acquired a competitor and the "degree of dominance reached substantially fetters competition."). *See also* Cases 142 & 156/84, BAT and Reynolds v. Comm'n, 1987 E.C.R. 4487, ¶¶ 37-39 & 64 (holding that Article Eighty-One, formerly thought not to affect mergers, could limit agreements wherein a firm acquired a minority share in a competitor).

30. JONES & SUFRIN, *supra* note 3, at 709.

31. *See id.* at 712.

32. *See id.* at 710.

33. *See* Mario Monti, *European Community Competition Law: European Competition for the 21st Century*, 24 FORDHAM INT'L L.J. 1602, 1606 (2001). *See also* KORAH, *supra* note 22, § 5.9. The changes in Regulation 17 are designed to modernize notification practices and diminish the Commission's power over granting exemptions, instead conferring some of this power on national authorities. *See* KORAH, *supra* note 22, § 5.9.

B. The E.C. Merger Control Regulation: Background

Adopted in 1989 and put into effect in September 1990, the EC Merger Regulation was designed to replace, rather than augment, Commission merger review under Articles Eighty-One and Eighty-Two.[34] In order to be reviewed by the Commission, mergers must meet the following two criteria: (1) they must contain a "concentration," and (2) have a "Community dimension" by meeting minimum financial thresholds.[35] If these two factors are met, the Commission has plenary jurisdiction; otherwise, potential mergers are subject to national review.[36]

Concentrations are "deemed to arise where: (a) two or more previously independent undertakings merge, or (b) one or more persons controlling at least one undertaking, or one or more undertakings acquire ... direct or indirect control of the whole or parts of one or more undertakings."[37] The creation of a concentration covers horizontal, vertical, and conglomerate mergers, as well as joint ventures.[38] Establishing a Community dimension in a concentration requires the application of the Regulation's relatively high financial thresholds.[39]

If a concentration has occurred with a "Community dimension,"[40] the

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34. *See* JONES & SUFRIN, *supra* note 3, at 710. The Regulation cannot, however, officially disapply treaty provisions itself. *See id.* at 748-49. Nor does the Regulation replace national merger review. *See id.* at 746.

35. Council Regulation, *supra* note 24, at art. 1.

36. *See id.* at recital 26.

37. *Id.* at art. 3(1).

38. Horizontal mergers are those mergers concerning two competitors who produce the same type of product on the same level, such as two companies producing the same component of a piece of machinery. Vertical mergers are those concerning "upstream" and "downstream" markets, for example, a producer of a piece of machinery and a producer of a component necessary to the production of a piece of that machinery. *See* JONES & SUFRIN, *supra* note 3, at 766-67. Conglomerate mergers concern two corporations operating in entirely different markets. *See id.* at 767.

39. The financial thresholds constituting a Community dimension are relatively high, leaving a large number of mergers out of the Commission's jurisdiction. These high thresholds gave industry and the Commission time to set up the day-to-day framework of the review authority by lessening the number of cases the Commission reviewed. *See* KORAH, *supra* note 22, § 11.2.3. Article 1(3) was added in 1996 to expose more mergers to European Commission jurisdiction when they involve more than two Member States. *See* Council Regulation, *supra* note 24, at art. 1(3).

40. Council Regulation, *supra* note 24, at art. 1(3):

> 2. [A] concentration has a Community dimension where: (a) the combined aggregate turnover of all the undertakings concerned is more than ECU 500 million; and (b) the aggregate Community-wide turnover of at least two of the undertakings concerned is more than ECU 250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate

concerned parties are required to report the agreement, announcement of a public bid, or acquisition of the controlling interest within one week.[41] The Commission has one month to make an initial determination on the compatibility of a potential merger with the Common Market. A Phase II examination of a merger usually takes four months,[42] involving a consultation of the Advisory Committee on Concentrations and a final decision made by the College of the Commissioners.[43] Finally, there is a right of appeal to the Court of First Instance.[44]

C. Compatibility with the Common Market

In order for the Commission to act against a contemplated merger, the merger must be incompatible with the common market.[45] Determining whether a potential merger will result in this proscribed outcome requires application of a two-part test: first, whether the merger will "create or strengthen a dominant position" and second, whether "as a result ... effective competition would be significantly impeded in the common market or a substantial part of it."[46] The first step in determining whether the test is fulfilled is establishing the markets in which the merging firms compete.[47] Once the nature of the market has been determined, the

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> Community-wide turnover within one and the same Member State. 3. ... [A] concentration that does not meet the thresholds laid down in paragraph 2 has a Community dimension where: (a) the combined aggregate worldwide turnover of all the undertakings concerned is more than ECU 2,500 million; (b) in each of at least three Member States, the combined aggregate turnover of all the undertakings concerned is more than ECU 100 million; (c) in each of at least three Member States included for the purpose of point (b), the aggregate turnover of at least two of the undertakings concerned is more than ECU 25 million; and (d) the aggregate Community-wide turnover of at least two of the undertakings is more than ECU 100 million; unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

Id.

41. *See id.* at art. 7(1).

42. *See id.* at art. 10(3).

43. *See id.* at art. 7(1).

44. *See* JONES & SUFRIN, *supra* note 3, at 715.

45. Incompatibility with the common market is defined in the Regulation as "creat[ing] or strengthen[ing] a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it." Council Regulation, *supra* note 24, at art. 2(2).

46. Council Regulation, *supra* note 24, at art. 3(2). *See also* JONES & SUFRIN, *supra* note 3, at 752. If either part is not fulfilled, the Commission has no power to block the merger. *See id.*

47. *See* JONES & SUFRIN, *supra* note 3, at 755. This determination can often have a

Commission must consider several factors, primarily market share, to reach an opinion of the firms' dominance or potential dominance in a market.[48]

Relevant markets may be defined both geographically and by product.[49] The geographic market must include the "common market or ... a substantial part of it."[50] The product market can include products in direct competition or products that can act as a substitute for the product in question on the supply or demand side.[51] The Commission published the "Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law" in 1997,[52] encouraging use of the "American Small but Significant Non-Transitory Increase in Price" test (SSNIP Test), which "postulat[es] a hypothetical, small lasting change in relative prices and evaluat[es] the likely reactions of customers."[53]

Once a market is defined, the merging firms' dominance must be established.[54] This position is evaluated using factors that are of varying importance in each case, but which include market shares, conditions of entry into the market, countervailing buyer power, efficiencies, portfolio power in conglomerate mergers, and foreclosure in vertical mergers.[55] The Commission has relied heavily on market shares in Article Eighty-Two

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significant effect on the outcome of the test. *See infra* note 169 and accompanying text.

48. *See* Council Regulation, *supra* note 24, at art. 2(1)(a), (b).

49. *See* KORAH, *supra* note 22, § 3.2.1.

50. Council Regulation, *supra* note 24, at art. 3(2).

51. *See* KORAH, *supra* note 22, § 3.2.1.1. Substitutions can be made on the demand side, by consumers choosing a different item that can serve the same purpose, for instance, a CD versus a cassette. To a limited degree, they can also be made on the supply side, by competitors with easily adaptable production facilities. *See id.* Cultural, psychological, and physical differences between products can play a part in this determination. *See* JONES & SUFRIN, *supra* note 3, at 756.

52. 1997 O.J. (C 372) 5, *reprinted in* JONES & SUFRIN, *supra* note 3, at 44.

53. *Id.* ¶ 15. The test assumes a five to ten percent price increase on the product to determine whether, as a result of that change, consumers would begin buying different products and whether suppliers would begin producing substitute products; if they would, the product must be included in the market. *See* JONES & SUFRIN, *supra* note 3, at 44. The Commission often interprets markets widely, unless prompted by competitors' complaints to look at specific activity. *See* KORAH, *supra* note 22, § 11.2.6.2.

54. *See* KORAH, *supra* note 22, § 11.2.6.4. Dominance can be attained by a single firm or by two or more firms in collective dominance; the ability of firms to manipulate prices is a factor to be considered in establishing a dominant position. *See id.*

55. *See* KORAH, *supra* note 22, §§ 11.2.6-11.2.6.4. This list "is not exhaustive ... [and] the Commission is required to consider relevant matters in the list." *Id.* at 11.2.6.1. According to Articles 2(1)(a) and (b) of the EC Merger Regulation, the factors that lead to the creation or strengthening of a dominant position are limited to competition concerns, as opposed to considerations involving social and cultural policy. *See* JONES & SUFRIN, *supra* note 3, at 752.

investigations and continues to find them important in investigations under the EC Merger Regulation.[56] The use of market shares can be minimized, however, if it appears that for some reason conditions in the industry are about to undergo a dramatic change.[57] Market shares can also be offset by the conditions of entry into the relevant market if the entry is relatively imminent and financially viable.[58] Finally, countervailing buyer power can also reduce the importance given to market share; this usually occurs when the demand in a market comes primarily from one or two sources that can turn to the other producer or producers if prices go up.[59]

In vertical mergers, the factor that the Commission looks for is the "foreclosure" of markets due to the integration of component and product industries.[60] In this situation, the component competitors suffer because: (1) there is no fair competition in accessing the product manufacturer, and (2) the manufacturer is not looking to other sources for a more efficient deal on the component it needs.[61] If a vertical merger does not contain a foreclosure element, it generally passes the Commission's review.[62] Review of conglomerate mergers will be discussed extensively later in this Comment.[63]

When a merger creates or strengthens a dominant position in the market in one of these ways, and this results in a significant impediment to competition, the Commission must generally reject it.[64] Unlike review under Article Eighty-Two, however, the effects of the disputed merger are prospective effects.[65] There is no post merger enforcement under the regulation.[66]

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56. *See* JONES & SUFRIN, *supra* note 3, at 761-62. *See also* AKZCO Chemie BV v. Commission, Case C-62/86, 1991 E.C.R. I-3359, 5 C.L.M.R. 215 (1993) (holding that a market share of 50% was high enough to be considered dominant).

57. *See* Case IV-M42, Alcatel/Telettra, 1991 O.J. (L 122/48), 4 C.M.L.R. 778 (1991) (determining that since eroding trade barriers were about to open the telephony market, a merger resulting in an 83% market share was permissible).

58. *See* KORAH, *supra* note 22, § 11.2.6.1.

59. *See* Case IV/M1225, Ensa/Stora, 1999 O.J. (L 254/9) (finding that since the principal purchaser had recourse to two of its other, smaller suppliers, any increase in price would simply result in a shifting of the order to them).

60. JONES & SUFRIN, *supra* note 3, at 766.

61. *See id.*

62. *See id.*

63. *See infra* Part IV.

64. *See* Council Regulation, *supra* note 24, at art. 3(2).

65. *See* JONES & SUFRIN, *supra* note 3, at 751.

66. *See id.*

III. U.S. MERGER ENFORCEMENT

A. Statutes and Mechanisms of Enforcement

The United States has been concerned with the regulation of mergers and market concentrations since passing §§ 1 and 2 of the Sherman Antitrust Act,[67] originally applicable to asset acquisitions that were "in restraint of trade or commerce"[68] and to intended monopolization, actual monopoly, or attempted monopolization.[69] Merger review by the U.S. government has largely passed over to § 7 of the Clayton Act,[70] which directly addresses mergers as a potential threat to competition.[71]

The Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) share concurrent jurisdiction over abuses of § 7.[72] Generally, the U.S. antitrust authorities review far fewer cases than the European Commission.[73] This is because the pre-merger notification requirements of the U.S. government, under the Hart-Scott-Rodino Act,[74] require the majority of mergers, even relatively small ones, to be reported.[75] The agencies have the option of beginning an investigation or of allowing the merger to go forward, but the FTC has an extensive administrative process to evaluate whether a challenge is appropriate, while the DOJ uses adjudication in the federal court system to reach its outcome.[76]

In order to clarify the review of mergers under § 7 of the Clayton Act, the FTC and DOJ began issuing *Merger Guidelines* in 1968, with

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67. 15 U.S.C. §§ 1-2 (1994).

68. *Id.* § 1.

69. *Id.* § 2.

70. *See id.* § 18. Section 7 generally applies to "person[s] engaged in commerce or in any activity affecting commerce." 15 U.S.C. § 18(7) (2000). It proscribes them from acquiring stocks or assets or from merging with another such entity when "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." *Id.*

71. *See id.* § 18 (2000).

72. *See id.* § 45. *See also* ABA SECTION OF ANTITRUST LAW, MERGERS AND ACQUISITIONS: UNDERSTANDING THE ANTITRUST ISSUES 13 (Robert S. Schlossberg and Clifford H. Aronson, eds., 2000) [hereinafter MERGERS AND ACQUISITIONS]. The agencies divide cases by a process called "clearance" whereby agencies are assigned cases primarily by area of expertise, and they agree beforehand on procedures to decide which agency will investigate a case if both agencies have an interest. *Id.* at 14-15.

73. *See* Thomas E. Kauper, *Merger Control in the United States and the European Union: Some Observations*, 74 ST. JOHN'S L. REV. 305, 312 (2000).

74. *See* 15 U.S.C. § 18(a) (2000).

75. *See id.*

76. *See* MERGERS AND ACQUISITIONS, *supra* note 72, at 28-30.

subsequent revisions in 1982, 1984, and 1992.[77] Since the *Merger Guidelines* do not have the force of law, case law still plays an important part in understanding U.S. merger law. [78] The present purpose of the guidelines is to enhance sound merger enforcement by "describing the analytical foundations of merger enforcement and providing guidance enabling the business community to avoid antitrust problems when planning mergers."[79] The *Merger Guidelines*, though non-binding on the agencies and not an exhaustive list of all factors that the agencies may consider,[80] purport to provide a general methodology that serves to avoid unnecessary interference in "the larger universe" of non-harmful and positive mergers.[81]

B. The *Merger Guidelines* and Criteria for the Rejection of a Merger

In order to determine whether a merger is permissible, the DOJ or FTC makes a prospective analysis of the effects of a merger by evaluating the relevant market and the corporations' place in this market.[82] Although this appears quite similar to the European method, there are differences.[83] The *Merger Guidelines* provide a step-by-step analysis of the way that the DOJ and FTC plan to look at corporations contemplating a merger,[84] but the

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77. *See id.* at 16.

78. *See id. See also* Kauper, *supra* note 73, at 314-15. However, recent developments have been guided by agencies rather than courts. *See id.*

79. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, STATEMENT ACCOMPANYING HORIZONTAL MERGER GUIDELINES (1992), *reprinted in* ABA SECTION OF ANTITRUST LAW, MERGERS AND ACQUISITIONS: UNDERSTANDING THE ANTITRUST ISSUES 491 (Robert S. Schlossberg and Clifford H. Aronson, eds., 2000) [hereinafter HORIZONTAL GUIDELINES STATEMENT (1992)].

80. DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES (1992) § 0.1, *reprinted in* ABA SECTION OF ANTITRUST LAW, MERGERS AND ACQUISITIONS: UNDERSTANDING THE ANTITRUST ISSUES 461 (Robert S. Schlossberg and Clifford H. Aronson, eds., 2000) [hereinafter MERGER GUIDELINES (1992)].

81. MERGER GUIDELINES (1992), *supra* note 80, § 0.1.

82. *Id.* § 0.2.

83. *See infra* notes 94-113 and accompanying text.

84. *See* MERGER GUIDELINES, *supra* note 80, § 0.2. These guidelines provide:

> First, the Agency assesses whether the merger would significantly increase concentration and result in a concentrated market, properly defined and measured. Second, the Agency assesses whether the merger, in light of market concentration and other factors that characterize the market, raises concern about potential adverse competitive effects. Third, the Agency assesses whether entry would be timely, likely, and sufficient either to deter or to counteract the competitive effects of concern. Fourth, the Agency assesses any efficiency gains that reasonably cannot be achieved by the parties through other means. Finally the Agency assesses whether, but for the merger, either party to the transaction would be

"ultimate inquiry" is whether the merger would "create or enhance market power or ... facilitate its exercise."[85]

1. The Relevant Market

Like the Commission, American federal agencies use both product-based and geographic viewpoints to establish the market.[86] The DOJ and FTC use the SSNIP test outlined above,[87] with the clarification that if different geographic or cultural areas would respond to the SSNIP test differently, the agencies may label them as different markets.[88]

The agencies establish a different market for each product produced by each of the merging companies; if one or more of these products overlap, the merger can be considered horizontal.[89] For inexact substitutes and products generally bought in a cluster of products, the guidelines allow for the construction of different markets and sub-markets, based on which competitors sell which items and in what combination.[90]

The *Merger Guidelines* also consider geographic markets, establishing one for each product market in which a firm participates.[91] In this analysis, such factors as transportation costs and correlated price patterns are used to create a "pragmatic approach."[92]

The agencies will also include "evidence that buyers have shifted or have considered shifting purchases" between different products or geographic locations, "evidence that sellers base business decisions on the prospect of buyer substitution between products" or geographic location, evidence that there is "downstream competition faced by buyers" in product or geographic markets, and evidence of "the timing and cost of switching products" or suppliers.[93]

2. Measuring Market Share and Determining Market Power

A merger violates § 7 by "substantially ... lessen[ing] competition, or ...

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likely to fail, causing its assets to exit the market.

Id.

85. MERGER GUIDELINES (1992), *supra* note 80, § 0.2.

86. *See id.* § 1.0.

87. *See id. See also supra* note 53 and accompanying text.

88. *See* MERGER GUIDELINES (1992), *supra* note 80, § 1.0.

89. *See id.* § 1.11.

90. *See* MERGERS AND ACQUISITIONS, *supra* note 72, at 51-57.

91. *See* MERGER GUIDELINES (1992), *supra* note 80, § 1.21.

92. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 337-39 (1962). *See also* MERGERS AND ACQUISITIONS, *supra* note 72, at 74-75.

93. MERGER GUIDELINES (1992), *supra* note 80, §§ 1.11, 1.21.

tend[ing] to create a monopoly."[94] To determine whether a merger would do this, agencies generally rely on market shares and market concentration, which translate into market power, with some exceptions.[95] Market power is power that results in unilateral price increases or in "coordinated interaction" between remaining firms.[96]

A firm's market share is calculated by tabulating current annual sales of participants in the relevant market and comparing them.[97] Where these figures do not, for some reason, reflect the true state of the market, courts may use the annual sales of previous years or other measurements.[98]

Market shares are used to determine market concentration,[99] a number reflecting the market shares of all market participants compared to the number of competitors in the market; this number is referred to as the Herfindal-Hirschman Index (HHI) of market concentration.[100] Mergers with an HHI below 1,000 rarely pose a threat to competition, while mergers with an HHI above 1,800 can result in anti-competitive effects if the merger produces an increase in the HHI of only fifty points.[101]

In *United States v. General Dynamics*,[102] the Supreme Court saw market share as largely indicative of future market power. This case, in conjunction with the *Merger Guidelines*' emphasis on market concentration, is the foundation of determining market power today.[103]

Under the *Merger Guidelines*, market share is not the only measure of a merger's potential effect on competition.[104] In keeping with the general

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94. Clayton Act, 15 U.S.C. § 18 (1994).

95. *See* MERGERS AND ACQUISITIONS, *supra* note 72, at 87.

96. *See id.* at 87, 95.

97. *See* United States v. General Dynamics Corp., 415 U.S. 486, 501 (1974) (using annual sales as the main component of market share analysis).

98. *See* MERGERS AND ACQUISITIONS, *supra* note 72, at 80-81.

99. *See* MERGER GUIDELINES (1992), *supra* note 80, § 1.5.

100. *See id.* "The HHI is calculated by summing the squares of the individual market shares of all the participants." *Id.* "For example, a market consisting of four firms with market shares of 30 percent, 30 percent, 20 percent and 20 percent has an HHI of 2600 ($30^2 + 30^2 + 20^2 + 20^2$)." *Id.* n.17. This test is a good method of measuring market concentration because it factors in both the number of competitors and the relative weight of their market share. *See* MERGERS AND ACQUISITIONS, *supra* note 72, at 84-85.

101. *See* MERGER GUIDELINES (1992), *supra* note 80, § 1.51. Mergers with an HHI between 1000 and 1800 will generally be allowed, unless the increase in concentration was over 100 points. *See id.*

102. 415 U.S. 486 (1974).

103. *See* Kauper, *supra* note 73, at 324. *But see* United States v. Von's Grocery Store, 384 U.S. 270 (1966) (holding that only 7.5% was sufficient to cause harm). *See also* United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) (holding that 36% was sufficient to cause harm). *See* Kauper, *supra* note 73, at 323.

104. *See* HORIZONTAL MERGER GUIDELINES (1992), *supra* note 80, § 1.52.

purpose of § 7,[105] several other factors are considered before a prospective merger is cleared, such as ease of entry into the market, the imminent failure of one of the firms involved, any efficiencies effected by the merger, and any characteristics of the product or relationship between competitors that make collusion particularly likely or unlikely.[106] Both the "failing firm" defense and the "ease of entry" defense are absolute, and their identification will lead to the acceptance of the merger.[107]

Unlike Commission authorities, American antitrust agencies do not review the vertical effects of mergers with great scrutiny.[108] In the early 1980's, the *Merger Guidelines* were amended to dramatically reduce the DOJ and FTC's abilities to limit non-horizontal mergers.[109] The guidelines allow agencies to challenge non-horizontal mergers when they may eliminate potential competition, perceived or actual, from the market.[110] The guidelines also allow agencies to create barriers to entry by requiring competitors to enter both the component and final product markets to compete, facilitate collusion, or lead to rate evasion.[111] However, authorities have not used even these limited provisions extensively,[112] and courts have shown skepticism regarding whether changes in supply relationships do indeed lead to an anti-competitive environment.[113]

A discussion of the American approach to conglomerate mergers follows.

IV. CONGLOMERATE MERGERS: DIFFERENT APPROACHES

Although the European and American systems of merger review do have much in common,[114] their positions regarding conglomerate mergers are in clear opposition.[115] European authorities have developed the area of merger review with enthusiasm, while the DOJ and FTC have steered away from

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105. *See* Sherman Antitrust Act, 15 U.S.C. § 18 (1994).

106. *See* HORIZONTAL MERGER GUIDELINES (1992), *supra* note 80, § 1.52. *See also* Kauper, *supra* note 73, at 326; MERGERS AND ACQUISITIONS, *supra* note 72, at 93-95.

107. *See* Kauper, *supra* note 73, at 324.

108. *See* JONES & SUFRIN, *supra* note 3, at 796-97. *See also* MERGERS AND ACQUISITIONS, *supra* note 72, at 295.

109. *See* DEPARTMENT OF JUSTICE AND FEDERAL TRADE COMMISSION, HORIZONTAL MERGER GUIDELINES (1984) § 4, *reprinted in* ABA SECTION OF ANTITRUST LAW, *supra* note 76, at 449 [hereinafter MERGER GUIDELINES (1984)].

110. *See* MERGER GUIDELINES (1984), *supra* note 109, § 4.1-4.23.

111. *See id.*

112. *See* MERGERS AND ACQUISITIONS, *supra* note 72, at 297-99.

113. *See id.*, at 297-99. *See also* Fruehauf Corp. v. FTC, 603 F.2d 345 (2d Cir. 1979); Alberta Gas Chem., Inc. v. E.I. du Pont de Nemours, 826 F.2d 1235 (3d Cir. 1987).

114. *See* Kauper, *supra* note 73, at 307.

115. *See* JONES & SUFRIN, *supra* note 3, at 701.

evaluating conglomerate mergers with scrutiny.[116]

In a conglomerate merger, the two merging firms function in different markets, although there may be cases where there is vertical or horizontal overlap.[117] The idea that harm can come from such mergers is based on the theory that the "market power deriving from a portfolio of brands exceeds the sum of its parts."[118] That is to say, a corporation may gain broad market power when it offers a wide range of products that are often purchased together or by the same consumers.[119] These negative effects are referred to as "range effects" in the United States[120] and as "portfolio power" in the European Union.[121] Generally speaking, this Comment will refer to such effects as conglomerate effects, because they are the perceived result of a conglomerate merger.

The anti-competitive harms that these mergers present can be divided into four general areas: entrenchment,[122] reciprocity,[123] tying,[124] and multiple market strategies.[125] The theory of "entrenchment" contends that a merger "reduce[s] the competitive structure of the industry by raising entry barriers and by dissuading the smaller firms from aggressively competing."[126] There are additional non-anti-competitive justifications for conglomerate merger scrutiny: the concentration of corporate power into

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116. *See* MERGERS AND ACQUISITIONS, *supra* note 72, at 309. *See also* JONES & SUFRIN, *supra* note 3, at 767.

117. *See* JONES & SUFRIN, *supra* note 3, at 767. Such is the case in the *GE/Honeywell* case. *See infra* Part V, Section C.

118. S. BISHOP & M. WALKER, THE ECONOMICS OF EC COMPETITION LAW: CONCEPTS, APPLICATION AND MEASUREMENT 159-60 (1999), *reprinted in* JONES & SUFRIN, *supra* note 3, at 767.

119. *See* JONES & SUFRIN, *supra* note 3, at 767.

120. Kolasky, *supra* note 1, at 12.

121. JONES & SUFRIN, *supra* note 3, at 767.

122. *See infra* note 126 and accompanying text.

123. Reciprocity is the purchase by a business of products from another business with the assumption or belief that the second business will buy goods from them. After a conglomerate merger, the different divisions in the company will most likely purchase supplies from each other. In order for reciprocity to be wrong, it must be an exploitation of the relationship that will substantially lessen competition. *See* MERGERS AND ACQUISITIONS, *supra* note 72, at 314-16.

124. Tying is the linking of one pre-merger business's product with another pre-merger business's product, so that consumers have no choice but to buy both products from the same post-merger business. *See* MERGERS AND ACQUISITIONS, *supra* note 72, at 318-19.

125. Multiple market strategies occur when two oligopolistic markets are linked by a merger and the completed merger will create a company with at least two firms in each market. The merger might create a pricing arrangement in one market, causing a competitor in both markets to cooperate for fear of retaliation in the other market. *See id.*

126. *Id.* at 312.

too few hands is an issue of socio-political concern for some theorists who worry about the non-economic effect on the surrounding community.[127]

These theories are not given much credence by American anti-trust officials today.[128] Although there was a time when American courts embraced the theory of entrenchment,[129] that time has long since passed.[130] The primary flaw found by United States authorities with the use of the entrenchment doctrine, and with other justifications for the "range effects" theory, rests in the efficiencies defense.[131] Though the defense is not absolute,[132] it does conflict with the theory that conglomerate effects are harmful to competition.[133] For example, when a merger is rejected because it would cause increased economies of scale for the merged firm and hardship for its competitors, it is, in effect, being rejected because it has caused efficiency.[134] For this reason, the United States' foray into the application of the entrenchment doctrine and "range effects" was cut short.[135] In 1992, the new Merger Guidelines neglected to discuss conglomerate mergers at all, and as a result, federal agencies constructively eliminated such mergers from scrutiny.[136]

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127. *See id.* at 310. *See also* JONES & SUFRIN, *supra* note 3, at 706.

128. *See* Kolasky, *supra* note 1, at 1.

129. *See* FTC v. Procter & Gamble, 386 U.S. 568 (1967) (the capital and product range of an already dominant firm inhibits competitors from entering the market and speeds their exit). *See also* Charles James, Antitrust Submission for OECI Roundtable on Portfolio Effects in Conglomerate Merger (Oct. 12, 2001) at 2, *at* http://www.usdoj.gov/atr/public/international/9550.pdf (last visited on Sept. 21, 2002).

130. *See* James, *supra* note 129, at 11.

131. *See* Kolasky, *supra* note 1, at 1. The efficiencies defense arises as when a merger "permit[s] a better utilization of existing assets, enabling the combined firm to achieve lower costs ... than either firm could have achieved without the proposed transaction." MERGER GUIDELINES (1992), *supra* note 80, § 4 (as revised April 8, 1997).

132. *See* MERGER GUIDELINES (1992), *supra* note 76, § 4 (as revised April 8, 1997).

133. *See* James, *supra* note 129, at 21.

134. *See* Majoras, *supra* note 5, at 6.

135. *See id.* The Commission does not officially recognize the efficiencies defense, though it does allow "technical and economic progress" to be considered in a merger evaluation. JONES & SUFRIN, *supra* note 3, at 796.

136. The *Merger Guidelines* refer the reader to the 1984 *Merger Guidelines* for information concerning conglomerate merger problems, stating: "Neither agency has changed its policy with respect to non-horizontal mergers. Specific guidance on non-horizontal mergers is provided in Section 4 of the Department's 1984 *Merger Guidelines*, read in the context of today's revisions to the treatment of horizontal mergers." STATEMENT ACCOMPANYING HORIZONTAL MERGER GUIDELINES (1992), *supra* note 79. However, though the 1984 provisions theoretically remain in effect, evaluation of conglomerate mergers is in effect no longer practiced. *See* MERGERS AND ACQUISITIONS, *supra* note 72, at 309. *But see id.* at 312-15, which states that though sheer size is not enough to entrench a business in the industry, size combined with a "specific, anticompetitive advantage[]" can result in a merger

The Commission, however, has developed its conglomerate effects theories in the last decade, suffering criticism from legal scholars and the United States government as a result.[137] The Commission used "portfolio power" to require divestitures in *Guinness/Grand Metropolitan*, in which the Commission determined that two firms producing a wide range of alcoholic beverages and bottled water could not merge because their merger would create a dominance in too many markets.[138] Since then, the Commission has used conglomerate effects in its evaluation of a few noted cases, particularly in *Boeing/McDonnell-Douglas*, which involved the merger of two American corporations.[139] Most recently, conglomerate effects were the deciding factor in the Commission's rejection of the GE/Honeywell merger.[140]

Common sense tells us that corporations with dominant positions in many markets, particularly those markets connected with consumers' habits and thoughts, may gain an inappropriate power over prices and product development in those markets. An antitrust regime need not protect competitors at the expense of competition to see this reality.[141] However, conglomerate mergers undeniably create vast efficiencies, which enhance the rigor of the marketplace, and this is a desired objective in a free market economy.[142] It is because the Commission's decisions tend to punish those efficiencies that they have been dubbed as creating an "efficiencies offense."[143]

Clearly, if the conglomerate effects theory is to be taken seriously by national antitrust regimes, it needs to undergo significant clarification. As it stands now, the theory inevitably leads to claims that the Commission has acted with political motivation or without sufficient expertise.[144] Suggestions for improvement of these flaws will be discussed later in this

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violating § 7. *Id.*

137. *See* JONES & SUFRIN, *supra* note 3, at 767.

138. Case IV/M.938, 1998 O.J. (L 288) ¶ 40.

139. *See generally* Case No. IV/M, Boeing/McDonnell-Douglas, 1997 O.J. (L 336). *See also* Case No. IV/M.833, Coca-Cola/Carlsberg, 1998 O.J. (L 145).

140. *See infra* Part V.

141. *See* Kolasky, *supra* note 1, at 4.

142. *See id.* at 1.

143. Mario Monti, Antitrust in the U.S. and Europe: a History of Convergence, Speech at the General Counsel Roundtable American Bar Association (Nov. 14, 2001) *at* http://europa.eu.int/comm/competition/speeches/index_speeches_by_the_commisioner.html. "Our view is that whilst conglomerate mergers are normally not anti-competitive, under some circumstances they can lead to exclusionary effects and a worsening of competition conditions." *Id. See also* Majoras, *supra* note 5, at 13-14. "[A]ntitrust should rarely, if ever, interfere with any conglomerate merger." *Id.*

144. *See infra* notes 252-53 and accompanying text.

Comment.[145] In the meantime, a discussion of *GE/Honeywell* will greatly enhance an understanding of the way the Commission applies the conglomerate effects theory today.[146]

V. GENERAL ELECTRIC AND HONEYWELL: THE MERGER

Early in 2001, GE and Honeywell, both United States corporations, notified U.S. and European Community authorities that they had made an agreement to merge their operations through the purchase of Honeywell's entire share capital by GE.[147] This merger, if completed, would have been significant in size and effect due to the substantial earning power of both firms involved.[148] There are few corporations with such a ubiquitous presence in American society as GE, which manufactures everything from light bulbs to helicopter engines.[149] Though Honeywell occupies a lesser place in the American consciousness, it is nonetheless a primary manufacturer of avionic and non-avionic aircraft equipment, products that have taken on a more significant importance in the past year as the public's concern with air safety has increased.[150]

The proposed merger between these corporations raised several concerns for antitrust authorities in both the U.S. and in the European Community.[151] The parties' concerns, however, were due to different factors and resulted in very different conclusions.[152] While the DOJ would have allowed the merger to proceed after the divestiture of Honeywell's helicopter engine production and a third-party service certification for

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145. *See infra* Part VI.

146. *See generally* Commission Decision, *supra* note 14.

147. *See id.* ¶ 1. *See also* Press Release, Justice Department, Justice Department Requires Divestitures in Merger Between General Electric and Honeywell (May 2, 2001) *at* http://www.usdoj.gov/atr/public/press_releases/2001/8140.htm [hereinafter DOJ Press Release].

148. *See* DOJ Press Release, *supra* note 147. In the year 2000, GE reported revenues of approximately $130 billion in 2000; Honeywell reported revenue of approximately $25 billion in 2000. The completed merger would have cost $42 billion dollars. *See id.*

149. *See id.* "GE ... is a diversified manufacturing and services company in such areas as aircraft engines, household appliances, lighting, power generation, industrial controls, medical imaging equipment, and engineering plastics." *Id.*

150. *See id.* "Honeywell ... is a ... company producing avionic products and services, home, building and industrial controls, automotive products, power generation systems, specialty chemicals, fibers, plastics and electronic and advanced materials." *Id.*

151. *See* Commission Decision, *supra* note 14, ¶ 8. *See also* DOJ Press Release, *supra* note 147.

152. *See* DOJ Press Release, *supra* note 147. For example, the DOJ was concerned about the horizontal effects of the merger, while the European Commission viewed the merger as raising horizontal, vertical, and conglomerate problems. *See* Commission Decision, *supra* note 14, ¶ 8.

particular Honeywell engines and auxiliary power units,[153] the European Competition Commission refused to allow the merger, even after GE and Honeywell had made several significant concessions.[154] Crucial to understanding this difference in outcome is a comprehension of the varying importance that U.S. and European authorities attribute to conglomerate and vertical effects of mergers.[155]

This section will first outline the overlapping and non-overlapping markets in which GE and Honeywell are involved, and then will analyze the competitive concerns that those markets raise from both the U.S. and European perspectives.

A. GE and Honeywell: Product Markets

In determining whether markets overlap, both the European Commission and the DOJ use the concepts of product markets and geographic markets.[156] However, from the European point of view at least, geographic markets do not play a substantial role in this case because the Commission has determined that the markets of aircraft engine manufacturing, civil aircraft equipment, and gas turbines are worldwide.[157] The DOJ failed to discuss geographic markets as being at issue.[158] Overlapping and non-overlapping markets appear to have been the primary basis for the decision.[159]

The range of products manufactured and serviced by GE and Honeywell does not lend itself to a cursory examination.[160] Confining the analysis to

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153. *See* DOJ Press Release, *supra* note 147. Auxiliary power units are "small engines used to power an aircraft's electrical systems while the aircraft is on the ground." *Id.* "Honeywell's helicopter engine business accounted for revenues approximating $200 million in 2000." *Id.*

154. *See* Commission Decision, *supra* note 14, ¶ 557. As expected, this decision is being appealed by GE and Honeywell in the European Court of First Instance. In the past ten years, twenty-five merger cases have been appealed to the court, seven of which were cases in which the planned mergers were blocked by the Commission, but only one has been completely reversed. *See GE Appeals Prohibition of Merger with Honeywell*, EURECOM, *at* http://www.eurunion.org/news/eurecom/2001/eurecom0901.htm (last visited Sept. 22, 2002).

155. *See supra* Part IV.

156. *See supra* notes 49, 86 and accompanying text.

157. *See* Commission Decision, *supra* note 14, ¶¶ 36, 240, 267. For instance, "all aircraft engine manufacturers market, sell and support their engines on a worldwide basis under similar conditions of competition. The transportation costs of delivery are negligible." *Id.* ¶ 36.

158. *See* DOJ Press Release, *supra* note 147.

159. *See id.*

160. *See infra* notes 161-64 and accompanying text.

products in which there is some possibility of conglomerate, vertical, or horizontal overlap between GE and Honeywell, four general categories emerge. In the aerospace market, there is the manufacturing of jet engines and the maintenance and repair of these engines.[161] There is also the supply of avionics and non-avionics products.[162] Thirdly, there are engine controls, which "enable the engine to interact with the commands of the cockpit" and include several products and components.[163] Lastly, there is also the production of power systems, which primarily includes gas turbines.[164] The diverse nature of these products, as well as the few common purposes for which they are designed, provided ample opportunity for a display of the differences between the U.S. and European systems of reviewing horizontal, vertical, and conglomerate effects.

B. Horizontal and Vertical Effects

Despite the many related products that both GE and Honeywell produce, there is actually relatively little horizontal product overlap between them.[165] The Commission found horizontal overlap in three primary markets: in large regional jet engines, corporate jet engines, and in small marine gas turbines.[166] In the large regional jet market,[167] both GE and Honeywell are active in manufacturing engines. Between them, in fact, they comprise one hundred percent of the supply to airframe

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161. *See* Commission Decision, *supra* note 14, ¶ 9-10. The Commission divides the production of aircraft engines into the following categories: large commercial, regional aircraft, and corporate aircraft. *See id.*

162. *See id.* ¶¶ 230-39. Avionics products are communication and navigation systems purchased by aircraft manufacturers and airlines. *See id.* ¶¶ 231-33. Non-avionics products are systems such as "auxiliary power units, environmental control systems, electric power, wheels and brakes, landing gear and aircraft lighting, all of which are key to the operation of an aircraft." *Id.* ¶ 234. Standard avionics products are generally purchased by airlines, while non-avionics products are usually purchased by the airframe manufacturer, although this is by no means a hard and fast rule. *See id.* ¶ 236.

163. *Id.* ¶ 332.

164. *See id.* ¶¶ 459-60.

165. *See id.* ¶¶ 428, 435, 476. *See also* DOJ Press Release, *supra* note 147.

166. *See* Commission Decision, *supra* note 14, ¶¶ 428, 435, 476.

167. The market for jet engines is determined based on factors such as the jet's seating capacity, its flying range, and its cost to purchase and run. *See id.* The regional jet market is defined as jets manufactured with approximately thirty to ninety seats, a range of less than 2,000 nautical miles, and a cost less than $30 million. *See id.* ¶ 10. The "large" regional jet market includes those regional jets seating seventy to ninety passengers. *Id.* The other two jet markets, as defined by the European Commission, include large commercial jets (with an excess of 100 seats, a range of greater than 2,000 nautical miles, and a cost in excess of $35 million) and corporate jets (those designed for corporate activities with a cost between $3 million and $30 million). *See id.*

manufacturers, which the Commission determined would strengthen the dominant position of GE in the field.[168] The reason why U.S. authorities did not consider this concentration significant perhaps lies in reasoning similar to that of the parties' arguments to the Commission, which pointed out that the Commission's jet categories were overly rigid and did not take into consideration the possible overlap in use by airlines of smaller "large commercial jets" and "small regional jets."[169] Indeed, the Commission's jet categories do seem almost designed to exclude any possible competition from other manufacturers in the market. In addition, the overlap may not be overly significant, especially since there are only four manufacturers of large regional jets in existence.[170] Another area in which the Commission found a horizontal overlap is in corporate jet engines, where the merged entity would command fifty to sixty percent of the market, creating a dominant position.[171] Third, in the market of small marine gas turbines, the merged entity would command between sixty-five and eighty percent of the market by creating a producer "four to five times larger than the second player."[172]

However, the U.S. authorities only identified two areas of horizontal overlap so serious as to require divestiture: military helicopter engines and the service and maintenance for particular models of Honeywell aircraft engines and auxiliary power units.[173] GE and Honeywell together provide a "substantial majority" of engines in U.S. military helicopters and receive substantial research and development funding from the Department of Defense.[174] In terms of maintenance, GE and Honeywell are two of only three firms certified to perform maintainenance on particular models of Honeywell corporate jet engines and auxiliary power units; the DOJ therefore required that an additional provider of maintenance be certified.[175]

The relative disinterest on the part of U.S. antitrust enforcement authorities in evaluating mergers for vertical effects stands in opposition to

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168. *See id.* ¶¶ 19-29, 428.

169. *See id.* ¶¶ 23-29.

170. *See id.* ¶ 21. Three of these airframe manufacturers use GE, while one uses Honeywell. *See id.*

171. *See id.* ¶ 435. GE currently commands ten to twenty percent of the market and Honeywell has control over forty to fifty percent. *See id.*

172. Commission Decision, *supra* note 14, ¶ 476.

173. *See* DOJ Press Release, *supra* note 147.

174. *Id.*

175. *See id.* The European Commission decision makes no mention of the helicopter engine concern, but the most likely explanation for this omission is that since the horizontal effects of this overlap apply solely to the U.S. military, they are not within the Commission's jurisdiction. *See supra* note 40 and accompanying text.

the vertical concerns identified by the Commission.[176] The vertical effects determined by the Commission were focused in the areas of avionics, non-avionics, and power systems.[177] These effects would most likely not be characterized as vertical by the DOJ because their basis is not a direct vertical product relationship, but is instead a result of integration between Honeywell's product lines and GE's capitalization services, which routinely negotiate exclusivity arrangements with airframe manufacturers.[178]

C. Conglomerate Effects

The most significant and controversial reason for the Commission not to allow the merger to proceed was due to the conglomerate effects that it would cause in the European market.[179] In many cases, the Commission found that a dominant position in a particular market already existed and that an increase in market power would strengthen that position by creating additional effects.[180] In other cases, the Commission found that the increased market power would itself create a dominant position.[181] In both scenarios, the increased market power was often a product of two primary circumstances: GE's extensive capitalization and leasing operations and the Commission's fear that the "bundling" of products and services would foreclose the market to other competitors.[182]

As previously mentioned, a dominant position in a market is primarily a product of market share, influenced by factors such as barriers to entry, strength of potential competitors, and countervailing buying power.[183] When determining the severity of portfolio effects, the Commission evaluates current market share and how power in that market can be leveraged by market power in another.[184] In this case, the Commission found that GE possessed high market shares in many markets of engine

176. For a discussion of the U.S.'s unwillingness to evaluate mergers for non-horizontal effects, see *supra* Part IV. *See also* Commission Decision, *supra* note 14, ¶¶ 342-48, 405-10, 438-42, 478-82.

177. *See* Commission Decision, *supra* note 14, ¶¶ 342-48, 405-10, 438-42, 478-82.

178. *See id.* For a more detailed discussion of GE's capitalization arm, see *infra* Part V, Section C.

179. *See* Commission Decision, *supra* note 14, ¶¶ 342-434. For a more detailed discussion concerning the controversy of using conglomerate effects as a basis for rejecting the merger, see *supra* Part IV.

180. *See* Commission Decision, *supra* note 14, ¶¶ 342-434.

181. *See id.* ¶¶ 342-55, 435-44, 476-84.

182. *See infra* notes 187-93 and accompanying text.

183. *See supra* note 55 and accompanying text.

184. *See* Peter Spiegel, *US Calls for More Antitrust Agreement with Europe*, FINANCIAL TIMES, October 26, 2001, at 8. *See also supra* Part IV.

manufacturing and that Honeywell possessed high market shares in a few areas of engine manufacturing, avionics, non-avionics, and engine controls.[185] In addition to these high market shares, the Commission found that GE's leasing and capitalization services, as well as the threat of "tying" or "bundling" services, would generally lead to the creation or strengthening of a dominant position, which would have a negative effect on the European market.[186]

According to the Commission, GE Capital, GE's financial arm, is highly significant in GE's dominance in engine manufacturing.[187] Because of the long and expensive development period for aircraft engines, for example, GE Capital allows GE to take more time developing its products in order to better absorb its losses than its competitors can.[188] GE also uses this capital flow to offer steep discounts, infuse airframe manufacturers with development capital, encourage airframe manufacturers to sign exclusivity agreements, and amass servicing facilities to repair both its own and its competitors' engines, the purpose of which, according to the Commission, is not to lower consumer costs, but to drive out competition.[189] GE also uses its leasing service, GE Capital Aviation Services (GE CAS), to influence airframe manufacturers, since GE CAS is the single largest purchaser of new aircraft.[190] Though its market share is only ten percent, its share of order backlogs is rapidly increasing and ninety-nine percent of the aircraft eventually bought by GE CAS are powered by GE engines.[191] The

185. *See generally* Commission Decision, *supra* note 14. In the market of large commercial aircraft engines, the Commission found a GE market share of 58.5%. *See id.* ¶ 70, 77. In the market of large regional jet engines, the Commission found that GE and Honeywell had a combined market share of 90-100%. *See id.* ¶ 84. In the market of corporate jet engines, the Commission found that GE and Honeywell had a combined market share of 50-60%. *See id.* ¶ 88. In the market of avionics generally, the Commission found that Honeywell had a market share of 50-60%. *See id.* ¶ 242. In the market of non-avionics, the Commission found that Honeywell had a market share of as high as 80-90% in the production of Auxiliary Power Units and as low as no market share in the In Flight Entertainment production market, but that the corporation maintained a unique position in these markets because of its wide range. *See id.* ¶¶ 275-76. Honeywell also maintained a powerful position in the servicing and maintenance markets for these products. *See id.* ¶¶ 283-88. In the engine starter market, the Commission found that Honeywell had a market share of 50-60%. *See id.* ¶ 337.

186. *See id.* ¶¶ 107-24.

187. *See id.*

188. *See id.* ¶¶ 107-10.

189. *See id.* ¶¶ 111-24.

190. *See* Commission Decision, *supra* note 14, ¶ 122.

191. *See id.* ¶¶ 122-33. The Commission claims that GE CAS's power is unlikely to be challenged by another engine manufacturer because of the time, capital, and installed engine base necessary to mount this kind of business. Furthermore, airlines have an interest in all

Commission claimed that the power of GE's capital and leasing services would be extended to Honeywell avionics and non-avionics products if these two corporations were to merge.[192] The Commission also rejected offers by the parties to make divestitures in various avionics products, including auxiliary power units and environmental control systems, engine starters, small marine gas turbines, large regional jet engines, and various behavioral agreements, including an agreement to keep GE CAS as a separate legal entity and an agreement not to bundle avionics and non-avionics with engines.[193]

The Commission was also concerned about bundling in the avionics, non-avionics, and engine industries.[194] Specifically, the Commission was concerned that the merged entity would present airframe manufacturers with a bundle of GE engines and Honeywell avionics and non-avionics, which would make it more likely that their products would be purchased, regardless of whether the price and quality of these products matched that of competitors.[195] The Commission rejected a number of arguments made by the parties in objection to this finding, including a claim that bundling would not occur in this industry because of the lengthy timeline between the purchase of the engine and installation of the avionics and non-avionics products, the countervailing buyer disinterest in packaged deals, and the potential entry of competitors into the industry.[196]

It was in this manner that the Commission determined that the proposed merger between GE and Honeywell would not be compatible with the European Community.[197]

D. U.S. Reaction to the Merger's Rejection

Although there has been some speculation that the Commission used conglomerate effects as an excuse to retaliate against American corporations,[198] United States authorities have generally focused their

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their aircraft having the same equipment, a practice referred to as "commonality;" therefore, the market is not easily penetrated. *See id.* ¶¶ 140-62.

192. *See id.* ¶¶ 342-48, 402-10, 438-42, 478-82.

193. *See id.* ¶¶ 488-99. The Commission's rationale in rejecting these measures rests in the general inadequacy of the divestitures in avionics, non-avionics, and engine starters. *See id.* ¶¶ 500-17. In rejecting the small marine gas turbine and large regional jet divestitures, the Commission doubts the feasibility of the measures. *See id.* ¶¶ 518-28. As to the other proposed undertakings, the Commission claimed that behavioral agreements could simply not eliminate a competition concern. *See id.* ¶¶ 529-33.

194. *See id.* ¶¶ 350-61, 372, 412.

195. *See id.*

196. *See* Commission Decision, *supra* note 14, ¶¶ 350-59, 361, 372, 445-47.

197. *See id.* ¶ 567.

198. *See Mergers: Divergence from Convergence*, FTC: WATCH 568, June 18, 2001.

criticisms on the legal and practical merits of the conglomerate effects theory itself, as well as the structural differences in the two systems.[199] These structural and definitional conflicts are no small matter and are, to some minds, the real cause of disagreement between the two authorities.[200] The European Commission's explanation for the differences lie in three separate factors: (1) the difference in legal definition of the phrases "dominant position" and "substantially ... lessening competition;"[201] (2) the European Commission's limited ability to use ex post remedies such as treble damage exposure to completed mergers that do, in fact, cause damage;[202] and (3) the length of time the authorities use as a tool for determining if damage will result from the merger.[203]

Although the first and second statements draw their fair share of disagreement,[204] the third element is one that seems to catch the attention of officials on both sides of the Atlantic.[205] This is because while the Commission may see its view as a "long-term perspective[]," American authorities do not perceive theirs as being "short-term."[206] Instead, they are adamant that American authorities are "humble about [their] ability to make these judgments, which would necessarily involve predictions far out into the future."[207] They see the European point of view as a lack of faith in the corrective nature of the market and suggest that European officials will accept less than the most rigorous empirical evidence in order to protect competitors who claim these predictions will come true.[208]

American authorities more often blame the size of the European Commission staff and its information gathering resources[209] or the rigor of

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"In addition to differing statutes, at least one U.S. analyst suggests that the Europeans may be taking the opportunity to poke the U.S. in the eye." *Id.*

199. *See generally* Majoras, *supra* note 5. *See also generally* Kolasky, *supra* note 1.

200. *See* Majoras, *supra* note 5 at 15-16.

201. Sherman Antitrust Act, 15 U.S.C. § 18 (1994); EC TREATY, *supra* note 28, art. 82. *See also Muris, James Stress Strong E.U./U.S. Bond Kolasky Agitates Again Over* GE/Honeywell, FTC: WATCH 577, November 19, 2001.

202. *See Muris, James Stress Strong E.U./U.S. Bond*, *supra* note 210.

203. *See id.*

204. *See* Kolasky, *supra* note 1, at 24-25. Kolasky rebuts the argument that the definitions of lessening competition and the creation or strengthening of a dominant position are in fact, or need to be, differing standards. *See id.* Kolasky also makes the somewhat tenuous argument that ex post remedies are irrelevant, because in the U.S., ex post remedies would not address the competitive issues that the Commission was concerned with, since in the U.S., where ex post remedies are used, these competitive issues are not illegal. *See id.*

205. *See* Kolasky, *supra* note 1, at 25.

206. *See Muris, James Stress Strong E.U./U.S. Bond*, *supra* note 201.

207. *See* Majoras, *supra* note 5, at 13.

208. *See id.*

209. *See* Majoras, *supra* note 5, at 15-16. *See also* Kolasky, *supra* note 1, at 26.

United States judicial review compared to that of the Europeans.[210] In response, Commissioner Mario Monti has defended the European system by pointing out that six of fifteen merger prohibition cases have been appealed, assuring that the court takes its review very seriously.[211] In addition, he vigorously denied claims by American authorities that the court was ill-informed, slow, and non-transparent.[212] Nonetheless, the European system still possesses a questionable lack of transparency, expertise, and expediency, particularly because the court's review of the Commission's decisions are simply not made de novo.[213]

Most of the United States' concerns with the decision, however, took issue with the Commission's use of conglomerate effects to prohibit the merger.[214] The DOJ, without abandoning the basic tenet that conglomerate effects should not be evaluated by antitrust authorities at all, also found valid faults with the Commission's evaluation of the significance of the threats of GE CAS, GE Capital and the potential problems associated with bundling.[215]

First, the DOJ found error in the Commission's determination of GE's dominance in the large jet engine market.[216] This is because when GE's exclusive contract with Boeing was subtracted from the market shares, they became far more balanced, leaving GE possessing only forty-four percent of the market.[217] The American view on this topic is also somewhat uneven. There is no particular reason *why* the Boeing contract should be excluded, since the product is still in the same market.[218] However, there is one point that is particularly apt: given that there is a dominant position in

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Kolasky points out that European officials do not have the right to compel the production of documents or the testimony of witnesses. *See id.*

210. *See* Kolasky, *supra* note 1, at 26.

> If we decide in the U.S. to challenge a merger, we know we may have to go to court to convince a federal judge, by the preponderance of the evidence after an evidentiary hearing, that the merger may substantially lessen competition. ... By contrast, in Europe, the Commission is sometimes said to act as investigator, prosecutor, judge and jury. Judicial review is slow and highly deferential to the Commission's factual determinations.

Id.

211. *See* Monti, *supra* note 18.

212. *See id.*

213. *See id. See also* William Kovacic, *Antitrust After Microsoft: Upgrading Public Competition Policy Institutions for the New Economy*, 32 UWLA L. REV. 51, 55-56 (2001).

214. *See generally* Kovacic, *supra* note 213; Kolasky, *supra* note 1.

215. *See* Majoras, *supra* note 5, at 4.

216. *See* Kolasky, *supra* note 1, at 4.

217. *See id.* at 4-5.

218. *See id.*

the engine market, the Commission had to show it had been strengthened.[219] The Commission has claimed that this aspect of the decision was not based on a bundling theory, but instead on the transfer of wealth to GE;[220] if this is so, there is no reason why a merger would have strengthened GE's position, since GE already owned GE Capital and GE CAS.[221]

American authorities also pointed out flaws in the Commission's theories of the merger causing impermissible tying and forcing rivals to exit the market.[222] The tying most feared by European authorities was that of Honeywell avionics and non-avionics products to those of General Electric aircraft engines, engineered by the strength of GE Capital and GE CAS, who would persuade airframe manufacturers to accept the deal.[223] However, the arguments behind this fear relied on a market power that American authorities claim GE never had.[224] The DOJ criticism of the Commission's fear of exiting rivals is persuasive even on the mere logic that GE and Honeywell's competitors, established companies in the markets, will not simply exit the market, but will instead use all counter strategies available to improve their own product range and prices.[225] Furthermore, the Commission dismissed teaming arrangements between companies, which are a substantial alternative to exit.[226] In short, American authorities found that even where the theoretical fears of the Commission in regard to conglomerate mergers may have been legitimate, the factual

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219. *See* Council Regulation, *supra* note 24, at art. 2(2).

220. *See* Majoras, *supra* note 5, at 6.

221. *See id.* at 5-6.

222. *See* Kolasky, *supra* note 1, at 13-22. In his Antitrust Submission for the OECI Roundtable on Portfolio Effects in Conglomerate Mergers, Charles James noted that "mixed bundling" occurs when a company prices some items in a bundle lower than their normal price, in order to have greater sales of the entire bundle. *See* James, *supra* note 129, at 21. This is referred to as the "Cournot effect." Under U.S. law, at least, this is not illegal unless the pricing is predatory. *Id.*

223. *See* Commission Decision, *supra* note 14, ¶¶ 350-61, 372, 412.

224. *See* Kolasky, *supra* note 1, at 14-17. In fact, Kolasky argued that if strong capitalization, besides being a necessary and non-extraordinary characteristic of GE, was always taken into account by antitrust authorities, it would lead to inevitable rejection of any merger undertaken by a large company. *See id.* As to GE CAS, Kolasky presents the fact that ninety percent of airline fleets are mixed as proof that the Commission depended too much on commonality when it interpreted GE CAS's ten percent market share as being enough to force tying on airframe manufacturers. *See id.* at 17-19.

225. *See id.* at 19. Kolasky presents evidence indicating that teaming arrangements on certain products have been recognized by the Commission as particularly effective counter-strategies in these product markets. *See id.*

226. *See id.*

reasoning in the case at hand was flawed.[227]

E. Conglomerate Effects: Continuing Differences

Absent the discrepancies in factual determination of the *GE/Honeywell* case, there is still clear disagreement between American and European authorities whether portfolio effects constitute a reason to reject a merger.[228] American authorities have divided the issues that restricting such mergers would address into three general categories: "tying/bundling, efficiencies, and a general fear that as a firm becomes larger its very size will undermine effective competition (i.e., 'big is bad')."[229] Opposition to tying and bundling considerations rests in the varied reasons that companies have for using bundling.[230] Given the disparate motivations for and methods of accomplishing the bundling, American authorities are understandably skeptical of the desirability of blocking all potential bundling on the basis that some types are harmful.[231]

The efficiency question is perhaps one of the most vigorous debates between the sides, because it realigns focus on the continually quoted maxim that European authorities protect competitors, not consumers.[232] When the Commission rejects a merger because the reductions in production cost that it creates will give it a substantial advantage over its competitors, the DOJ has posited that the Commission has created an "efficiencies offense."[233] The Commission unequivocally rejects this label, declaring instead that:

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227. *See id.* at 13-22. *See also* James, *supra* note 129, at 20-23.

228. *See* Mario Monti, Antitrust in the U.S. and Europe: a History of Convergence, Speech at the General Counsel Roundtable American Bar Association (Nov. 14, 2001) *at* http://europa.eu.int/comm/competition/speeches/index_speeches_by_the_commisioner.html. "Our view is that whilst conglomerate mergers are normally not anti-competitive, under some circumstances they can lead to exclusionary effects and a worsening of competition conditions." *Id. See also* Majoras, *supra* note 5, at 13-14. "[A]ntitrust should rarely, if ever, interfere with any conglomerate merger." *Id.*

229. James, *supra* note 129, at 12.

230. *See id.* at 15-18. James identifies four motivations for tying and bundling: (1) to increase efficiency by lowering cost of production and sales, thereby producing a better market for the consumer; (2) to bundle consistently demanded products with those for which there is inconsistent demand, which has an ambiguous effect on prices; (3) to increase consumer identification of its product, compared to competitor's versions; and (4) to expressly drive competition from the market, which has a negative effect on competition. *See id.* at 16-17.

231. *See id.* at 18.

232. *See* Kolasky, *supra* note 1, at 4. "[W]e view the EU approach to conglomerate mergers as inconsistent with the central tenet of U.S. antitrust policy – that the antitrust laws 'protect competition, not competitors.'" *Id.*

233. *See* James, *supra* note 129, at 18.

> [w]e distinguish clearly between—on the one hand—mergers leading to price reductions that are the result of strategic behaviour on the part of a dominant firm, the purpose of which is to eliminate or marginalize competitors with a view to exploiting customers in the medium term, and—on the other—mergers which will objectively lead to significant and durable efficiency gains that are likely to be passed on to the consumer.[234]

The problem with this declaration, of course, is that deciding beforehand whether such efficiencies will be passed on to consumers is such a complex and unpredictable process that rejecting mergers out-of-hand because of it is not advisable.[235] Monti has claimed that the Commission does not simply presume that where there has been a merger, beneficial efficiencies will occur.[236] At this point, however, both parties' arguments begin to border on the ridiculous, as the Europeans insist that it is right to presume efficiencies will be harmful and the American authorities insist that it is right to presume efficiencies will be beneficial—when neither party has made any solid argument that the specific efficiencies in this case will be either.[237]

As for the last idea, that Europeans espouse a "big is bad" mentality, there is less evidence for the support of this view than for the others. The idea that large companies are inherently dangerous to competition *is* flawed, as authorities such as Charles James claim.[238] However, James' identification of the fluidity of capital towards new opportunities and the undependability of large capital as an assurance of continued market power do not in any way explain why conglomerates should not be evaluated for the negative conglomerate effects of their mergers.[239] Nor does it address Commissioner Monti's denial of the existence of such a mindset on the Commission.[240] Monti's claim is supported by the fact that over the decade the Commission has been working, it has only identified a "handful" of

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234. Monti, *supra* note 143.

235. *See* James, *supra* note 129, at 18-19.

236. *See* Monti, *supra* note 143.

237. *See* James, *supra* note 129, at 19. *See also* Monti, *supra* note 228.

238. *See* James, *supra* note 129, at 19.

239. *See id.* at 19.

240. *See* Monti, *supra* note 143:

> We do not have a sentiment that big is bad. Mergers may indeed contribute to efficiency, to innovation, to consumer interest, but there may be circumstances in which a merger creates either a single or a collective market dominance by one or two or maybe three players, and then this goes to the detriment of consumers.

What they Said: Competition Commissioner Mario Monti, "Europe Update" EUR. MAG., July-Aug., 2000, at 1.

cases where portfolio effects were at issue.[241]

VI. INCREASED COOPERATION

The American reaction to the Commission's decision was predictably unreceptive, and it highlighted a determined energy on the part of the DOJ to commit itself to trans-Atlantic merger cooperation. Due to a 1991 cooperation agreement between the parties,[242] the Commission and DOJ extensively shared information throughout the investigation, despite their divergent conclusions.[243] Although the cooperation agreement only requires the sharing of information and not conformity of results, there was hope that substantive policy uniformity would be its eventual result.[244] This was not to be. Both in the *Boeing/McDonnell Douglas* case[245] and in the *GE/Honeywell* case, overseas cooperation was not enough to ensure a single outcome.[246]

There have been improvements in cooperation, however, since the 1997 *Boeing/McDonnell Douglas* case, in which the Commission attempted to block the $16.3 billion merger of two American corporations, Boeing and McDonnell Douglas. This caused significant controversy over the portfolio effects theory.[247] The *Boeing/McDonnell Douglas* merger was eventually allowed to proceed with "cosmetic concessions,"[248] either because the

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241. Monti, *supra* note 143.

242. *See* Agreement between the Government of the USA and the Commission of the European Communities regarding the application of their Competition Laws, 23 Sept. 1991, 30 I.L.M. 1491 in 4 Trade Reg. Rep. (CCH) ¶ 13,504.

243. *See* James, *supra* note 16, at 5-6.

> I do not believe that we could have worked together more closely. Our staffs talked on the phone frequently and had extensive meetings in Washington and Brussels; the EC staff had access to our economic expert; and we had extensive substantive discussions at the very highest policy levels about the evidence and the theories the two agencies were pursuing.

Id.

244. *See* James, *supra* note 16, at 5.

245. *See generally* Case No. IV/M.877, Boeing/McDonnell Douglas 97/816, 1997 O.J. (L 336), at 16. *See also* JONES & SUFRIN, *supra* note 3, at 1070.

246. *See* James, *supra* note 16, at 5.

247. *See* Case No. IV/M.877, Boeing/McDonnell Douglas 97/816, 1997 O.J. (L 336), at 16. *See also* Bruce Barnard, *Competition Questions Linger*, EUR. MAG., Sept. 2001, at 22-23.

248. Barnard, *supra* note 246, at 23. The cosmetic nature of the required adjustments may be questioned. The divestitures included the "cessation of existing and future exclusive supply deals ...," retaining a separate legal identity for McDonnell Douglas' commercial aircraft division, the licensing of patents to other manufacturers, "commitments not to abuse relationships ...," and the annual reporting of certain publicly funded projects. *Boeing/MDC*

Commission felt that the divestitures it required satisfied its competitive concerns, or because the political pressure of U.S. authorities was so deafening.[249]

One area in which there has been a great deal of improvement in relations is in the area of transnational jurisdiction over international mergers. To businesses, the mere fact that the European Union has the power to prohibit the merger of two American-based corporations seems strange.[250] However, in the course of the GE investigation, American and European authorities both made it quite clear that there was nothing improper in transnational evaluation of mergers under the established "effects doctrine."[251]

Another improvement between authorities is the relative lack of political accusations coming from the United States authorities.[252] Although there were initially rumblings of discontent from the American side, officials largely backed away from the argument that politics had influenced the Commission's decision this time around.[253] Despite the unwillingness of

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Merger Cleared (With Notable Conditions), EURECOM, *supra* note 15, at 1.

249. *See* JONES & SUFRIN, *supra* note 3, at 1058. Both the United States president and vice-president intervened in the matter. *See id.* Boeing's major competitor, Airbus Industries, was the primary objector to the merger, and the Commission was widely regarded as molding European competition policy to fit Airbus' interests. *See id.* In the GE case, this argument had no place because the primary complaining competitors were American companies, such as Pratt & Whitney and Rolls Royce. *See* Commission Decision, *supra* note 14, ¶¶ 174, 196.

250. *See* Barnard, *supra* note 247, at 22. The GE case "prompted ordinary Americans, and not a few business leaders too, to ask what right a foreign regulator had to interfere in a deal between two U.S. firms." *Id.*

251. *See id.* at 22. The effects doctrine, as currently applied by the United States, and as interpreted by other nations, balances issues of comity, defined as "living peacefully with other nations ... and accommodating their interest," with the importance of investigating acts with "'direct, substantial and reasonably forseeable' effects within the United States." JONES & SUFRIN, *supra* note 3, at 1041, 1046. The effects doctrine is in a sense inherently worked into the Competition Commission's guidelines via the "concentration" requirement of the Merger Regulation. *See supra* note 37 and accompanying text.

252. *See* Spiegel, *supra* note 184, at 8.

253. Before a final decision was made, Commissioner Monti defended the Commission against statements made by President Bush and details of the investigation released to the public by GE: "The EU executive body ... accused the American company [of] trying to trigger political intervention in order to get the deal approved." *See Antitrust: EC Scores Bush, GE for Releasing Details of Antitrust Approval Talks*, INT'L BUS. AND FIN. DAILY, (BNA), June 19, 2001. However, Charles James later remarked that "[n]o one believes the EU opposed the transaction to favor national interests." *See* Spiegel, *supra* note 184. FTC Commissioner Thomas B. Leary also stated: "It is simply wrong to suggest that U.S. merger regulation is informed by empirical economic knowledge and European Union ... merger regulation is not." *Leary Offers Respect for EU Merger Enforcement, James Continues the*

American officials to accuse European officials of wrongdoing, however, there remain undeniable substantive policy differences, of which conglomerate merger review is one.

The difference of opinion on this topic raises the question of why foreign nations with differing cultural comfort levels for antitrust regulation *should* try to mold their policies into one.[254] After all, the European Union is a sovereign authority and is perfectly within its rights in having a unique merger review policy, a fact of which United States antitrust authorities are well aware.[255] In fact, one could argue that the Union, in establishing its own policy, is reflecting the cultural values of its citizens, which should be preserved, not assimilated into a larger world antitrust policy.

Despite such arguments, however, uniformity in international merger review is the only practical route for the future.[256] First, the economic growth of corporations operating on a global scale has made transnational mergers far more common.[257] This has led to a proliferation of antitrust legal systems that simply were not present in the past.[258] When there are inconsistencies in the procedural and substantive policies of antitrust, the consequences for corporations contemplating a merger are costly and inconvenient.[259] There is also the possibility that beneficial mergers will be abandoned before filing, because executives perceive that there is too much uncertainty in the review process to make the attempt profitable.[260]

In the area of conglomerate mergers, the motivation for creating a convergence in policy is particularly strong.[261] United States' authorities point out that when such mergers are rejected by the European Union,

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Quarrel, FTC: WATCH 576, (Nov. 5, 2001). In a speech, Commissioner Monti claimed: "[T]he Commission's record as an antitrust agency contains no indication, whatsoever, of any discriminatory treatment vis-à-vis US companies, as some might have suggested." *Id.*

254. *See* Kolasky, *supra* note 1, at 22.

255. *See* Majoras, *supra* note 5, at 14.

> We recognize that the EU is entitled to make and interpret its own laws. We also recognize that we and the EU will not always agree and that our way is not always best. We have no power to change EU law, other than by persuasion, and vice versa.

Id.

256. *See* James, *supra* note 16, at 8-11.

257. *See id.* at 1.

258. *See id.* at 2. James notes that "[o]ver 90 countries currently have antitrust laws of some sort, and that roughly 20 more countries are in the process of drafting such laws." *Id.*

259. *See* Kolasky, *supra* note 1, at 23. Kolasky, for example, notes that the costs of filing in so many nations will increase transaction costs. *See id.*

260. *See id.*

261. *See id.* at 22-23.

consumers worldwide lose the benefits that those mergers may entail.[262] The other side of that argument, of course, is that a harmful merger passed by the European Union, under political pressure from the United States, will subject consumers world-wide to negative effects. Additionally, in a policy area so broad, divergence "undermines the strong political consensus supporting vigorous antitrust enforcement, something none of us wants."[263] As was clearly shown by the *GE/Honeywell* case, cooperation agreements between nations are not going to resolve these issues.[264]

A Global Competition Network (GCN) was consequently proposed and endorsed by the United States and the European Union.[265] It is hoped that this network will be able to solve the antitrust inconsistencies currently plaguing international enforcement through periodic consensus building meetings, which would focus on specific policy issues and reach conclusions on those issues that could be voluntarily adopted by national governments.[266] Officials appear optimistic about this process and often stress their intent to cooperate.[267]

However, the parties are still far away from the consensus they seek. There is a note of mulishness where authorities describe their own policies and the perceived flaws of those policies. For example, Commissioner Monti, when addressing the contentious issue of the difference in legal definition between the nations, remarked:

> US and EU merger control laws are phrased in quite different language. In the EU, where the law ... was drafted only in 1990, mergers must be declared unlawful where they "create or strengthen a dominant position." In the US, in the words of a statute dating from 1914, mergers can be enjoined if they result in a "substantial lessening of competition ...."[268]

United States authorities, on the other hand, have referred to the Supreme

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262. *See id.* at 22.

263. *Id.* at 23.

264. *See* James, *supra* note 16, at 8.

265. *See id.* at 9. James stated: "In my view, the GCN should be a venue where senior antitrust officials from developed and developing countries formulate and develop consensus on proposals for procedural and substantive convergence in antitrust enforcement." *Id.*

266. *See id.* Rather than discussing "abstract" policy issues and sharing antitrust experiences at a forum, the GCN would analyze specific policy gaps and resolve them through multilateral means. *See id.* at 10-11.

267. *See id.* at 11. *See also* Monti, *supra* note 18. "I have recently expressed to Mr. Charles James and Mr. Tim Muris, respectively the new heads of the Antitrust Division of D[O]J and of the FTC, my willingness to work with them to intensify this co-operation. They have both indicated, also publicly, the same determination." *Id.*

268. Monti, *supra* note 143.

Court's fleeting embrace of entrenchment theories in the sixties and seventies as "fifteen years of painful experience"[269] and an "unfortunate interlude."[270]

To its credit, the United States has a legitimate history of antitrust expertise. Commissioner Monti freely admits that in the early years of European Union antitrust enforcement, American influence was crucial to the forming of antitrust legislation.[271] In fact, Americans possess a great deal of pride in their "export" of antitrust knowledge, transferred to foreign countries via informal communication, technical assistance, and antitrust cooperation agreements.[272] On the other hand, it must be kept in mind that European authorities, with the benefits of United States law set before them, chose to craft their own substantive policies on some issues, perhaps under the impression that they could learn from the United States' wrong turns.[273]

There is a cautiousness in the cooperative relationship as well, an example being Monti's statement that: "I am not convinced that the gap between us is as wide as some would have it—but I can obviously only speak for the Commission, and not for the US agencies."[274] This cautiousness has also occasionally exploded into polite anger, such as when Monti professed that he found it "neither pleasant nor appropriate" to be criticized at the Organization for Economic Development Forum in October by United States antitrust authorities.[275]

Between these parties there is a stubborn adherence to existing national policy.[276] This stubbornness should have no place in the GCN proposed by

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269. Kolasky, *supra* note 1, at 1.

270. Spiegel, *supra* note 184.

271. *See* Monti, *supra* note 143. "This influence has helped to ensure that today, after almost 50 years of application and development of antitrust rules in Europe, we can confidently say that we share the same goals and pursue the same results on both sides of the Atlantic ...." *Id.*

272. *See* James, *supra* note 16, at 3-4. James reports that the United States has entered into eight cooperation agreements and has sent almost 250 "advisory missions" to foreign countries in the last ten years. *Id.* at 4.

273. *See* Monti, *supra* note 143.

274. *Id.* at 6.

275. Spiegel, *supra* note 184, at 8.

276. The American opinion:

> We simply could not identify any conditions under which a conglomerate merger ... would likely give the merged firm the ability and incentive to raise price and restrict output. We recognized, conversely, that conglomerate mergers have the potential as a class to generate significant efficiencies ....
>
> [T]he immediate effect of the merger is to reduce prices and increase output, with the anti-competitive effect of the type the EU has posited occurring only if the

Charles James.[277] There are compromises to be made on both sides in the conglomerate merger debate. For its part, the United States ought to consider the possibility that the abandoned entrenchment doctrine of the Warren court may have some validity.[278] The European authorities, however, must agree that as it stands, the "portfolio power" theory is deeply flawed.[279]

The merits of the conglomerate effects theory lie in its ability to predict the nuances of a harmful market power. Where one corporation is dominant in a number of related, but not horizontally or vertically linked markets, there is a realistic danger that the firm will bundle products in a way that forces competitors from the market. There is also a danger that the firm will use its purchase power on one product to implicitly influence a second firm's purchasing decisions on another product that the first producer makes. This was the case with respect to GE CAS, which purchased airplanes to lease from Boeing, which purchased GE engines.[280] After a merger, it is highly likely that Honeywell's products would have been bundled with GE's and sold at great advantage to Boeing, some of whose own aircraft would shortly be sold back to GE CAS.[281] Inherent in this transaction is an understanding that by having access to this type of arrangement, Honeywell's already dominant position in avionics and non-avionics is strengthened to an even greater degree.

However, there are several clarifications that could be made in the European view of conglomerate effects. First, by assuming, as *Guinness/Grand Metropolitan* did, that cost saving efficiencies inevitably lead to an anti-competitive environment,[282] the European authorities do not apply their own test for incompatibility with the market.[283] The Commission must show, not merely predict, that "mergers do not

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other competitors cannot match the merged firm's offerings and exit the market.

Majoras, *supra* note 5, at 14. The European opinion:

> Conglomerate mergers will raise concerns when they make possible that the merged entity leverages its market power with the effect or object to foreclose one or several markets from effective competition. These foreclosing practices, which are not based on normal business performance or "competition on the merits," may substantially reduce consumers' choice and ultimately lead to higher prices and a loss of welfare.

Monti, *supra* note 143, at 6.

277. *See* James, *supra* note 16, at 9.

278. *See* FTC v. Procter & Gamble Co., 386 U.S. 568 (1967).

279. *See supra* notes 228-36 and accompanying text.

280. *See* Commission Decision, *supra* note 14, ¶¶ 121-23.

281. *See id.* ¶ 530.

282. Case No. IV/M.938, 1998 O.J. (L 288) ¶ 40.

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

significantly impede effective competition in the common market or a substantial part of it."[284] In *GE/Honeywell*, the Commission relied, among other things, on a rival's exit to make its decision,[285] but neglected to specify which rivals would be forced to exit, and why they could not act as GE and Honeywell had to find counter strategies of winning the market.[286] In addition, the Commission should specify why efficiencies, when they do occur, will not be passed onto the consumer, instead of simply stating that they will not.[287]

Another flaw in the Commission's approach to conglomerate mergers is its time frame.[288] The Commission has characterized its approach as long term,[289] but such vagueness does little to clarify the law for firms contemplating a merger and wondering how long competitors must stay in business to make the merger legal. At the very least, the Commission should designate a time for which the likelihood of a rival's exit should be evaluated.[290]

In addition, the Commission's dependence on the availability of capital markets is not persuasive. GE's large capitalization was one of the Commission's primary justifications for stopping the merger.[291] However, capitalization provides a firm with the necessary resources for its development of products. A firm's mere possession of the ability to finance its own projects should not create a competitive threat whenever that firm acquires a new product range, particularly given the fact that within a firm, divisions must generally compete for capitalization.[292] By merging with GE, Honeywell was not driving out its competitors by aligning itself with a pair of unfathomably deep pockets, it was competing with other firms in its market by infusing itself with new capital.[293]

Lastly, the Commission's rejection of the parties offers to make behavioral commitments is a serious weakness in their policy.[294] The Commission claimed that the competition problems caused by GE CAS and bundling could not be cured by the parties' offer to make behavioral commitments not to engage in bundling, to use GE CAS as a tool for

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284. Council Regulation, *supra* note 24, recital 5.
285. *See supra* Part V.
286. *See* Kolasky, *supra* note 1, at 6.
287. *See supra* note 189 and accompanying text.
288. *See* Kolasky, *supra* note 1, at 6.
289. *See id.* at 25.
290. *See id.*
291. *See* Commission Decision, *supra* note 14, ¶¶ 107-24.
292. *See* Kolasky, *supra* note 1, at 15.
293. *See id.* at 14-15 n.39.
294. *See* Commission Decision, *supra* note 14, ¶¶ 530-33.

strengthening Honeywell's dominance, and to maintain GE CAS as a separate legal identity.[295] The stated reason for this refusal was that there was no manner of ensuring that GE and Honeywell kept their word because the Commission does not have jurisdiction over ex-post occurrences.[296] This idea, however, is profoundly flawed in principle. When parties are willing to cooperate and their cooperation will effectively cure the problems complained of by the Commission, the Commission should embrace a voluntary solution, rather than force parties to abandon a merger that has been costly both in terms of time and money. This is especially so in a case where the Commission's predictions of harm are so vague.[297]

These flaws make the European system unpredictable and vulnerable to accusations of political motivation.[298] Despite these substantial flaws, however, the basic theory that conglomerate mergers can have a negative effect on competition in a wide range of markets is an idea with merit. The American system of merger review has created a system that effectively gives carte blanche approval to firms without direct horizontal ties to each other.[299] Just as the European system erroneously assumes that efficiencies will lead to anti-competitive conditions, the American system creates a similar assumption, that efficiencies will cure all competitive concerns caused by these mergers.[300]

VII. CONCLUSION

The *GE/Honeywell* case has sparked a great deal of debate over whether the European system of evaluating conglomerate mergers has any true anti-competitive merit. Although there were several flaws in the reasoning of the case, the theory behind conglomerate effects remains sound. American antitrust theory, motivated by the continuous quest for efficiency in competition, appears blind to this reality.[301] It can only be hoped that with the recent first meeting of the GCN, American and European authorities will be willing to compromise on this issue, not only to protect the much vaunted efficiency of the free market, but to protect the every day consumers who want to fly from Chicago to Brussels, not *via* economic

295. *See id.*

296. *See id.* ¶ 532.

297. *See supra* notes 280-85 and accompanying text.

298. *See supra* note 253 and accompanying text.

299. *See supra* Part IV.

300. *See supra* notes 234-36 and accompanying text.

301. *See* Kolasky, *supra* note 1, at 5. "The goal is efficiency, not competition. The ultimate goal is that there be efficiency." *See id.* (quoting Lawrence H. Summers, *Competition Policy in the New Economy*, 69 ANTITRUST L.J. 353, 358 (2001)).

theory, but on a good old fashioned Boeing 737.[302]

Lisa M. Renzi

302. At the publishing of this comment, the Global Competition Network has been officially named the "International Competition Network." Its Inaugural Conference was held on September 28-29, 2002. More information on the International Competition Network's Merger Working Group can be found at http://www.internationalcompetition network.org/.

NOTES

Does "Any" Mean "All" or Does "Any" Mean "Some"? An Analysis of the "Any Court" Ambiguity of the Armed Career Criminal Act and Whether Foreign Convictions Count as Predicate Convictions

I. INTRODUCTION

Let all the laws be clear, uniform and precise:
to interpret laws is almost always to corrupt them.[1]

Any: "[O]ne or some indiscriminately of whatever kind .... [O]ne, some, or all indiscriminately of whatever quantity .... [U]nmeasured or unlimited in amount, number, or extent."[2] Any: "A flexible word."[3] Any: "**In Legislation**. *Any* is greatly overworked in statutes <if any person shall commit any action upon any other person>. Usually, replacing *any* with the indefinite article *a* or *an* results in heightened readability with no change in meaning."[4]

The definition of "any" is the subject of a current federal circuit split. The Tenth Circuit translates "any" to mean "some,"[5] and the Fourth and Sixth Circuits take the opposite view that "any" means "all."[6] District courts have followed both interpretations.[7] The reason for the split is the

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1. Voltaire, A DICTIONARY OF LEGAL QUOTATIONS 19 (Simon Jones & Chantal Stebbings, eds., 1987).

2. WEBSTER'S NINTH COLLEGIATE DICTIONARY 93 (9th ed. 1983).

3. BALLENTINE'S LAW DICTIONARY 80 (3d ed. 1969).

4. A DICTIONARY OF MODERN LEGAL USAGE 65 (2d ed. 1995) (emphasis in original).

5. *See* United States v. Concha, 233 F.3d 1249, 1256 (10th Cir. 2000).

6. *See* United States v. Atkins, 872 F.2d 94, 96 (4th Cir. 1989), *cert. denied*, 493 U.S. 836 (1989); United States v. Winson, 793 F.2d 754, 757 (6th Cir. 1986).

7. *See* United States v. Chant, No. CR 94-0185, 1997 WL 231105 (N.D. Cal. Apr. 4, 1997), *aff'd*, 201 F.3d 445 (9th Cir. 1999) (following the Sixth Circuit); Bean v. United

Armed Career Criminal Act (hereinafter the ACCA), which provides for sentence enhancement, and a preceding section referenced within the ACCA, which provides for felony possession.[8] Both of these sections apply to a person who has previous convictions in "any court."[9] Predicate convictions are then used to either enhance the current sentence[10] or to prevent firearm ownership by the convicted party.[11] The courts are trying to determine whether "any court" includes predicate convictions from foreign courts or whether Congress intended to exclude foreign courts so that the sections pertain only to predicate *domestic* convictions.[12]

The purpose of this Note is to analyze this circuit split. This Note will review the legislative history of the ACCA and the preceding felony possession provision, and will then review case law regarding the split.[13] This Note will then focus on the legal issues and policies that may encompass interpretation of the ACCA in regards to Congress' intentions—whether foreign convictions and courts were meant to be covered in the language of both sections.[14] Finally, after close examination of these procedures, policies and legal issues, this Note will conclude that the Fourth and Sixth Circuits have properly interpreted the ACCA and the preceding felony possession statute, and that they *are* both meant to encompass convictions from foreign jurisdictions.[15]

States, 89 F. Supp. 2d 828 (E.D. Tex. 2000), *aff'd*, 253 F.3d 234 (5th Cir. 2001) (following the Tenth Circuit and rejecting the Sixth Circuit's reasoning); *cert. granted*, 534 U.S. 1112 (2002); United States v. Small, 183 F. Supp. 2d 755 (W.D. Pa. 2002) (following the Fourth and Sixth Circuits).

8. *See* 18 U.S.C. § 924(e)(1) (1986) (referencing 18 U.S.C. § 922(g)(1)).

9. *See id.* §§ 922(g)(1) and 924(e)(1) (by reference to § 922(g)(1)).

10. *See id.* § 924(e)(1) (2000).

11. *See id.* § 922(g)(1) (2000).

12. *See* United States v. Concha, 233 F.3d 1249 (10th Cir. 2000); United States v. Atkins, 872 F.2d 94 (4th Cir. 1989), *cert. denied*, 493 U.S. 836 (1989); United States v. Winson, 793 F.2d 754 (6th Cir. 1986); *Chant*, 1997 WL 231105, *aff'd*, 201 F.3d 445 (9th Cir. 1999); *Bean*, 89 F. Supp. 2d 828; *Small*, 183 F. Supp. 2d 755.

13. *See Concha*, 233 F.3d at 1255-56; *Atkins*, 872 F.2d at 96; *Winson*, 793 F.2d at 757; United States v. Chant, No. CR 94-0185, 1997 WL 231105, at *2 (N.D. Cal. Apr. 4, 1997), *aff'd*, 201 F.3d 445 (9th Cir. 1999); *Bean*, 89 F. Supp. 2d at 837; *Small*, 183 F. Supp. 2d at 757-59.

14. *See infra* Part IV.

15. *See infra* Part V.

II. THE ARMED CAREER CRIMINAL ACT AND 18 U.S.C. § 922(G)(1)

With all the law's faults it had one great virtue.
It was there.[16]

Section 1202(a) of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968 was enacted to preclude certain types of people from owning firearms and to provide sentencing provisions for those found in violation of the statute.[17] Section 1202(a) reads:

> Any person who—
> (1) has been convicted by a court of the United States or of a State or any political subdivision thereof of a felony, or
> (2) has been discharged from the Armed Forces under dishonorable conditions, or
> (3) has been adjudged by a court of the United States or of a State or any political subdivision thereof of being mentally incompetent, or
> (4) having been a citizen of the United States has renounced his citizenship, or
> (5) being an alien is illegally or unlawfully in the United States,
> and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both.[18]

The ACCA was added as a second sentence in § 1202(a)(5) in 1984 and provided for stricter sentences for a felon convicted three times in *any* court referred to in paragraph (1) for robbery or burglary, or both.[19]

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16. Arthur Hailey, A DICTIONARY OF LEGAL QUOTATIONS 92 (Simon James & Chantal Stebbings, eds., 1987).

17. *See* 18 U.S.C. app. § 1202(a) (1970 & Supp. II 1985) (repealed 1986). For further discussion of the purposes of the ACCA, see *infra* notes 145-98 and accompanying text.

18. Id.18 U.S.C. app. § 1202(a).

19. *See* Pub. L. No. 98-473, 98 Stat. 2185 (1984), *reprinted* in 1984 U.S.C.C.A.N. Section 1202(a) now concludes:

> ...
>
> (5) being an alien is illegally or unlawfully in the United States, and who receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both. *In the case of a person who receives, possesses, or transports in commerce or affecting commerce any firearm and who has three previous convictions by any court referred to in paragraph (1) of this subsection for robbery or burglary, or both, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and,*

Two years after the enactment and addition of the ACCA into § 1202(a), the section was repealed and immediately reenacted into the Firearms Owners' Protection Act of 1986 (hereinafter FOPA).[20] The basic language of the old § 1202(a) was amended and split into two separate sections within FOPA.[21]

During the repeal of § 1202(a) and its quasi-reenactment into FOPA, the ACCA adopted the language that was already present in the felony possession statute therein.[22] This adoption created the present controversy that resulted in the current circuit split.[23] The controversial change is the ACCA's referenced felony possession statute found in the first subsection, § 922(g). The language reads "[i]t shall be unlawful for any person—(1) who has been convicted in *any court* of, a crime punishable by imprisonment for a term exceeding one year."[24] The ACCA, reenacted into § 924(e)(1), adopted this change by referencing the court identified in

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notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under this subsection, and such person shall not be eligible for parole with respect to the sentence imposed under this subsection.

18 U.S.C. app. § 1202(a) (1968 & Supp. II 1985) (emphasis added).

20. The first sentence of § 1202(a) was effectively "reenacted" into 18 U.S.C. § 922(g), and the ACCA was actually reenacted into § 924(e)(1) (1986). *See* H.R. REP. NO. 99-495 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1327, 1349-52. For a discussion of why the Act was repealed, see *infra* note 185 and accompanying text.

21. *See* H.R. REP. NO. 99-495 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1327, 1349-52.

22. *See* 18 U.S.C. § 924(e)(1) (2000).

23. Enactment of the ACCA has caused many other language controversies. *See generally, e.g.*, Jill C. Rafaloff, *The Armed Career Criminal Act: Sentence Enhancement Statute or New Offense?*, 56 FORDHAM L. REV. 1085 (1988) (discussing whether the ACCA created a new federal offense or is a sentence enhancement statute); Cynthia R. Cook, *The Armed Career Criminal Act: A Federal Sentence Enhancement Provision*, 12 GEO. MASON L. REV. 99 (1989) (discussing circuit court split on the issue of whether the ACCA created a new crime or is a sentence enhancement provision); Derrick D. Crago, *The Problem of Counting to Three Under the Armed Career Criminal Act*, 41 CASE W. RES. L. REV. 1179 (1991) (discussing whether courts should use the "criminal episodes approach" or the "intervening convictions approach" to satisfy the three felonies requirement under the ACCA); James E. Hooper, *Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act*, 89 MICH. L. REV. 1951 (1991) (discussing how to count convictions under ACCA); Jondavid S. DeLong, Annotation, *What Constitutes Three Previous Convictions for Offenses Committed on Occasions Different from One Another for Purpose of Sentence Enhancement Under Armed Career Criminal Act (18 U.S.C.S. § 924(e))*, 123 A.L.R. FED. 397 (1995 & Supp. 2000); Francis M. Dougherty, Annotation, *What Constitutes "Use" of Firearm for Purposes of 18 U.S.C.S. § 924(c)(1), Providing Penalty for Use of Firearm During Drug Trafficking Crime or Crime of Violence*, 125 A.L.R. FED. 545 (1995).

24. 18 U.S.C. § 922(g) (Supp. IV 1986) (emphasis added).

§ 922(g)(1), as it once referenced the court identified in the old § 1202(a)(1).[25] The language in § 922 that is referenced currently fails to identify a specific court, such as a court of the United States or of a State or of a political division thereof.[26] It merely refers to *any* court.[27]

In summary, Congress adopted the "new" language found in § 922 for the ACCA.[28] The language that the ACCA references changed from "a court of the United States or of a State or any political subdivision thereof of a felony"[29] to "any court of, a crime punishable by imprisonment for a term exceeding one year."[30] The intent of Congress thus becomes important as to whether it intended the felony possession statute codified in § 922(g), and consequently the ACCA in § 924(e)(1), to include foreign courts in the statute or just the Federal and State Courts that were previously identified in § 1202(a).

Courts have since addressed this question, and, in doing so, have come to completely opposite conclusions as to the intent of Congress. Therefore, the question remains whether or not to allow a court to use foreign convictions to enhance sentences.[31] Appellate Courts have thus left trial courts and defendants with more questions than answers.[32]

III. CASE LAW

Laws are a dead letter without courts to expound and define their true meaning and operation.[33]

The new language adopted by the ACCA in its preceding felony possession section has caused a circuit split between the Tenth Circuit and

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25. *See id.* § 924(e)(1). This section now provides:

> 1. In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined not more than $25,000 and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

Id.

26. *See id.* § 922(g)(1).

27. *See id.*

28. *See id.* § 924(e)(1).

29. *Id.* § 1202(a) (Supp. III 1985) (repealed 1986).

30. *Id.* § 922(g)(1).

31. *See infra* Part III.

32. *See infra* Part III.

33. Alexander Hamilton, A DICTIONARY OF LEGAL QUOTATIONS 28 (Simon James & Chantal Stebbings, eds., 1987)

the Fourth and Sixth Circuits.[34] The split is centered on whether a court can use foreign convictions to either enhance a sentence under the ACCA, or use them as prior felonies under § 922(g)(1).[35] Because the ACCA references § 922(g)(1), discussion of one provision necessarily involves discussion of the other.[36]

A. The Sixth Circuit

The Sixth Circuit was the first to squarely address the issue in *United States v. Winson*.[37] This case is significant because it was decided in the period between the enactment of the ACCA provision in § 924(e)(1) of Title 18 of the U.S.C., the repeal of the same language in § 1202(a), and the adoption of the different language in § 922(g)(1).[38] This afforded the court the unique opportunity to compare and contrast the two statutes' troublesome language.[39] The court first reviewed the trial judge's decision to disallow the government to use the prior foreign convictions of the defendant.[40] The trial court concluded that "Congress could not have intended such an inequitable application of [§ 922(h)]."[41] The inequitable

34. *See supra* notes 5-12 and accompanying text.

35. *See* United States v. Concha, 233 F.3d 1249 (10th Cir. 2000); United States v. Atkins, 872 F.2d 94 (4th Cir. 1989), *cert. denied*, 493 U.S. 836 (1989); United States v. Winson, 793 F.2d 754 (6th Cir. 1986); United States v. Chant, No. CR 94-0185, 1997 WL 231105 (N.D. Cal. Apr. 4, 1997), *aff'd*, 201 F.3d 445 (9th Cir. 1999); Bean v. United States, 89 F. Supp. 2d 828 (E.D. Tex. 2000), *aff'd*, 253 F.3d 234 (5th Cir. 2001), *cert. granted*, 534 U.S. 1112 (2002); United States v. Small, 183 F. Supp. 2d 755 (W.D. Pa. 2002).

36. *See* 18 U.S.C. § 924(e)(1). "In the case of a person who violates section 922(g) of this title ...." *Id.*

37. 793 F.2d 754. The defendant was a citizen of Zimbabwe and moved to the United States in 1976, becoming a resident alien and subsequently a naturalized citizen in 1985. *See id.* at 756. He was indicted for unlawful receipt of firearms and the making of false statements in order to obtain firearms. *See id.* at 755. The government sought to use two previous convictions as predicate offenses for felony possession after he purchased several guns from a dealer without disclosing those convictions. *See id.* at 756. The predicate foreign offenses included a 1970 Argentinean conviction for possession of counterfeit U.S. currency, and a 1976 Swiss conviction for fraud. *See id.*

38. *Winson* was argued on October 24, 1985 and decided on June 18, 1986. *See Winson*, 793 F.2d at 754. Both sections of Title 18 of the United States Code (§§ 922 and 924) were enacted in their new forms on May 19, 1986. *See* 18 U.S.C. § 922 (2000). 18 U.S.C. § 1202(a) was repealed on November 15, 1986. *See* 18 U.S.C. § 1202(a) (Supp. III 1985) (repealed 1986).

39. *See Winson*, 793 F.2d at 756-58. The court actually refers throughout the decision to § 922(h) of Title 18, which has not been discussed in this Note. This section references § 922(g) in the same way as the ACCA, and is therefore an appropriate substitute. *See Winson*, 793 F.2d at 756-58.

40. *See id.* at 756.

41. United States v. Winson, 793 F.2d 754, 756 (6th Cir. 1986).

application it referred to was a worse case scenario of the required recognition of the crimes of political prisoners in Poland or those judged in violation of a military tribunal in Nicaragua.[42] The trial court determined that this forced recognition could not have been what Congress intended; thus, an interpretation of "any court" demanded a resolution in favor of the defendant.[43] The trial court also stated that it would be guided in part by the "well-established maxim that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'"[44] The same court cautioned that this general rule is not to be used to circumvent legislative intent but rather when a court is uncertain about a statute's meaning.[45]

The Sixth Circuit Court of Appeals began its analysis by commenting on the lack of legislative history pertaining to the meaning of "in any court."[46] It concluded that because the language was not as specific as the language in § 1202(a), which clearly stated to what courts it applied, it was equally evident that qualifying predicate convictions were not intended by Congress to be limited only to those obtained in a court of the United States or a state or political subdivision thereof.[47] The little history that exists led the court to conclude that it should support a finding that there is no ambiguity.[48] The history used by the court included an inquiry by Senator Dodd as to whether Title VII would substitute Title IV. The reply of the amendment's sponsor, Senator Long, was that it would *add* to it and take nothing away.[49] The court noted that things proceeded in a similar manner in the House of Representatives where Representative Machen made it clear that "the amendment would complement ... the gun-control legislation contained in Title IV."[50] The court then surmised that had the legislature intended the bills to overlap, it would not have indicated the purpose of the amendment to be that of a complement, but rather that of a substitute.[51]

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42. *See id.*

43. *See id.*

44. *Id.* (listing Rewis v. United States, 401 U.S. 808 (1971); Whalen v. United States, 445 U.S. 684 n.10 (1980); United States v. Dalpiaz, 527 F.2d 548, 552 (6th Cir. 1975)).

45. *See Winson*, 793 F.2d at 756. (referencing Perrin v. United States, 444 U.S. 37, 49-50 (1979)).

46. *See id.* at 757. "We agree with the trial court that an examination of the legislative history of Title IV [of the Omnibus Crime Control and Safe Streets Act of 1968] reveals no discussion of the actual meaning of the phrase "in any court." *Id. See also infra* Part IV for further discussion of legislative history.

47. United States v. Winson, 793 F.2d 754, 757 (6th Cir. 1986).

48. *See id.*

49. *See id.* (citing 114. CONG. REC. 14774 (1968)).

50. *Id.* (citing 114 CONG. REC. 16286 (1968) (statement of Rep. Machen)).

51. *See id.*

The court was also not persuaded that application of the statute would be in any way inequitable either in its application or on its face.[52] Therefore, although the trial court had been concerned with a "parade of horribles," the appellate court did not appear to be as concerned.[53] In fact, the court could see no reason why the commission of a crime in another country would make an individual less dangerous than one whose crimes were committed in the United States.[54] It also concluded that the statute itself allowed the defendant to be granted relief where an applicant could show that "the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of relief would not be contrary to the public interest."[55] The court concluded that this provision was clearly intended to allow a defendant to clear his name before obtaining a firearm. The court was not claiming that the statute should apply to him when he was caught in possession of a weapon again.[56] The

52. *See id.*

53. United States v. Winson, 793 F.2d 754, 757-58.

54. *See id.* at 758. The court also discussed that the defendant failed to point out any particular reason as to how the convictions in Argentina and Switzerland were the result of any violation of his civil rights or contrary to any "cherished principle of American constitutional law." *Id.* at 757. A survey of Argentinean law shows that it is possible that there could have been a violation, if not in this case, in others. *See* LEGAL TRADITIONS AND SYSTEMS, AN INTERNATIONAL HANDBOOK 199 (Alan N. Katz ed., 1986). Argentinean law is civil law inherited from Spain, France, and Italy and has evolved over the time of its independence. *See* LAW AND JUDICIAL SYSTEMS OF NATIONS 34 (Charles S. Rhyne ed., The World Peace Through Law Center, 3d ed. 1978). Although it is considered one of the most industrialized nations in the world, Argentina has a political history and has demonstrated that it can at times have ample disregard for the law. *See id.* Included in this disregard for the law was the overturn of the "leftest terrorist" government in the early 1980s that came at the cost of thousands of missing people spirited away in the night without trial. *See id.* at 201. It capped a "crucial period that witnessed an almost total disregard for the rule of law (especially human rights), as protected under [Argentina's] Constitution." *Id.* Since then, the legal system in Argentina has seemingly begun to return to a position of importance in a democratic system. *See id.* However, the Argentinean Supreme Court often still dismisses an appeal with a constitutional issue on the grounds that it involves only a procedural issue and not a substantive federal question suitable for review by the highest court. *See* Alejandro D. Carrió & Alejandro M. Garro, *Argentina, in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY 6 (Craig M. Bradley ed., Carolina Academic Press 1999). The "long-standing tradition of non-review [during the rule of the military government] explains the relative paucity and analytical shortcomings of Argentine constitutional jurisprudence over significant areas of due process." *Id.* So it seems that it may be possible that Winson's convictions, or at least some criminal convictions in Argentina, have violated "cherished principles of American constitutional law." *Winson*, 793 F.2d at 757.

55. *Winson*, 793 F.2d at 758 (quoting 18 U.S.C. § 925(c)).

56. *See id.* The court also said that the statute meets Congress' broad purpose to "keep

court finally held that predicate felonies from a foreign jurisdiction were meant to be included in the provision "any court." Thus, the court remanded the case back to the trial court with directions to reinstate the conviction.[57]

B. The Fourth Circuit

Three years after the *Winson* case, the next court to address the ambiguity was the Fourth Circuit in *United States v. Atkins*.[58] The defendant again argued in this case that § 922(g) was sufficiently ambiguous in its reference to "any court" and that the court should apply

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firearms away from the persons classified as potentially irresponsible and dangerous." *Id.*

57. *See id.* at 759. Before reaching this conclusion, the court also discussed a policy statement issued by the Bureau of Alcohol, Tobacco and Firearms (hereinafter the BATF) in 1974 interpreting the section as being inapplicable to foreign convictions. *See id.* at 758. The court noted during this discussion that neither of these documents had the effect of an administrative regulation or a published rule and were therefore not binding on the court. *See id.* It was noted that the government did not dispute the interpretation of the position of the BATF, but stated its position had changed as of July 30, 1984, when the BATF was advised by the Director of Enforcement and Operations, Steven Higgins. Higgins had suggested to "reverse its position so as to 'acknowledge the Federal firearms and explosives disabilities of persons who have been convicted in foreign courts of a crime punishable by imprisonment for a term exceeding 1 year.'" *Id.* (quoting a memorandum from Mr. Higgins to the Assistant Secretary of the Treasury for Enforcement and Operations. This is an internal document, as was the previous statement initially announcing the BATF's policy). Particularly interesting are the reasons given by the Director of the BATF's Technical Division in its original policy statement interpreting the statute as not including foreign convictions:

1. Foreign law does not, in the majority of instances, give the protections to our citizens that they are afforded under our system of justice.
2. There is difficulty in interpreting foreign law with respect to the specific offense charged.
3. There is extreme difficulty in obtaining adequate documentation of a foreign conviction.

Id. at 759.

58. 872 F.2d 94 (4th Cir. 1989), *cert. denied*, 493 U.S. 836 (1989). The defendant in this case had been convicted of unlawful possession of a firearm with intent to endanger life in 1981 by the Crown Court of Croydon, England. *See id.* at 95. He was sentenced to a term of five years and was released and deported to the United States. *See id.* In 1987 he was arrested for using a false Army identification card to obtain a car sticker entitling him to entrance into the Fort Myer Army Base in Virginia. *See id.* The Military Police who searched him incident to that arrest found a Smith and Wesson .38-caliber pistol fastened to his ankle. *See id.* He was indicted for violation of § 922(g) and pled guilty, reserving the issue of whether his conviction in England counted as being by "any court" as required in the statute. *See id.*

the concept of lenity as it applies to criminal cases.[59] The defendant argued that the court should then find that his predicate English conviction should not count as a predicate offense.[60] In a very short decision, the court decided that it was favorably impressed by the reasoning in *Winson* that the scant legislative history of § 922 offers no illumination or injects no uncertainty into Congress' intended meaning of the wording.[61] The court concluded that "considering the plain meaning of the subject language, Atkin's conviction appears to satisfy the requirements of the statute. 'Any' is hardly an ambiguous term, being all-inclusive in nature."[62] When a term

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59. *See id.* at 95-96. The concept of lenity only applies in criminal statutes. *See* Rewis v. United States, 401 U.S. 808, 812 (1971). It is a well-established maxim that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Id.* This maxim is applied when a court is uncertain about a statute's meaning. *See id.* It is not meant to be a tool to circumvent legislative intent. *See id.* When the maxim is applied, courts should "not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." United States v. Diaz, 989 F.2d 391, 393 (10th Cir. 1993).

60. *See Atkins*, 872 F.2d at 96.

61. *See id.*

62. *Id.* The court also noted, here and in an earlier footnote of its opinion, that the defendant had not suggested that the English conviction was the "result of the violation of [his] civil rights or contrary to any cherished principle of American constitutional law." *Id.* at 96 n.1 (quoting United States v. Winson, 793 F.2d 754, 757 (6th Cir. 1986)). The court also remarked:

> Atkins suffered the misfortune of violating foreign law in England, the country that provides the origin or antecedent of the jurisdictional system employed in the United States of America. We here deal with a system of common law and statutes refining it which obtains in England and America alike.

Id. Like American law, its ascendant, English law is based on common law, equity, and statutes, as well as some European Union Law. *See* LAW AND JUDICIAL SYSTEMS OF NATIONS, *supra* note 54, at 802. Although it is the foundation for law in the United States, the court in *Atkins* may not be aware that there may be constitutional violations in the eyes of an American court. There is neither an entrenched constitution nor constitutional Bill of Rights. *See* David J. Feldman, *England and Wales*, *in* CRIMINAL PROCEDURE: A WORLDWIDE STUDY 91 (Craig M. Bradley ed., Carolina Academic Press 1999). This has allowed Parliament to progressively expand police powers and has also limited the protection of criminal defendants in criminal proceedings. *See id.* For example, a defendant questioned prior to being charged is told that he/she has the right to remain silent, but is also told that failing to mention anything later relied upon in court may harm that defense. *See id.* at 109. In addition to this, failure to explain incriminating items in a defendant's possession to the arresting officer allows the court to draw any inferences that seem proper from the failure, although there must also be other evidence from which to convict. *See id.* A caveat to this is that the police officer must have told the defendant what he was investigating and also explained that the evidence implicates the suspect and that the interview may be used as evidence against him. *See id.* While at first glance English law certainly seems the same, there may be more imperceptible differences that are questionable as far as American

is unambiguous, as the court determined here, the principle of lenity is inapplicable.[63] Therefore, the *Atkins* court affirmed the decision of the lower court to use the English conviction as a predicate felony for the purposes of § 922(g).[64]

C. District Courts

Before the Tenth Circuit addressed the ambiguity of § 922 and created the circuit split, there were several district courts that did the same.[65] The first court to address the ambiguity was the Northern District of California in *United States v. Chant*.[66] The defendant in *Chant* argued that his foreign convictions could not count as predicate offenses under the "any court" language set out in § 922(g).[67] The reasoning of *Winson* and *Atkins* that the statutory language was unambiguous persuaded the *Chant* court, and it thus held that the principle of lenity should not apply.[68] The *Chant* court was also persuaded by the Ninth Circuit, who had earlier ruled in *United States*

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constitutional principles are concerned. Even though they are not necessarily egregious, they are different, and in the United States may be violations of the Constitution. *See id.*

63. *See Atkins*, 872 F.2d at 96 (citing United States v. Turkette, 452 U.S. 576, 587-88 n.10 (1981)).

64. *See id.*

65. *See* United States v. Chant, No. CR 94-0185, 1997 WL 231105 (N.D. Cal. Apr. 4, 1997), *aff'd*, 201 F.3d 445 (9th Cir. 1999) (following the Sixth Circuit); Bean v. United States, 89 F. Supp. 2d 828 (E.D. Tex. 2000), *aff'd*, 253 F.3d 234 (5th Cir. 2001) (following the Tenth Circuit and rejecting the Sixth Circuit's reasoning), *cert. granted*, 534 U.S. 1112 (2002).

66. 1997 WL 231105. The defendant in this case was indicted in California by two different grand juries for two separate conspiracies, numerous narcotics offenses, and being a felon in possession of a firearm under § 922(g). *See id.* at *1. In indicting the defendant on the felony possession charge, the government used the defendant's convictions in Ontario, Canada for "Possession of a Narcotic for the Purpose of Trafficking, Possession of a Narcotic, and Possession of a Weapon." *Id.* The defendant also had convictions for "Possession of a Controlled Substance" in Dover, England in 1990 and for "Possession of a Weapon" in Toronto, Canada in 1976. *See id.* at *5.

67. *See id.* at *1. Interestingly, the defendant also argued that he could not be convicted under § 922(g)(1) because his civil rights had been restored under operation of Canadian law. *See id.* at *2. The defendant claimed that this occurred because he was never deprived of his civil rights under foreign law. *See id.* However, the court noted that he was in fact deprived of his right to vote in Canada, as a British citizen, while incarcerated. *See id.* at *3 n.2. The defendant's argument was that this indicated that his civil rights were restored when he was later allowed to vote. *See id.* In fact, the government argued, he was never given the rights in the first place as he had not resided in Ontario for the required residential waiting period, and therefore the rights had not been restored, but merely initially granted. *See id.* at *4. The court found this to be a factual dispute that could not be addressed under a motion to dismiss a count contained in an indictment. *See id.*

68. *See id.* at *2.

v. McDonald[69] that a "defendant's conviction of a military offense in a general court-martial fell within the statutory language of § 922.[70] In reaching this decision, the *McDonald* court held that a general court-martial was within the meaning of "any court" and it was "consistent with the statutory purpose, 'to keep guns out of the hands of presumptively risky people.'"[71]

Chant also contended that the rationale behind *Winson* and *Atkins* was now flawed.[72] He believed that the decisions were based on the relief granted under § 925(c) of the same act, which was now deemed repealed due to lack of funding.[73] Chant claimed this repeal undermined *Winson* and *Atkins* because the courts had reasoned that the defendants in those cases could take advantage of the procedure in § 925(c) to "obtain relief from the disability of owning a firearm."[74] The *Chant* court did not agree with the defendant's analysis, however, stating that the two previous courts had not

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69. 992 F.2d 967 (9th Cir. 1993).

70. *See Chant*, 1997 WL 231105, at *2 (finding support from *McDonald*, 992 F.2d 967).

71. *McDonald*, 992 F.2d at 970 (citing Dickerson v. New Banner Inst., Inc., 460 U.S. 103 (1983)). The Seventh Circuit made similar findings as the *McDonald* court in *United States v. Martinez*, 122 F.3d 421 (7th Cir. 1997). *Martinez* involved a defendant who had prior convictions in a military court for housebreaking and burglary. *See id.* at 424. The defendant claimed that the term "any court" in § 922(g) did not include a military court. *See id.* The Seventh Circuit reasoned that:

> we find nothing that defines or limits the term "court," only a requirement that a conviction have been "in any court" in the course of prohibiting possession of firearms by a felon. Certainly "any court" includes a military court, the adjective "any" expanding the term "court" to include "one or some indiscriminately of whatever kind"; "one that is selected without restriction or limitation of choice"; or "all."

Id. (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 1991). *See also* United States v. Stuckey, 220 F.3d 976, 984 (8th Cir. 2000) (holding that the court in *Martinez* had decided correctly and that the term "any court" is not ambiguous and does include military courts), *appeal after remand*, 255 F.3d 528 (8th Cir. 2001), *cert. denied*, 122 S. Ct. 498 (2001) (holding that the court in *Martinez* had decided correctly and that the term "any court" is not ambiguous and does include military courts).

72. United States v. Chant, No. CR 94-0185, 1997 WL 231105, at *2 (N.D. Cal. Apr. 4, 1997), *aff'd*, 201 F.3d 445 (9th Cir. 1999).

73. *See id.* As mentioned in the analysis of *Winson* above and in notes 55-56 and accompanying text, this section allowed an applicant under § 922 to petition to be granted relief from the provisions of the statute where the applicant is not likely to act in a dangerous manner. *See also* United States v. Winson, 793 F.2d 754, 758 (6th Cir. 1986) (quoting 18 U.S.C. § 925(c)). The U.S. Supreme Court will address whether relief *is* still available under this section during its October 2002 Fall Term. *See* United States v. Bean, 122 S. Ct. 917 (2002).

74. *Chant*, 1997 WL 231105, at *2.

based their decisions on the availability of relief, but on the lack of ambiguity in the statute.[75] The *Chant* court determined that the previous courts had merely discussed § 925(c) in order to dismiss an additional argument propounded by defendants that § 922 was inequitable, and not as a basis of their respective rulings.[76] The court also addressed the defendant's lack of acknowledgement of the Ninth Circuit's holding in *McDonald,*[77] that the statute's language was not ambiguous during its conclusion that a military court was included in the language.[78] As *McDonald* was decided two years after Congress denied funding to § 925(c), the court stated that the defendant's argument was weakened further as its own higher court had decided a case *after* the denial of funding of the relief statute and had cited, with approval, both *Winson* and *Atkins* in making its decision.[79] The *Chant* court concluded that if the Ninth Circuit had included military courts, then it would probably also include foreign courts, and, therefore, it was appropriate for them to do the same.[80]

The first court to decide that a foreign conviction cannot, as a de facto rule, serve as a predicate offense was the Eastern District of Texas in *Bean v. United States.*[81] The court began its analysis of § 922 by calling the reasoning of the Fourth and Sixth Circuits in *Winson* and *Atkins* flawed.[82] Those courts had stated that the commission of a crime elsewhere in the world would not be likely to make a person less dangerous than if

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75. *See id.*

76. *See id.* Although Congress had suspended funding to the BATF, it is argued that this merely changed a court's role in relief applications from reviewing denials to that of either granting or denying relief. *See* Ronald C. Griffin, *Obtaining Relief from Federal Firearms Disabilities: Did Congress Really Suspend the Relief Available to Felons Through Appropriations Acts?,* 23 OKLA. CITY U. L. REV. 977, 995 (1998).

77. 992 F.2d at 967. For discussion of the Ninth Circuit's holding, see *supra* notes 69-71 and accompanying text.

78. United States v. Chant, No. CR 94-0185, 1997 WL 231105, at *2 (N.D. Cal. Apr. 4, 1997), *aff'd,* 201 F.3d 445 (9th Cir. 1999).

79. *See id.*

80. *See id.*

81. 89 F. Supp. 2d 828 (E.D. Tex. 2000), *aff'd,* 253 F.3d 234 (5th Cir. 2001), *cert. granted,* 534 U.S. 1112 (2002). Thomas Bean, the petitioner in this case, was detained and charged with introduction of ammunition into Mexico after several rounds of ammunition were found in plain view in the back of his car as he and his assistants from his gun dealership crossed into Mexico for dinner after attending a gun show. *See id.* at 829. He was taken to jail and consequently sentenced to five years, serving his term in both a Mexican and American prison under a prisoner transfer treaty. *See id.* He petitioned the court for relief under § 925(c) to be allowed to own a gun once more. *See id.* at 830. Upon denial of the petition, he appealed, and at the same time he also appealed his Mexican conviction counting as a predicate felony. *See id.*

82. *See id.* at 837.

convicted in the United States.[83] The *Bean* court stated that "[t]he dangerous flaw in this reasoning is that a 'serious' crime in one country is not necessarily considered 'serious' in the United States."[84]

The *Bean* court was also the first court to be confronted with a conviction that could have violated due process of law regarding the manner in which Bean had been processed upon his arrest and subsequent conviction,[85] as well as a five-year prison term for carrying ammunition which the court felt was too severe.[86] The crime, the court said, was "hardly ... serious enough to take away an individual's right to possess a firearm."[87] The court concluded that this case was a perfect example of why § 922(g) "cannot be interpreted to mean 'any court in the world regardless of the severity of the crime or the due process [to] which the defendant was entitled during the defense of his case.'"[88]

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83. *See* United States v. Winson, 793 F.2d 754, 758 (6th Cir. 1986); United States v. Atkins, 872 F.2d 94, 96 n.1 (4th Cir. 1989).

84. *Bean*, 89 F. Supp. 2d. at 837.

85. *See id.* Mexican law requires a defendant to furnish a statement regarding the crime charged even if it is incriminating. *See id.* Bean could not read, speak, or understand the Mexican language and signed a statement that the Mexican officials had prepared without it being interpreted for him. *See id.* Bean found out later that he had signed a confession. *See id.* It was this confession that got him the five-year jail term. *See id.* The *Bean* court also noted that it is unclear as to whether Bean had an attorney while he was in Mexico. *See id.*

86. *See id.*

87. *Id.* at 838. The court here also recognized Mexico's right to make its own laws, but pointed out that since learning of Bean's conviction through the media, the Mexican legislators had changed the criminal statute to make the offense a misdemeanor. *See id.*

88. *Id.* Sentencing in foreign countries can be somewhat disparate to the United States as, of course, it is within each country's power to legislate for itself. This concerned Martha Kimes in her article on repeat offender statutes and the use of foreign convictions. *See* Martha Kimes, *The Effect of Foreign Criminal Convictions Under American Repeat Offender Statutes: A Case Against the Use of Foreign Crimes in Determining Habitual Criminal Status*, 35 COLUM. J. TRANSNAT'L L. 503 (1997). The *Bean* court seemed to agree, quoting Kimes' article at length. *See Bean,* 89 F. Supp. 2d at 838. Kimes' survey of state repeat offender statutes worries that:

> Because some countries display a much more punitive policy than others by criminalizing more behaviors and prosecuting violations of the law more aggressively, the use of foreign convictions ... invites arbitrary distinctions in punishment simply based on whether a defendant happens to have committed a prior crime in a country with strict, rather than lenient, policies.

Kimes, *supra*, at 519. This would lead to defendants being treated differently under American law. *See id.* Other concerns were that some convictions would be easier to discover than others, and that procedural concerns are automatically raised with the use of foreign criminal convictions. *See id.* These procedural concerns were further outlined in Kimes' article:

D. The Tenth Circuit

Three years after *Bean*, the Tenth Circuit decided *United States v. Concha*,[89] which contributed to the circuit split. The court began its analysis of § 922(g)(1) by stating that the section gives little guidance as to which courts would be included under the language "conviction by any court."[90] The court then looked to § 921(20) of the same title to "illuminate ... the scope of § 922(g)(1)."[91] Section 921 is the definitional section for the Chapter. The subsection that the court referred to provides:

> (20) The term crime punishable by imprisonment for a term exceeding one year does not include:
>
> (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or
>
> (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.
>
> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such

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> The American concept of due process is one that has slowly developed and evolved over many years, ultimately providing a large body of procedural safeguards that work together to guarantee an acceptable level of fairness in criminal trials. The whole system of due process protections that the American system provides amounts to more than just the sum of the individual procedural safeguards of which it is made. Although other countries have due process clauses in their constitutions and many countries provide criminal defendants with most of the same safeguards that the United States provides, no other system truly matches the rules that have been deemed necessary in the United States to protect both individual fairness and reliability of convictions.

Id. at 520-21.

89. 233 F.3d 1249 (10th Cir. 2000). The defendant was arrested after a domestic dispute escalated when he tried to use a police officer's gun against the officer. *See id.* at 1251. Concha was subsequently charged with intent to commit murder and assault with a dangerous weapon, use of a firearm, and being a felon in possession of a firearm. *See id.* The government sought to enhance his sentence under § 924(e) after he was convicted of the lesser counts. *See id.* They introduced evidence of four prior convictions. *See id.* The convictions included two for burglary, one for arson, and one for a "Lewd and Lascivious Act Involving Child Under 14." *Id.* The convictions for burglary and arson took place in the United Kingdom, the latter charge in California. *See id.*

90. *See Concha*, 233 F.3d at 1253.

91. *See id.* at 1253-54. 18 U.S.C. § 921 is the definitional section for Chapter 18 discussed in this Note.

> pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.[92]

The *Concha* court looked at the exclusion of certain federal and state crimes with no mention of similar foreign crimes as indicating that Congress did *not* intend to include foreign crimes at all.[93] The court stated that if § 922 *were* meant to cover foreign crimes, an "anomalous situation that fewer domestic crimes would be covered than would be foreign crimes would arise."[94] For example, the court noted, "someone who had been convicted of a U.S. antitrust violation would be allowed to possess a firearm, [while] someone convicted of a British antitrust violation would not be allowed to possess a firearm."[95] The court observed that there was no reason to believe that Congress would have intended this anomaly.[96]

After analyzing the definitional provision, the court reasoned that it provided some evidence that Congress intended § 922(g)(1), and thus § 924(e)(2), to cover only state and federal convictions.[97] "Therefore, when the Armed Career Criminal Act requires 'three previous convictions by any court referred to in § 922(g)(1),' it would exclude foreign convictions."[98]

The court then looked at the United States Sentencing Guidelines § 2K2.1 for further clarification.[99] This section enhances the penalty in cases where a defendant has one or two prior felony convictions of a crime of violence or a controlled substance offense and subsequently is charged with being a felon in possession of a firearm.[100] The court noted that this provision of the sentence guidelines applies only to such offenses "under *federal or state law.*"[101] Furthermore, it "comports with the general approach of the Guidelines, which is not to count foreign convictions in computing a defendant's criminal history."[102] The court highlighted a

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92. 18 U.S.C. § 921(20) (1999).

93. *See Concha*, 233 F.3d at 1254.

94. *Id.*

95. United States v. Concha, 233 F.3d 1249 (10th Cir. 2000). The court also noted in a footnote that in neither case would the previous conviction for an antitrust violation be used for sentence enhancement under the ACCA as it is not a violent felony or serious drug offense as needed for this provision to apply. *See id.* at 1254 n.2. The court then concluded that "it would make no sense to give § 922(g)(1) one interpretation when it is applied without reference to § 924(e)(1), and to give it a different interpretation when it is applied through § 924(e)(1)." *Id.*

96. *See id.*

97. *See id.*

98. *Id.* at 1254.

99. *See id.*

100. *See* United States v. Concha, 233 F.3d 1249, 1254 (10th Cir. 2000).

101. *Id.* (quoting U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 (1998)).

102. *Id.* (referencing § 4A1.2(h) for this proposition, but also referencing § 4A1.3(a)

possible resulting anomaly that would arise by not using "foreign convictions to enhance a felon-in-possession sentence when there are one or two prior convictions," but to require using it "when there are three previous convictions."[103]

The court concluded by reviewing the constitutionality of the predicate foreign convictions for use under the ACCA.[104] It determined that the *Winson* and *Atkins* courts had both dismissed constitutionality as an argument because the predicate foreign convictions of each of the defendants had been obtained fairly,[105] but it disagreed that this is so in most instances.[106] The *Concha* court was, therefore, reluctant to allow the use of foreign convictions because:

> [F]oreign criminal defendants are not necessarily given the same constitutional protections that we take for granted in this country. This concern would be a compelling reason to exclude previous foreign

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for the proposition that a court, using discretion, may use foreign convictions for enhancement).

103. *Id.* Another court to reference the United States Sentencing Guidelines as generally standing for the proposition that foreign convictions cannot be relied upon when imposing criminal punishment did so upon the defendant's contention. *See* United States v. Chant, No. CR 94-0185, 1997 WL 231105, *3 (N.D. Cal. Apr. 4, 1997), *aff'd*, 201 F.3d 445 (9th Cir. 1999). The *Chant* court dismissed this contention quickly by stating that the argument could not be sustained. *See id.* It stated that although the guidelines provide "that foreign convictions are not to be considered in computing the defendant's criminal history, that section specifically notes that foreign convictions *may* be considered in determining whether to depart from the guideline sentencing range pursuant to" § 4A1.3 ("Adequacy of Criminal History" Category). *See id.* (emphasis added). The second reason for its rejection of the defendant's contention was that other sections of the criminal code establish that Congress had found it appropriate to consider foreign convictions in some circumstances. *See id.* The court then gave some examples of this, including 21 U.S.C. § 841(b)(1)(A) and (B). *See Chant*, 1997 WL 231105, at *3. The court noted:

> 21 U.S.C. § 841(b)(1)(A) and (B) provide for enhanced penalties for an individual convicted of manufacturing or distributing a controlled substance, or for possessing a controlled substance with the intent to manufacture or distribute, where that individual has suffered a prior felony drug offense. Pursuant to 21 U.S.C. § 802(43), "the term felony drug offense means an offense that is punishable by imprisonment for more than one year *under any law of the United States or of a State or foreign country* that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances. 21 U.S.C. § 802(43) (emphasis added). The inclusion of paragraph 43 in the 1993 Amendments to § 802 demonstrates that Congress is receptive to relying upon foreign convictions in determining the proper criminal sentence to be imposed."

Id.

104. *See Concha*, 233 F.3d. at 1254.

105. *See id.* at 1256.

106. *See id.* at 1254.

> convictions if there were no mechanism for a defendant to challenge the validity of those previous convictions.[107]

However, the *Concha* court noted, it would be inappropriate to consider the constitutionality of the predicate offenses in the present hearing, given that the U.S. Supreme Court provided for the possibility of such a mechanism in *Custis v. United States*.[108] The Court did so, not in the form

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107. *Id.*

108. 511 U.S. 485 (1994). Although the defendant in *Custis* challenged the constitutionality of prior *state* convictions counting as predicate convictions, *Custis* was an important case for defendants' sentence enhancement under the ACCA with foreign convictions. *See id.* The *Custis* court held that defendants whose sentences were enhanced under the ACCA *cannot* collaterally attack the constitutionality of their prior convictions at the sentence enhancement stage (with the exception of those obtained in violation of the right to counsel). *See id.* In fact, the court held prior convictions are presumptively valid when they have not been set-aside on direct or collateral review. *See id.* at 492. A sentence that has been served may not be attacked in a direct habeas action. *See* United States v. Concha, 233 F.3d 1249, 1254. However, a defendant still in custody for previous convictions can raise a challenge that any such conviction was constitutionally deficient. *See* David G. Savage, *High Court Limits '3 Strikes' Challenges; Crime: Defendants Cannot Contest Validity of Prior Convictions*, LOS ANGELES TIMES, May 24, 1994, at 15A. The use of a prior conviction in enhancing a sentence for a subsequent conviction does not renew a defendant's status as "in custody." *See* Barry W. Strike, Custis v. United States*: Are Unconstitutional Prior Convictions Being Used to Increase Prison Terms?*, 25 GOLDEN GATE U. L. REV. 267, 282 (1995). As mentioned *supra* in this note, Custis did not challenge the constitutionality of predicate foreign convictions, but instead argued that two of his convictions from Pennsylvania and Maryland were unconstitutional due to inadequate assistance of counsel. *See Custis*, 511 U.S. at 488. In ruling that Custis could *not* challenge the constitutionality of his predicate state offenses at the ACCA sentencing hearing, the U.S. Supreme Court pointed to many other statutes in which express language provides for such an attack. *See id.* at 491-92. An example of a statute that does this, the court said, is 21 U.S.C. § 851(c) which was enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970. *See id.* Section 851 (c)(2) provides:

> A person claiming that a conviction alleged ... was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

Id. at 492 (quoting 21 U.S.C. § 851(c)(2) (1970)). The lack of similar language in the ACCA and § 922(g)(1) suggests, the Court reasoned, that Congress meant to provide no such mechanism in these sections. *See id.* The U.S. Supreme Court has also said that legislative history shows Senator Long's discussion of only "convictions" not of "valid" convictions, and "not a conviction not subject to constitutional challenge." Lewis v. United States, 445 U.S. 55, 62 (1980).

of a direct collateral attack on the predicate conviction in the sentence enhancement proceeding itself, but rather in the form of a habeas corpus attack.[109]

The *Concha* court noted it had previously held that *after* the previous sentence had been served, a defendant may bring a habeas corpus petition against the current sentence.[110] This could be possible because the sentence may be enhanced by a prior, unconstitutional conviction.[111] However, after a discussion of how this remedy may still be available to a defendant, the court dismissed it and suggested that a petition for habeas corpus in its case would be "of limited utility" even if still available to a defendant.[112] The reason the court gave for this was that the petition "could not be filed until after the defendant began serving the sentences."[113] This would in turn mean that the defendant might end up serving his sentence, or at least significant prison time, before review.[114] A further reason the court gave

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109. *See Concha*, 233 F.3d at 1254, 1256.

110. *See id.* at 1254.

111. *See supra* note 108 for a discussion of when a defendant may challenge the ACCA sentence. *See also Concha*, 233 F.3d at 1254 (quoting Gamble v. Parsons, 898 F.2d 117, 118 (10th Cir. 1990)). The *Concha* court also cited *United States v. Clark*, 203 F.3d 358, 364 (5th Cir. 2000), *vacated*, 532 U.S. 1005 (2001). In *Clark*, the court held that a conviction may be challenged under a habeas corpus petition even if the state whose conviction is being challenged is not a party to the current federal charge. *Clark*, 203 F.3d at 364-65. The context of the holding was at an ACCA sentencing hearing. *See id.* at 365-67. The defendant effectively sought to challenge his state convictions in federal court by challenging the enhancement of the sentence for his federal conviction during his ACCA hearing. *See id.* at 362. Upon review of *Clark*, the U.S. Supreme Court vacated the judgment and remanded the case to the United States Court of Appeals for the Fifth Circuit for further consideration in light of its decision in *Daniels v. United States*, 532 U.S. 374 (2001). *See* United States v. Clark, 532 U.S. 1005 (2001). In *Daniels*, the U.S. Supreme Court held that a defendant who was convicted and had his sentence enhanced under the ACCA and failed to pursue direct or collateral review while the alleged unconstitutional predicate conviction was open to attack in its own right, or had attacked the conviction unsuccessfully, was now without recourse. *See Daniels*, 532 U.S. at 376. Thus, the defendants in *Clark* or *Concha* would not be able to question the constitutionality of their prior state convictions if they had not attacked them previously. The *Daniels* court followed the *Custis* court and carved out an exception to this rule for cases where the defendant challenges the constitutionality of a previous offense obtained in violation of the right to counsel. *See Daniels*, 532 U.S. at 376. There are also several other cases preceding *Custis* that first carved out this exception. *See generally* D. Brian King, *Sentence Enhancement Based on Unconstitutional Prior Convictions*, 64 N.Y.U. L. REV. 1373 (1989).

112. *See Concha*, 233 F.3d at 1255.

113. *Id.*

114. *See id.* For example, the Court said that "if all the predicate convictions were foreign convictions obtained in an improper manner, and there were no other concurrent sentences, the defendant would not serve any time but for improper convictions." *Id.*

for dismissing the use of a habeas corpus petition was that it is often more difficult to attack a foreign conviction than to attack either a federal or state conviction, and the defendant would bear the burden of proving the unconstitutionality of the offense being attacked.[115] Records may be incomplete or may not be kept at all, and issues that the court would find constitutionally significant could possibly lack documentation.[116] Although the court dismissed the first concern in this case, indicating that Concha's sentence would be long enough to not be completed before review was possible,[117] the court stated that documentation from the United Kingdom on the predicate convictions did not appear to resolve the question.[118] Given these reasons, the court determined "[w]e are disinclined to infer that Congress intended to impose this burden absent a clear indication to the contrary."[119]

Finally, the court returned to an analysis of *Winson* and *Atkins* and, in doing so, recognized that the reasoning of the Fourth and Sixth Circuits, as well as its own reasoning, highlighted textual and policy arguments for both sides.[120]

> [T]here is a textual argument that § 924(e) covers foreign convictions ("any" means any), but there is a competing textual argument that it does not (the reference in § 921(20) to state and federal crimes). There are policy reasons to believe that Congress intended to include previous foreign convictions (foreign criminals are likely to be as dangerous as domestic criminals), but there are equally strong policy reasons to believe that Congress did not so intend (unfair foreign convictions can be challenged with difficulty, if at all).[121]

The court concluded that because arguments were strong on both sides, it must be guided by the principle of lenity[122] and held that Concha's sentence must be vacated and the matter remanded for resentencing.[123]

The *Concha* court was the last federal circuit court to review whether foreign convictions should count as predicate offenses for purposes of

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115. *See id.*

116. *See id.*

117. *See Concha*, 233 F.3d at 255 n.4.

118. *See id.* at 1255 n.5.

119. *Id.* at 1255.

120. *See id.* at 1255-56.

121. *Id.* at 1256.

122. *See id. See also supra* note 59 for a discussion on the principle of lenity.

123. *See Concha*, 233 F.3d at 1256. There is also a dissent in the case in which Circuit Judge Baldock argued that if Congress had wanted to restrict predicate convictions to state and federal convictions only, it would have done so. *See id.* at 1257. He concluded that the court has now made an unambiguous statute ambiguous. *See id.*

sentence enhancement under the ACCA.[124] There are many reasons that the courts have given for both embracing foreign convictions as predicate offenses and excluding them. The Fourth and Sixth Circuits have relied upon the current lack of identification of particular courts in the ACCA and § 922(g)(1).[125] These pro-use courts have determined this showed that qualifying predicate convictions were not intended by Congress to be limited to only those obtained in a court of the United States or a state or political subdivision thereof.[126] This was also indicated by legislative history that showed that the statutes were enacted and meant to run concurrently and complement each other.[127] The courts have also found the language to be unambiguous, contrary to claims raised by defendants and later courts.[128] Another reason that courts have given for upholding the use of predicate foreign convictions in sentencing under the ACCA or § 922(g)(1) was that the intent of the statute was to keep firearms out of the hands of dangerous criminals.[129] These criminals, the courts have

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124. Since *Concha*, another district court has followed the Fourth and Sixth Circuits and determined that § 922(g)(1) *was* meant to include foreign convictions. *See* United States v. Small, 183 F. Supp. 2d 755, 756-57 (W.D. Pa. 2002). The defendant in *Small* had a Japanese conviction that the government wanted to use as a qualifying prior conviction for possession of a firearm by a convicted felon. *See id.* at 757. Small argued that foreign convictions should not count as predicate felonies for the purposes of § 922(g), or, in the alternative, his Japanese conviction was unconstitutional and therefore it should not be used. *See id.* The court quickly dismissed the defendant's contention that foreign convictions could not be used, citing the courts in *Winson* and *Atkins*, agreeing with their reasoning and dismissing the reasoning in *Concha*. *See id.* at 757-60. The court then decided that it was necessary to undertake an analysis of the constitutionality of the Japanese conviction because the government wished to use it as an element of the offense of felony possession and thus it was important to address it now rather than in a habeas corpus petition. *See id.* at 762 & n.8. Small raised a number of constitutional challenges to his conviction in Japan. *See id.* at 765-66. These included the denial of bail, the denial of his right to a speedy trial, the inclusion of prejudicial hearsay in the trial transcript, the denial of his right to a jury trial, the denial of his right to effective counsel, and the denial of his right to remain silent. *See id.* at 766. The court dismissed each one of these contentions easily, relying on the fact that none of them were serious enough to render his conviction unfair. *See id.* at 766-70. Outside the scope of this Note is a body of case law surrounding the states' attempts to deal with the same issues as those found in federal courts. For an overview of state problems with foreign convictions, see generally Kimes, *supra* note 88.

125. *See* United States v. Winson, 793 F.2d 754, 757 (6th Cir. 1986).

126. *See id.*

127. *See id.* (citing 114 CONG. REC. 16286 (1968)).

128. *See* United States v. Atkins, 872 F.2d 94, 96 (4th Cir. 1989), *cert. denied*, 493 U.S. 836 (1989); United States v. Chant, No. CR 94-0185, 1997 WL 231105, at *2 (N.D. Cal. Apr. 4, 1997), *aff'd*, 201 F.3d 445 (9th Cir. 1999).

129. *See Winson*, 793 F.2d at 758; United States v. McDonald, 992 F.2d 967, 970 (9th Cir. 1993) (citing Dickerson v. New Banner Inst., 460 U.S. 103, 112 (1983)).

concluded, are no less dangerous because their convictions are foreign.[130] Finally, the courts identified a section of the legislation that allows relief in the form of a petition to disable the provision in certain instances.[131]

Courts that have determined that foreign convictions should not be included as predicate offenses under the ACCA and § 922(g)(1) have countered each of the arguments above with contrary reasoning. They have stated that criminals with convictions obtained in foreign jurisdictions are not necessarily as dangerous as those convicted in the United States due to disparity in crimes and sentencing internationally.[132] Foreign convictions may include sentences propounded upon a defendant abroad that seem severe to courts in this country.[133] Courts have also looked to definitional provisions and sentencing guidelines to aid in interpretation of the ACCA and § 922(g)(1).[134] The definitional provision quoted states, in part, that a "crime punishable by imprisonment for a term exceeding one year" does not include certain Federal or State offenses or any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.[135] Courts have taken this to mean that foreign convictions are not to be included since to do so would lead to a disparity in which foreign crimes could be considered where the same Federal or State counterpart is excluded.[136]

In addition to the drawbacks of using foreign convictions, anti-use courts have also touched on the availability of a petition of habeas corpus.[137] The courts have excluded the availability of habeas corpus because of the difficulty of challenging a foreign conviction and also the probability that the sentence would be over before a challenge could be completed.[138] In addition to this, the United States Supreme Court has ruled out challenging the ACCA sentence because it was based on a possible unconstitutional predicate conviction.[139] The Court ruled that a defendant must challenge the constitutionality of the predicate offense itself and not the ACCA sentence. If a defendant did not challenge the offense when it was possible, then he had no recourse.[140]

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130. *See Winson*, 793 F.2d at 758.

131. *See id.* (quoting 18 U.S.C. § 925(c)).

132. *See* Bean v. United States, 89 F. Supp. 2d 828, 837 (E.D. Tex. 2000), *aff'd*, 253 F.3d 234 (5th Cir. 2001), *cert. granted*, 534 U.S. 1112 (2002).

133. *See id.* at 838.

134. *See* United States v. Concha, 233 F.3d 1249, 1253-54 (10th Cir. 2000).

135. *See id.* (quoting 18 U.S.C. § 921(a)(20)(B) (1999)).

136. *See id.* at 1254.

137. *See id.*

138. *See id.* at 1255.

139. *See* Daniels v. United States, 532 U.S. 374, 376 (2001).

140. *See id.*

A final reason that these courts have given for not applying foreign convictions as predicate offenses under the ACCA is that of statutory interpretation, which the *Concha* court determined to be the most important factor.[141] The court acknowledged that there were contrasting textual arguments that foreign convictions count as predicate offenses.[142] In cases such as this where the court found the statute ambiguous, the court is guided by the principle of lenity toward the defendant and should find in his favor.[143]

Therefore, it seems important to courts seeking to interpret the ACCA to look to the legislative history of the provision for guidance. Unfortunately, legislative history, in this case, creates more questions than it may answer.

IV. LEGISLATIVE HISTORY

It usually takes a hundred years to make a law, and then, after it has done its work, it usually takes a hundred years to get rid of.[144]

In 1968, Congress was faced with a very grave situation—a national crisis involving the use of firearms.[145] The Omnibus Crime Control and Safe Streets Act[146] passed the House on June 6, 1968, the same day that the assassination of Senator Robert F. Kennedy was announced on the floor.[147]

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141. *See id.*

142. *See id.*

143. *See id.*

144. Henry Ward Beecher, A DICTIONARY OF LEGAL QUOTATIONS 111 (Simon James & Chantal Stebbings, eds., 1987).

145. *See* Jerald J. Director, Annotation, *Validity, Construction, and Application of Provision of Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C.S. Appx. § 1202(a)(1)) Making it Federal Offense for Convicted Felon to Possess Firearm*, 13 A.L.R. FED. 103, 106 (1972 & Supp. 2000). Statistics reported to the Senate by the FBI show that firearms were used in sixty percent of the murders committed in the United States in 1966 (6,500 people). *See* S. REP. NO. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2163. This was a sixteen percent increase from 1965. *See id.*

146. 42 U.S.C. §§ 3711-3714 (1994). The Omnibus Crime Control and Safe Streets Act preceded The Gun Control Act of 1968 by a few months. *See* LORD WINDLESHAM, POLITICS, PUNISHMENT, AND POPULISM 42 (Oxford University Press 1998). Discussion of one often includes discussion of the other because the latter act placed restrictions on the provisions of the former. *See id.*

147. *See* 114 CONG. REC. 16227 (1968); *see also* David T. Hardy, *The Firearms Owners' Protection Act: A Historical and Legal Perspective*, 17 CUMB. L. REV. 585, 602 (1986). The purpose of the Omnibus Crime Control and Safe Streets Act was to reduce the incidence of crime to increase effectiveness, fairness, and coordination of law enforcement and criminal justice systems at all levels of government. *See* S. REP. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2113-14. It therefore "focused on the issue of

It also followed in the wake of the assassinations of President John F. Kennedy and Dr. Martin Luther King, Jr.[148] The Act included Title IV and VII, the two initial versions of the current provisions—§ 922(g)(1) and the

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preventing crime by limiting public access to firearms and guns." *See* WARREN FREEDMAN, THE PRIVILEGE TO KEEP AND BEAR ARMS: THE SECOND AMENDMENT AND ITS INTERPRETATION 74 (1989).

148. *See* Director, *supra* note 145, at 106. Further violence in the 1960s involved the shooting spree of Charles Whitman on top of the University of Texas tower. *See* ERIK LARSON, LETHAL PASSAGE: HOW THE TRAVELS OF A SINGLE HANDGUN EXPOSE THE ROOTS OF AMERICA'S GUN CRISIS 135 (1994). In addition to this were the shootings of two Marine lieutenants in 1968, killed at a downtown Washington lunch counter by a gang "who [had] found it remarkably easy to arm themselves." 114 CONG. REC. 16292 (1968) (statement of Rep. Boland). It was a "great spasm of domestic violence." LARSON, *supra*. There was a national tension leading to this legislation: "[t]his bill was adopted through fear." 114 CONG. REC. 16066 (1968) (statement of Rep. Celler of New York). There are also numerous statements accredited to President Lyndon Johnson as pressuring Congress to pass the legislation: "There is no more urgent business ... than to pass the Safe Streets Act this year." 114 CONG. REC. 16071 (1968) (statement of Rep. Anderson of Illinois quoting the President's State of the Union Address on Jan. 17, 1968); "I hope the time for talking is coming to an end and the time for doing is starting." *Id.* (statement of Rep. Anderson of Illinois quoting the President's Address to the members of the National Emergency Committee of the National Council on Crime on June 21, 1967); "The delay has been costly to the American people. I urge that it not be continued. Once again, I urgently recommend passage of the Safe Streets and Crime Control Act as soon as possible." *Id.* (statement of Rep. Anderson of Illinois quoting the President's Statement in San Antonio on Dec. 11, 1967); "The Safe Streets and Crime Control Act should be a first order of business of the new session. If any single piece of legislation is urgently needed, this is it." *Id.*; "This measure ... demands the most urgent attention of the Congress upon its return." *Id.* (statement of Rep. Anderson of Illinois quoting the President's Statement while signing into law a District of Columbia crime bill on Dec. 27, 1967); "I think that one of the most important bills that the Congress will have to face up to this coming year will be the safe streets bill." *Id.* (statement of Rep. Anderson of Illinois quoting the President's Statement on Feb. 5, 1968); and finally, Rep. Anderson stated that the President's patience appeared to be wearing thin:

> President Johnson said "Now I have urged the Congress to do what it could do to supplement the work of the local and State governments in this country. I am asking them to do this year what I hoped they would do last year on the plan we worked up the year before: That is to act—act—on legislation that we think is needed in this country."

Id. (quoting the President's Statement on Feb. 12, 1968). The President was frustrated with Congress' back and forth introductions of amendments and bill substitutions that had delayed the bill many months from his original transmission to Congress proposing legislation pertaining to firearms regulation. *See* H.R. REP. NO. 90-1577 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4410, 4412. Upon leaving office, President Johnson said that one of his greatest disappointments was that he left before seeing a gun registration or licensing program passed. *See* WINDLESHAM, *supra* note 146, at 42.

ACCA—which have resulted in the circuit split.[149] Previously, the Act had been introduced and passed by the House on August 8, 1967, and went on to the Senate without the Title VII felony possession provision, and eventually was rewritten completely by the Judiciary Committee.[150] Title VII was added as an amendment on May 17, 1968, by Senator Long of Louisiana and contained a suggested sentence provision.[151] During the introduction of the amendment, Senator Long pointed out that Dr. King's assassin had been a convicted felon.[152] Senator Long also stated during testimony upon questioning by Senator Dodd as to whether the amendment was a substitute for Title IV: "This amendment would take nothing from the bill."[153] The amendment passed the Senate after a brief debate during which several Senators suggested "further thought" or "study."[154] Before this further thought or study was possible, there was an unexpected vote.[155] As a result of this vote, the bill was passed without modification, and received "only passing mention in the House," and no "committee consideration or study."[156] There is, therefore, little guidance on Congressional intent as to Title VII, and more specifically on why the referenced courts from which predicate convictions were obtained were expressly limited to "a court of the United States or of a State."[157] The

149. Title VII of this Act is the section in which the ACCA was first enacted—18 U.S.C. § 1202(a)(1). It is the repealed provision that specifies that prior convictions must be from "a court of the United States or of a State." 18 U.S.C. app. § 1202(a)(1) (1970 & Supp II 1985) (repealed 1986). *See supra* note 18 and accompanying text for the exact language of this section. Title IV of the Act is the section now referenced by the ACCA, § 922(g)(1). It provides a felony possession statute and states that it is unlawful for any person "who has been convicted in any court" to ship or transport a firearm. *See* 18 U.S.C. § 922(g)(1) (2000).

150. *See* S. REP. NO. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2114-15.

151. *See* 114 CONG. REC. 13867 (1968) (statement of Sen. Long).

152. *See id.* at 13869. The assassin, James Earl Ray, had "committed a number of serious offenses and [had] been convicted [for them]." *Id.* For further information about Ray's convictions, see 114 CONG. REC. 13869-71 (1968) (article introduced by Sen. Long and ordered printed into the Record, "The Story of the Accused Killer of Dr. King").

153. 114 CONG. REC. 14774 (1968) (statement of Sen. Long). "The notion that [Title VII] was enacted to dovetail neatly with Title IV rests perhaps on a conception of the model legislative process; but we cannot pretend that all statutes are model statutes." United States v. Bass, 404 U.S. 336, 344 (1971).

154. Director, *supra* note 145, at 109, n.11.

155. *See id.* at 109-10, n.11.

156. *Id.* at 110, n.11. Representative Roth from Delaware stated "I believe [Title VII] is necessary to a coordinated attack on crime and also a good compliment to the gun-control legislation contained in [T]itle IV of this bill." 114 CONG. REC. 16286 (daily ed. June 6, 1968) (statement of Rep. Roth). "I agree with this provision." 114 CONG. REC. 16298 (daily ed. June 6, 1968) (statement of Rep. Pollack).

157. *See supra* notes 145-156 and accompanying text.

same problem exists with Title IV of the same Act in that there is little legislative intent that can be gleaned from the legislative history.[158] Title IV is the provision that the ACCA now references.[159] The purpose of Title IV, however, is clear: it was enacted "to keep firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency."[160] However, when referencing the section of the provision that dealt with predicate convictions, legislative history states only the word "criminals"—there is no discussion of what constitutes a criminal, or why the provision is different from Title VII.[161] Therefore, the two provisions from the beginning contained contrary language with little explanation as to why.[162] President Johnson signed the bill into law on June 19, 1968.[163]

Senator Arlen Specter of Pennsylvania introduced the ACCA on October 1, 1981, and the Senate Subcommittee on Juvenile Justice subsequently held hearings on October 26, 1981, December 10, 1981, January 28, 1982, and March 18, 1982.[164] "On June 3, 1982, the full Committee of the Senate Judiciary reported the bill with amendments."[165] The ACCA was introduced because "[i]t has also become increasingly clear that a large percentage of ... crimes are committed by a very small percentage of repeat offenders."[166] "The powerful imagery of the incorrigible criminal

158. The main Senate report contains no discussion about the language that is the focus of this Note. *See generally* S. REP. NO. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2113-14.

159. For the complete language of this provision, *see supra* Part II, and accompanying text to note 25.

160. S. REP. NO. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2113. "The ready availability; that is, ease with which any person can anonymously acquire firearms ... is a matter of serious national concern." *Id.* at 2114.

161. *See, e.g.*, S. REP. NO. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2164, 2243, 2247, 2249.

162. The reason may simply be that § 1202(a) was an amendment to the bill introduced at the last moment by Senator Long. *See supra* notes 145-156 and accompanying text for discussion on the introduction and enactment of § 1202(a).

163. *See* S. REP. NO. 90-1577 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4410, 4412. Even as it was signed into law, there was an additional amendment to the bill still outstanding—The Gun Control Act of 1968—that had been introduced on June 10, 1968, at the request of the Justice Department. *See* H.R. REP. NO. 90-1577 (1968), *reprinted in* 1968 U.S.C.C.A.N. 4410, 4412. The amendment controlled mail order purchases and imposed restrictions on rifles and shotguns parallel to those imposed on handguns. *See id.* It did not, however, significantly change any of the language that is the concern of this Note. *See id.* at 4418-25.

164. *See* H.R. REP. NO. 98-1073 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3661, 3663.

165. *Id.*

166. 130 CONG. REC. H10550 (1984) (statement by Rep. Hughes). Representative

committing further violent offenses soon after being released into the community, having served only a fraction of the sentence imposed for his previous crimes, inspired the [Act]."[167] On September 30, 1982, the Senate passed the bill with a vote of 95-1.[168] On May 13, 1982, Representative Wyden introduced a similar bill and the Subcommittee on Crime held a hearing on September 16, 1982, that led to the amended version. Such version was passed by the House and Senate on December 20, 1982, as part of a comprehensive seven-part crime package.[169] The package was pocket vetoed by President Reagan in January of 1983.[170] Following this veto, the

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Sawyer summed it up:

> [I]t is clear that a small number of criminals are committing an inordinate amount of crime in our Nation's communities. These persons have come to be known as career criminals. Common sense dictates that if our law enforcement efforts were dedicated toward career criminals, a major drop in crime would result.

Id. However, criminals already in prison said in a 1994 survey that they "would [have] ... little or no trouble ... obtain[ing] a handgun once they were released from prison, [and] that they could arm themselves in a matter of a few hours." JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS 18 (1994).

167. WINDLESHAM, *supra* note 146, at 25.

168. *See* H.R. REP. NO. 98-1073 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3661, 3663.

169. *See* H.R. REP. NO. 98-1073 (1984). In addition to the ACCA, the seven-part package included the Comprehensive Drug Penalty Act, which increased drug-offense penalties and improved forfeiture provisions to allow the Government to take the profit out of drug trafficking; the Federal Intelligence Personnel Protection Act, which provided protection against attempts to kill those serving in the C.I.A. or other elements of the intelligence field; the Anti-Tampering Act, a response to recent Tylenol poisonings; the Justice Assistance Act, designed to give assistance to aid state and local law enforcement efforts against violent crime; the Drug Dependent Federal Offender Program Reauthorization, which was to extend a cost-effective after-care program designed to reduce recidivism among drug users; and the National Narcotics Act, which would implement a Federal Drug Coordinator. *See* Arlen Specter, Letter to the Editor, *A Crime Bill That Deserves Reagan's Signature*, N.Y. TIMES, Jan. 14, 1983, at 26A [hereinafter Letter to the Editor].

170. *See* H.R. REP. NO. 98-1073 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3661, 3663. In a letter to the Editor of the New York Times during this time period, Senator Specter identified the opposition to the bill as being focused on the establishment of the Federal Drug Coordinator, although he also identified questions pertaining to the ACCA and federalism concerns. *See* Letter to the Editor, *supra* note 169. The Senator stated that the bill had the personal approval of President Reagan, the formal support of the Department of Justice, and the support of prosecutors from Boston, Detroit, Louisville, Miami, and Philadelphia. *See id.* In addition to this, the Senator identified Assistant United States Attorney General Lowell Jensen as another person endorsing the bill as "concrete Federal participation attacking the heart of violent crime—the recidivist." *Id.* The Senator concluded:

> [C]areer criminals wear out state court justice systems by engaging in delaying

House of Representatives then moved to eliminate the President's federalism concerns by making the bill part of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968.[171] This was reported favorably by the Committee on the Judiciary on September 13, 1984, and was passed by the House on October 1, 1984, and subsequently by the Senate on October 4, 1984.[172] Because the ACCA was appended to § 1202(a)(1) of Title VII, it adopted its specific language relating to predicate felonies.[173] There was no discussion at this point during the introduction, hearings, or amendments of the ACCA pertaining to foreign convictions because they were specifically ruled out under the language in Title VII.[174] The ACCA was a provision of Title VII until 1986, when it underwent further amendments and language changes, including reenactment into Title IV of the Omnibus Crime Control and Safe Streets Act of 1968.[175] It is this reenactment into Title IV with its "any court" language that has caused the circuit split on which this Note focuses.[176]

Senator Specter, the original sponsor of the ACCA, introduced an amendment in 1986.[177] Senator Specter introduced the amendment to broaden the definition of the ACCA in order to "have a greater sweep and

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> tactics, judge shopping and plea bargaining. In a context where there is a vast disagreement over any role for the Federal Government in the crime field, the crime bill is a significant step forward. Moreover, the bill's enactment sets the stage for further productive action by a bipartisan coalition in both houses of Congress.

Id.

171. *See* H.R. REP. NO. 98-1073 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3661, 3664.

172. *See* H.R. REP. NO. 98-1073 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3665. The conviction rate under the ACCA for the first two years of its implementation was 98 percent. *See Senate Appropriations Committee, at Urging of Specter, Provides Mandatory Sentences*, P.R. NEWSWIRE, Sept. 17, 1987. Senator Specter is quoted in the same article as saying that in 1986 alone there were 44 convictions under the statute, resulting in 665 years in enhanced sentences. *See id.* In 1995, the total had risen to 6,000 career criminals "brought ... to justice." Gordon Witkin, *Attacking the Firearm Police; Two Versions of the Truth*, U.S. WORLD & NEWS RPT., May 8, 1995, at 40.

173. *See* H.R. REP. NO. 98-1073 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3661, 3664. For the language of the ACCA, see *supra* note 18. The ACCA therefore adopted the language "a court of the United States or of a State or any political subdivision thereof" for its analysis of what constituted a predicate conviction under the Act. *See* 18 U.S.C. app. § 1202(a) (1968 & Supp. II 1985) (repealed 1986).

174. *See* 18 U.S.C. app. § 1202(a).

175. *See* H.R. REP. NO. 99-495 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1327, 1349, 1352.

176. *See id.*

177. *See* 132 CONG. REC. S4325 (1986) (statement of Sen. Specter).

more effective use of this important statute."[178] The amendment was necessary, Senator Specter said, because of the restrictive definition of the ACCA that was enacted in 1984 due to federalism concerns.[179] The Senator said that the success of the ACCA in working precisely as planned for a year and a half meant that it deserved expansion.[180] The expansion would include not only the use of predicate robbery and burglary convictions, but also violent crimes and drug offenses.[181] This amended language gives support to pro-use courts holding that by specifically excluding some crimes from some States or the United States means that foreign convictions should not be counted either.[182]

During the same period in 1986, FOPA was being considered for passage.[183] The Act would combine into one group of provisions[184] all of the offenses related to the sale of firearms and, at the same time, repeal Title VII of the Omnibus Crime Control and Safe Streets Act of 1968.[185] In

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178. *Id.*

179. *See id.*

180. *See id.* (statement of Sen. Specter). The Senator outlined two ways in which the ACCA is effective. *See id.* The first is that the toughest criminals receive swift and tough sentences, and the second is that it can be used as leverage for inducing favorable pleas or cooperation as informants. *See id.*

181. *See* 132 CONG. REC. S4326 (1986) (text of proposed amendment). The text of the amendment proposed striking out "for robbery or burglary, or both," in § 1202(a)—the ACCA—and replacing it with "for a crime of violence or a serious drug offense, or both." *Id.* The amendment would also insert definitions of "crime of violence" and "serious drug offense." *See id.* Senator Specter's proposal was supported by the Justice Department in a letter from Assistant Attorney General John R. Bolton. *See id.* (letter from Assistant Attorney General Bolton, Mar. 18, 1986). During the introduction of the amendment into the House, Representative Wyden, the House sponsor of the ACCA in 1984, gave some statistics to support the bill. *See* 132 CONG. REC. H1973 (1986) (statement of Rep. Wyden). The statistics showed that nearly thirty percent of the people apprehended by the BATF for firearms violations were drug traffickers. *See id.* In addition to this, nearly fifty percent of those apprehended had prior felony convictions. *See id.* Statistics used by the Representative, provided by the National Institute of Justice, showed that one-quarter or more of homicides in several cities were related to drug trafficking. *See id.*

182. *See supra* notes 91-96 and accompanying text.

183. *See* H.R. REP. NO. 99-495, at 23 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1327, 1349. FOPA, unlike the Omnibus Crime Control and Safe Streets Act, was enacted "to protect honest firearms owners and dealers from the kind of abuse we have seen in the past." 131 CONG. REC. S9101 (1985). The existing gun control legislation (The Omnibus Crime Control and Safe Streets Act of 1968 and its companion Act, The Gun Control Act of 1968) that FOPA sought to replace and amend, was touted as a bad law, and "a bad law is like an accident waiting to happen." *Id.*

184. The provision in question for the purposes of this Note is 18 U.S.C. § 922(g), the felony possession statute that the ACCA currently references.

185. *See* H.R. REP. NO. 99-495, at 23 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1327,

addition to this, the ACCA would be reenacted at the same time so as not to be lost by the repeal of Title VII.[186] Although extensive testimony was taken on the provisions of FOPA,[187] no discussion was presented as to the new language that the ACCA would now embrace under § 922(g)(1),[188] instead of the language it previously referenced under § 1202(a).[189] The ACCA was subsequently reenacted into § 924(e) where it remains today, and Title VII of the Omnibus Crime Control and Safe Streets Act of 1968 was repealed on May 19, 1986.[190]

As a result, § 922(g)(1) still exists as it has since its original enactment in the Omnibus Crime Control and Safe Streets Act of 1968.[191] Section 1202(a) was originally enacted at the same time but contained different language regarding what constituted predicate convictions.[192] The reason for this language difference, unexplained during testimony and committee hearings, is quite possibly that the section was an amendment introduced at the last minute and hastily voted on.[193]

1349. The reason for the combination of the statutes was bluntly put in a document ordered printed into the record during testimony on the Act: "the Protection Act consolidates the several separate and inconsistent statutes setting out classes of prohibited persons into one easily identified group of individuals who are prohibited access to firearms." 131 CONG. REC. S9101-05 (1985) (Factsheet on FOPA, introduced by Sen. Hatch). In addition to this, it is pointed out that one statute (§ 922) identifies four classes of people who cannot own a firearm and another (§ 1202) identifies six classes, only two of which overlap. *See id.* (statements of Vince McGoldrick, Chairman, National Legislative Committee Fraternal Order of Police and statement of Sen. Sasser, both introduced by Sen. Hatch). During testimony on the Act, Senator Symms described the Omnibus Crime Control and Safe Streets Act of 1968 as "hastily enacted" and ineffective. *See id.* (statement of Sen. Symms). He used statistics to demonstrate its ineffectiveness: "[T]he national homicide and handgun-homicide rates rose fifty percent [between 1967 and 1982], while robbery rates and robberies involving the use of firearms nearly tripled." *Id.*

186. *See* H.R. REP. NO. 99-495, at 23, 26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1327, 1349, 1352.

187. It took seven years to pass the legislation because FOPA overruled six U.S. Supreme Court decisions. *See* FREEDMAN, *supra* note 147, at 75. It also negated about one third of case law construing the Gun Control Act of 1968. *See id.* This, and its name, showed that the new Act was a monument to the National Rifle Association, not to gun control. *See* WINDLESHAM, *supra* note 146, at 43.

188. "[A]ny court." 18 U.S.C. § 922(g)(1) (2000).

189. "[A] court of the United States or of a State." 18 U.S.C. § 1202(a) (1982).

190. *See* Firearms Owners' Protection Act, Pub. L. No. 99-308, § 104(b), 100 Stat. 449, 459, *reprinted in* 1986 U.S.C.C.A.N.

191. *See* 18 U.S.C. § 922(g) (2000).

192. *See* 18 U.S.C. § 1202(a) (repealed 1986).

193. *See supra* notes 145-156 and accompanying text for a discussion on how § 1202(a) was introduced and enacted. There are other discrepancies in the legislation. *See* Hardy, *supra* note 147, at 600-01. Indeed, the "titles contain somewhat dissimilar provisions

The ACCA itself was originally enacted into § 1202(a), adopting the language that specifically ruled out any foreign convictions counting as predicate offenses.[194] After the repeal of § 1202(a), the ACCA was reenacted into § 924(e) and now referenced § 922(g) instead.[195] During the reenactment, there was no discussion as to the difference in the language between § 1202(a) and § 922(g)(1).[196] The significance of the change appears to have been lost in the numerous hearings and testimony on FOPA itself.[197] FOPA was a large, sweeping legislation, the aim of which was to clarify and revise federal requirements relating to private ownership and use of firearms for lawful means, to enhance the ability of law enforcement to fight violent crime and narcotics trafficking, and to improve administration.[198]

Legislative history, therefore, gives little specific indication as to the intent of Congress in including foreign predicate offenses in sentence enhancement under the ACCA and its referenced felony possession provision. Using case law and legislative history, and attempting to analyze the questions that each has created, the conclusion must be that Congress intended for predicate foreign convictions to enhance sentences under the ACCA. For each argument that anti-use proponents put forward, there is a more logical counter-argument that can be made.[199]

V. ANALYSIS

Among the defects of the bill, which were numerous,
one provision was conspicuous by its presence
and another by its absence.[200]

Legislative history of the ACCA and preceding statutes gives no guidance as to specific Congressional intent in reference to the disputed

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covering identical substantive areas." Deborah S. Prutzman, Note, *Prior Convictions and the Gun Control Act of 1968*, 76 COLUM. L. REV. 326, 327-28 (1976). These discrepancies included exemptions from the penalty for certain business related crimes in Title IV, while not in Title VII, and Title VII exempted a person who had been pardoned, and Title IV did not. *See* Hardy, *supra* note 140, at 601.

194. *See supra* note 15 for the specific language of 18 U.S.C. § 1202(a).

195. *See supra* note 25 for the specific language of the ACCA, now located in 18 U.S.C. § 924(e).

196. *See supra* notes 175-193 and accompanying text.

197. *See supra* notes 175-193 and accompanying text.

198. *See* H.R. REP. No. 99-495, at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1327, 1327.

199. *See infra* Part V for a discussion of these arguments.

200. Lord John Russell, A DICTIONARY OF LEGAL QUOTATIONS 114 (Simon James & Chantal Stebbings, eds., 1987).

language.[201] However, it does give guidance as to the intent of the legislation and the purposes in its enactment.[202]

The usual first step in interpreting a statute, when the statutory meaning is not clear from legislative history, is to examine its plain language.[203] In this case, plain language should dictate that "any court" be interpreted to mean just that.[204] Without any enumerated exceptions, "any court" means what it says.[205] However, the ambiguity arises in this instance because of the change in location of the ACCA.[206] The statute as originally enacted in 1984 references a felony provision that left little doubt as to whether foreign convictions should be included in the equation.[207] The ACCA was then relocated in 1986 in order to streamline and combine all gun control legislation.[208] Absent the changes in the location of the ACCA from a section that did not have this language to begin with, the ambiguity claimed would be less obvious, and courts would probably determine that Congress intended to include "any court" as stated in "plain language" in the statute. Because the ACCA was relocated, there has become a court-created ambiguity as to whether "any court" includes foreign convictions.[209] The next step in statutory construction is to analyze whether the interpretation fits the intent of Congress in enacting the legislation.[210]

The underlying purpose of Title IV of the Omnibus Crime Control and Safe Streets Act of 1968—the predecessor to the Firearms Owners' Protection Act of 1986, and the title that includes § 922(g)(1)—was to cut down on the increasing number of crimes that were gun-related.[211] It was passed in an era of assassinations and fear,[212] and it was passed hastily.[213] The intent then was plain—to keep guns out of the hands of criminals and others and to control the transportation of those guns. Ultimately, the goal

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201. *See supra* notes 143-98 and accompanying text.

202. *See supra* notes 143-98 and accompanying text.

203. *See* Lewis v. United States, 445 U.S. 55, 60 (1980) (stating that the starting point of statutory interpretation should be the language of the statute itself).

204. *See Lewis*, 445 U.S. at 60 (holding that the "language" of the statute itself is not ambiguous, therfore no further discussion should be necessary).

205. *See supra* notes 2-4 and accompanying text.

206. *See supra* notes 143-98 and accompanying text.

207. *See supra* note 18 and accompanying text.

208. *See supra* note 186 and accompanying text.

209. *See supra* notes 34-143 and accompanying text.

210. *See* Lewis v. United States, 445 U.S. 55, 62 (1980).

211. *See* S. REP. NO. 90-1097 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2164.

212. *See supra* notes 145-48 and accompanying text.

213. *See* 131 CONG. REC. S9101-05 (1985) (statement of Sen. Symms). *See also* United States v. Bass, 404 U.S. 336, 344 (1971) (stating that it was "hastily passed, with little discussion, no hearings, and no report").

was to reduce gun-related crime and gun-related deaths.[214] Similar to § 922(g)(1), the intent of Senator Long in introducing § 1202(a) of the Omnibus Crime Control and Safe Streets Act was for safety and the desire to not have the criminals "armed to the teeth."[215] Senator Long specifically included only courts of the United States or a state in his amendment, thus creating a difference between the two sections from the beginning.[216] The amendment was not meant to replace Title IV, but to complement it.[217] It was into this provision that the ACCA was enacted in 1984.[218] The intent of both sections, therefore, was to control guns and keep them out of the hands of criminals.[219] However, while the language of the acts is different, "no conclusion can be drawn from Title IV concerning the correct interpretation of Title VII."[220] Logically, then, the converse must apply. The intent of these statutes was similar to Senator Specter's intent in 1984 in enacting the ACCA.[221] His intent was to create a tool to allow federal government and state authorities to more effectively prosecute career criminals.[222] This, in turn, was to provide an easier means to keep guns out of the hands of habitual offenders.[223] U.S. Attorneys like the enhanced penalties, and view the statute as the valuable tool it was enacted to be.[224]

Therefore, the Congressional intent behind all three provisions was to control guns by keeping them out of the hands of dangerous repeat offenders (career criminals), thereby reducing the number of gun-related deaths and crimes.[225] Taking this into account, it seems that there should be no difference between a predicate offense from a foreign country and one from the United States. As stated by the Sixth Circuit, a criminal is no less

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214. *See supra* notes 145-56 and accompanying text.

215. 114 CONG. REC. 14774 (May 23, 1968).

216. *See supra* note 18 and accompanying text.

217. *See* United States v. Winson, 793 F.2d 754, 757 (6th Cir. 1986).

218. *See* 114 CONG. REC. 16286 (1968) (statement of Rep. Roth).

219. S. REP. NO 90-1097 (1968), *reprinted in* 1968 U.S.C.C.AN. 2112, 2113.

220. United States v. Bass, 404 U.S. 336, 344 (1971). In fact, the Court stated that "[t]he notion that [they were] enacted to dovetail neatly with [each other] rests perhaps on a conception of the model legislative process; but we cannot pretend that all statutes are model statutes." *Id.* In fact, the Court said, the statutes overlapped. *See id.* at 343.

221. *See* 130 CONG. REC. H10550 (1984) (statement of Rep. Hughes).

222. *See* Letter to the Editor, *supra* note 169. The ACCA has been called a prosecutor's "slam dunk." David Wagner, *Is There Anyone Guarding the Guardian's at Justice?*, INSIGHT ON THE NEWS, Aug. 4, 1997, at 14.

223. *See* Letter to the Editor, *supra* note 169.

224. *See* Wagner, *supra* note 222 at 14. "It's gotten a lot of violent felons off the street." *Id.* The bill received support from prosecuting attorneys in Boston, Detroit, Louisville, Miami, and Philadelphia. *See* Letter to the Editor, *supra* note 169.

225. *See supra* Part IV.

dangerous because his convictions were received abroad than someone whose convictions were received in the United States.[226] Therefore, the intent of Congress in enacting the statute was simple, and counting foreign convictions as predicate offenses meets the intent and purpose of the statute. The plain language and intent of the statute are clear—foreign convictions should count as predicate convictions for the purposes of sentence enhancement under the ACCA. The arguments of courts who wanted to find the opposite have included the constitutionality of the predicate offenses, definitions in accompanying provisions, sentencing guidelines, disparity in international crimes and the principle of lenity.[227] Thus they have ignored the plain language of the statute.

The possibility of an unconstitutional offense being counted towards sentence enhancement should not be a matter of controversy under the ACCA. The writ of habeas corpus was created in order to deal with unconstitutional offenses, and provides a method for challenging them.[228] The U.S. Supreme Court has determined that if a defendant does not chose to question the validity of an offense prior to the ACCA sentencing hearing, then there is no recourse available at the hearing.[229] A writ of habeas corpus allows a challenge of the offense only before the hearing, and an offense not challenged should not then be excluded from the ACCA equation on constitutional grounds.[230] To allow a defendant to challenge the constitutionality of an offense at the actual sentencing hearing would allow him to sidestep the process already in place, and force sentencing courts to make decisions on constitutionality with less information and time than is available in a habeas petition. Thus, by the time a defendant comes to sentencing, there should be no investigation either allowed or necessary as to the constitutionality of predicate foreign convictions.

The definitions contained in § 921(20) included the term "crime punishable by imprisonment for a term exceeding one year" as used in § 922(g)(1) and excludes some "white collar" crimes from federal and state courts.[231] Courts have relied upon this language to conclude that Congress intended to exclude only white collar crimes from federal or state courts and not foreign courts, creating a disparity between what would be included under federal and state laws, and what would be included under

226. *See* United States v. Winson, 793 F.2d 754, 758 (6th Cir. 1986) ("[W]e can perceive no reason why the commission of serious crimes elsewhere in the world is likely to make the person so convicted less dangerous than he whose crimes were committed within the United States.").

227. *See supra* notes 81-123 and accompanying text.

228. *See supra* notes 110-19 and accompanying text.

229. *See id.*

230. *See id.*

231. *See* 18 U.S.C. § 921(20) (1999).

foreign laws.[232] The answer to this argument is that the definitions contained in § 921(20) do not apply to the strict language of the ACCA because the Act does not define a "violent felony" or a "serious drug offense."[233] However, the weakness to this argument is that it would then be applied differently through the ACCA than separately.[234] To use this as a guide, however, would be to put words into Congress' mouth, using definitions that it chose to make for those that it did not.

Another problem is that United States Sentencing Guidelines exclude predicate foreign convictions when calculating a defendant's criminal history.[235] However, this is not always the case, since the United States Sentencing Guidelines do permit a court to consider foreign convictions "in determining whether to depart from the guideline sentencing range."[236] There are also other statutes that specifically list foreign convictions as predicate felonies.[237] Therefore, it is conceivable that Congress would intend for foreign convictions to be counted against a defendant.[238] Choosing to apply one part of sentencing guidelines instead of another and one that is inconsistent with the plain meaning would merely be to twist them to suit a purpose, with no real grounds for doing so.

The terms "violent felony" and "serious drug offense" can also be used to dispel any problems that a court would have with the disparity between international sentencing guidelines and United States sentencing guidelines.[239] A crime that is not violent or drug related would not be used under the ACCA to enhance a sentence, notwithstanding the difference between the foreign sentence and one imposed in the United States.[240]

Finally, courts argue that the principle of lenity should apply when there is ambiguity concerning the ambit of criminal statutes.[241] The overriding

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232. *See* United States v. Concha, 233 F.3d 1249 (10th Cir. 2000).

233. *See id.* at 1254 n.2.

234. *See id.*

235. *See id.* at 1254.

236. *See* United States v. Chant, 1997 WL 231105, at *3 (N.D. Cal. 1997), *aff'd*, 201 F.3d 445 (9th Cir. 1999).

237. *See* 21 U.S.C. § 802(44) (2000) (stating that "[t]he term 'felony drug offense' means an offense that is punishable by imprisonment for more than one year *under any law of the United States or of a State or foreign country* that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances.") (emphasis added).

238. *See Chant*, 1997 WL 231105, at *3 (stating that statutes that allow the use of foreign convictions show that Congress is receptive to their use).

239. *See* United States v. Concha, 233 F.3d 1249, 1254 n.2 (10th Cir. 2000).

240. *See id.*

241. *See id.* at 1256 (stating that it would not "interpret a federal criminal statute so as to increase the penalty that it places on an individual").

finding of this Note is that the plain language of the statute has no ambiguity, and therefore the principle of lenity should not be applied.

VI. CONCLUSION

All laws, written and unwritten, have need of interpretation.[242]

Analysis of the plain language of the ACCA, and the referenced felony possession statute, as well as the legislative history pertaining to Congressional purpose in enacting the provisions, clearly reveals that Congress intended the ACCA to apply to predicate foreign convictions.

Congressional intent about the specific provision "any court" is not clear, especially because of the shift of the ACCA in referencing one section that excluded certain crimes to a section that did not exclude such crimes. The purpose behind all three sections of legislation is clear: to aid gun control. More specifically, the ACCA aims to keep guns out of the control of habitual criminals. Individuals are not any less criminal—or less dangerous—just because their convictions were obtained in another country. Arguments to the contrary are weak, and, in some cases, overruled by the U.S. Supreme Court.

The consequences of precluding sentence enhancement where the predicate convictions are foreign sidesteps the existing process for habeas review, and may lead to challenges of the constitutionality of an offense where benefit may be gained. To broadly exclude all predicate foreign offenses because of the possibility that some were unconstitutionally obtained should not be an option. It would lead to dangerous defendants with previous convictions being allowed to go free while individuals with domestic convictions would not. Both defendants are equally dangerous, and should be treated as such.

The plain language and Congressional intent behind the purpose of the ACCA and referenced felony possession statute is meant to cover predicate foreign convictions. It is only by doing so that guns can be kept out of *all* dangerous criminals' hands, not just *some*.

Tracey A. Basler

242. Thomas Hobbes, A DICTIONARY OF LEGAL QUOTATIONS 92 (Simon James & Chantal Stebbings, eds., 1987).

The Convention on Cyber-Crime: Should the United States Ratify?

I. INTRODUCTION

The Convention on Cyber-crime [hereinafter, the Convention] is the first international treaty to battle a relatively new area of crime that is feverishly spreading around the globe: cyber-crime.[1] As the number of countries being affected by cyber-crime increases, the Council of Europe decided to address the issue by creating a Draft Convention on Cyber-crime.[2] With the Draft Convention now complete, the Convention on Cyber-crime was presented on November 8, 2001 to foreign affairs ministers in Strasbourg.[3] This was followed by an International Conference held in Budapest on November 23, 2001, where the Convention was "opened for signatures" for the first time.[4] The signing ceremony was held in the Hungarian Parliament at 11:00 a.m. on November 23, 2001.[5] At precisely 11:30 a.m. the Ministers (or their representatives) signed the Convention.[6] The Convention includes forty-three European member states in addition to Japan, Canada, South Africa, and the United States.[7] Although an international treaty combating cyber-crime is much needed, the question arises: is this the right treaty for the United States? Individuals in the United States who hold their civil liberties in high regard must be wary of the United States' ratification of the Convention, as there are serious issues of whether the Convention goes far enough to protect individual rights.[8] There are two competing interests facing the United States with respect to

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1. *See* Julia Lawlor, *Cybercrime: Interpol for the Internet*, RED HERRING, Sept. 1, 2001, at 27.

2. *See* Convention on Cybercrime, *at* http://www.coe.int (last visited Nov. 5, 2002) [hereinafter *The Convention*].

3. *See* Wendy McAuliffe, *Europe Plans Convention on Cybercrime*, *at* http://www.cnet.com (last visited June 1, 2002). *See also Budapest, November 2001: Opening for Signature of the First International Treaty to Combat Cybercrime*, *at* http://www.coe.int (last visited Nov. 5, 2002) [hereinafter *Budapest*].

4. *See id.*

5. *See Budapest*, *supra* note 3 and accompanying text. *See also International Conference on Cybercrime and Signing Ceremony of the Council of Europe Convention on Cybercrime*, *at* http://www.coe.int (last visited Nov. 5, 2002).

6. *See Budapest*, *supra* note 3 and accompanying text.

7. *See* Lawlor, *supra* note 1.

8. *See id. See also Big Brother or Free-For-All—How Can the Law Strike a Balance?*, *at* http://www.coe.int (last visited Nov. 5, 2002) [hereinafter *Big Brother*].

the ratification of the Convention: (1) society's interest in protection from and prevention of crimes committed through the Internet and on computers, as well as society's demand for secure networks; (2) the interest of those who wish to maintain their civil liberties, such as privacy and free speech, while on the Internet, and protections against self-incrimination as well as fourth amendment search and seizure provisions.[9] While one would anticipate the consideration of both interests in the Convention, critics argue it does not appear to go far enough to protect civil liberties to the extent that citizens of the United States have come to expect.[10]

This Note will analyze both the positive and negative implications that the ratification of the Convention may have on the United States.[11] Before such an analysis can begin, the Note must outline several other issues. Part II of the Note will discuss a wide range of background information regarding cyber-crime.[12] Section A of Part II will include a brief explanation as to the purpose of this Note.[13] Section B of Part II will define cyber-crime and will also include examples of cyber-crime.[14] Section C will explain the history of the Convention, including a description of the Council of Europe, why the Convention was created, the purpose of the Convention, and the role of the United States in drafting the Convention.[15]

Part III of this Note will discuss the effect the Convention may have upon particular constitutional rights.[16] This section will include a discussion as to whether the Convention infringes upon privacy rights, whether the Convention infringes upon protections against self-incrimination, whether the Convention will benefit the United States, and the need for the United States to combat cyber-crime.[17]

Part IV will begin the analysis as to whether the benefit conferred upon the United States will outweigh the potential threat to particular constitutional rights.[18] This section will also address the possible benefits the Convention may provide the United States and how the citizens of the United States will be affected by such benefits.[19] More specifically, this portion will discuss society's needs for secure communication networks

9. *See Big Brother*, *supra* note 8.
10. *See* Lawlor, *supra* note 1. *See also Big Brother*, *supra* note 8.
11. *See infra* Part III.
12. *See infra* Part II.
13. *See infra* Part II.A.
14. *See infra* Part II.B.
15. *See infra* Part II.C.
16. *See infra* Part III.
17. *See infra* Part III.
18. *See infra* Part IV.
19. *See infra* Part IV.

and the related interests of big business.[20] This section will also discuss the disadvantages the Convention could impose upon the United States and how United States citizens will be affected by such disadvantages.[21] The Note will then analyze, based upon prior discussion, whether or not the United States should ratify the Convention.[22]

Finally, Part V of the Note will conclude with a recommendation to Congress and the President of the United States as to whether the Convention should be ratified.[23]

II. LEGAL REACTION TO CYBER-CRIME

A. Why the Convention on Cyber-Crime?

The purpose of this Note is to evaluate the Convention and its possible positive and negative implications upon the United States and her citizens. After the positive and negative implications have been analyzed, a recommendation will be made as to whether the United States should ratify the Convention. The Note's purpose would be served if referenced by Congress or the President of the United States in order to determine some implications of the Convention before a decision is made as to whether or not to ratify the Convention. Therefore, the final purpose of this Note is to be an additional aid to Congress or the President of the United States when deciding whether the United States should ratify the Convention.

B. What is Cyber-Crime: A Brief History

Although the term 'cyber-crime' implies crime occurring on the Internet or via the Internet, the Convention covers crime that not only occurs on or via the Internet, but also crimes that occur through the use of a computer and crimes that involve computers in general.[24] The terms 'computer crime,' 'computer related crime,' 'high-tech crime,' and 'cyber-crime' are regularly interchanged with one another and therefore can have a similar meaning.[25] For the purposes of this Note, the term cyber-crime will be used throughout, as it is the term the Council of Europe has chosen to refer to

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20. *See infra* notes 249-96 and accompanying text.

21. *See infra* notes 284-96 and accompanying text.

22. *See infra* notes 276-96 and accompanying text.

23. *See infra* notes 297-301 and accompanying text.

24. *See The Convention, supra* note 2.

25. *See* Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions: Creating a Safer Information Society by Improving the Security of Information Infrastructures and Combating Computer-Related Crime, WL Celex No. 500DC0890, at 11 [hereinafter Communication from the Commission].

such crimes.[26] There is a distinction between computer specific crimes and traditional crimes performed with the aid of a computer.[27] This Note refers to traditional crimes performed with the aid of a computer, as well as computer specific crimes.[28]

Keeping in mind the interchangeability of various phrases when referring to cyber-crime, Black's Law Dictionary defines "computer crime" as "[a] crime requiring knowledge of computer technology, such as sabotaging or stealing computer data or using a computer to commit some other crime."[29]

The ease of accessibility to information and communication networks benefits cyber-criminals.[30] Such networks are far-reaching, inexpensive to access, and seemingly private.[31] Misuse and abuse of computers began with the first wave of computer technology in the late 1940s.[32] Computer crime intensified as computer technology allowed an increase in the use of computers in private and sensitive areas of society.[33] Computer abuse first began in military systems, and then spread to the scientific arena, and finally to business and private applications.[34] It seems inevitable that with ever-changing technology, computer crimes will only worsen. The sudden and massive increase in the use of computers has been the main contributor to the large and steadily increasing growth of cyber-crime, "exploiting modern technologies to the full[est]."[35] Technology only increases the ability of criminals to commit crimes via the Internet.[36]

As technology improves, computer crimes will grow in number and complexity.[37] An enormous amount of people are using the Internet—in the

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26. *See The Convention*, *supra* note 2.

27. *See* Communication from the Commission, *supra* note 25. A traditional crime performed with the aid of a computer refers to crimes that are committed by using the Internet and crimes that "call for improved co-operation and procedural measures." *Id.* Computer specific crimes require legislators to constantly improve and bring up-to-date definitions of crimes in national criminal codes. *See id.*

28. *See The Convention*, *supra* note 2.

29. BLACKS LAW DICTIONARY 377 (7th ed. 1999). *See also* IRVING J. SLOAN, THE COMPUTER AND THE LAW 2 (1984).

30. Communication from the Commission, *supra* note 25.

31. *See id.*

32. SLOAN, *supra* note 29.

33. *See id.*

34. *Id.*

35. *Democracy at Risk*, *at* http://www.coe.int (last visited Nov. 5, 2002).

36. *See id.*

37. *See id.* For example, it takes the police "eighteen months to investigate" a money-laundering operation, whereas it takes a criminal less than one minute to complete the crime. *Id.*

year 2000 the number of Internet users increased to over 350 million users world-wide.[38] This number, though incredibly large, is not suprising, given that the price of computers and Internet access is going down while there has been an increase in accessibility.[39] In addition, this number is increasing daily as technology improves, more computers are sold, and more Internet accounts are opened.[40]

Increases in cyber-crime are unsurprising, considering how seemingly available the Internet and computers are for criminals, as the Internet provides inexpensive and worldwide communication in seconds, has few barriers and relatively no limitations.[41] Characterized by ease of use, low cost, and a wide variety of capabilities, the Internet feels like home to many types of criminals, from those that are termed "hardened criminals" to those who are still on the brink of breaking the law.[42]

Cyber-crime has been referred to by some as the "perfect crime" because cyber-crime can be committed anonymously and is not easily traceable.[43] Cyber-crime is also a favorite to many criminals because the Internet is seldom policed.[44] The crimes that occur on the web include: the spread of computer viruses; the creation, maintenance and distribution of child pornography and child pornography sites; piracy and fraud; and, although not technically a crime, the maintenance of websites promoting and encouraging racism.[45]

The spread of computer viruses are frequently heard about through e-mail and sometimes on the news.[46] Oftentimes, warnings are sent indicating e-mail users should not open particular e-mails because a virus is

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38. *See Riding the Web—Over 350 Million Surfers*, *at* http://www.coe.int (last visited Nov. 5, 2002) [hereinafter *Riding the Web*]. The 350 million web users can be broken down to represent a large portion of the world: the United States counts for 158 million users, Europe has 95 million users, Asia and the Pacific contribute 90 million users, there are 14 million users in Latin America, and 3.5 million users in Africa. *See id.*

39. *See id.*

40. *See id.* In fact, more than 60 million computers were sold across the world in the year 2000, demonstrating a growth rate of fifteen percent annually. *See id.* Internet sales account for $650 billion in 2000 and it is estimated that this figure will have tripled by 2002. *See id.* In the last few years, well over twenty-eight million websites were designed and implemented. *See Riding the Web*, *supra* note 38.

41. *See id.*

42. *See id.*

43. *See Running the Gamut*, *at* http://www.coe.int (last visited Nov. 5, 2002).

44. *See id.*

45. *See id.*

46. A computer virus is a "mini-programme which multiplies automatically through another programme and spreads at epidemic speed without the user's knowing it." *Running the Gamut*, *supra* note 43.

attached.[47] Computer viruses are capable of mass destruction such as eliminating files, damaging hardware, or worse, incapacitating entire networks.[48] The total damage done around the world has been estimated at approximately ten billion dollars.[49] The Federal Bureau of Investigation (FBI) estimates that there are at least fifty viruses, worms, and Trojan horses per week that affect computer users in all forms.[50] These computer viruses, worms, and Trojan horses often render systems useless,[51] leaving the victims wondering how this criminal be punished, especially when the criminal is hard to trace.

Another major criminal activity involving the use of computers is child pornography.[52] Child pornography[53] is actively increasing on the Internet.[54] The head of the French police division responsible for investigating offenses against persons and property, Inspector Jean-Francois Cosse, estimates there are anywhere from three hundred thousand to five hundred thousand pornographic photos of children on the Internet that are easily accessible and available for distribution.[55]

Though not widely reported or even an actual criminal activity, the issue of racism on the Internet is adderessed on the Council of Europe's webpage under the section for the Convention.[56] Reports indicate that the number of racist sites on the Internet has increased from 160 in 1995 to 2,500 in 2000,

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47. *See id.*

48. *See id.* For example, the popular "I Love You" virus was sent via the Internet to infect computers, and the destruction that occurred was overwhelming. *See id.* Sent on May 4, 2000 from the Philippines, the "Love Bug" bit computer users all around the world, including Asia, Europe, and the United States. *See id.* Targets hit ranged from individual computer users to businesses and governments. *See id.* In fact, sixty-five percent of American businesses with over two hundred employees were infected with the virus; in addition, the Swiss Government's e-mail system was rendered useless for over twenty-four hours. *See id.* This was just a sampling of the damage done and those affected by it.

49. *See* Kelly Cesare, Comment, *Prosecuting Computer Virus Authors: The Need for an Adequate and Immediate International Solution*, 14 TRANSNAT'L LAW. 135, 145 (2001).

50. *See Running the Gamut, supra* note 43. "Worms," similarly to viruses, "spread from computer to computer, without even needing to transmit through another programme." *Id.* "Trojan horses" are described as "full-scale programme[s], which can take your computer over at long range." *Id.*

51. *See id.*

52. *See id.*

53. Child pornography is also known as pedophilia or pedopornography. *See* Lyombe Eko, *Many Spiders, One Worldwide Web: Towards a Typology of Internet Regulation*, 6 COMM. L. & POL'Y 445, 457 (2001).

54. *See Running the Gamut, supra* note 43.

55. *See id.*

56. *See* http://www.coe.int (last visited Nov. 5, 2001).

in the United States alone.[57] Worldwide, the number of Internet sites that "openly encourage racial violence" has been estimated at 4,000.[58] Although some countries have created and implemented safeguards to eradicate racism on the Internet, these safeguards are becoming less and less effective as each day passes.[59]

Another type of cyber-crime that is growing exponentially is the use of the Internet by pirates and Mafiosi.[60] This new wave of criminals targets the weakest points in the computer systems of the world.[61] Online fraud is leading to disorder on the Internet and destruction via the Internet.[62] Although many countries, such as Russia, Japan, Switzerland and France, now have specialized police units to trace and capture these computer hackers, each of these countries has yet to beat such a new, high-tech crime wave.[63]

Although anyone can be a target and/or victim of cyber-crime, a survey of businesses in the United States indicates that the prime targets of computer hackers are business firms.[64] Although big business seems to be the prime target, criminal computer hackers often go after individuals and public agencies as well.[65] In the United States, the FBI has concluded that some five thousand of its computer systems are "highly vulnerable to cyber-crime, which has according to Ronald L. Dick, the FBI's new

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57. *See id.*

58. *Id.*

59. *See id.*

60. *See Running the Gamut*, *supra* note 43. For example, four hackers recently broke into the confidential files of fourteen hundred participants of the World Economic Forum in Davos. *See id.* These cyber-criminals gained access to a wealth of information of the world's leading economic experts including credit card numbers and their respective expiration dates, private addresses, and cell phone numbers. *See id.* The potential damage that could come to these economic experts is disturbing and overwhelming, and the threat that remains to the rest of the world is potentially devastating. *See id.*

61. *See id.* For example, not long ago an organized gang of hackers from Russia and the Ukraine accessed over forty sites in the United States alone. *See id.* These hackers gained access to at least one million random credit card numbers. *See id.*

62. *See id.*

63. *See id.*

64. *See Cyber-Crime—The Targets it Hits, the Damage it Does*, *at* http://www.coe.int (last visited Nov. 5, 2002) [hereinafter *Cyber-Crime—The Targets it Hits*]. After being questioned, eighty-five percent of United States businesses say they have at some point been the targets of computer hackers. *See id.* In fact, The Communications Management Association completed a report in Great Britain, which concluded that one-third of the major businesses and public authorities in Great Britain have been victims of computer hackers. *See id.*

65. *See id.*

director, the capacity 'to destabilize a country's whole economy.'"[66] In addition to the threat the FBI faces, the Pentagon's systems were not only threatened, but actually invaded more than twenty-two thousand times in one year alone.[67]

Cyber-crime poses major problems not only because it is high-tech and its offenders are often anonymous and difficult to trace, but also because very few victims actually report the crimes.[68] Major studies were performed in the United States and in Europe, which suggested that only one-third of victims actually report offenses.[69] Cyber-crime is also an extremely expensive offense for those whose privacy is violated.[70]

As the offenses of cyber-crime increase, the public develops more concern for the threats this type of crime presents.[71] "The calls for international co-operation between governments, police forces and courts are becoming more insistent ...."[72] With the request for international cooperation in mind, one must first consider what each individual country is doing to declare its own war on cyber-crime.[73] The European Union has responded to cyber-crime by issuing several legal instruments to the European Union Member States.[74] There is clearly no debate that there is a growing need and a strong demand for legislation regulating computer crimes and prosecuting criminals.[75] Last March, at the Council of Europe's Parliamentary Meeting, an American expert brought two key points to the Council of Europe's attention: "[L]aws are needed to make cyberspace safe, and countries with inadequate laws will be less competitive on the

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66. *Id.*

67. *See id.*

68. *See Cyber-Crime—The Targets it Hits*, *supra* note 64.

69. *See id.* This means that the offenses that are reported are just the beginning of a long list of offenses likely committed. *See id.*

70. *See id.* Fraudulent use of credit cards leads to over $400 million in damages each year, and virus attacks result in losses of approximately $12 million annually. *See id.* One report indicates that firms that have patents and trademarks stolen are incurring costs of $250 billion dollars per year. *See id.*

71. *See A New Sense of the Dangers*, *at* http://www.coe.int (last visited Nov. 5, 2002).

72. *Id.*

73. *See id.* A United States firm, McConnell International, surveyed fifty-two countries around the world in order to determine what each respective country's laws were regarding direct and indirect prosecution of cyber-crimes. *See id.* McConnell International's survey concluded that only ten countries of the fifty-two had significantly altered their laws in order to prosecute cyber-crime, another ten of the fifty-two countries had only partially updated their laws, and thirteen others have intentions to update their laws in order to better respond to cyber-crime. *See id.*

74. *See* Communication from the Commission, *supra* note 25.

75. *See id.*

new economic markets."[76] There is an obvious desire for international legislation because the Internet has no frontiers or no barriers; criminals in one country can create victims in another country.[77] Without international cooperation it would be very difficult, if not impossible, to prosecute those criminals who commit offenses in other countries via the Internet.[78] While there is a great demand for an instrument like the Convention, whether or not this piece of legislation is effective is still being debated by many.[79]

Although the list of various types of cyber-crimes is an extensive one, this article will focus on the cyber-crimes that the Convention expressly mentions.[80] The cyber-crimes mentioned by the Convention will be elaborated upon in greater detail later in this Note.

C. The Council of Europe and the Convention on Cyber-crime.

1. Who is the Council of Europe?

Once suggested by Winston Churchill, among others, the Council of Europe is an international organization located in Strasbourg.[81] The Council of Europe is comprised of forty-three democratic countries, each of which is located in Europe.[82] An intergovernmental organization, the

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76. *A New Sense of the Dangers*, *supra* note 71.

77. *See* Communication from the Commission, *supra* note 25.

78. *See id.*

79. *See id.*

80. The offenses the Convention specifically articulates may be separated into four different categories: (1) offenses against the confidentiality, integrity and availability of computer data and systems, including: illegal access, illegal interception, data interference, system interference, and misuse of devices; (2) computer-related offenses, including: forgery and computer fraud; (3) content-related offenses, including: production, dissemination and possession of child pornography; and (4) offenses related to infringement of copyright and related rights, individualizing the wide-scale distribution of pirated copies of protected works. *See Main Lines of the Convention*, *at* http://www.coe.int (last visited Nov. 5, 2002).

81. *See A Short History of the Council of Europe*, *at* http://www.coe.int (last visited Nov. 5, 2002).

82. *See An Overview*, *at* http://www.coe.int (last visited Nov. 5, 2002). The Council of Europe should not be confused with the European Union, as these entities are totally separate and very different from one another. *See id.* It should be noted that each of the European Union States, which include fifteen countries in Europe, are members of the Council of Europe. *See id.* The Council of Europe's decision-making body is known as The Committee of Ministers. *See id.* The Council of Europe's deliberative body is known as the Parliamentary Assembly. *See id.* These members are selected by the national parliaments. *See id.* Finally, the Congress of Local and Regional Authorities of Europe is the representative body of the Council of Europe representing local and regional authorities. *See id.*

Council of Europe aims "to protect human rights, pluralist democracy and the rule of law; to promote awareness and encourage the development of Europe's cultural identity and diversity."[83] The work of the Council of Europe fosters European Conventions and agreements in which member states may then "harmonize and amend their own legislation to comply with" the European Conventions or agreements formulated by the Council of Europe.[84] The Council of Europe covers many important issues that are prominent in European society today.[85]

2. How/Why Was the Convention on Cyber-crime Created?

The very first recommendation and report on cyber-crime, Recommendation No. R. (89) 9, was presented to the Council of Europe in 1989.[86] Subsequently, the Council of Europe issued a recommendation concerning the substantive law of computer crimes.[87] Recommendation No. R. (89) 9 asked member states to consider computer crimes when developing their domestic legislation.[88] The report on cyber-crime, which was also included in Recommendation No. R. (89) 9, gave legislators guidelines to follow when considering computer crimes.[89] In fact, the recommendation contained what has been referred to as a "Minimal List" and an "Optional List."[90] Recommendation No. R. (89) 9 resulted in a plethora of computer laws across the member states of the Council of

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83. *Id.* The Council of Europe further aims "to seek solutions to problems facing European society [such as] discrimination against minorities, xenophobia, intolerance, environmental protection, human cloning, AIDS, drugs, organized crime, etc; [and] to help consolidate democratic stability in Europe by backing political, legislative and constitutional reform." *Id.*

84. *Id.*

85. *See id.* For example, the work programs of the Council of Europe include: "human rights, media, legal co-operation, social and economic questions, health, education, culture, heritage, sport, youth, local democracy and transfrontier co-operation, the environment and regional planning." *Id.*

86. *See* Michael A. Sussmann, Article: *The Critical Challenges from International High-Tech and Computer-Related Crime at the Millennium*, 9 DUKE J. COMP. & INT'L L. 451, 478 (1999).

87. *See* David Goldstone & Betty-Ellen Shave, Essay: *International Dimensions of Crimes in Cyberspace*, 22 FORDHAM INT'L L. J. 1924, 1945 (1999).

88. *See* Sussmann, *supra* note 86.

89. *See id.*

90. *See* Goldstone and Shave, *supra* note 87. The "Minimal List" described conduct with regard to computers that the Council of Europe's member states should consider criminal. *See id.* These member states were expected to update their legislation accordingly. *See id.* The "Optional List" considered conduct that some of the member states may wish to criminalize. *See id.*

Europe.[91] Recommendation No. R. (89) 9 also opened the door for the second recommendation, Recommendation No. R. (95) 13.[92] Recommendation No. R. (95) 13 was presented to and adopted by the Council of Europe in 1995, bringing to life the idea of the Convention.[93] For four years, the Council of Europe has been working on a convention to attack cyber-crime.[94] During these fours years, numerous experts have not only been consulted, but have played a key role in the drafting of the Convention.[95] In February of 1997, the Council of Europe created a new committee: the Committee of Experts on Crime in Cyberspace.[96] The Council of Europe's Committee of Ministers, sought out to create a "binding legal instrument, and to consider questions relating to offenses, substantive criminal law, the use of coercive powers and jurisdiction in cyber-crime cases."[97] The Committee of Members sought out for the Committee of Experts on Crime in Cyberspace to evaluate each of the above referenced issues on an international level as well.[98] After the draft was created, the text of the draft was "declassified" making the draft available to the public via the Internet.[99] The Council of Europe "declassified" the draft Convention in hopes of gaining the relevant and valuable opinion of those closely affected by the Convention, such as professionals in the computer industry as well as the opinion of Internet users.[100] In March of 2001, the Parliamentary Assembly contributed to the creation and adoption of the draft by extending an invitation to experts from around the globe to a special hearing.[101] Subsequently, in its April 2001 session, the Committee of Ministers asked the Assembly for an

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91. *See id.*

92. *See* Sussmann, *supra* note 86.

93. *See id.*

94. *See* The Convention, *supra* note 2 and accompanying text.

95. *See Budapest*, *supra* note 3. Such experts have come from the Council of Europe countries as well as the United States, Canada, Japan and many other countries outside of the Council of Europe. *See id.*

96. *See* The Draft International Convention, *at* http://www.coe.int (last visited Nov. 5, 2002).

97. *See id.*

98. *See id.* The Committee of Experts on Crime in Cyberspace held ten plenary meetings during the span of two and one half years, April 1997 and December 2000; the drafting committee met roughly fifteen times during this period. *See id.*

99. *See First International Treaty to Combat Crime in Cyberspace Approved by Ministers' Deputies*, *at* http://www.coe.int (last visited Nov. 5, 2002) [hereinafter *First International Treaty*]. Declassification is an unusual step in the drafting process, especially for that of an international legal treaty. *See id.*

100. *See id.*

101. *See id.*

opinion on the draft.[102] After several amendments were in place, the Assembly adopted the draft convention on Cyber-crime at this April 2001 session.[103] The Assembly's vote to adopt the draft allowed for the draft to be given back to the Committee of Experts on Crime in Cyberspace to write a final draft.[104] After twenty-seven drafts and four years, the Committee of Ministers of the Council of Europe approved, thereby adopting the Convention on November 8, 2001.[105] However the Convention will not be effective or enforceable until five states, three of which must be Council of Europe members, ratify the treaty.[106] In fact, the Council of Europe has extended an invitation to all member states and non-member states that participated in the creation of the Convention.[107]

3. What's the Point: The Purpose and Objectives of the Convention on Cyber-crime

Although the Convention is said to have a plethora of purposes, its main focus is to combat cyber-crime on an international scale, to unify the nations against computer crimes, and to harmonize laws universally regarding offense, prosecution, and punishment.[108] The apparent need for an international treaty is founded on the premise on which many experts concur: cyber-crime is a new category of crime that requires a separate legal framework in order to address emerging technologies that are being utilized to commit traditional crimes.[109] Supporters of the Convention believe the Convention is the only way to bring countries together against cyber-criminals in hopes of creating a more effective way to combat cyber-

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102. *See* The Draft International Convention, *supra* note 96.

103. *See id.*

104. *See Cybercrime Treaty Moves Closer*, *at* http://www.cnn.com/2001/WORLD/europe/04/24/france.cybercrime/index.html (last visited Nov. 5, 2002).

105. *See Council of Europe Adopts Global Cyber-Crime Treaty*, *at* http://www.newsbytes.com (last visited June 2, 2002). *See also Budapest*, *supra* note 3; Robert Lemos, *International Cybercrime Treaty Finalized*, CNET News *at* http://news.com.com/2100-1001-268894.html (June 22, 2001).

106. *See Council Of Europe Adopts Global Cyber-Crime Treaty*, *supra* note 105. *See also Budapest*, *supra* note 3.

107. *See* Catherine P. Heaven, Note: *A Proposal for Removing Road Blocks from the Information Superhighway by Using an Integrated International Approach to Internet Jurisdiction*, 10 MINN. J. GLOBAL TRADE 373, 388 (2001). States will be permitted to ratify the Convention with or without reservations. *See id.* It is expected that Australia, Canada, New Zealand, Japan and the United States are to be the first of many signatories to the Convention. *See Council of Europe Adopts Global Cyber-Crime Treaty*, *supra* note 105.

108. *See Main Lines of the Convention*, *supra* note 80.

109. *See* Cesare, *supra* note 49, at 142.

crime.[110] The Convention is said to maintain such successful law enforcement because the Convention standardizes computer crime statutes and requires all signatory states to work with one another.[111] The text of the Convention is intended to protect network and user security.[112] The Convention covers not only substantive and procedural law, but also provides for international instruments to be implemented, including international levels of jurisdiction and the international use of coercive powers.[113]

The main objective of the Convention, which is stated in the preamble, "is to pursue a common criminal policy aimed at the protection of society against Cybercrime, especially by adopting appropriate legislation and fostering international cooperation."[114] The Convention is said to allow many countries to work together against defendants who affect many nations at one time or defendants who commit crimes in one nation while physically present in another nation.[115] The Convention addresses substantive law, procedural law, and jurisdictional aspects for all signatory states.[116]

a. Crimes Covered: The Substantive Law of the Convention on Cyber-crime

The Convention covers a wide range of substantive criminal law in Chapter II, Section I.[117] Such criminal offenses are separated into five main "Titles;"[118] covering crimes such as illegal access, illegal interception, data interference, system interference and misuse of devices;[119] criminal activity such as forgery and computer fraud;[120] crimes such as producing,

110. *See id.* at 166.

111. *See id.* at 165.

112. *See* The Draft International Convention, *supra* note 96.

113. *See id.*

114. *First International Treaty*, *supra* note 99.

115. *See Main Lines of the Convention*, *supra* note 80.

116. *See The Convention*, *supra* note 2.

117. *See id.* at ch. 2, § 1. Section I of the Convention lists specifically the substantive criminal law the Convention addresses. *See id.*

118. *See id.* at ch. 2, § 1, tits. 1-5.

119. *See id.* at ch. 2. § 1, tit. 1. *See also Main Lines of the Convention*, *supra* note 80. Title I of Chapter II is entitled "Offenses Against the Confidentiality, Integrity and Availability of Computer Data and Systems." *The Convention*, *supra* note 2, at ch. 2, § 1, tit. I, arts. 2-6.

120. *The Convention*, *supra* note 2, at ch. 2, § 1, tit. II, arts. 7-8. *See also Main Lines of the Convention*, *supra* note 80. Title II of Chapter II is entitled "Computer-Related Offenses." *The Convention*, *supra* note 2 at ch. 2, § 1, tit. II.

possessing, or making available to others child pornography;[121] as well as "wide scale distribution of pirated copies of protected works;"[122] and finally, this section covers responsibilities of signatories of the Convention in relation to any attempt to aid or abet criminals under the Convention.[123] It is important to note that for an activity to be considered criminal, the activity must satisfy two conditions: first, the activity or offense must be committed deliberately, and second, the activity or offense must be committed "without right."[124]

Only when these two conditions are met will an activity be deemed a criminal offense under the Convention.[125]

b. Logistics: The Procedural Law of the Convention on Cyber-crime

Section 2 of the Convention addresses the procedural law, which will govern all signatory states.[126] This section of the Convention is divided up into five main titles.[127] The procedural law section includes rules, which the Convention supporters say, make it easier for police to investigate and solve cyber-crime.[128] These rules include the new idea of "mutual

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121. *See The Convention, supra* note 2, at ch. 2, § 1, tit. III, art. 9. *See also Main Lines of the Convention, supra* note 80. Title III is entitled "Content-Related Offenses." *The Convention, supra* note 2, at ch. 2, § 1, tit. III, art. 9.

122. *The Convention, supra* note 2, at ch. 2, § 1, tit. IV, art. 10. *Main Lines of the Convention, supra* note 80. Title IV is entitled "Offenses related to infringements of copyright and related rights." *The Convention, supra* note 2, at ch. 2, § 1, tit. IV, art. 10.

123. *See The Convention, supra* note 2, at ch. 2, §1, tit. V, art. 11. *See also Main Lines of the Convention, supra* note 80. Title V is entitled "Ancillary Liability and Sanctions." *The Convention, supra* note 2, at ch. 2, §1, tit. V.

124. *See Main Lines of the Convention, supra* note 80. The term "without right" is said to obtain its meaning from the circumstances in which it is being used. *See Explanatory Report to the Convention on Cyber-crime*, ch. 2, § 1 para. 38 (2001) *at* http://www.coe.int (last visited Nov. 5, 2002) [hereinafter *Explanatory Report*] (applying the term "without restricting how Parties may implement the concept in their domestic law[;] it may refer to conduct undertaken without authority or conduct that is otherwise not covered by established legal defense, excuses, justifications, or relevant principles under domestic law"). The Department of Justice, when explaining how the term "without right" is intended to apply indicated that if activity is lawful in one state, then it will not be deemed unlawful or "without right" under that state's law. *See Frequently Asked Questions and Answers About the Council of Europe Convention on Cybercrime (Draft 24REV2), at* http://www.usdoj.gov/criminal/cybercrime/COEFAQs.htm (last visited Nov. 5, 2002) [hereinafter *Frequently Asked Questions*].

125. *See Main Lines of the Convention, supra* note 80.

126. *See The Convention, supra* note 2 at ch. 2, § 2.

127. *See id.* at ch. 2, § 2, tits. 1-5.

128. *See Main Lines of the Convention, supra* note 80.

assistance" among the signatory states.[129] Such new forms of "mutual assistance" are the subject matter of Title 1 through Title 5.[130] Title 1 covers the common provisions of Section 2.[131] Title 1 discusses the legislation signatories must adopt, when and what types of procedures will be applied to criminal offenses by signatories, and conditions and safeguards.[132] Title 2 focuses on the expedited preservation of stored computer data and partial disclosure of traffic data.[133] Title 3 addresses when and how signatories will adopt proper legislation to allow authorities to order production of certain items, such as: subscriber information from service providers, specified computer data, etc.[134] Title 4 addresses the search and seizure of stored computer data by signatories.[135] Finally, Title 5 discusses the real-time collection of computer data, including the real-time collection of traffic data and the real-time interception of content data.[136] In order to further the mutual assistance and international cooperation necessary, the Convention "will enforce cooperation corresponding to powers defined in the convention and as a consequence the legal authorities and police in one country will be able to collect computer-based evidence for police in another ...."[137] Such information will have to be transferred between signatories quickly in order to ensure success. Therefore, a contact network will be established and will operate around the clock to provide fast paced assistance to investigators.[138] The provisions of mutual assistance within the Convention further support such a network.

c. *Who Can Play? The Jurisdiction of the Convention on Cyber-crime*

Section 3 of the Convention covers the complex matter of

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129. *See id.*

130. *See The Convention, supra* note 2, at ch. 2, § 2, tits. 1-5. *See also Main Lines of the Convention, supra* note 80.

131. *See id.* at ch. 2, § 2, tit. 1.

132. *See id. See also Main Lines of the Convention, supra* note 80.

133. *See The Convention, supra* note 2, at ch. 2, § 2, tit. 2. *See also Main Lines of the Convention, supra* note 79.

134. *See The Convention, supra* note 2, at ch. 2, § 2, tit. 3. *See also Main Lines of the Convention, supra* note 80.

135. *See The Convention, supra* note 2, at ch. 2, § 2, tit. 4. *See also Main Lines of the Convention, supra* note 80.

136. *See The Convention*, supra note 2, at ch. 2, § 2, tit. 5. *See also Main Lines of the Convention, supra* note 80.

137. *Main Lines of the Convention, supra* note 80.

138. *See id.*

jurisdiction.[139] Signatories must establish jurisdiction over any offense via legislative or any other necessary means.[140] Such jurisdiction will apply when the offense is committed in the territory of the signatory's country, on board a ship of the signatory, on board an aircraft of the signatory, or by one of the signatory's nationals, "unless another state has territorial jurisdiction."[141]

i. The U.S. and the Council of Europe: The Role of the United States in Drafting the Convention on Cyber-Crime

The United States Department of Justice and the United States Department of State, in addition to other government agencies, have played an important role in drafting the Convention.[142] The Council of Europe extended an invitation to the United States originally to participate as an observer in 1989 and 1995 when the first recommendations were occurring.[143] The United States was merely an observer at that time of the creation of the Convention.[144]

Subsequently, the Council of Europe requested the United States actually participate in the negotiations regarding the Convention, and the United States agreed.[145] Because the United States participated in the negotiations of the Convention, the Council of Europe has given the United States the right to become a signatory to the Convention.[146] However, it is important to note that the United States is not required or bound to sign the Convention.[147] Because the United States was an active participant in the negotiations of the drafting of the Convention, the Department of Justice concludes that "the United States has had a real voice in the drafting process."[148]

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139. *See The Convention*, *supra* note 2, at ch. 2, § 3. *See also Main Lines of the Convention*, *supra* note 80.

140. *See The Convention*, *supra* note 2, at ch. 2, § 3. *See also Main Lines of the Convention*, *supra* note 80.

141. *See The Convention*, *supra* note 2, at ch. 2, § 3. *See also Main Lines of the Convention*, *supra* note 80.

142. *See Frequently Asked Questions*, *supra* note 124.

143. *See id.*

144. *See id.*

145. *See id.*

146. *See id.*

147. *See id.*

148. *Frequently Asked Questions*, *supra* note 124.

III. ARE "THE PEOPLE" IMPACTED?: THE CONVENTION ON CYBER-CRIME AND UNITED STATES CONSTITUTIONAL RIGHTS

Many organizations have spoken out actively against the Convention.[149] Groups such as the Global Internet Liberty Campaign,[150] the American Civil Liberties Union,[151] as well as Privacy International[152] each agree that the Convention poses a serious threat to several constitutional rights that many American citizens hold dear.[153]

The Global Internet Liberty Campaign, which consists of twenty-two associations in nine European Countries, the United States, Japan, Australia and South Africa, is campaigning against the Convention.[154] The Global Internet Liberty Campaign appreciates the need to harmonize laws worldwide in order to address the growth in cyber-crime.[155] However, the Global Internet Liberty Campaign also believes the draft as it stands will jeopardize the protection of personal data and the right to anonymity.[156] Privacy International and the American Civil Liberties Union support the concerns of the Global Internet Liberty Campaign.[157] The concerns of these groups will be discussed in the next two sections.[158]

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149. *See* David Banisar et al. *Comments of the American Civil Liberties Union, the Electronic Privacy Information Center and Privacy International on Draft 27 of the Proposed CoE Convention on Cybercrime, at* http://www.privacyinternational.org/issues/cybercrime/coe/ngo_letter_601.htm (last visited Nov. 5, 2002). *See also* Cesare, *supra* note 49, at 167.

150. The Global Internet Liberty Campaign is composed of numerous organizations coming together under this name to oppose the ratification of the Convention due to the lack of privacy assurances. *See* Mark Ward, *Treaty Could Stifle Online Privacy, at* http://news.bbc.co.uk/ 2/hi/sci/tech/1378482.stm (last visited Nov. 5, 2002).

151. The American Civil Liberties Union, founded in 1920, is a nonprofit and nonpartisan organization whose mission is to fight civil liberties violations all over the country. *See Freedom is Why We're Here, at* http://www.aclu.org (last visited Nov. 5, 2002).

152. Privacy International, formed in 1990, is a human rights group based out of London, England. *See* http://www.privacyinternational.org (last visited Nov. 5, 2002). Privacy International considers itself a "watchdog" on governments and corporations trying to ensure that privacy rights of individuals, as well as other human rights, are not adversely affected. *See id.* Privacy International has organized campaigns all over the world "on issues ranging from wiretapping and national security activities, to ID cards, video surveillance, data matching, police information systems, and medical privacy." *Id.*

153. *See* Banisar, *supra* note 149. *See also* Cesare, *supra* note 49, at 169.

154. *See* Cesare, *supra* note 49, at 169.

155. *See id.*

156. *See id.*

157. *See* Banisar, *supra* note 149. *See also* Cesare, *supra* note 49, at 169.

158. *See infra* notes 159-248.

A. Does the Convention on Cyber-Crime Infringe Upon Privacy Rights of United States Citizens?

Before we can discuss whether the Convention infringes upon privacy rights of the United States citizens we must first consider the source of the right to privacy, whether the right to privacy is fundamental, and if the right to privacy is an enumerated right. The Supreme Court in *Griswold v. Connecticut* established the right to privacy.[159] Griswold v. Connecticut is a 1965 case involving the criminal prosecution of Estelle Griswold, the Executive Director of Planned Parenthood and a physician.[160] Griswold was prosecuted for providing married women with contraceptives; such distribution was illegal under a Connecticut statute at that time.[161] In an opinion written by Justice Douglas, the Supreme Court held that the Connecticut law prohibiting the distribution and use of contraceptives was unconstitutional.[162] Justice Douglas stated the basis for finding the Connecticut law unconstitutional was that the Connecticut law violated the right to privacy.[163] The Supreme Court found that the right to privacy was a fundamental right, a right implicit in the "penumbra" of the Bill of Rights.[164] Justice Douglas cited the First, Third, Fourth, Fifth, and Ninth Amendments; stating that together they create the right to privacy.[165] When discussing the importance in recognizing the right to privacy, Justice Douglas stated: "Various guarantees create zones of privacy ... [w]e have had many controversies over these penumbral rights of privacy and repose. These cases bear witness that the right of privacy which presses for recognition here is a legitimate one."[166]

Having now established that the right to privacy, although implied in the Constitution, is a fundamental right created through several amendments of

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159. Griswold v. Connecticut, 381 U.S. 479 (1965). *See also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 10.3.2 (1st ed., 1997). It is significant to note that the right to privacy is recognized worldwide. *See* David Banisar and Simon Davies, Article: *Global Trends in Privacy Protection: An International Survey of Privacy, Data Protection, and Surveillance Laws and Developments*, 18 J. MARSHALL J. COMPUTER & INFO. L. 1, 3 (1999). Most countries recognize privacy as a right in their constitutions. *Id.* "Privacy is a fundamental human right recognized in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and in many other international and regional treaties." *Id.*

160. *See Griswold*, 381 U.S. at 480. *See also* CHEMERINSKY, *supra* note 159, at 658.

161. *See Griswold*, 381 U.S. at 480. *See also* CHEMERINSKY, *supra* note 159, at 658.

162. *See Griswold*, 381 U.S. at 485. *See also* CHEMERINSKY, *supra* note 159, at 659.

163. *See Griswold*, 381 U.S. at 485. *See also* CHEMERINSKY, *supra* note 159, at 659.

164. *See Griswold*, 381 U.S. at 484. *See also* CHEMERINSKY, *supra* note 159, at 659.

165. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965). *See also* CHEMERINSKY, *supra* note 159.

166. *Griswold*, 381 U.S. at 484.

the Bill of Rights,[167] now consider whether this right may be threatened by the Convention. Civil liberties groups, human rights groups, and many other individuals criticize the Convention, arguing that the method used to regulate the Internet may be detrimental to the right to privacy.[168] Three groups sent a letter to the draft committee: the American Civil Liberties Union, the Electronic Privacy Information Center, and Privacy International.[169] These three civil liberties groups expressed their concerns with the Convention and urged the Council of Europe to open the redrafting of the treaty to non-governmental organizations, such as themselves.[170] These groups argue that the Council of Europe has "ignored" the imperative concerns many have regarding privacy.[171] In fact the civil liberties groups stated "the treaty's recommendations on protecting privacy are vague and do not go far enough."[172] More specifically, the civil liberties groups desire a greater separation of powers thereby creating distance between the police, who, for example, request the ability to obtain records from Internet service providers and the government officials who grant the police such powers.[173] Under the Convention, the United States and European law enforcement agencies will be armed with new powers, allowing them to investigate and prosecute computer crimes.[174] The concern is that giving these new powers to law enforcement will inevitably give the government, according to civil liberties organizations, too much power, and thereby violate the privacy rights of individuals.[175] For example, the Convention will allow authorities to require individual persons to disclose their passwords, which allow them to access various encrypted material and databases.[176] The Convention achieves this forced disclosure by requiring each signatory State to pass laws that guarantee "any person who has knowledge about ... measures applied to secure

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167. *See id.* at 484. *See also* CHEMERINSKY, *supra* note 159, at 659.

168. *See Critics Say Cybercrime Treaty Harmful*, *at* http://www.zdnet.com (last visited Nov. 5, 2002).

169. *See* Ward, *supra* note 150.

170. *See id.*

171. *See id.*

172. *Id.*

173. *See id.*

174. *See* Declan McCullagh, *Cybercrime Solution Has Bugs*, *at* http://www.wired.com (last visited Nov. 5, 2002).

175. *See id.* This idea is supported by Gus Hosein, a senior fellow of Privacy International, who was quoted as saying, "[t]he increase of the powers of law enforcement waters down the protection of human rights." *See* Joris Evers, *Council of Europe Wraps Up Cybercrime Treaty*, *at* http://www.cnn.com/2001/TECH/internet/05/29/cybercrime.treaty.idg/index.html (last visited Nov. 5, 2002).

176. *See* McCullagh, *supra* note 174.

computer data can be ordered to 'provide all necessary information' to allow law enforcement to access that data."[177] The forced disclosure of passwords to law enforcement officials is currently only practiced in two countries: Malaysia and Singapore.[178] The Global Internet Liberty Campaign, in a letter to the draft committee of the Convention, referred to the Convention as "'appalling,' and warned that it handed law enforcement agencies sweeping powers to snoop and could seriously erode online privacy."[179] It appears that an argument could be made that allowing little balance between these powers gives police easier access to private information and, with easier access, a greater potential for the abuse of various fundamental rights of United States citizens, rights that extend past the right to privacy and into other rights guaranteed to us through the Constitution, such as the protection against self-incrimination, fourth amendment search and seizure issues and due process of law. For example, if you are now required to turn over your password in order for the government to obtain information from your computer, e-mail account, or web page in order to prosecute you, how should this be reconciled with the privilege against self-incrimination?[180] This is a concern of many of the civil liberties groups opposing the enactment of the Convention.[181] "Forc[ing] ordinary Internet users to turn over decryption keys and other personal information to the government—[] will not only erode online privacy, but may also violate the right against self-incrimination."[182] "The

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177. David Banisar, *Love Letter's Last Victim*, *at* http://online.securityfocus.com/news/39 (last visited Nov. 5, 2002). In his article, David Banisar argues that once the Convention is ratified, the "biggest victim of the ILOVEYOU worm ... [is] ... everyone's basic right to privacy." *Id.* Banisar argues further that "[w]hen the U.S. government cannot get a controversial policy adopted domestically, they pressure an international group to adopt it, and then bring it back to the U.S. as an international treaty—which obliges Congress to enact it." *Id.* David Banisar is an attorney in the Washington D.C. area and the Deputy Director of Privacy International. *See id.*

178. *See id.*

179. Ward, *supra* note 150.

> Allowing law enforcement direct access to a service provider's network to conduct surveillance ... provides police with the ability to conduct broad sweeps of network communications with only their unsupervised assurance that they will only collect that data which they are lawfully entitled to collect. It invites abuse of the most invasive investigative powers.

Banisar, *supra* note 149.

180. *See Cyber-Rights Groups Join Forces to Oppose Anti-Privacy Cybercrime Treaty*, *at* http://www.aclu.org/Privacy/Privacymain.cfm (last visted Nov. 5, 2002) [hereinafter *Cyber-Rights Groups*].

181. *See id.*

182. *Id.* In a letter of comments to the U.S. Department of Justice and the Council of Europe in an effort to voice their concerns with the Convention, the American Civil

new document would permit government agents to invade the privacy of law-abiding citizens."[183] Many groups are concerned, that we are heading in the direction of having "Big Brother" become a reality, in fact they believe the Convention is one step closer to a "global Big Brother."[184]

Another problem, various groups argue, is that the Convention will also require Internet providers and companies maintaining websites to accumulate various information about their users.[185] Such provisions of the Convention would seemingly violate privacy rights of the affected individuals.[186] One could argue that no longer would individuals be able to remain anonymous on the web, no longer would individuals be able to subscribe to various websites or mailings without the fear of another finding out. "What," some will ask, "is the point in having passwords to protect private information, if the government can force you to reveal what it is you are maintaining as private?" When asked a similar question, Barry Steinhardt, the associate director of the ACLU and co-founder of the Global Internet Liberty Campaign,[187] stated: "I think it's [referring to the Convention] dangerous for the Internet. I think it will interfere with the ability to speak anonymously."[188]

Another problem with the Convention involving Internet service providers, argues Privacy International, is that the Convention will create situations where United States Internet service providers can be forced to comply with government officials regarding user information relating to matters legal in the United States, yet illegal in other states.[189] The Privacy

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Liberties Union, the Electronic Privacy Information Center, and Privacy International urged that the Convention be changed to protect against self-incrimination. *See* Banisar, *supra* note 149. These groups argued that the privilege against self-incrimination, a privilege that has been in existence since the Romans and later adopted by the United States through the Constitution, prohibits the government from forcing an individual to testify against himself. *Id.* The letter further argues that forcing an individual to testify against himself violates the European Convention on Human Rights. *Id.*

183. *Cyber-Rights Groups*, *supra* note 180.

184. *Council of Europe Adopts Global Cyber-Crime Treaty*, *supra* note 105.

185. *See* McCullagh, *supra* note 174.

186. *See id.* When discussing in their letter to the Department of Justice and the Council of Europe the provisions of the Convention that place heavy requirements on Internet service providers, the civil liberties group stated, "[w]ithout sufficient privacy and due process protections, which are noticeably lacking in the Treaty, these provisions threaten human rights." Banisar, *supra* note 149.

187. McCullagh, *supra* note 174.

188. *Id.*

189. *See* Evers, *supra* note 175. In their letter to the Department of Justice and the Council of Europe, the American Civil Liberties Union, the Electronic Privacy Information Center and Privacy International, expressed great concern for the mutual assistance provisions of the Convention:

International spokesperson, Gus Hosein, cites hate speech as an example of such a situation.[190] Mr. Hosein indicates that an Internet service provider, under the Convention, can be required to cooperate with German authorities by giving them information about a customer, meanwhile the customer is protected here in the United States by the Constitution.[191] Such a requirement for Internet service providers is rather burdensome. Internet service providers, according to The World Information Technology and Services Alliance,[192] could also be held responsible for third party actions, in addition to the heavy data-preservation requirements of Article Seventeen of the Convention.[193] Requiring so much of Internet service providers could inevitably lead to more restrictive sign up policies for individuals to use the web or for individuals and companies to maintain their own webpage. In turn, are we looking at the Convention as a body of law that will restrict the use of the Internet all together? Unfortunately, we will have to wait and see how the impact of the Convention will affect individual usage of the Internet in the United States.

Even though the drafters of the Convention, after receiving great pressure from civil liberties and human rights groups such as the Global Internet Liberty Campaign, the American Civil Liberties Union, and Privacy International, incorporated a few provisions in the Convention which "limit[ed] surveillance to criminal investigations and added some safeguards to civil liberties, the groups are still dissatisfied.[194] 'But it's still not enough,'"[195] said the Deputy Director of Center the for Democracy and Technology.[196] The Director added, "[u]nfortunately, it remains a

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> We remain deeply concerned with the draft treaty's failure to consistently require dual criminality as a condition for mutual assistance. No nation should ask another to interfere with the privacy of its citizens or to impose onerous requirements on its service providers to investigate acts, which are not a crime in the requested nation. Governments should not investigate a citizen who is acting lawfully, regardless of whatever mutual assistance conventions are in place.

Banisar, *supra* note 149.

190. *See* Evers, *supra* note 175.

191. *See id.*

192. The World Information Technology and Services Alliance (WITSA) is a "global consortium" of information technology associates. *See* George A. Chidi, Jr., *Group Voices Concern Over EU Cybercrime Plan*, *at* http://www.cnn.com/2000/TECH/computing/12/05/eu.cybercrime.plan.idg/ index.html (last visited Nov. 5, 2002).

193. *See id.* Article Seventeen of the Convention requires Internet service providers to log traffic data and to maintain logs for government agencies to use when pursuing cyber-criminals. *See id.*

194. Lemos, *supra* note 105.

195. *Id.*

196. James X. Dempsey is Deputy Director of the Center for Democracy and

fundamentally imbalanced document. While privacy issues received somewhat more attention in the final stages of the process, the treaty does not have the specificity needed for meaningful privacy protection in the face of increasing surveillance power of this new technology."[197]

The Global Internet Liberty Campaign, representing the American Civil Liberties Union, Privacy International, and twenty-one other civil and human rights groups, frustrated with the Council of Europe turns also to governments worldwide making a strong plea in the name of privacy: "We call on governments around the world to reject the treaty because it does not provide enough protection to fundamental human rights."[198]

B. How will the Convention on Cyber-Crime Benefit the United States and her citizens?

Although the civil liberties groups and human rights groups have many valid concerns with the Convention and have compelling arguments for why the Convention is detrimental to the right to privacy, is the Convention really all that bad? Why would forty-three European member states as well as Japan, Canada, South Africa, and the United States join together to create such an international coalition for the sake of increasing government powers in order to better regulate what individuals are doing, thereby violating privacy? There are many valid reasons why the Convention was drafted, namely the need to fight cyber-crime or succumb to this new-age criminal activity. The purpose for the Convention has been previously discussed, let us now turn to what benefits are in store for the United States as a result of the Convention.

The United States Department of Justice answered such a question in response to frequently asked questions about the Council of Europe Convention on Cybercrime.[199] One must acknowledge how vital computers are now to our everyday lives, the running of our businesses, and our governments. Only after such an acknowledgement can we begin to understand the benefits and protections the Convention will bring to our

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Technology in Washington D.C. *See id.*

197. *Id.*

198. *Cyber-Rights Groups*, *supra* note 180.

199. *See Frequently Asked Questions*, *supra* note 124. The direct response given by the Department of Justice states:

> If the United States were to become a party to this Convention, it would directly benefit by having better methods of obtaining international assistance from other parties in computer-related crime cases, particularly because the other parties to the Convention would have similar minimum definitions of computer crimes and the domestic procedural tools needed to investigate those crimes.

Id.

society as a whole. At this time cyber-crime poses serious threats to our lives and our country.[200] For example, some types of computer crimes target our utilities, communication companies, and transportation abilities.[201] In addition, cyber-criminals are also committing "traditional crimes, including fraud copyright infringement, [and] distribution of child pornography."[202] Therefore, an international tool, such as the Convention, can potentially eliminate many of the "procedural and jurisdictional obstacles" that prevent the prosecution of cyber-criminals.[203] The Convention, according to the Department of Justice, "breaks new ground by being the first multilateral agreement drafted specifically to address the problems posed by the international nature of" cyber-crime.[204] The Convention furthers the ability to prosecute cyber-criminals, and thereby deter cyber-crime, by requiring all signatory countries to implement minimum substantive offenses relating directly to computer crime, requiring all signatory countries to put into place procedural laws allowing the investigation of computer crimes, and finally the Convention establishes a means for international support during investigation and prosecution of cyber-criminals.[205]

> [For example,] [t]ake the recent investigation of the Love bug virus. ... Although our investigators continue to work closely with investigators in the Philippines, international coordination would have proceeded more quickly and effectively had there existed common computer crime laws between our countries.[206]

Without an international tool to unify nations against cyber-crime, the criminals will have free reign when it comes to committing crimes across international boarders.

The civil liberties and human rights groups argue that the Convention may violate the protections against self-incrimination and the right to privacy by forcing individuals to surrender their passwords or other encrypted information to authorities.[207] However, the Fourth Amendment,[208] as well as the Fifth Amendment,[209] still exist and are as

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200. *See id.*

201. *See id.*

202. *Id.*

203. *Id.*

204. *See id*

205. *Frequently Asked Questions*, *supra* note 124.

206. Gwendolyn Mariano, *Global Hacker Agreement Could Affect Bug Hunters*, CNET News, *at* http://news.com.com/2102-1023-247761.html (last visited Nov. 5, 2002).

207. *See supra* notes 168-184 and accompanying text.

208. *See* U.S. CONST. amend. IV.

209. *See* U.S. CONST. amend. V.

powerful as ever. Patricia Bellia[210] argues "[t]he convention is not designed to undermine privacy protection."[211] In fact, the Convention maintains the privacy protections[212] that exist via the Fourth Amendment[213] of the Constitution and the penumbras of the Bill of Rights.[214] Bellia further explained, "[f]or example, if the United States signed the treaty, it couldn't do anything to undermine the Fourth Amendment."[215]

Another argument advanced against the enactment of the Convention by civil liberties and human rights groups is that the Convention could require an individual to be prosecuted for something that is illegal in one country, yet legal in her own country.[216] The groups opposing the Convention call for a dual criminality requirement with regard to mutual assistance.[217] This would require that the activity be illegal in both the country affected and the country of citizenship before the individual is prosecuted.[218] Keeping in mind, however, that the objective of the Convention is to create similar laws across the nations,[219] it is hard to believe that such an occurrence is likely to happen. Once the Convention is enacted and signatory states enforce necessary laws to comply with the Convention, most states will be prosecuting for similar acts. Therefore, what is illegal in one country will most likely be illegal in another. However, there may still be occurrences where the laws differ. In such a situation one must reflect upon the meaning of "without right" and what the Convention requires in order for the activity to be deemed a criminal offense before making such hasty conclusions that individuals will be prosecuted for an act that is legal in their own country.[220] "Without right" is defined in the Draft Explanatory Notes of the Convention as "conduct undertaken without authority."[221] Furthermore, committing the act "without right" is a condition that must be met before the activity is deemed a criminal offense.[222] Therefore, if an

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210. Patricia Bellia is an assistant professor of law at Notre Dame Law School and is a former attorney with the United States Department of Justice. *See Lemos*, *supra* note 105. Bellia is also an expert "in the jurisdictional problems in prosecuting Internet crimes." *Id.* Bellia argues that privacy issues with the Convention are "overstated." *Id.*

211. *Id.*

212. *See id.*

213. *See id.*

214. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

215. *Lemos*, *supra* note 105.

216. *See supra* notes 124, 189-93 and accompanying text.

217. *See supra* notes 124, 189-93 and accompanying text.

218. *See supra* notes 124, 189-93 and accompanying text.

219. *See supra* notes 124, 189-93 and accompanying text.

220. *See supra* notes 124, 189-93 and accompanying text.

221. *See supra* notes 124, 189-93 and accompanying text.

222. *See supra* notes 124, 189-93 and accompanying text.

individual commits an act that is undertaken with authority, an act that the individual's nation does not consider illegal, then how can the Convention deem the act without right? The Convention will unlikely be be used in such a manner, therefore there is no *apparent* problem of mutual assistance.

The Convention is criticized for placing heavy burdens upon Internet service providers.[223] Many critics argue that the Convention places heavy data-preservation requirements on Internet service providers via article seventeen.[224] The critics once again argue that privacy rights are being violated by allowing government officials to obtain user information via a third party, the Internet service provider.[225] However, if you refer directly to the explanatory notes of article seventeen, it clearly demonstrates that the so-called "burden" placed on Internet service providers is hardly a burden at all.[226] As stated in the explanatory notes to article seventeen "this data is frequently stored for only short periods of time, as laws designed to protect privacy may prohibit or market forces may discourage the long-term storage of such data."[227] Here the Convention concedes to the right to privacy in the only way it can while still maintaining its effectiveness.

The Convention only requires the storage of such data for brief periods of time.[228] Furthermore, as explained by the United States Department of Justice, the Convention does not require the Internet service provider to "retain" data, it merely allows for government officials to request that Internet service providers set aside "specified data that is already in the service provider's possession."[229] In fact such preservation provisions are not new to the United States.[230] According to the Department of Justice, data preservation has been good law in the United States for five years.[231] In practice, such a law requires the Internet service provider to set aside "only reasonably small amounts of specific data identified as relevant to a particular case where the service provider already has control over that data."[232] Obtaining such data is critical to the prosecution of individuals for criminal activity. It is required in order for the Convention to work;

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223. *See supra* notes 185-93 and accompanying text.

224. *See supra* notes 185-93 and accompanying text.

225. *See supra* notes 185-93 and accompanying text.

226. *See Explanatory Report*, *supra* note 124 at ch. 2, § 2, tit. 2, art. 17.

227. *Id.*

228. *See id.*

229. *Frequently Asked Questions*, *supra* note 124.

230. *See id.*

231. *See id.* "18 U.S.C. § 2703(f) requires an electronic communications service provider to 'take all necessary steps to preserve records and other evidence in its possession pending the issuance of a court order or other process' upon 'the request of a governmental entity.'" *Id.*

232. *Id.*

otherwise such individuals can remain anonymous because prosecutors have no evidence against the offender.

Although the issue of privacy is rather compelling here, this situation seems no different from the government's power to obtain private information in a prosecution for tax evasion. In such an instance, most individuals would not argue their right to privacy is being violated. If we allow the right to privacy to prevent Internet service providers from complying with the subpoena power of the government, we may as well discard the Convention because hardly anyone could be prosecuted for cyber-crime activities. There seems to be no other apparent method to obtain critical information and potential evidence for the necessary prosecution of cyber-criminals.

Another concern the civil liberties and human rights groups have expressed is that since there seems to be no exemption from liability for Internet service providers, such service providers may be held liable for third party actions.[233] More specifically, critics presume that Internet service providers would be responsible for monitoring customers and user content and thereby held criminally liable when failing to do so, or for employees whose actions are offenses under the Convention.[234] Such a presumption is false. The Convention does not require Internet service providers to monitor content, nor to be liable for failing to monitor content.[235] The Convention only punishes offenses by Internet service providers who intend to transmit or store data with the knowledge of its contents.[236] For example, as long as the Internet service provider only intends to transmit data and does not know that the data contains child pornography, the Internet service provider cannot be prosecuted criminally under the Convention.[237]

Moreover, article twelve of the Convention, relating to corporate liability, addresses the issue of Internet service providers and their employees.[238] Only if an individual "with significant authority within a corporation intentionally undertakes, or through a lack of supervision, permits the undertaking of criminal activity for the corporation's benefit"

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233. *See supra* notes 185-93 and accompanying text. *See also Frequently Asked Questions*, *supra* note 124.

234. *See supra* notes 185-93 and accompanying text. *See also Frequently Asked Questions*, *supra* note 124.

235. *See Frequently Asked Questions*, *supra* note 124. *See also The Convention*, *supra* note 2, at ch. 3, § 2.

236. *See Frequently Asked Questions*, *supra* note 124. *See also The Convention*, *supra* note 2, at ch. 3, § 2.

237. *See Frequently Asked Questions*, *supra* note 124. *See also The Convention*, *supra* note 2, at ch. 3, § 2.

238. *See The Convention*, *supra* note 2, at art. XII.

will the corporation or, in this example the Internet service provider, be criminally liable for the actions of its employees.[239] Once again, the Convention is only holding those who are intentionally committing cyber-crime or those who are knowingly allowing cyber-crime to occur,[240] even though they have the ability to prevent such activity. If we were to remove such provisions from the Convention or refine them anymore, the Convention would, again, lose its purpose and cyber-criminals would reign.

Although not a criticism or issue relating directly to privacy, it is important to discuss in this section, as a benefit to enacting the Convention in the United States, whether the Convention will require the United States to execute new legislation in order to comply with the Convention. According to the Department of Justice, the Convention will not require the United States to execute new legislation for the United States to become a signatory state to the Convention.[241] As a result of the Department of Justice's participation in drafting the Convention, the main lines of the Convention are consistent with the "framework" of current United States substantive and procedural law.[242] For example, "the need to change domestic legislation or amend existing treaties in order to facilitate extradition becomes irrelevant because the [Convention] contains provisions that ameliorate the dilemma." [243] In addition, the Convention provides for signatories to take full or limited reservations to a limited number of provisions, when such provisions are inconsistent with United States law.[244] Having to adjust or implement legislation is an important consideration when participating in international treaties. Knowing that the United States had a voice in the drafting of the Convention and that the subsequent Convention is, for the most part, consistent with United States law is significant. With such knowledge in mind, it is hard to imagine that our privacy rights will be easily violated, given that the United States may make reservations to the Convention where necessary.[245]

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239. *Frequently Asked Questions, supra* note 124. It is interesting to note that this provision in the Convention applies to a narrow group of individuals, whereas under United States federal law, a much greater number of individuals would face criminal prosecution. *See id.*

240. *See id.*

241. *See id.*

242. *See id.*

243. Cesare, *supra* note 49, at 167.

244. *Frequently Asked Questions, supra* note 124.

245. Another relevant point is that the United States already has several pieces of legislation in place that further the protection of privacy; such legislation includes the Privacy Act of 1974, the 1994 Electronic Communications Privacy Act, and the Privacy Protection Act. Nicole M. Buba, Note: *Waging War Against Identity Theft: Should the United States Borrow from the European Union's Battalion?*, 23 SUFFOLK TRANSNAT'L L.

With cyber-crime as "crimes biggest growth-area" international laws addressing such criminal activity are in demand.[246] More specifically, individuals demand new training and resources for our government officials in order to apprehend cyber-criminals, and individuals demand laws addressing the crimes that cyber-criminals are committing. In order for such training and laws to come into play, our nations must cooperate.[247] "When one country's laws criminalize certain activities on computers and another country's laws do not, cooperation in solving a crime and prosecuting the perpetrator may not be possible."[248] Cyber-criminals benefit by nations having various laws and little international cooperation with regard to regulation and prosecution; we must synchronize our laws to benefit society and the world by attacking the attacker as one. Only then can we truly begin to fight cyber-crime.

IV. RISK – BENEFIT ANALYSIS: DOES THE BENEFIT OF THE CONVENTION ON CYBER-CRIME OUTWEIGH THE POTENTIAL THREAT TO THE RIGHT TO PRIVACY?

Although the concerns that privacy rights may be adversely affected by the enactment of the Convention are valid, they are not certain. At this point the Convention may pose a threat to the privacy rights of individuals, this author believes such potential concerns do not rise above the more certain benefits the Convention has to offer the United States, and the international community.[249] For example, the Convention will further the fight against child pornography, a major problem in the United States and

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REV. 633, 644-46 (2000). The Privacy Act of 1974: "[t]he privacy act of 1974 (Privacy Act) attempts to provide protection for personal data by requiring federal adherence to limits and prohibitions regarding the collection, maintenance, use, and dissemination of information by the government." *Id.* at 644. The 1994 Electronic Communications Privacy Act: "protect[s] 'any transfer of signs, signals, writings, images, sounds, data, or intelligence of any nature transmitted in whole or in party by a wire, radio, electromagnetic, photoelectric or photooptical system.'" *Id.* at 645 (quoting Electronic Communications Privacy Act, 18 U.S.C. 5, §§ 2510-2522, and §§ 2701-2711 (1994)). Finally, the Privacy Protection Act (PPA): "offers protection for the limited category of publishers' work product materials. The PPA forbids government seizure of these materials unless there is probable cause showing that the person in possession of such information is committing an offense to which the materials relate." *Id.* at 646. Considering the United States already has legislation in place to further the protection of privacy rights, the Convention, if enacted, will work with the current United States privacy protections, thereby ensuring protection of privacy, as well as a fight against cyber-crime.

246. *See A New Sense of the Dangers*, *supra* note 71.

247. *See id.*

248. Mariano, *supra* note 206.

249. *See The Convention*, *supra* note 2, at ch. 2, § 1, tit. III, at art. 9.

an issue that the international community must address regularly.[250] The Convention, by helping to reduce cyber-crime, will also cut expenses incurred by victims of cyber-crime, expenses paid all too often by big business and our government.[251] Such benefits should have a significant impact on this new ring of terror called cyber-crime. When considering the privacy issues brought up by civil liberties groups and human rights activists, first consider the benefits the Convention will provide.[252]

Meet "Niki" and "Nadia," teenage sisters living in St. Petersburg, Russia.[253] Niki, fourteen, and Nadia, seventeen, enjoy going to the beach and listening to classical music.[254] But, these sisters do not enjoy all the normal activities of teenage girls, as they have been posing nude for Internet sites for over three years now.[255] At the ages of fourteen and eleven, Nadia and Niki began posing nude for "Lolita" sites.[256] Niki and Nadia work for a site that is only one of thousands; in fact the United States Customs Services states there are 100,000 or more of these sites.[257] "Boris," the owner and operator of the site that Niki and Nadia pose for, owns at least three more sites like this one.[258] The site the girls pose for sells pictures of nude girls ranging in age from ten to sixteen.[259] Boris justifies the young girls posing nude by stating the girls "feel better about themselves emotionally when they are naked."[260]

Many operators of such "Lolita sites," whose photos of nude children in

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250. *See id.*

251. *See id. See also Cyber-Crime—The Targets it Hits*, *supra* note 64.

252. *See generally The Convention*, *supra* note 2.

253. *See* Robert Grove & Blaise Zerega, *The Lolita Problem*, RED HERRING, Jan. 2002, at 47-53.

254. *See id.*

255. *See id.*

256. *See id.* The United States Federal Bureau of Investigation refers to sites featuring nude photos of children from the ages of three years old to seventeen as "Lolita sites."

> "My mother was on vacation and accidentally discovered a nudist beach," explains Nadia. The next day, their mother returned to the beach with her daughters. "On the beach I met an artist and started posing for him," says Nadia. "Soon I started working as a photographer's model for Internet pictures."

Id. It is important to note that Niki and Nadia's parents were aware that nude photos were being taken of their daughters for Internet sites and approved of their daughters' posing.

257. *See id.*

258. *See id.* It is interesting to note that "Boris," working from Russia, requested anonymity and that his exact location not be disclosed, including the name of the sites he operates, for fear of "shakedown from local authorities." *Id.* Although Boris has managed to avoid prosecution because of his claim that his photos are "art." *Id.*

259. *See id.* at 48.

260. *Id.* at 53.

sexual poses are sold internationally, can be located anywhere in the world.[261] For example, when *Red Herring* investigated "The Lolita Problem," they discovered sites such as Illegalheat.com, where upon entry you are taken to Pedoland.[262] This site guarantees its members 5,000 new photos and movies.[263] Upon further investigation *Red Herring* "clicked on a link to Sexteens" only to discover photographs of adult males posing with young girls.[264] *Red Herring* reported that "one child, about three years old, held a cookie in one hand and an adult male in the other."[265] Other photos on the site revealed an eight-year-old child tied to a table, naked and blindfolded.[266] Some of the sites that maintain these pictures are making up to $40,000 per month.[267] The responsibility of taking down these "Lolita sites" falls upon law enforcement officials who regularly face conflicting regulations, which leaves such officials with little ability to shut down "Lolita sites."[268] Another problem in bringing down such sites is that the volume of child porn online is so large that the United States officials cannot investigate and prosecute these criminals without help.[269] The United States is heading in the right direction to fight child pornography online, as John Ashcroft, the United States Attorney General, has made child pornography a priority for law enforcement officials and the Bush Administration.[270] However, as the *Red Herring* article indicates, the United States must attack child pornography on an international level, as well, in order to properly address the issue, and prosecute the appropriate criminals.[271]

Activities related to child pornography are one of the more monstrous offenses the Convention directly addresses.[272] The victims of child pornography are young, innocent, and easily impressionable. They cannot defend themselves, so they rely on others to fight for their protections. The government officials of the United States and the international community must step in and stop the victimization of those directly and adversely affected by child pornography. Often times the victims' parents are either unaware of the offense being committed upon their children or they see

261. *See id.* at 48.
262. *See id.*
263. *See id.*
264. *Id.*
265. *Id.* at 48.
266. *See id.*
267. *See id.*
268. *See id.* at 52.
269. *See id.* at 53.
270. *See id.*
271. *See id.* at 53.
272. *See The Convention*, *supra* note 2, at ch. 2, § 1, tit. 3, art. 9.

nothing wrong with it.

Article 9 of the Convention, which comes under Title 3's "Content-related offences," deals directly with "Offences related to child pornography" :

1. Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offenses under its domestic law, when committed intentionally and without right, the following conduct:
   a. producing child pornography for the purpose of its distribution through a computer system;
   b. offering or making available child pornography through a computer system;
   c. distributing or transmitting child pornography through a computer system;
   d. procuring child pornography through a computer system for oneself or for another;
   e. possessing child pornography in a computer system or on a computer data storage medium.
2. For the purpose of paragraph 1 above "child pornography" shall include pornographic materials that visually depicts:
   a. a minor engaged in sexually explicit conduct;
   b. a person appearing to be a minor engaged in sexually explicit conduct;
   c. realistic imagers representing a minor engaged in sexually explicit conduct.
3. For the purpose of paragraph 2 above, the term "minor" shall include all persons under 18 years of age. A Party may, however require a lower age limit, which shall not be less than 16 years.
4. Each Party may reserve the right not to apply, in whole or in part, paragraph 1(d) and 1(e), and 2(b) and 2(c).[273]

The explanatory notes to the Convention further explain the objectives of Title 3, Article 9 as follows: "Article 9 on child pornography seeks to strengthen protective measures for children, including their protection against sexual exploitation, by modernising criminal law provisions to more effectively circumscribe the use of computer systems in the commission of sexual offenses against children."[274] The explanatory notes state further:

> Most States already criminalise the traditional production and physical distribution of child pornography, but with the ever-increasing use of

273. *See id.*

274. *Explanatory Report*, *supra* note 124, at ch. 2, § 1, tit. 3, art. 9.

> the Internet as the primary instrument for trading such material, it was strongly felt that specific provisions in an international legal instrument were essential to combat this new form of sexual exploitation and endangerment of children.[275]

The Convention is the best possible solution to the international problem that child pornography presents to the United States and the rest of the world. The Convention equalizes the laws across the signatory states.[276] With equal laws on the international level, it will be easier for the United States to prosecute people like Boris, who provide child pornography materials across the Internet to purchasers in the United States. The problem of child pornography is simply too large for the United Statesto attack alone.[277] But with the Convention, international barriers come down and the number of those seeking to attack the problem could greatly increase. With an increase in states fighting cyber-crime, more resources may become readily available, and the exchange of information necessary to prosecute offenders may flow more freely between the states. It will be easier for all signatory states to combat child pornography with the cooperation of authorities when investigating and prosecuting criminals that the Convention provides.[278]

Knowing just how large the problem of child pornography is, how can anyone *not* promote a Convention that provides a solution to the prosecution of such offenders? The problem of child pornography must be addressed, and what the signatory states, including the United States, have done up to now to address the problem is simply not enough. At this point, the Convention is the best solution to fighting child pornography offenders worldwide and in the United States. The equalization of laws across the signatory states is fundamental to the fight against child pornography. This is a fight in which the United States must be ready to do battle and that it must win. The Convention not only prepares the United States for this battle; the Convention makes victory a reality .

As discussed earlier, the cost to big business and the government when they are hit by cyber-criminals is atrocious.[279] If the United States does not act now, who knows just how adversely our society will be affected? At this point, cyber-criminals feel they can remain anonymous; they evade the law and avoid prosecution, thus the growth in cyber-crime is steady and strong.[280] We must, as a country, send a message to cyber-criminals that

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275. *Id.*

276. *See The Convention, supra* note 2.

277. *See* Grove & Zerega, *supra* note 253, at 53.

278. *See The Convention, supra* note 2.

279. *See Cyber-Crime—The Targets it Hits, supra* note 64.

280. *See* Cesare, *supra* note 49, at 164.

we *can* and *will* prosecute. In order for such a message to register with cyber-criminals we must enact an international doctrine that will allow the United States to prosecute someone in another country who commits a crime via the Internet. The only solution available for the United States is to work with the other countries' authorities. The Convention provides similar laws around the world and helps mitigate jurisdictional problems so that the United States may prosecute an offender, even if he is in another part of the world.[281] The Convention also collects and makes the exchange of evidence between the victim's countries and the offender's country.[282] We can no longer remain victims, we can no longer open the pockets of big business and force them to continue to suffer financial blows every time cyber-crime hits simply because we lack the means to track down and punish offender. Not only will the Convention help deter future cyber-criminals, but it will also provide punishment for offenders.[283] Although punishment does not give the stolen money back to big business or the government, punishment will assure such entities that the particular offender will not strike again.

The benefits of the Convention are vital to the United States' fight against international cyber-crime. The United States must fight cyber-crime on an international level or we will succumb to offenders throughout the world. The right to privacy is important; in fact this author considers herself an advocate of privacy rights. However, when innocent children, big business, the government of the United States, and society as a whole stand to be victimized by cyber-crime, the benefits of the Convention outweigh the potential threat to privacy. Even Constitutional rights are not absolute rights;[284] the right to privacy has been infringed upon in appropriate cases where a heightened state interest exists.[285] Many opponents of the Convention argue that it gives the police too much power and that a greater separation of power is needed between the police who obtain information from Internet service providers and those agencies who authorize the police to gather this information.[286] However, if the police are not given subpoena power, how will they properly fight cyber-crime? If the police are unable to determine the name and location of an offender, how will they protect the victims of cyber-crime? By preventing the police from obtaining such information, we allow the offenders to continue to enjoy

281. *See Main Lines of the Convention, supra* note 80.

282. *See id.*

283. *See The Convention, supra* note 2.

284. *See, e.g.*, Boy Scouts of America v. Dale, 530 U.S. 640, 678 (2000) (holding that the First Amendment's freedom of association, inter alia, is not an absolute right).

285. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 162-63 (1973).

286. *See* Ward, *supra* note 150.

anonymity while they commit their crimes. The anonymity of cyber-crime helps explain the increase in the number of cyber-crimes.[287] We must give the police the power to subpoena information such as the names and locations of offenders (provided the police have probable cause) so that the United States and the international community can effectively fight cyber-crime.[288] If we refuse the police such power, we might as well hand over our children and open our pockets and because there will be no effective way to cross international borders to investigate and prosecute cyber-criminals who hide behind their computers.

Opponents of the Convention are also concerned that giving the police such power may allow the police to force individuals to provide their passwords to officials.[289] However, if the police have the necessary probable cause to obtain a search warrant, you must unlock the door and let them in.[290] When you allow the police to search your home, is that not your own private space? How is this any different from allowing the police, who have probable cause and a valid search warrant, to "search" your computer or e-mail inbox? You must give them your password and allow them access in the same way you would unlock your door and allow them into your home. Once the police have established probable cause and have the proper authority, what is it that you are trying to hide? What is it that you are doing that you need to remain anonymous? In the United States the Constitution still applies, thus the Fourth Amendment still stands.[291] We must be mindful of the fact that our own United States Department of Justice participated in drafting the Convention.[292] As long as the police are in compliance with the Constitution, they should be allowed to conduct an investigation, and the government should be allowed to prosecute those who break the law. The Convention does not, on its face, seem to provide for any violations of our constitutional rights, it only increases the ability of the United States to prosecute those in other countries who commit cyber-crimes against United States citizens.[293] Civil libertarians and human rights activists are concerned that we will no longer remain anonymous on the

287. *See Running the Gamut*, *supra* note 43.

288. As one author has noted, "the citizens of the United States place greater value on rights and freedoms other than the right to privacy, which are guaranteed by the Constitution. These other rights diminish the importance of privacy." Julia Gladstone, *The U.S. Privacy Balance and the European Privacy Directive: Reflections on the United States Privacy Policy*, 7 WILLAMETTE J. INT'L L. & DISP. RESOL. 10, 32 (2000).

289. *See* McCullagh, *supra* note 174.

290. *See* U.S. CONST. amend. IV.

291. *See id.*

292. *See Frequently Asked Questions*, *supra* note 124.

293. *See The Convention*, *supra* note 2.

Internet.[294] This argument is a stretch. The government has no desire to regulate what every Internet user is doing, nor would it be possible for the government to maintain such information. Between the Constitution and the Convention, the only individuals who face a threat to their privacy while online will be the individuals who are breaking the law.

We must be mindful of the fact that the Convention itself specifically addresses privacy and human rights. The Preamble of the Convention states:

> Mindful of the need to ensure a proper balance between the interests of law enforcement and respect for fundamental human rights, as enshrined in the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 United Nations International Covenant on Civil and Political Rights, as well as other applicable international human rights treaties, which reaffirm the right of everyone to hold opinions without interference, as well as the right to freedom of expression, including the freedom to seek, receive, and impact information and ideas of all kinds, regardless of frontiers, and the rights concerning the respect for privacy;
> Mindful also of the protection of personal data, as conferred e.g. by the 1981 Council of Europe Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data.[295]

Given that the Convention specifically addresses human rights and privacy,[296] there is no support for the argument that the Convention directly violates the right to privacy.

V. RECOMMENDATION AND CONCLUSION

After careful consideration of the issues regarding human rights, privacy, and self-incrimination, the United States become a party to the Convention. The United States played an important role in drafting the Convention, which should dispel fears that the Convention could negatively affect the consititional rights of United States citizens. Realizing the United States Justice Department was privy to drafting the Convention makes it more likely than not that the concerns of United States citizens were addressed during the drafting process.[297] Realizing just how much cyber-crime has grown demonstrates the need for a doctrine specific to cyber-crime.[298] Realizing further that cyber-crime is not and cannot be

294. *See* McCullagh, *supra* note 174.
295. *The Convention*, *supra* note 2.
296. *See id.*
297. *See Frequently Asked Questions*, *supra* note 124.
298. *See Democracy at Risk*, *supra* note 35.

confined to the United States, the need for an international tool becomes greater. United States citizens, businesses, government and society are being victimized regularly by cyber-criminals all over the world who anonymously hide behind their computer.[299] This is causing our businesses to lose money, costing our government and thereby the taxpayers hundreds of thousand of dollars, and we currently have no resolution to the problem of cyber-criminals in other countries.[300] We must protect the United States and her citizens from continued victimization, and the Convention is a step in that direction.

The right to privacy is a fundamental right.[301] Human rights must be accorded the highest respect, but the *potential* threat to them is not definite enough to continue allowing cyber-criminals to violate the innocence of children, or to steal money from our businesses, government, and taxpayers. The nations of the world must come together to fight cyber-crime, as it is a global problem. The nations of the world must work together by implementing similar laws to ensure that cyber-crime is illegal in all nations. Finally, the nations of the world must come together to eliminate jurisdicational problems and must open international borders in order to better work together when investigating and collecting evidence to use against cyber-criminals. We must prevent these anonymous criminals from continuing to victimize United States citizens and citizens of the world. The only way to ensure cyber-criminals are punished and cyber-crime deterred is to enact an international tool, bringing together nations so that the world can fight cyber-crime as one. The Convention on Cyber-Crime is the treaty that will bring our nations together and the international tool that has the power to effectively fight cyber-crime. The United States should enact the Convention; the benefit that will be conferred heavily outweighs the possible threat to the right to privacy.

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299. *See Cyber-Crime—The Targets it Hits*, *supra* note 64.

300. *See id.*

301. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

Law and Psychiatry, Metaphorically Speaking*

Rodney J.S. Deaton, MD, JD

A leading textbook of psychiatry defines forensic psychiatry as "the branch of medicine that deals with disorders of the mind and their relation to legal principles"[1] a straightforward definition for a subject that is anything but straightforward. The clinical, jurisprudential, and ethical questions the field engenders are legion, the answers even more so.

I do not claim to pose any new questions, nor to offer any new answers. Instead, I wish to analyze the ways that forensic psychiatrists talk: of how they say what they say about "disorders of the mind and their relation to legal principles."[2] And just as I do not propose new questions or answers, neither do I propose how I believe forensic psychiatrists *should* talk. I only wish to analyze both how forensic psychiatrists usually *do* talk and how they *could* (and sometimes do) talk by analyzing the metaphors that psychiatrists do and could use as they make their evaluations. In doing this, I hope to help forensic psychiatrists and legal professionals deepen their understanding of the forensic psychiatric practice so that they may use forensic psychiatric testimony as effectively as possible.

THE STANDARD METAPHORS

Psychiatrists' Metaphors

To understand how forensic psychiatrists talk, one should first understand how psychiatrists usually talk in their natural, professional language. Psychiatrists describe their work primarily by using two extended metaphor systems: metaphors of possession (including metaphors for the exchange of possessions) and metaphors of location.

The metaphor of possession is the more important one in modern

*The author wishes to express his thanks to Drs. Thomas Gutheil, George Parker, John Scofield, Alan Stone, and John Wimmer for their helpful comments on an earlier draft of this paper.

1. Thomas G. Gutheil, *Legal Issues in Psychiatry, in* COMPREHENSIVE TEXTBOOK OF PSYCHIATRY/VI 2747 (Harold I. Kaplan & Benjamin J. Sadock eds., 1995).

2. *Id.*

psychiatric discourse. It is the primary metaphor for diagnosis. Patients *have* illnesses. They *display* the signs and *describe* the symptoms of the illnesses that they *have*. They *use* psychological defenses to *defend against* the impulses that they *have*.

Psychiatrists have expanded this discourse to include metaphoric expressions of the exchange of possessions as well: expressions of what people do with what they have. This is the primary metaphor for interpersonal processes. A person *receives* emotional cues *from* another person and then *processes* those cues via right hemispheric neuronal processes. A person *projects* thoughts and feelings *into* another person, causing that person to *hold* the thought or feeling and *identify* with it. Even in colloquial language, we speak of *sharing* thoughts and of *picking up on* emotions.

The other metaphor still underlying some psychiatric thinking is the metaphor of location and, with it, of direction. It is the primary metaphor for psychotherapy. The psychotherapist asks; "*where* is a patient's life *going*?"; "how did she *get* to *where* she is today?"; "how did the patient *progress through* certain developmental stages?"

Because the metaphors can be combined easily, it makes sense to say that *people often carry burdens as they progress down life's road.* This complex metaphor becomes the primary rationale for psychiatrists' daily work. At times they focus their attention on the patient's burdens: on what he has to bear and on what he can get rid of, through medications, through talk, or through some combination of both. At other times they focus their attention on his life road: on where he is, on where he is going, on how far he can get with the burdens that he is bearing. At any moment in a course of treatment, psychiatrists are making a figure-ground assessment in which they ask themselves: which issue should be in the forefront for focus now for this patient, and which issue should be put off for later discussions?[3]

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3. Psychiatrists use other metaphors as well, although not as routinely in daily practice. For example, they can differentiate between what linguist George Lakoff and philosopher Mark Johnson describe as a "self" and what they describe as a "subject," in which the "selves" are a series of identities which the "subject" can metaphorically *put on*. GEORGE LAKOFF & MARK JOHNSON, PHILOSOPHY IN THE FLESH: THE EMBODIED MIND AND ITS CHALLENGE TO WESTERN THOUGHT 267-89 (1999) [hereinafter PHILOSOPHY IN THE FLESH]. Psychiatrists can also use a metaphor system which Lakoff and Johnson call "faculty psychology," in which different mental functions (e.g., perception, reason, passion) are metaphorically described as persons that act on the "stage" of a person's mind. *Id.* at 410-14; *cf.* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1980) (describing Lakoff and Johnson's theory of the structuring role of metaphor in human thought).

Forensic Psychiatrists' Metaphors[4]

Forensic psychiatrists take these standard metaphors and apply them in a particular way within their field, depending on the phase of work in which they are engaging. Forensic psychiatric evaluations generally proceed in two phases: the data gathering phase and the data presentation phase. During the data gathering phase, forensic psychiatrists still focus on what a particular litigant *has*, but in order to show their objectivity, they then focus not on where the litigant is going or has been, but instead on where they, the forensic psychiatrists, *are*.

During the data presentation phase, they shift their metaphoric focus. As in the data gathering phase, they focus on what the litigant *has*. But in this phase they speak of what they have been able to *get* (*or gather*) from the litigant, which turns out to be a metaphoric replica of what the litigant *has*. They then transform what they *have gotten* into something that the judge can then *take* and *use*. In the data presentation phase, all these manipulations (in metaphoric replica) of what the litigant *has* take place in a very specific spot where the psychiatrist *is*—a spot *away from* the forensic psychiatrist.

According to the standard metaphors, forensic psychiatrists are highly-skilled technicians. The litigant *has* a problem. Forensic psychiatrists *see* the problem from a distance. From this distance, they *take* from the litigant a representation of the problem. They *change* the representation of the problem into proper legal form; and then they *hand* the representation *over* to judges for them to *use* as they see fit.

THE DATA GATHERING PHASE

What the Litigant Has

The first major task of the forensic psychiatrist is to gather psychiatric data from the litigant to provide useful information for a judge. When psychiatric issues become relevant in a particular legal case, judges usually

4. For ease of discussion, and given my own professional training and experience, throughout the paper I will use the word "psychiatrist" or "forensic psychiatrist" to describe any mental health professional who consults to the legal system, recognizing that nonmedical mental health professionals contribute just as extensively to the process. (Mental health professionals differ primarily in their clinical practices and less so in their forensic consultation practices.) I will use the word "litigant" to describe any person who is examined by a psychiatrist during a legal proceeding of any kind, whether that be plaintiff, defendant, respondent, or witness. I will use the word "judge" to describe any legal professional who seeks psychiatric consultation to help her make decisions about what to do in particular cases, whether that professional be a judge, a lawyer, an administrative officer, or even, in some cases, a jury.

ask psychiatrists some combination of the following questions: (1) "What is the problem with this litigant?"; (2) "How bad is the problem and what can you, psychiatrists, do about it?"; (3) "How did this problem get to be like this?"; and (4) "What do persons think and do when they have this problem (and more importantly, what did *this* person think and do because he had this problem)?"

Psychiatrists can easily translate these questions into the possession metaphor as follows: (1) "What does the litigant have?"; (2) "Can you, psychiatrists, reduce it or get rid of it?"; (3) "How did the litigant get it?"; and (4) "What do people in general, and what did this litigant in particular, do because they have (and he has) it?"[5]

Forensic psychiatrists have several options available to them as they attempt to explain what type of problem a litigant might have. They can focus on the physical aspects of the litigant's problems, as psychiatrists study the actual abnormalities of the brain and the neurons (i.e., nerve cells). Psychiatrists explain such problems in the language of science, with causal reasoning and with metaphors of force and movement. Neurons *fire*, *releasing* neurochemicals and neuropeptides *into* a synaptic space. The molecules *cross* the space and *attach* to the membrane of the next neuron, *causing* the structure of the membrane to change, *leading* to ion *movement* and electrochemical *shifts* that are *passed down* the length of the second neuron.

They can equally focus, however, on the abstract aspects of the litigant's problems, on the symbolic representations of the underlying physical problems. They explain these problems in the metaphoric language of essays and storytelling. Sometimes psychiatrists simply describe, as in an informative essay. This is the language of descriptive psychiatry, of the DSM-IV-TR[6], the standard book of psychiatric diagnosis. To do this, psychiatrists use metaphoric language about things: they *describe* the symptoms of depression, or they *outline* the course of an illness.

At other times psychiatrists narrate, as in a short story. This is the language of psychoanalytic psychiatry, in which the narrative includes some description of purpose. Psychiatrists use more spatial reasoning, with

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5. In family law, there is an additional request: Is this good for this child? Translated into the possession metaphor, judges could ask: Does this caretaker have what this child needs?—a variant of the first question.

6. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, FOURTH EDITION, TEXT REVISION (2000) [hereinafter DSM-IV-TR]. The DSM-IV-TR catalogues various psychiatric disorders by grouping them according to their most salient features (e.g., thought problems, mood problems, etc.). Each diagnosis is defined by a list of criteria that must be met for a patient to warrant receiving the diagnosis. The book's authors seek to make it a definitional manual, not an operational one. It is not a book that outlines treatment for the various disorders.

metaphors of movement *toward* something (e.g., a goal) or *away* from something (e.g., a painful experience).

Modern psychiatrists are attempting to link metaphoric descriptions with underlying literal, neurodynamic functioning.[7] Their attempts represent what most leaders in the field would consider the cutting edge of psychiatric investigation and discourse. Either way, in this part of the data gathering phase, forensic psychiatrists try to describe accurately what the litigant *has*.

Where the Psychiatrists Are

In order to effectively describe what the litigant has, forensic psychiatrists believe that they need to be as objective as possible. Thus, they will apply all their complex knowledge in as evenhanded a manner as possible. "Objectivity" requires them to use another metaphor, one that shifts the focus from the litigant to the psychiatrist.

Epistemologically speaking, most psychiatrists believe that humans actually perceive people, objects, and sounds (of language, for example) that exist in the world, at least in some folk meaning of the word "exist." Through physical (usually visual and auditory) processes, a person in the world makes an "objective," physiologic impact on another person. The other person's own, real physiology then kicks in, in a way that is objective as well: neurochemicals and neuropeptides are things that exist in time and space, and the changes in the other person's physiology can be measured in some way—objectively. In this sense, few psychiatrists, if any, would have a problem with the word "objective." When they are asked to list objective findings from a patient, for example, they are usually asked to list the words that people say (which would strike the hearing apparatus of any auditorily-competent listener) and the behaviors and physical characteristics that people demonstrate (which would strike the visual apparatus of any visually-competent observer).

When most forensic psychiatrists use the word "objective," however, they are not usually speaking of *things* that people have or that other people perceive. Instead, they are usually speaking of a particular *place* from which psychiatrists observe what a litigant has. They are using a location metaphor, not a possession metaphor. This metaphor derives from the logical positivism that has formed the philosophic basis for modern behavioral science. Under this metaphoric formulation, forensic psychiatrists do not *enter* the subjective world of the litigant. Instead they

7. For an analysis of the interface between psychological and neurobiological explanations for behavior see JIM GRIGSBY & DAVID STEVENS, NEURODYNAMICS OF PERSONALITY (2000) and DANIEL J. SIEGEL, THE DEVELOPING MIND: TOWARD A NEUROBIOLOGY OF INTERPERSONAL EXPERIENCE (1999).

stand back and observe it. For epistemologists and even for neuroscientists, "objectivity" may be about what is there and what "it" is. But for behavioral scientists, and thus for many forensic psychiatrists, "objectivity" is about how far away "it" is.[8]

In summary, in the data gathering phase, forensic psychiatrists metaphorically *stand back* from the litigant and observe what problem(s) the litigant *has*, formulating the problem(s) as completely and accurately as possible.

THE DATA PRESENTATION PHASE

The second major task of forensic psychiatrists is to present data in a form useful to judges. In this phase, their focus remains on what the litigant *has,* seen from a distant spot where the psychiatrists *are.* But they can do nothing useful for the judge if they simply leave what the litigant *has*, metaphorically speaking, with the litigant. Instead, they have to *take* something from the litigant (basically, a description of the litigant's words and behaviors) and then *change* it into a useful form. What that useful form will be depends on one's point of view. From the psychiatrists' point of view, they *change* the description into an opinion, literally a written text describing the mental health problem (or lack thereof) that the litigant *has.* They then *give* this opinion/text to the judge. But from the judges' point of view, forensic psychiatrists *change* the litigant's mental health problem into something that helps (or does not help) the litigant *build* a case. Thus, for judges, psychiatrists *give* not only an opinion/text, but also a building block. All this happens from a spot distant from the litigant, where the psychiatrists *have stood back* and now *are.*

What the Psychiatrists Take and Make

In the data gathering phase, forensic psychiatrists *stand back* and *look from afar* at what the litigant *has*, which is an illness or a problem of some kind. In the data presentation phase, though, psychiatrists, still from afar, focus on something else that the litigant *has*: words and behaviors. Seen from this angle, the litigant creates a metaphoric "text," both verbal and nonverbal, which psychiatrists can read. It is a "text" about the problem(s) that the litigant *has*. This metaphoric text is what psychiatrists then *take*

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8. Dr. Paul Appelbaum added a particular twist to this location metaphor when he described the forensic psychiatrist's attempt to present objective truth. When he uses "objective" in this sense, he argues for a psychiatrist's ethical obligation to explain to the judge the pros and cons of an opinion. Thus, for Dr. Appelbaum, psychiatrists are not so much getting some distance from the litigant as they are getting some distance from their own ideas. Paul S. Appelbaum, *A Theory of Ethics for Forensic Psychiatry*, 25 J. AM. ACAD. PSYCHIATRY & L. 233, 239 (1997).

from the litigant – the symbolic representations of what the litigant literally *has* going on inside his nervous system. They then *change* (or better *translate*) this metaphoric text into a literal text, an opinion, which judges can use.[9]

This translation process is a complicated one, since ultimately it requires the performance of two translations for the benefit of the courtroom. First, psychiatrists must translate the litigant's metaphoric text from the natural language of the words that the litigant says and the behaviors that he exhibits into the psychiatric language of diagnosis and formulation. Litigants talk about their problems in terms of narratives, not in terms of diagnostic categories. In the strictest sense, psychiatrists also do some editing during this first translation, for not every word or action of a litigant can end up in neat psychiatric categories. Nonetheless, because psychiatric language is usually broad enough to encompass most of the salient aspects of a litigant's words and actions, psychiatrists need ignore few of the litigant's words or behaviors. They can almost always come up with a comprehensive psychiatric "translation."

However, given that judges are only interested in what the litigant *has*, relevant to the matter being litigated, the psychiatric "text" provides far more information than judges need for their task. Therefore, if psychiatrists are to *take* the metaphoric text that the litigant *has* (created) and *change* it into a literal text—their opinion for a judge—they must edit away the words, observations, and language that are not relevant to the judge's ultimate purposes. Only then are they ready to translate the metaphoric text a second time, into a literal text in the language of mental health law.

This second translation, however, requires far more extensive preliminary editing than the first. Psychiatric language (e.g., schizophrenia, personality disorder, delusions) almost never has a one-to-one correspondence with mental health law language (e.g., competence, insanity, damages). Therefore, psychiatrists must know what is relevant to the final target language of the written opinion, mental health law, so that they can edit away from the psychiatric translation all that is not relevant to the needs of the more specialized, less-encompassing language of mental health law. The guiding principle for translation is clear: mental health law language and its peculiarities drive what can and cannot be translated from the first psychiatric "translation."

Forensic psychiatrists, therefore, claim to be trilingual: fluent in the "native language" common to all culturally-competent observers—i.e., folk psychology, the everyday understanding of human passions and

9. I am indebted to Dr. Thomas Gutheil for his formulation of this "translation" perspective.

motivations; fluent in psychiatry; and fluent in mental health law. Both psychiatrist and judge speak the "native language," but neither believes that folk psychology is adequate to meet the requirement of justice inherent in the law. A proper translation requires scientific psychology—a psychology based on careful observations made under controlled conditions. In the chain of translations, the intermediate, scientific language (psychiatry) sharpens the concepts of the native language (folk psychology) so that the concepts may better be used in the final target language (mental health law).

Therefore, after this complex series of edits and translations, psychiatrists end up with a literal text—an opinion—written (and if necessary, spoken) in the language of mental health law. They are then ready to *give* this text—literally—to a judge.

What Judges Take

And—literally—a judge does take that opinion from a psychiatrist. The opinion/text becomes a piece of evidence that helps build a case either for or against the litigant. Metaphorically, therefore, judges take something different from a piece of paper: they take a building block.

This metaphoric shift is an important one to note. In theory, opinions might not be worth the paper they are written on. But building blocks must be reckoned with. It may be true that judges (and here it is worthwhile to mention specifically judges and the jury) are free to reject a building block that a psychiatrist offers. But then they must find (or construct) another similar block to complete the edifice, that is, to meet the elements of the case. In legal cases, psychiatric opinions are not epiphenomena that explicate interesting aspects of a litigant's life. They are very solid pieces of evidence which can either help or hinder the progression of an important case—a case that will have important consequences for all involved in it.

Thus, to review: (1) the standard chain of forensic psychiatric metaphors —the metaphors that forensic psychiatrists usually do use—is straightforward; (2) the litigant *has* a problem; (3) psychiatrists *see* it *from a distance*; and from that distance, they then *take* the words and behavioral descriptions representative of that problem, *translate* them once, *edit* and *translate* them again, and then *render* an opinion that *builds* some aspect of a case. It is important to note that all these processes involve psychiatrists who *take* what they find in the world and do something with it *out there* in the metaphoric world. Their opinion may have creative elements in it, but it is not a product the psychiatrists' creativity *per se*, of their imagination. They are a more skilled technician than artist.

ALTERNATIVE METAPHORS

The standard forensic psychiatric metaphors have tremendous utility,

given that they easily meet the requirements of mental health law definitions as they are now formulated and used. No matter what the underlying substantive issue, most forensic psychiatric questions are formulated so that the moving party must prove (1) the presence of a mental illness that (2) causes some legally relevant outcome. Psychiatrists are experts in the presence of mental illness (what people *have*), and forensic psychiatrists are experts in explaining the legal relevance of those illnesses (the *translation* of what people *have*).

Nevertheless, it may be useful to consider alternative metaphors to describe "disorders of the mind and their relation to legal principles"[10]—a way that forensic psychiatrists *could* talk if they so chose (and they sometimes do). These alternative metaphors are simply that—alternatives, not necessarily better alternatives. Yet by using them, one might more easily explain some problems and ambiguities of forensic psychiatry—and thus might be able to address such problems and ambiguities in a more direct fashion.

In one sense, the alternative metaphors that I will present involve only the data presentation phase. Given the requirements found in most legal definitions that the litigant *have* a mental illness, forensic psychiatrists are hard pressed to avoid the standard analysis of what the litigant *has*. Yet in another sense, the alternative metaphors change the formulation of the entire process of forensic psychiatric evaluation. When one explains the evaluation process with the alternative metaphors, one formulates how psychiatrists may indeed be focusing (at least in part) on what the litigant *has*, but one formulates quite differently what psychiatrists *take* from the litigant, *where* they take it, and *what* they do with it.

To understand these alternative metaphors, consider two questions. First, do the standard metaphors adequately address judges' true questions? Second, do the standard metaphors adequately reflect what psychiatrists actually do? Because the answer to both questions turns out to be "not necessarily," one may wish to consider some of the advantages of an alternative type of forensic psychiatric "talk."

What May Be Judges' True Questions?

The standard questions that I listed in the previous section, whether or not stated in terms of the possession metaphor, may not adequately reflect judges' true concerns, even if the questions appear to be required by particular mental health law definitions. Judges may actually not care about the particular problem a litigant has, just so long as psychiatrists can guarantee that some psychiatrist somewhere can take care of the problem so that a judge does not have to make a decision about it. In other words,

10. Gutheil, *supra* note 1, at 2747.

judges may really have nothing but passing interest in what seems to be captivating modern psychiatrists' interest: what people *have* (no matter what the legal definitions call for).

In a psychiatric malpractice action, for example, judges (and juries) do not necessarily care what the plaintiff's problem is. Be it a brain-problem or be it a mind-problem, the only question that interests judges is whether the defendant psychiatrist recognized some problem in a way that other, reasonable psychiatrists would have recognized the problem. Judges are more concerned about the defendant psychiatrist's assessment of the problem than they are with the problem itself. When all the parties in a particular malpractice litigation do their jobs well, judges then only have to decide which one of the opposing forensic psychiatrists' descriptions of the defendant psychiatrist's assessment is more credible and therefore dispositive.

But even in areas of law other than tort actions, in the more traditional "law and psychiatry" areas, the possession metaphor does not encompass many judges' concerns. In civil and administrative contexts, judges are often concerned only about damages, because liability or contractual/statutory obligation has been stipulated. In criminal contexts, judges are often concerned only about mitigation, because guilt already has been admitted. When the presence or severity of a mental illness plays an important role in these determinations, it might appear that judges are concerned about the problem, i.e., about the actual mental illness from which the litigant is suffering. But once again, judges are usually much more concerned about what reasonable practitioners say about the problem: how typical it is and how it can be treated, whatever it is.

Similarly, in the context of coerced treatment, whether involuntary civil commitment or court-ordered treatment in a criminal case, judges again do not usually care about the particular problem that a litigant suffers from, just so long as a psychiatrist can assure a judge that some psychiatrist somewhere can treat the problem. Be it schizophrenia, alcoholism, pedophilia, or stalking, the judge tells the psychiatrist to just treat the problem, if they can. Then the legal problem will go away. There may be independent concerns about whether the State should coerce the treatment of the problem, but that is a different problem—one for jurisprudence, not medicine. Even in the assessment of competence (to stand trial, to make a will, to waive rights, etc.), one of the most prototypical forensic psychiatry contexts, judges really do not care what the litigant's problem is—just so long as some psychiatrist can make the problem go away long enough for the litigant to say the necessary words to make the necessary decisions in the necessary legal context.

Judges do not usually care what particular problem the litigant has—*as long as* the litigant's problem is a psychiatric problem. This is the question

that truly interests judges: when is the litigant's problem a medical problem and when is it a moral problem?

Such a simple question naturally brings with it tremendous complexity, for judges have introduced norms into the discussion that may or may not be within psychiatry's purview. The questions are the familiar ones: what is "mad" and what is "bad?" What is "incompetent" and what is "foolish?" What is "damaged" and what is "lazy?" Who decides which actions fit into which category, both in general and in a specific case?

Yet no matter how difficult these questions may be, both judge and psychiatrist know that, at some level, pragmatic, "good enough" answers must exist. Judge and psychiatrist both know that people will always categorize expectable, universal human activity differently from unusual, particular human activity, whether that be for cultural reasons (i.e., language forces humans to label phenomena so that sense may be made of the world) or for neurologic reasons (neurodynamics force humans to categorize information so that incoming information may be processed with at least some degree of effectiveness). Even if scientists eventually find themselves capable of mapping out the neuronal pathways of all human activity, at least some human activity will always be so bizarre and unpredictable that we humans will label it "mad" or "incompetent" or "psychiatrically damaged."[11] Therefore, the judges' question to the psychiatrists is a fair one.

But the judges have done more than just change the question. They have changed the entire discourse of answers that psychiatrists must now give. For the most relevant concern of judges is not just what problem the litigant has; it is which problem the litigant acted out of. The most relevant question for judges is "Where is the problem—or more accurately, where is the person with this problem *coming from*?" The most relevant metaphor for psychiatrists is now about the location of a person, not about the possession of a thing.

Essentially, judges say the following to psychiatrists:

> 1. We are interested either in muscle movement or in the lack of muscle movement. Did the litigant *do* something with his muscles (e.g., kill somebody), or did he *not do* something with his muscles (e.g., stay home from work, or not work as efficiently as he could have)?
>
> 2. We realize that neurons fire muscles. Neurons originate somewhere. We are interested in where those neurons originated—literally *and* metaphorically.

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11. For an excellent discussion of our human need for categorization, discussed from the standpoints of both law and cognitive neuroscience, see ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 19-53 (2000).

3. We want to know literally where the neuronal chain leading to the action or inaction originated. Where were this person's neurons coming from? Did the neurons arise primarily in a sick (i.e., insane or compensable) part/processes in the brain, or did they arise primarily in a perhaps immoral, yet still "normal-enough" (i.e., sane or noncompensable) part/processes of the brain?

4. We also want to know metaphorically where those neurons originated. Where was this person coming from? When we use that particular expression, we are asking one or both of two questions. First, what are the litigant's motivations? Here we are "looking forward" to what goals and for what reasons the litigant acted. Second, what are the litigant's explanations? Here we are "looking backward" at the purposeful sequences that led to the action (inaction).

Even if psychiatrists could figure out which question interests the particular judge to whom they are speaking, in real situations involving real litigants they must now figure out whether they can give *any* useful answer to these questions. The change in metaphor has taken psychiatrists, metaphorically speaking, into very different territory.

The Judges' Literal Question

To the judges' literal question, psychiatrists would have to respond something like this:

1. We know, literally, that thoughts, emotions, and behaviors are neuronal events. Even though we cannot yet bridge the mind-brain gap, we assume that mind emerges from the physical activity of brain.[12]

2. Physical actions (what litigants do) and experiential motivations (why litigants do what they do) both have underlying neuronal substrates, i.e., chains (or sequences) of neurons. The chains of neurons (almost certainly) begin in different brain locations, with neurons of varying functions. The chains of neurons for experiential motivations are probably much more complex and extensive than are the chains for simple muscle movement. But both chains have a final common pathway in the final set of neurons that either move the muscle or not.

3. We would like to be able to chart those chains of neurons much more accurately, perhaps using some advanced computerized radiographic technique. We would like to be able to trace the components of the neuromuscular junction back to the particular brain regions that were involved in the particular actions, with all the neuronal pit stops in

12. *See* Kenneth S. Kendler, *A Psychiatric Dialogue on the Mind-Body Problem*, 158 AM. J. PSYCHIATRY 989 (2001).

between. But so far, we cannot do this.

Put simply, psychiatrists cannot yet give any useful answer to the judges' literal question, i.e., where is this muscle action coming from? Whether they will be able to do so at any time in the future remains a very hypothetical question. Psychiatrists today do not have anything outside themselves upon which they can rely to restrict their possible interpretations. Current imaging techniques and blood tests are far too nonspecific.

This puts psychiatrists in a decided disadvantage when they are attempting to answer the judges' literal questions. Psychiatrists are only beginning to correlate with any accuracy the inner workings of the nervous system with the outer appearances of a disorder's signs and symptoms. The best answer that they can give is a guess. Such a guess may be quite reasonable; however, it remains solely a very educated guess.

The Judges' Metaphoric Question, and the Psychiatrists' First Alternative Metaphoric Answer

Psychiatrists run into a different problem when they attempt to answer the judges' metaphoric question, i.e., where is this litigant coming from? They can give a reasonable metaphoric answer, one which turns out to be the first of the alternative metaphors, but first, the psychiatrist must change the question's form.

Simply put, to tell where a litigant might metaphorically be coming from, one compares the litigant to other persons who have ended up in the same "spot," i.e., the same legal situation, and yet, who have come from different "spots," i.e., different psychiatric-legal categories. In other words, one looks for a *resemblance*. Does the litigant, metaphorically, look more like a "mad" person or like a "bad" person, more like an "insane" person or like a "sane" person, more like an "incompetent" person or like a "foolish" person? Here, the word "look" does not simply denote physical appearance, but metaphoric appearance as well; how the litigant's actions look, how his words are formulated and used, and how he responds to situations. Judges may first pose their question using a location metaphor (where is the litigant *coming from*?), but given the limits of psychiatric diagnosis, the answer they receive must come in terms of a description (whom does this litigant *resemble*?), the first alternative metaphor. The process becomes one of comparison of prototypical examples: is this particular litigant more like one prototypical litigant (e.g., insane) or more like another prototypical litigant (e.g., sane)?

It is important to note that by using this first alternative metaphor forensic psychiatrists must consider psychiatric-*legal* prototypes, not just psychiatric prototypes. There are no psychiatric categories of "insane" or "incompetent." Psychiatrists do not provide the prototypes for these

categories as they might for categories such as "schizophrenia" or "depression." To ask what a depressed person looks like, one would ask a psychiatrist. But to ask what an insane person looks like, one would ask a judge; and eventually, an appellate judge. With this alternative metaphor, one says that it is not legal definitions that drive forensic psychiatrists' work, for their task is not a translation; rather it is legal fact patterns, for their task is a comparison of prototypes. In the case of insanity, for example, no matter what definition one uses in any particular jurisdiction, forensic psychiatrists ask, "what do insane persons *look like* in this jurisdiction?" "What do they say?" "How do they do what they do?"

Any law student, however, knows the pragmatic problems of implementing solutions of this type, for, by the very nature of the common law system, legal prototypes (including psychiatric-legal prototypes) are quite thin descriptions. Appellate judges in a particular jurisdiction may not give psychiatrists much to work with: thus, to encompass the myriad of unforeseeable fact patterns in life, legal prototypes are purposefully kept vague. Details are filled in on a laborious case-by-case basis; and even then, rarely does the appeals court reject the trial court's legal prototype. Much more likely is an affirmation of the lower court's decision, which leaves psychiatrists only with the knowledge that the litigated fact pattern is a good-enough "insanity" or "incompetence" fact pattern, without any real guidance as to what might not be good enough.

Consequently, many empirical researchers call for increased study as to how judges and juries actually make decisions about legal prototypes, so that the categories can be thickened from the bottom up, in a way that will delineate how these prototypes function in the real world of the trial court.[13] By describing how the prototypes are indeed "fleshed out," scholars can then better argue how they should be flushed out. Controlled observations, standardized psychological testing, and carefully designed questionnaires could all be used to help practicing forensic psychiatrists come to a better judgment of whom a particular litigant might most accurately *resemble*.

Such research will indeed help psychiatrists fill in many metaphoric gaps. However, even with all the best research behind them, psychiatrists will still face a problem familiar to every lawyer, that is, that any two versions of a set of facts can, given the proper attention to the proper detail,

13. See, for example, the very extensive empirical research on competency done by the members of the MacArthur Foundation project. Paul S. Appelbaum & Thomas Grisso, *The MacArthur Treatment Competence Study: Mental Illness and Competence to Consent to Treatment*, 19 LAW & HUM. BEHAV. 105 (1995); *see also* Thomas Grisso & Paul S. Appelbaum, *The MacCAT-T: A Clinical Tool to Assess Patient's Capacity to Make Treatment Decisions*, 48 PSYCHIATRIC SERVICES 1415 (1997) (describing empirically-tested instruments to measure patient's various competencies).

be narrated to form two very reasonable, yet mutually contradictory, descriptions. Psychiatrists always have a problem when they try to describe a litigant and *use nothing else* besides "simple" observation to limit their narrative possibilities: which aspect of the litigant's story do they focus on, and which do they relegate to the background? Do they focus on the more "mad" aspects of the story or the more "bad" ones? The "incompetent" aspects or the "foolish" aspects? How can they limit the narrative possibilities so that they can answer the judges' questions reliably and validly?

Some psychiatrists try to avoid the issue entirely by making no attempt whatsoever to answer, either literally or metaphorically, the question of "where is the action coming from?" Instead, they urge forensic psychiatrists only to give "the clinical findings" about the litigant and then give the judges the responsibility to answer their own questions. According to these psychiatrists, psychiatric-legal fact patterns are indeed legal formulations, not psychiatric formulations. The legal actors—whether judge or jury—should simply take the clinical findings and do with them what they will.

Such a position, however, assumes that there actually are clinical findings that could be independent of any premise about the litigant's underlying problem and "where it comes from." Every psychiatrist has to choose which clinical findings are relevant and which are not. For a finding to be relevant, it must be relevant to something. Even if psychiatrists try to give equal time to all potentially relevant "somethings" by presenting an equal number of findings for each possible diagnosis or clinical conclusion, by doing so they have already decided that there *should* be an equal numbers of findings. Perhaps there should not be. They have no radiographic images or blood tests to help them make this decision, or to guide them in their choices of presentation, nor do they have any unambiguous observable criteria to help guide their narrative. Thus, they have no neutral clinical findings that are independent of all those variables.

Psychiatry's critics have been pointing out these truths for years.[14] According to them, because psychiatrists have no literal answers to provide judges, because their metaphoric answers have no external limits to them, and because they report clinical "facts" that already have theoretical assumptions embedded in them, psychiatric testimony is at best irrelevant to the legal process, and at worst, prejudicial. Therefore, the argument goes, psychiatrists should not enter the legal arena.

It is true that psychiatrists have no external limits on their possible interpretations. It is also true that a psychiatrist's choice of relevant facts

14. *See, e.g.*, Stephen J. Morse, *Failed Explanations and Criminal Responsibility: Experts and the Unconscious*, 68 VA. L. REV. 971 (1982).

will influence the range of their eventual interpretations. But simply because psychiatrists have no external limits to their interpretations does not mean that they have absolutely *no* limits to them. Psychiatrists may not yet have a radiographic image to help rein in their narrative creativity, but they do have something that can provide some limits: their clinical experience. One has to consider what psychiatrists actually do every day. By analyzing that concept carefully, one can see that the potential benefits of such clinical experience should not be dismissed lightly. The concept does require, however, additional alternative metaphors. If forensic psychiatrists are to use their clinical experience to help guide them in their choice of *resemblances,* then they will have to reconsider *what* they take from the litigant and *from where* they compare those resemblances.

What Do Psychiatrists Really Do?

Good forensic psychiatrists may not now be capable of certainty about a litigant's physiology, but they can become certain enough of one very useful type of information: their own physiologic responses to the litigant and to his situation.

People have impacts on us. We are exchanging physiologic information with each other all the time. We see people, we hear them. When our perceptual systems pick up input from other people (how they look, how they sound, etc.), we evaluate it, often in a nonconscious[15] manner. We process perceptual information directly in areas of the brain's sensory cortices that have developed to decipher and organize incoming perceptions. Yet we also process perceptual information affectively (emotionally), via neuronal processes that neuroscientists are now only beginning to explore and to understand. When we see something, for example, certain parts of the brain help our bodies/minds determine whether the "something" is frightening, exciting, or unremarkable. These affective, evaluative neuronal processes involve the right hemisphere, especially in parts of the frontal lobe, and they probably involve complex subcortical and somatic structures as well.[16]

Regardless of the particular underlying physiologic mechanisms, as humans we know people in a social and emotional way. We do not just

15. I am using the term in a neurocognitive sense (literally *not*-conscious), not in a Freudian sense. *See* SIEGEL, *supra* note 7, at 132-36 (explaining unconscious processes in emotional responses); *see generally* COGNITIVE SCIENCE AND THE UNCONSCIOUS (Dan J. Stein ed., 1997) (presenting various perspectives on the neuropsychology of traditional Freudian unconscious processes).

16. *See generally* ANTONIO R. DAMASIO, DESCARTES'S ERROR: EMOTION, REASON, AND THE HUMAN BRAIN (1994); ANTONIO R. DAMASIO, THE FEELING OF WHAT HAPPENS: BODY AND EMOTION IN THE MAKING OF CONSCIOUSNESS (1999) (hypothesizing the close connections between body processes, brain processes, and the experience of emotions).

simply know facts about people. The former knowing is the French *connaître*, the latter *savoir*. We immediately recognize the impacts that people make on us. Through complex processes of memory, perception, and reasoning, most of which is nonconscious, we catalogue people in an instant. We get a gist of them. We begin the process of figuring out "who they are." It is the feel that we get from people when we talk to them.

So, what do psychiatrists know about mental illness that lay people do not? Simply put, through their training and their "years of clinical experience," good psychiatrists have learned to trust their guts. Not only do they depend on the DSM and its lists to help them know what is going on with a patient or litigant (lists that any computer can manipulate), they depend on their guts, or more elegantly put, on their clinical impressions, i.e., the "feel" that a patient has.

Throughout their careers, psychiatrists meet many people. They watch them over time. They develop a feel for which patients get better with what interventions and which patients do not. They learn by prototype or by example.[17] It is a deeply human and deeply interpersonal process. It is true that psychiatrists also learn how to seek, and then use, categorical information, the type of information elicited by questionnaires and rating scales. However, ultimately, psychiatrists depend on their clinical impressions for their diagnoses, no matter how tentative, and for their treatments, no matter how complicated.

Good forensic psychiatrists take the "feel" for patients that they have learned in their regular psychiatric practices and apply that knowledge to litigants. They develop a feel for those litigants who are lying, who are desperate, who are mistaken, and who are suffering and deluded. The more litigants that they see in this legal setting, the better the psychiatrists' "legal guts" become, i.e., the better their forensic clinical impressions become. They learn how litigants fall within the various psychiatric-legal categories. They learn which "sortings" are routine and which ones are controversial. They adjust their clinical impressions accordingly.

Such a process is naturally fraught with difficulties. How can one really know when a litigant is lying? How can one really know that a litigant is mistaken if the whole issue in litigation is what actually happened? Still, as psychiatrists see many cases in the legal setting, they can get "good enough" feedback from the legal process to find out, at least in many cases, which litigant is indeed lying and which one is indeed mistaken. Such experiences build up within psychiatrists' rational and emotional memories of litigants. These cases then serve as prototypes for future evaluations and prototypes for particular psychiatric-legal categories. Hopefully,

17. For a succinct discussion of prototypical reasoning, see PHILOSOPHY IN THE FLESH, *supra* note 3, at 19-20.

psychiatrists will improve and change these prototypes as their experience increases.

For psychiatry's legal critics, such knowledge provides little relief for their concerns. Judges must still depend on the individual psychiatrist to have the right experiences to have a "legal gut" that corresponds both to the gut that other similarly situated forensic psychiatrists might have and to the broadest outlines of the psychiatric-legal prototypes of a jurisdiction. The safeguards for standardization of clinical experience are tenuous, and the chances for error are high, with possibly disastrous consequences for a litigant. Thus, critics may wish to return to their original position which is: psychiatry has nothing useful to offer judges, so judges should simply make a moral judgment about the litigant, based on the principles (or intuitions) of justice that they already possess.[18]

But this is a question of policy, and it certainly does not have to be an indictment of psychiatry. Psychiatrists are in no different a position in their practice than are the practitioners of other arts and sciences. In any area, knowledge in a particular case is always uncertain. When one evaluates a particular case or a particular course of action, one is always comparing the particular case to the ideal prototypes that one has developed, whether that prototype be for the construction of a bridge or for the prescription of a medication. Psychiatrists help people daily using these same principles of prototypical reasoning and of learning by experience. They simply acknowledge that all prototypical reasoning has some "internal" component: that every comparison has, in some way, a "feel" to it that cannot easily be translated into linguistic symbols.

Forensic psychiatrists can therefore be "reasonably medically certain" of their impressions of a litigant because, if they are indeed skilled, they have worked with many other reasonable psychiatrists, they have examined many patients using standard medical paradigms and prototypes, they have examined many litigants using jurisdictional psychiatric-legal prototypes, and, through their experience, both in and out of the legal arena, they have come to trust their guts with what is usually reliable certainty.

By stressing the advantages of their clinical experience, psychiatrists can therefore somewhat assuage the concerns of judges and critics regarding the limitless possibilities of psychiatric testimony, while at the same time offering judges admittedly imperfect, yet still potentially quite accurate and useful, information about "where a litigant might be coming from." To be

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18. *Cf.* Jules B. Gerard, *The Medical Model of Mental Illness: Its Application to the Insanity Defense*, 22 INT'L J. L. & PSYCHIATRY 65, 70-73 (1999) (advocating bright line rules, especially in the criminal law, in which only certain "well-defined" diagnoses, ones which "characteristically" interfere with sufferer's moral decision making, would qualify a defendant to benefit from the insanity defense).

able to speak clearly of this, however, forensic psychiatrists would benefit by using an additional set of alternative metaphors. If the first metaphoric shift was from the standard "what does the litigant *have*?" to the alternative "whom does the litigant *resemble*?" then the second shift is just as radical, from the standard "*what* do forensic psychiatrists *take* from the litigant?" to the alternative "*whom* do psychiatrists take and *where* do they take him?"

The Psychiatrists' Second Alternative Metaphoric Answers

The standard metaphor for forensic psychiatric "objectivity" is one of location *out there*: psychiatrists *step back* from the litigant to observe *the whole* situation, to *take* what is necessary and then to *translate*. Debates about objectivity usually center around this question: how close should psychiatrists get to the litigant? The answer to the question is usually some form of "just close enough," close enough to *take* accurate information, but far enough to prevent bias. Distance is the key: if psychiatrists get too close, they might not see all that they need to see.

But given what we know about neuroscience, how much useful information can we say psychiatrists may glean about litigants if those litigants have made only minimal impacts on the psychiatrists, if they have taken very little social-emotional-perceptual information about the litigants into their own neurophysiology—if the litigants have not, in some way, *gotten into* them? Psychiatrists cannot even gain a gist of the litigants unless the litigants have somehow tickled a few neurons in them. Thus, there really is no metaphoric distance between psychiatrists and litigants. Litigants are always, in some way, *in* the psychiatrists. *Whom* do the psychiatrists *take*? The litigants (i.e., a representation of them as whole persons). And *where* do the psychiatrists take the litigants? *Into* the psychiatrists.

When thinking in terms of these alternative metaphors, psychiatrists should be quite skeptical when they hear any colleague describe litigants as if they were specimens to be examined, as if it were possible to observe them and catalogue them from some neutral point, without psychiatrists themselves being impacted in some way. Rhetorically it gives the illusion that somehow psychiatrists can indeed be untouched by people. From the alternative viewpoint, the question is not *whether* forensic psychiatrists can be untouched by litigants, but rather *how* psychiatrists are touched by litigants, how psychiatrists *take in* the litigants, and how much conscious control psychiatrists can exert over that process.

With the standard metaphors, most forensic psychiatrists argue that objectivity, even if difficult in practice, can nevertheless be some ideal place from which to observe a litigant. It is a metaphoric place that psychiatrists move to; they *stand back* from the litigant. The alternative

metaphors can also encompass a notion of "standing back." Psychiatrists can still *stand back* from the litigant, but they do not do so in the metaphoric world *out there*, but rather in the metaphoric world *in here*, inside the psychiatrist. Psychiatrists make their evaluations now not only with their metaphoric eyes, not just observing how the litigant appears *out there,* but also with their metaphoric (and from a neurochemical standpoint, even literal) gut, helping out those metaphoric eyes by giving the observations a certain feel *in here.*

In the language of the alternative metaphors, psychiatrists will be making comparisons between the complex representation of the litigant that they have *in* them and the prototypes of past litigants (also *in* them) who have ended up in particular psychiatric-legal categories, the psychiatric-legal prototypes constituting their "legal gut." Psychiatrists will eventually have to put the comparisons and categorizations into words, into an opinion that they will then hand to the judge to use to *build* a case. But unlike with the translation metaphor, where words are the main issue, with the comparison metaphor words are an afterthought. They are the best approximation to a comparison process that encompasses more than words.

When forensic psychiatrists evaluate a litigant, in many (if not most) cases they can come up with competing comparative descriptions that would argue for two different prototype choices. Seen from one point of view, a litigant might *resemble* one legal-psychiatric prototype, and seen from another point of view, a different one. Words themselves cannot distinguish the descriptions enough to aid a choice based on some neutral reason. But to experienced forensic psychiatrists, with good legal guts, one prototype choice will simply "feel" more right than the other. Metaphorically, psychiatrists *bring* the litigant *into* their nervous system, into their memory, both verbal and nonverbal, and do the comparison there, *in here.* Only afterwards can the "feelings" brought on by this internal comparison be put into words.

Explanations using the alternative metaphors are thus often longer, less crisp, even a bit more lyrical. They refer not only to what the litigant says, but how he says it and how he uses vocal tone, interpersonal space, and reasoning patterns. These explanations always contain some sense of being incomplete; of missing something. But to say that they are thereby less accurate is only to take an *a priori* epistemologic position on a long-debated question: is there any way that anyone can "work on," understand, or manipulate any information at a "neutral" point outside him or herself? When one uses the alternative metaphors, one is answering that question "no," and one has a good deal of neuroscience to back oneself up in this practice. Crisp formulations of problems worked on *out there* might be pragmatic, but they are not necessarily, in some absolute sense, more accurate.

Therefore, to summarize the alternative metaphors: forensic psychiatrists *take in* a representation of the litigant as a person and then *compare* the litigant to particular fact-pattern prototypes, using both linguistic and nonlinguistic tools. They then choose which prototype the litigant most *resembles*, and then they put their reasoning, as much as possible, into words, into an opinion which they *render* to judges to help litigants *build* a case. If by using the standard metaphors forensic psychiatrists talk as if they were skilled technicians, by using the alternative metaphors they talk as if they were experienced artists. As in any dichotomy, the functions are not that easily cleaved in the real world: a translator, even when moving around words and categories, still creates, just as an artist, while observing, still categorizes and manipulates. Yet each metaphoric system creates a different image of the forensic psychiatrist, and it is worthwhile to see how the alternative, less widely-used image may help illuminate aspects of the field that might otherwise be hard, in the standard way of talking, to put into words.

THE POSSIBILITIES OF THE ALTERNATIVE METAPHORS

The Strengths of Forensic Psychiatry

By describing their professional diagnostic skills with metaphors that locate diagnostic/evaluative work *inside* the psychiatrist, forensic psychiatrists will finally be describing how they actually make clinical judgments, not how they might appear to some to make clinical judgments. Psychiatrists use their entire person—their perceptual capacities, their intellectual capacities, their emotional capacities—to diagnose and treat their patients. They cannot rely on images or lists external to their bodies. In spite of the appearance of the DSM, there are no easy sorting methods to distribute litigants into discrete disease categories.

Even though some legal professionals may wish that psychiatrists truly did know what is going on inside a patient's nervous system, one suspects that at least most professionals can be made to understand not only the limits, but also the possibilities—and therefore the strengths—of modern psychiatric diagnosis. Good psychiatrists spend many years trying to improve their clinical impressions, or guts, making them more accurate and more reliably predictive. Good forensic psychiatrists do the same trying to improve their psychiatric-legal impressions, or legal guts. Although no one attains the accuracy of an X-ray, with time good psychiatrists become increasingly successful at their skills, and fellow psychiatrists recognize their expertise. This is the actual, real-life meaning of the "standard of care." The standard consists of the consensus formulations that psychiatrists have made concerning the best descriptions of and treatments for mental illness. With the alternative metaphors, legal professionals are

being given a much more fluid, yet much more accurate standard by which to make their judgments of litigants with psychiatric problems.

Most forensic psychiatric opinions will come formulated in the standard metaphors of possession and translation. But by reformulating the opinions with the alternative metaphors (even if only in one's own mind), legal professionals can understand psychiatrists' own physiological involvements in the diagnostic process, using the metaphoric equivalents of neuroscientific principles that are receiving increasing research support. They can also understand better the real limitations, though still real hopes, of the new biological psychiatry. Biological psychiatry is years—*years*—away from being able to answer even the simplest question of the judge. It is in fact quite debatable whether neuroradiographers will ever be able to provide clues to an individual's neuronal functioning sufficiently nuanced to allow fair legal judgments based primarily on that radiographic information.

Nevertheless, even though the alternative metaphors point out limitations on psychiatric knowledge, a legal professional need not minimize the useful, reliable information that she can obtain and then use. The alternative metaphors give an accurate, fair picture of the profession that psychiatrists practice daily.[19]

The Dangers of Forensic Psychiatry

Additionally, by localizing the work of the forensic psychiatrist *inside* the psychiatrist, legal professionals can understand more clearly one of the thorniest ethical problems of forensic psychiatry. For almost twenty years, Professor Alan Stone has expressed deep concerns about the ethics of testifying against a litigant's interests, especially when the psychiatrist is an expert at getting information from people. [20] His concerns, although quite clearly and thoughtfully articulated, have always seemed to get lost in the

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19. This formulation resembles the ideas set forth by writers such as Dr. Andrew Watson. *See* Andrew S. Watson, *Response from a Straw Man*, 12 BULL. AM. ACAD. PSYCHIATRY & L. 221 (1984) (the "good clinical practice standard"); *see also* Dr. Paul Appelbaum, Paul S. Appelbaum, *Psychiatric Ethics in the Courtroom*, 12 BULL. AM. ACAD. PSYCHIATRY & L. 225 (1984) ("objective truth"); Appelbaum, *supra* note 8, at 238.

20. Professor Stone first articulated his concerns about this problem in his "Parable of the Black Sergeant." *See generally* Alan A. Stone, *Morality for Psychiatry*, *in* LAW, PSYCHIATRY AND MORALITY 251 (1984). In the parable, he describes his distress over testifying against a black Army sergeant accused of theft. *See id.* S*ee also* Alan A. Stone, *Revisiting the Parable: Truth Without Consequences*, 17 INT'L J. L. & PSYCHIATRY 79 (1994) [hereinafter Stone, *Revisiting the Parable*] (further analyzing his remorse over his testimony in that case); Stone, *The Ethics of Forensic Psychiatry: A View from the Ivory Tower*, *in* LAW, PSYCHIATRY AND MORALITY 57 [hereinafter Stone, *The Ivory Tower*] (placing this issue within the context of multiple concerns about forensic psychiatric ethics).

many discussions of forensic psychiatry's ethics—perhaps because the alternative metaphors are not as widely used to describe forensic psychiatric practice.

When justifying forensic psychiatry ethics, most theoretical writers have sought to justify forensic psychiatrists' "double agency": that psychiatrists have a duty to the litigant to perform a fair, accurate examination, but have a primary duty to judges to perform the examination, no matter what the consequences might be for the litigant. As these writers have eloquently explained, such action by psychiatrists can be justified by a variety of ethical arguments.[21]

These arguments, however, miss a very important aspect of Stone's point about double agency. Stone is equally concerned about what forensic psychiatrists do during the interview when they interact with the litigant, not just about what they do with judges afterwards. He is not just concerned that psychiatrists will have to answer to judges and not to the patient at the end of the day. He is even more concerned that they may have to answer to no one for what they do *with* that patient to prepare for the end of the day.

Treating psychiatrists must eventually answer to a patient for what they stir up in him. The old medical maxim, *primum non nocere*, first do no harm, has guided treating psychiatrists by reminding them constantly that avoiding harm to the patient is the first priority. Forensic psychiatrists have no similar maxim. They therefore run the risk of never having to answer for what they did with the litigant or why they should be allowed to ask what they ask. Stone is concerned about psychiatrists who say, with a respectful smile, "even though we both know I have been hired by your opponent, let's talk" and then not-so-gently lead the litigant into subjects that the litigant might prefer to keep to himself. And because psychiatrists have—through good training—learned to become such expert "leaders," they can sometimes get the litigant into subjects before the less-skilled litigant even has a chance to figure out where he has ended up.

What do ethical forensic psychiatrists do at this point and, more importantly, to whom will they be beholding for the decision that they make? The answer to the first part of the question might be easy enough: informed consent is an ongoing process, one in which examining psychiatrists are continually assessing the litigant's agreement to the interview.[22] Therefore, one could say that it should fall on the psychiatrist

21. *See generally* Douglas Mossman, *Is Expert Psychiatric Testimony Fundamentally Immoral?* 17 INT'L J.L. & PSYCHIATRY 347 (1994); *see also* Edmund D. Pellegrino, *Societal Duty and Moral Complicity: The Physician's Dilemma of Divided Loyalty*, 16 INT'L J.L. & PSYCHIATRY 371 (1993); Appelbaum, *supra* note 8.

22. *See* Harold J. Bursztajn et al. *The Rebirth of Forensic Psychiatry in Light of Recent Historical Trends in Criminal Responsibility*, 17 PSYCHIATRIC CLINICS N. AM. 611,

to keep asking the litigant, "do you want to keep talking about this subject?" But what safeguards are there against psychiatrists who might say, "but since we're already talking about it, let's explore it a bit further?" And what about other psychiatrists who, even if willing to drop a line of troublesome questioning, may still make some observations about the litigant's physiologic responses to the offending questions; observations that end up, perhaps damningly, in the psychiatrist's report to the judge?[23]

This is the aspect of double agency that cannot be so clearly delineated and then debated using the standard metaphors. In that metaphoric system, forensic psychiatrists are just doing a job, taking representations of what the litigant *has* and *translating* them using specific, well-defined rules. Everything is on the surface and in plain view (and, if one wants to go with the Fourth Amendment metaphor, thereby usable).[24]

But the problem can be delineated, and therefore debated, much more clearly with the alternative metaphors. Metaphorically, litigants are being *taken in* by psychiatrists. If psychiatrists do indeed *take* litigants *inside* them so that they can make a judgment about which psychiatric-legal prototype a litigant *resembles*, then they are not just making a simple, technical translation of observations. They are also engaging, even if only briefly, in an extremely personal interaction. If psychiatrists are going to *take in* litigants in any meaningful way, they have to get litigants relaxed enough to "go there."[25] There may be no realistic way out of this problem short of not having psychiatrists examine adverse litigants at all. On the

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624-25 (1994).

23. This is the crux of Stone's very impassioned argument about the ethics of the switch caused when a psychiatrist is suddenly thrust from a "forensic role" (following lines of questions) to a "therapeutic role" (suddenly realizing that you need to stop a particular line of questions). *See generally* Stone, *Revisiting the Parable*, *supra* note 20, at 84. If one does take the ethical and humane step of curtailing the questions but then goes on to report on the "insights" that one has made based on the offending line of questions, even if such information harms the litigant, no one can blame the litigant for feeling deeply—and one can easily argue, correctly—betrayed.

24. The Fourth Amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. In delineating the scope of the Fourth Amendment's protections, the Supreme Court has held that, under certain circumstances, the State may seize, and then later use in trial, evidence which may not have been sought in a warrant, but which may still have been in the "plain view" of officers conducting the search. Coolidge v. New Hampshire, 40 U.S. 443 (1971).

25. As Professor Stone says (granted, provocatively), "It is no accident that good [forensic] clinicians are often *emotionally seductive* human beings who inspire personal trust." STONE, *The Ivory Tower*, *supra* note 20, at 67.

other hand, the alternative metaphors will at least alert forensic psychiatrists and legal professionals that there is always a danger in these adversarial situations.[26]

The Powers of Forensic Psychiatry

Finally, the alternative metaphors serve to remind forensic psychiatrists and legal professionals about the very important, creative role of forensic psychiatrists as they formulate their opinion and thus of their very considerable powers.

When psychiatrists use the standard metaphors, one does not see this fact as clearly. In standard language, psychiatrists can sound to legal professionals as if they are doing something quite foreign to law, quite technical and quite difficult to evaluate. Forensic psychiatrists observe clinical phenomena. They give clinical diagnoses that are often quite complex. Even though they may translate some technical information into laymen's terms, they still may fill their opinions with inscrutable phrases such as "biological diatheses" or "patterns of defense."

But when psychiatrists use the alternative metaphors—or when legal professionals reformulate a standard opinion in those metaphors—both psychiatrist and legal professional will realize that psychiatrists are doing something quite familiar to legal professionals. By *taking in* litigants and comparing them to relatively thin psychiatric-legal prototypes, psychiatrists are doing a comparison of fact patterns that is quite similar to the comparison of fact patterns that legal professionals do every day, whether in the courtroom or in the law office. Psychiatrists and legal professionals are on much more equal footing. As experienced forensic psychiatrists know, experienced legal professionals often have as good a "legal gut" for mental health law issues as forensic psychiatrists. Even inexperienced legal professionals know how sketchy legal fact patterns are. Often the

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26. The late Dr. Seymour Halleck, trying to justify the practices of forensic psychiatrists, notes that:

> If the psychiatrist is to report accurately, it is important that the patient's communication be as complete and reliable as possible. The patient must disclose behavior, thoughts, or feelings that would not be revealed in most social situations. To obtain honest self-disclosure, the psychiatrist uses certain skills. He or she tries to be straightforward, friendly, reinforcing, and, above all, empathic. Without use of these skills, the psychiatrist is not much more efficient than a lay person. It is almost impossible for a competent psychiatrist to conduct a psychiatric examination without being selectively reinforcing and empathic. Herein lies the most difficult aspect of the ethical dilemma posed by the double-agent role.

Seymour L. Halleck, M.D., *The Ethical Dilemmas of Forensic Psychiatry: A Utilitarian Approach*, 12 BULL. AM. ACAD. PSYCHIATRY & L. 279, 280 (1984).

whole point of a trial is to fight over how the particular details of a case will be used to fill in such sketchy, generalized prototypical fact patterns. Psychiatric-legal prototypes are no different because they are so thin that when forensic psychiatrists have to fill in details, they *really* have to fill in details.

As long as mental health law definitions require the proof of mental illness, some expert testimony will be necessary to prove this crucial element of the particular legal claim. In general, by describing the case with the standard metaphors, forensic psychiatrists do that task more efficiently. The alternative metaphors only point out, from this other point of view, how creative forensic psychiatrists must be when they do that task. In the legal arena, creativity is power, especially when that creativity is exercised under the evidentiary doctrine of "expertise," the doctrine that holds that legal professionals cannot claim to have subject matter knowledge superior to the expert's.[27] Legal professionals may be able to sit in judgment over experts' credibility, but they cannot do so over their accuracy.[28] The expert's creative opinion is the final word, a building block that must be taken as is, accepted or rejected without modification. If the alternative metaphors reveal that artistic creativity plays an important role in the formation of that building block, then they also reveal that the artist can, quite potentially, be a powerful one.

CONCLUSION

In this paper, I have tried to delineate two metaphor systems that psychiatrists can use as they talk about "disorders of the mind and their relation to legal principles."[29] The standard system describes the psychiatrist's task as one of *taking* a representation of what the litigant *has* and then *changing* it into a form that a judge can *use*. The alternative system describes the psychiatrist's task of one of *taking in* a representation of who the litigant *is* and then *comparing* it to something that the judge can then *use*. The standard system is the language of the technician; the alternative system is the language of the artist. The standard system has the most going for it in terms of pragmatism, as the definitions of mental health law and the requirements of evidence can so easily be met when forensic

27. "[W]here expert testimony has the scientific earmarks of reliability, the judicial inquiry is over. The courts are not to decide if the expert's opinions are, in fact, scientifically or technically correct. The evidence is then admitted and subjected to the kind of adversarial attack that facilitates the jury's central functions of deciding what weight to attribute to the evidence and what witnesses to believe." CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6262 (ed. 1997).

28. *Id.*

29. Gutheil, *supra* note 1, at 2747.

psychiatry is spoken within the standard terms. Nonetheless, the alternative metaphors can serve an important purpose for forensic psychiatrists and legal professionals. When forensic psychiatry is spoken in the alternative terms, its complexities become much more obvious. Even if there is not now a place for such complexities to be spoken in the middle of a hearing room, there certainly may be a very good place, metaphorically speaking, for them to be spoken in the consulting room or the classroom. Talk in such quarters can sometimes find its way into the hearing room. Perhaps such talk might even turn out to be helpful.

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An Attempt to Quiet the Controversy: The Case for Automatically Equipping an Adverse Possessor with a Slander of Title Action

Brian Lester*

INTRODUCTION

The law, in general, seeks to channel behavior towards that which produces good and, in doing so, channel behavior away from that which produces harm. Adverse possession operates as an intriguing illustration of this principle.[1] In the real property context, what initially is subject to a suit for wrongful trespass with a remedy for ejectment can ripen into ownership with continued use inconsistent with another's property interest. Prior to the expiration of the statutory period, the person in possession adverse to the property interests of another enjoys only a naked possessory claim, which can be easily defeated through legal action by anyone with superior property rights.[2] Once the period of limitations has run, the once-naked possessory claim transforms itself into legally recognizable title. In this way, the transformation of legal rights prior to and after the applicable period reflects society's judgment of property ownership—the initial wrongdoing of the adverse possessor shifts to the now-divested owner as punishment for "sitting on one's rights."[3]

Once the rights in another's property have been "transferred" to the adverse possessor, the adverse possessor may choose to legitimate their interest through a judicial proceeding to quiet title.[4] In most jurisdictions,

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* Law Clerk; J.D., Notre Dame Law School 2002; B.A., University of Washington 1998. I dedicate this Article to both my grandmothers who taught me important lessons about life. I would like to thank the members of the New England Law Review for their hard work.

1. *See infra* Part I.A.

2. Edward G. Mascolo, *A Primer on Adverse Possession*, 66 CONN. B.J. 303, 313-14 (1992).

3. John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 820 n.12 (1994).

4. *See* 3 AM. JUR. 2D *Adverse Possession* § 40 (1986).

many of an adverse possessor's legally protected property interests, are received automatically, regardless of the possessor's decision to seek a declaratory judgment to quiet title. In the event an adverse possessor decides against, or even delays, the recording of title, the degree of legal protection afforded to that adverse possessor varies by jurisdiction.[5] It is during this intermediary period, between satisfying all of the requirements and receiving formal, legal recognition, where jurisdictions are divided on the issue of whether an adverse possessor has a sufficient property interest immediately following the running of the statute to recover for slander of title.[6]

This disparate treatment on the availability of an action for slander of title to an adverse possessor prior to obtaining legal recognition arises in the first instance because a claimant, in order to bring a slander of title action, must have some sort of property interest to be slandered.[7] Thus an owner with record title, the strongest form of proof of ownership available, or even a lessee with a bare possessory interest, may maintain an action for slander of title,[8] however, a contractor, whose interests are unrelated to any rights attached to the property itself, may not.[9] Within these extremes, courts have reached different results when confronted with the question of what degree of property interest is sufficient to maintain an action for slander of title.[10] Considering the legal and operative effect of adverse possession, it would seem consistent that an adverse possessor should immediately gain enough of a property interest to become eligible to bring a slander of title action. In light of the importance and purpose of adverse possession in property law, as well as the requirements that an adverse possessor satisfy the elements of actual, open, hostile, continuous, and exclusive,[11] this would appear to be the logical result.

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5. *See infra* Parts II-III.

6. *See infra* Part II.

7. *See, e.g.*, Gillmor v. Cummings, 904 P.2d 703, 705 (Utah Ct. App. 1995); Allison v. Berry, 44 N.E.2d 929, 934 (Ill. App. Ct. 1942); Butts v. Long, 80 S.W. 312, 313 (Mo. Ct. App. 1904).

8. *See* Davis v. Sponhauer, 574 N.E.2d 292, 297 (Ind. Ct. App. 1991). It should be noted that the system of proof for determining title quality is not an exact science in which the prospective purchaser easily discovers reference to the individual with current title and the obligations attached to the property. *See* ROGER A. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 10.12, at 721 (2d ed. 1993); *see also* Schlosser v. Creamer, 284 A.2d 220, 223 (Me. App. Ct. 1971). Instead, title searching involves deducing through a recreation of history, often incomplete, as to how recorded transactions have affected the title to the property. *See* CUNNINGHAM ET AL., *supra*, § 10.12, at 721.

9. *See Allison*, 44 N.E.2d at 934.

10. *See infra* Part II.

11. *See infra* Part I.A.

The question of an adverse possessor's right to recover for slander of title is not simply an outdated academic debate, but in fact remains a subject of contemporary significance.[12] For example, in *Nolan v. Gaudiosi*, a Connecticut superior court would have had an opportunity to confront this issue had the plaintiff not withdrawn his slander of title claim prior to trial.[13] This article will analyze and reflect upon the doctrines of adverse possession and slander of title as they exist independently and interdependently, and hopefully, in the process, provide insight for those courts that confront this issue in the future.

Part I of this article discusses slander of title and adverse possession separately, explaining the elements of each and providing a context for the discussion that follows. Part II, after merging the two doctrines, discusses two different approaches that jurisdictions have taken when confronted with adverse possessors who allege slander of title to have occurred prior to obtaining legal recognition of their property interest. Part III analyzes this intersection in the broader context of the property interests obtained by an adverse possessor, and after incorporating legal and policy perspectives into the framework, advocates that the better, more legally consistent approach is to provide an adverse possessor with an immediate right to a slander of title action.

I. AN OVERVIEW OF SLANDER OF TITLE AND ADVERSE POSSESSION

A. Adverse Possession as a Claim of Title

The infamous real property doctrine of adverse possession rewards title to the wrongful occupier of another's land. The successful adverse possessor is said to have gained perfect legal title to another's property at the expense of the dispossessed owner's title.[14] Generally, courts require that an adverse possessor satisfy the following elements: (1) actual; (2) open and notorious; (3) hostile; (4) exclusive; and (5) continuous

12. *See, e.g.*, Raymond v. Lyden, 728 A.2d 124, 125 (Me. 1999) (stating that the plaintiffs did not appeal the lower court's dismissal of adverse possession but appealed its decision on slander of title); Nolan v. Gaudiosi, No. CV 970142745S, 2000 WL 254625, at *1 (Conn. Super. Ct. 2000); *see also, e.g.*, Santa Fe Energy Operating Partners v. Carrillo, 948 S.W.2d 780, 784-86 (Tex. App. 1997) (noting that that without first finding malice on Santa Fe Energy Operating Partner's part the court did not have to resolve whether sufficient interest exists for slander of title action); Roman v. Julian, No. CV 9763656S, 1998 Conn. Super. LEXIS 2668, at *13, *37-*39 (Super. Ct. Sept. 21, 1998).

13. *See Nolan*, 2000 WL 254625, at *1.

14. *See* 3 Rufford G. Patton, *Other Methods of Acquiring Title, in* AMERICAN LAW OF PROPERTY: A TREATISE ON THE LAW OF PROPERTY IN THE UNITED STATES § 15.2, at 760–61 (2d prtg. 1974).

possession of the property.[15] As a threshold matter, the period of adverse possession is statutorily prescribed. Adverse possession statutes may contain additional qualifying provisions, such as tolling conditions [16] or stipulations as "against whom the statute will not run."[17] Once an adverse possessor satisfies each statutory requirement through clear, positive, and unequivocal evidence,[18] he then acquires the identical interest in the property as held by the previous owner.[19] The acquired title is not derived from the dispossessed owner, but instead is treated as original title, virtually free from all claims against the former owner.[20]

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15. *See* CUNNINGHAM ET AL., *supra* note 8, § 11.7, at 808. Although the literature suggests that these are the elements for an action in adverse possession—even where the question of good faith is irrelevant—the adverse possessor may not necessarily be entitled to favorable relief after satisfying these requirements. *See generally* Richard Helmholz, *Adverse Possession and Subjective Intent,* 61 WASH. U. L.Q. 331 (1983). Some jurisdictions also statutorily require payment of applicable property taxes for a number of consecutive years. *See, e.g.*, ARIZ. REV. STAT. § 12-525(A) (2000); CAL. CODE CIV. PROC. § 325 (2001) (applying to those whose claims lie with unwritten title); Hunter v. Robertson, 40 S.W.3d 337, 339–40 (Ark. Ct. App. 2001); Rieddle v. Buckner, 629 N.E.2d 860, 862 (Ind. Ct. App. 1994) (recognizing that payment of taxes is required for a claim of adverse possession unless the claim arises under a boundary dispute). Other jurisdictions do not strictly require payment of taxes as a condition precedent. *See, e.g.*, Barnes v. Winford, 833 P.2d 756, 758 (Colo. Ct. App. 1991); Alaska Nat'l Bank v. Linck, 559 P.2d 1049, 1053 (Alaska 1977). Proof of payment of taxes, however, is strong evidence of a claim of title. *See* ALA. CODE § 6-5-200(a) (2001); Shilts v. Young, 567 P.2d 769, 777 (Alaska 1977); *Roman*, 1998 Conn. Super. Lexis 2668, at *30. In the absence of a statutory provision to that effect, an adverse possessor need not pay taxes assessed to the estate. 3 AM. JUR. 2D *Adverse Possession* § 165 (1986).

16. If, at the time the cause of action would arise, the owner has a disability such as insanity or infancy, the statute does not begin to run until a disability is removed. *See* 3 Patton, *supra* note 14, § 15.12, at 822. A useful description and application of the tolling doctrine can be found in *Stalberg v. Western Title Insurance*, 27 Cal. App. 4th 925, 932-34 (Ct. App. 1994).

17. CUNNINGHAM ET AL., *supra* note 8, § 11.7, at 808; *see also* RALPH E. BOYER ET AL., THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY § 4.7-.8, at 52 (4th ed. 1991); *see also, e.g.*, CONN. GEN. STAT. § 52-575(b) (2001).

18. *See* Davis v. Sponhauer, 574 N.E.2d 292, 297 (Ind. Ct. App. 1991); *see also* Nolan v. Gaudiosi, No. CV 970142745S, 2000 WL 254625, at *2 (Conn. Super. Ct. 2000).

19. *See* CUNNINGHAM ET AL., *supra* note 8, § 11.7, at 808. *But see* W.W. Allen, Annotation, *What Acts, Claims, Circumstances, Instruments, Color of Title, Judgment, or Thing of Record Will Ground Adverse Possession in a Life Tenant as Against Remaindermen or Reversioners*, 58 A.L.R. 2D 299, 302-05 (1958).

20. *See* Plauchak v. Boling, 653 A.2d 671, 677 (Pa. Super. Ct. 1995); *see also* BOYER ET AL., *supra* note 17, § 4.5, at 52; CUNNINGHAM ET AL., *supra* note 8, § 11.7, at 808. This only makes sense, for example, when an individual with remainder or reversion interests is barred from bringing an ejectment action until the life estate terminates. *See* 3 Patton, *supra* note 14, § 15.8, at 802; § 15.13, at 825-28.

As for the requirement of actual possession an adverse possessor must show significant physical occupation based upon acts that would normally constitute possession (measured by the degree of actual use and enjoyment) by an average owner similarly situated.[21] The inquiry into actual use is factually intensive, largely depending on the character of the property.[22] As Arthur Patton once described, "in the absence of additional provisions in a particular statute, the type of possession required is merely that which will give to the owner a cause of action against the occupant throughout the prescribed period."[23] The title thereby gained by an adverse possessor is limited to that portion of the property actually used, with an exception for someone who enjoys color of title through constructive possession.[24]

Under the doctrine of constructive possession, one who can show actual possession of a portion of a parcel of land described in a document receives title to the entire estate described in the document, without having to satisfy the requirements of the unoccupied portion.[25] This windfall will not be realized where the prior owner actually possessed a portion of the estate, in which case only that which the adverse possessor actually used is annexed.[26]

The open and notorious element requires that possession be conspicuous so that it provides reasonable notice to the owner and the community at large.[27] In most cases, this requirement resembles that of open, actual use.[28] As long as the adverse possessor's use does not substantially deviate

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21. *See* CUNNINGHAM ET AL., *supra* note 8, § 11.7, at 809-10; 3 Patton, *supra* note 14, § 15.3, at 765.

22. *See* Davis v. Haines, 182 N.E. 718, 720-21 (Ill. 1932); *see also* 3 Patton, *supra* note 14, § 15.3, at 766. Under some circumstances, mere proof of residency may not be enough. *See id.* The amount of evidence of control required ranges from the less demanding of "wild, undeveloped lands," to the more demanding of cultivated land. *Id.* at 766-67.

23. 3 Patton, *supra* note 14, § 15.3, at 765.

24. *See id.* § 15.11, at 819. Color of title is title that appears to be valid title but is in fact not, such as an invalid deed or other written document. *See id.* A variation to the constructive possession doctrine recognizes a claimant's color of title upon proof of "paying taxes on wild and unimproved land." Hunter v. Robertson, 40 S.W.3d 337, 339-40 (Ark. Ct. App. 2001).

25. *See* CUNNINGHAM ET AL., *supra* note 8, § 11.7, at 810; 3 Patton, *supra* note 14, § 15.11, at 819; *see also* BOYER ET AL., *supra* note 17, § 4.9, at 53. On a related matter, a few courts have adopted the view that since a bona fide claim of title is required, one's award is limited to the extent of title actually possessed. *See* 3 Patton, *supra* note 14, § 15.4(b), at 782.

26. *See* 3 Patton, *supra* note 14, § 15.11, at 820.

27. *See* CUNNINGHAM ET AL., *supra* note 8, § 11.7, at 810-11; *see also* Rieddle v. Buckner, 629 N.E.2d 860, 863 (Ind. Ct. App. 1994).

28. *See* 3 Patton, *supra* note 14, § 15.3(a), at 769-70.

from the use and enjoyment of an average owner under similar circumstances, the owner will be presumed to be on notice.[29]

To satisfy the hostility requirement, the possession must exist absent permission, express or implied, by the individual legally empowered to grant such permission.[30] Some relationships, such as co-tenants and tenants, are presumed permissive and only become hostile after one of the parties repudiates the special relationship upon which the presumption applies.[31] Jurisdictions differ on the issues of whether the adverse possessor's subjective knowledge of another's title defeats hostility[32] and whether "the adverse possession be [only] accompanied by claim of title."[33] A claim of title or right is merely another way of saying that the adverse possessor intends to use the property to the exclusion of all others.[34] The necessity of showing good faith typically arises under color of title or constructive possession claims, created either by statute or through judicial construction.[35] However, demonstrating good faith is not required when the claim arises from entry and possession of the premises.[36]

The exclusivity element requires that the property not be shared[37] in at least some portion of the estate.[38] A typical adverse possessor should have little difficulty with satisfying the exclusivity requirement, as evidence of casual intrusion by trespassers, for example, has been held not to defeat the exclusive character of one's claim.[39]

The final element, that the possession be continuous, requires that adverse possession continue without meaningful interruption for the statutory period.[40] An adverse possessor's possessory interest discontinues upon such events as abandonment by the adverse possessor, ejectment against the adverse possessor, or re-entry by the owner.[41] A finding of continuous possession also depends on the factual circumstances

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29. *See id.*

30. *See* CUNNINGHAM ET AL., *supra* note 8, § 11.7, at 811; *see also, e.g.*, Bd. of County Comm'rs v. Ritchey, 888 P.2d 298, 298 (Colo. Ct. App. 1994).

31. *See* BOYER ET AL., *supra* note 17, § 4.10, at 53; 3 Patton, *supra* note 14, § 15.4(a), at 773.

32. *See* CUNNINGHAM ET AL., *supra* note 8, § 11.7, at 812.

33. 3 Patton, *supra* note 14, § 15.4(b), at 774 (citations omitted).

34. *See* 3 AM. JUR. 2D *Adverse Possession* § 132 (1986).

35. *See* 2 C.J.S. *Adverse Possession* § 206(a)-(d) (1972).

36. *See* 3 AM. JUR. 2D *Adverse Possession* § 133.

37. *See* CUNNINGHAM ET AL., *supra* note 8, § 11.7, at 813.

38. *See id.*

39. *See* McKelvy v. Cooper, 437 P.2d 346, 347 (Colo. 1968).

40. *See* CUNNINGHAM ET AL., *supra* note 8, § 11.7, at 813; *see also, e.g.*, COLO. REV. STAT. § 38-41-101 (2000).

41. *See* 3 Patton, *supra* note 14, § 15.9, at 807-09.

surrounding each estate, so that land which by its nature is seasonally used would permit continuous possession on a seasonal basis.[42] In addition, where privity exists between successive adverse possessors, formally or informally, neither the statute of limitations will expire nor will an action seeking ejectment interfere with the continuous nature of one's possession.[43]

Once the statute of limitations expires, the previous owner becomes disposed. The disposed owner is then barred from seeking the remedy of ejectment and loses all other rights and incidents attached to the estate.[44] Moreover, the acquired estate shares all the attributes of the previous owner's estate and cannot be divested by oral admission, re-entry by former owner, or waiver after the statute of limitations has run.[45] The rights to possession and use thus acquired arise in connection with the adverse possessor or disseisor.[46] Once acquired, the adverse possessor's vested title is independent, without any privity with the former owner,[47] and is equivalent to title acquired from formal conveyance.[48] Not only are the subsequent owner's property rights protected, but also the burdens connected to the estate, such as liens and, in some circumstances, easements flow to the new titleholder.[49] The minor differences among jurisdictions with respect to the requirements of adverse possession produce a clear two-sided controversy when an adverse possessor, without first obtaining legal recognition of one's newly acquired property interests, seeks a slander of title action.

B. Slander of Title as a Cause of Action

Slander of title,[50] as a subcategory of injurious falsehood or disparagement, covers false statements made maliciously to third parties regarding the quality of one's ownership interest.[51] Typically, an action

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42. *See* CUNNINGHAM ET AL., *supra* note 8, § 11.7, at 813-14.

43. *See id.* § 11.7, at 814; 3 Patton, *supra* note 10, § 15.10, at 813-14. It should be noted that oral transfers are insufficient for establishing privity for adverse possessors with constructive possession. *See* BOYER ET AL., *supra* note 17, § 4.7, at 52.

44. 3 Patton, *supra* note 14, § 15.14, at 828-29.

45. *See* Davis v. Haines, 182 N.E. 718, 720 (Ill. 1932); 3 Patton, *supra* note 14, § 15.14, at 829.

46. *See* Lyle v. Holman, 238 S.W.2d 157, 159 (Ky. Ct. App. 1951).

47. 3 Patton, *supra* note 14, § 15.14, at 829.

48. *See* 3 AM. JUR. 2D *Adverse Possession* § 3 (1986).

49. 3 Patton, *supra* note 14, § 15.14, at 830-31.

50. Slander of title is also referred to as "disparagement of property," "slander of goods," "commercial disparagement," and "trade libel." *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS ch. 24, § 128 (5th ed. 1984).

51. *See* 1 ARTHUR B. HANSON, LIBEL AND RELATED TORTS IN CASE AND COMMENT ¶

arises when parties file documents with a court asserting interest in a particular piece of property inconsistent with another's interest.[52] As the Ohio Court of Appeals recently observed, an action for slander of title involves recovery for injuries stemming from assertions or conduct disparaging "a particular piece of property by parties who claim an interest in the property."[53] Borrowing the term "slander" from defamation, the two causes of action are theoretically distinct, but in practice are often confused.[54] Arthur Hanson made a noble attempt to clarify the distinction when he wrote:

> [s]tatements impugning the integrity or financial responsibility of the plaintiff, whether an individual or business organization, are actionable as defamation, but statements casting doubt on the quality or true ownership of the plaintiff's property or product are actionable as disparagement . . . .[55]

The distinction is brought out most visibly in a comparison of the nature of the harm caused by the conduct alleged in each action.[56] Generally, relief under slander of title only covers economic losses connected to a person's association with one's property, which one has cast into doubt, whereas an action for defamation includes recovery for damage to one's personal reputation.[57] Prosser implicitly questioned any attempt to establish a clear distinction between the two when he suggested that injurious falsehood, as in defamation, involves harmful interference with one's relations to others.[58] Despite any relational aspect which may be involved, an action for slander of title fundamentally involves one's association with an interest in property and seeks to provide a remedy where the value of one's property has diminished due to the influence of another's disparaging remarks.

Aside from the nature of the injury sought to be protected, a plaintiff seeking relief under slander of title must plead and prove special damages.[59] This burden limits recovery to direct and immediate damages,

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266 (1969 & Supp. 1976); 9 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 33:1, at 1010 (1992); 50 AM. JUR. 2D *Libel & Slander* § 553 (1986).

52. *See* Green v. Lemarr, 744 N.E.2d 212, 224 (Ohio Ct. App. 2000).

53. *Id.*

54. *See* 1 HANSON, *supra* note 51, ¶ 267. Slander of title arose out of defamation for the protection of reputation tied to property. *See* 9 SPEISER ET AL., *supra* note 51, § 33:1, at 1010.

55. 1 HANSON, *supra* note 51, ¶ 267.

56. *See* 9 SPEISER, *supra* note 51, § 33:3, at 1017.

57. *See* KEETON ET AL., *supra* note 50, § 128, ch. 24.

58. *See id.*

59. *See* James O. Pearson, Jr., *What Constitutes Special Damages in Action for*

such as an "inability to obtain a mortgage, depreciation in market value, loss of customers, or the reasonable cost of removing the doubt cast upon the title or property."[60] As early as the sixteenth century, a period in which many believe this doctrine originated, judges required a showing of special damages.[61] The added requirement of showing special damages is derived from the very purpose of slander of title claims—"to compensate a vendor for pecuniary loss suffered because statements attacking the quality of his goods have reduced their marketability."[62] Limiting a plaintiff to recovery upon proof of special damages, along with the burden of proving both falsity and malice, make slander of title a more difficult cause of action to recover from than defamation.[63]

A minority of jurisdictions limit special damages to those losses directly connected with the property's vendibility and do not include attorney's fees.[64] However, the majority allow a claimant to recover from litigation expenses related to removing the doubt placed upon one's property.[65] Of those that permit recovery for litigation expenses, most limit the recovery of attorney's fees to legal action to remove the cloud placed directly upon one's ownership interests.[66] As a result, most courts would not allow recovery for the costs of bringing an action for slander of title on the ground that such an action is not itself necessary to remove doubts placed upon one's property.[67] A minority of jurisdictions have a more expansive view of recoverable damages in the area of attorney's fees based upon the fact that the person whose property has been disparaged is left with the judicial process as the only reasonable and practical course of action.[68]

With regard to the elements of proof, slander of title requires a false statement of fact, published with malice,[69] to a third party that disparages

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Slander of Title, 4 A.L.R. 4TH, § 2[a] (1981).

60. ROBERT D. SACK & SANDRA S. BARON, *Other Related Causes of Action*, *in* LIBEL, SLANDER, AND RELATED PROBLEMS § 11.1.4.6 (2d ed. 1994) (citations omitted).

61. *See* 1 HANSON, *supra* note 51, ¶ 267 (1969 & Supp. 1976).

62. *See* SACK & BARON, *supra* note 60, § 11.1.2.3 (Supp. 1998).

63. *Id.* § 11.1.4.1 (2d ed. 1994).

64. Pearson, *supra* note 59, at § 10.

65. *See* Colquhoun v. Webber, 684 A.2d 405, 410 (Me. 1996).

66. *See* 65 AM. JUR. 2D *Quieting Title* § 85 (2001); *see also* Green v. Lemarr, 744 N.E.2d 212, 227 (Ohio Ct. App. 2000) (in dicta); *see also, e.g.*, Rorvig v. Douglass, 873 P.2d 492, 497 (Wash. 1994); Keilbach v. Dorothea, 669 N.E.2d 1052, 1054 n.2 (Ind. Ct. App. 1996).

67. *See Green*, 744 N.E.2d at 227 (in dicta); *see also, e.g.*, *Colquhoun*, 684 A.2d at 410–11. The *Green* court recognized that an exception to the "American Rule" is warranted where one acts in such bad faith. *See Green*, 744 N.E.2d at 227.

68. *See Rorvig*, 873 P.2d at 497.

69. A complete defense to a claim of malice is that the statement was made in good

one's property interest, and causes actual economic loss or special damages.[70] In cases where the disparagement of property does not expressly refer to another by name, the plaintiff—as in the defamation context—may show that the defendant's remarks can be reasonably understood as referring to the plaintiff.[71] An individual is said to have maliciously made a false statement when either it is done with the deliberate intent to harm another or it is made with a reckless disregard of its consequences, the latter being measured by the conduct of a reasonable person.[72]

A defendant enjoys a privilege upon a showing that the statement, although false, was made in good faith with probable cause for believing its veracity.[73] An area where a privilege applies is when one with record title disputes another's claim to the property through the filing of an affidavit or through the initiation and maintenance of a lawsuit against the claimant.[74] This privilege is available because it would be contrary to the public interest to encourage the owner to acquiesce to the potentially false claims of an adverse possessor, but it extends only so far as the pleadings and the proceedings.[75] Despite the absence of a privilege, some jurisdictions have disallowed relief to a party alleging disparagement when one's property interest rested solely on a bare claim of adverse possession.

II. THE INTERSECTION OF SLANDER OF TITLE AND ADVERSE POSSESSION

In the relatively light case law[76] where these two legal theories intersect, jurisdictions have been equally divided on whether an action for slander of title should lie for an adverse possessor without first obtaining legal recognition of one's property interests. The split in authority on this issue arises from a difference of opinion regarding the effect that the running of the statute has on the relationship of the adverse possessor to the estate

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faith and with probable cause. George Lefcoe et al., *Title and Marketable Title*, *in* 11 THOMPSON ON REAL PROPERTY § 91.03 (David A. Thomas ed., 1994).

70. *See* KEETON ET AL., *supra* note 50, ch. 24, § 128 (1984).

71. *See* 9 SPEISER ET AL., *supra* note 51, § 33:5, at 1021.

72. *See* Davis v. Sponhauer, 574 N.E.2d 292, 300 (Ind. Ct. App. 1991) (finding that reckless disregard includes inquiry notice to discover the true owner); 9 SPEISER ET AL., *supra* note 51, § 33:7, at 1024.

73. *See* Weaver v. Stafford, 8 P.3d 1234, 1244 (Idaho 2000); Butts v. Long, 80 S.W. 312, 313 (Mo. Ct. App. 1904).

74. *See, e.g.*, Raymond v. Lyden, 728 A.2d 124, 126 (Me. 1999); Herring v. Behlmann, 734 S.W.2d 311, 313 (Mo. Ct. App. 1987); Green v. Lemarr, 744 N.E.2d 212, 225 (Ohio Ct. App. 2000); George v. Teare, No. CA 99-4102, 2000 Mass. Super. LEXIS 374, at *11 (Super. Ct. 2000).

75. *See* cases cited *supra* note 74.

76. *See supra* note 15.

claimed under adverse possession.[77] One way to view adverse possession is to look at it as an alteration in the relationship between the disposed owner and the estate in question. Under this view, the adverse possessor's interest in the estate would be nonexistent until so recognized by law, since after all, the divested owner is presumed to be the legal titleholder until otherwise recognized by law. Therefore, the running of the statute affects only the previous owner's interests in the property and it then becomes necessary for the disseisor to initiate an action to quiet title in order for his interests to be recognized.

The opposing view to adverse possession focuses on the changed relationship between the adverse possessor and the estate, viewing the effect on the disseised owner as incidental to the effect the running of the statute has on the relationship between the adverse possessor and the estate.[78] As this view stresses, the running of the statute transforms an inchoate property right into an immediately vested right. According to this view the wrongful possessor immediately obtains a sufficient property interest to recover in a suit for slander of title, regardless of whether a court has so recognized.[79] These contrasting viewpoints receive more in-depth discussion below.

A. Courts Recognizing a Cause of Action

It has been held by some courts that a slander of title suit may be brought prior to legal recognition of an adverse possessor's interests.[80] The justification lies in that the possessory interest acquired through adverse possession is a sufficient property interest to sue for slander of title.[81] In *Colquhoun v. Webber*, the defendant argued the filing of her quitclaim deed before the plaintiff obtained a judicial decree could not constitute slander of title.[82] Applying the Restatement (Second) of Torts § 624[83] comment (c)

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77. *See infra* Part II.A-B.

78. This is not to suggest that this view denies the proposition that adverse possession involves the transfer of title from the dispossessed owner to the adverse possessor since the title acquired is treated as new title. *See* 4 HERBERT T. TIFFANY, *Adverse Possession of Land, in* THE LAW OF REAL PROPERTY § 1172 (1975).

79. *See id.* § 1171.

80. *See, e.g.*, Davis v. Sponhauer, 574 N.E.2d 292, 300 (Ind. Ct. App. 1991); Hines v. Lumpkin, 47 S.W. 818, 820 (Tex. Civ. App. 1898). A Texas Court of Appeals holding that the defendant's actions were justified left this question for another day. *See* Santa Fe Energy Operating Partners v. Carrillo, 948 S.W.2d 780, 784 (Tex. App. 1997); *see also* Colquhoun v. Webber, 684 A.2d 405, 409 (Me. 1996); 50 AM. JUR. 2D *Libel & Slander* § 550 (1986).

81. *See* S. La. Land Co. v. Riggs Cypress Co., 43 So. 1003, 1005 (La. 1907).

82. *See Colquhoun*, 684 A.2d at 409.

83. According to the Restatement (Second) of Torts, the disparagement must refer to

that broadly defines the interest sufficient to maintain an action for slander of title, the Maine Supreme Court held that the property interest acquired after satisfying all the elements of adverse possession is sufficient enough to maintain an action for slander of title without first having obtained legal recognition of such interests.[84]

Quoting comment (c) which suggests "[a]ny kind of legally protected interest in land, chattels or intangible things may be disparaged if the interest is transferable and therefore salable or otherwise capable of profitable disposal,"[85] the Maine Supreme Court based its holding on the fact that a slander of title action can be brought on a minimal property interest.[86] The court further reasoned that prior state court decisions in Maine had held that, whether title is obtained by common law disseisin or by statutory adverse possession, perfect title vests by operation.[87] Furthermore, the court held that mere proof of adverse possession creates the title, not its subsequent exhibition as evidence to a fact finder.[88] An Indiana court in *Davis v. Sponhauer* reached a similar conclusion but focused more of its attention on the fact that title automatically vests in the adverse possessor by operation of law upon the continuous, adverse, and exclusive possession for the statutory period.[89] Thus, one who satisfies the requirements for adverse possession receives the equivalent of title conveyed by contract or deed, and therefore a slander of title action should lie.[90] Whether an adverse possessor enjoys a substantial or minimal property right, the person acquiring an estate through adverse possession has enough of an interest at stake to justify permitting an action for slander of title.

B. Courts Refusing To Recognize a Cause of Action

In the seminal case, *Howard v. Schaniel*,[91] a California Appeals Court affirmed the judgment quieting title to the Howards who had satisfied the statutory requirements for adverse possession but reversed the trial court's

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"another's property rights in land . . . ." RESTATEMENT (SECOND) OF TORTS § 624 (1976).

84. *See Colquhoun*, 684 A.2d at 409-10.

85. RESTATEMENT (SECOND) OF TORTS § 624 cmt. c.

86. *See Davis*, 574 N.E.2d at 300.

87. *See Colquhoun*, 684 A.2d at 409-10; Davis v. Haines, 182 N.E. 718, 721 (Ill. 1932); 3 AM. JUR. 2D *Adverse Possession* § 3 (1986); *see also, e.g.*, *Davis*, 574 N.E.2d at 300.

88. *See Colquhoun*, 684 A.2d at 410.

89. *See Davis*, 574 N.E.2d at 300 (concluding factually that the defendant in the slander of title action neither had knowledge nor reckless disregard of his statements' falsity).

90. *Id.*

91. 113 Cal. App. 3d 256 (Ct. App. 1980).

award for damages for slander of title.[92] In *Howard*, the Silvas hired Arbaugh as their real estate agent to help sell their property, after it had been dispossessed by the Howards.[93] Although aware of the Howards' claim of title, Arbaugh nevertheless arranged to sell the disputed parcel and then recorded it in a third party's name.[94] Despite Arbaugh's egregious conduct, the court reversed the lower court's decision to allow a slander of title action, holding that such a cause of action is unavailable to those whose cause of action arises under a claim of adverse possession without first obtaining a judicial decree.[95]

In its holding, the court found particularly important the fact that: (1) significant time elapsed between the alleged conduct constituting slander of title and the expiration of the period of limitation; and (2) that the Howards had not used the adversely possessed property for some time.[96] In order for the Howards to have qualified for relief, the court found that they would have had to satisfy the condition precedent of establishing record title through a quiet title action.[97] The condition precedent was necessary because, at least in California, title acquired by adverse possession was unmarketable until the adverse possessor overcame the presumption favoring the original owner of legal property rights.[98]

Without marketable title and with a presumption against the adverse possessor, the court opined that no legally recognizable damage to the vendibility of the property occurred.[99] In other words, until otherwise determined, title rested with the record holder.[100] As the New Mexico Court of Appeals wrote, a finding against the adverse possession is necessitated by the fact that "adverse possession is not established until the actual decree."[101] While admitting that a slander of title action may be brought concurrently in other legal contexts to quiet title,[102] the court

92. *See id.* at 266-68.

93. *See id.* at 260-61.

94. *See id.* at 261.

95. *See id.* at 262.

96. *See id.*

97. *See id.* at 264.

98. *See id.* at 264-65.

99. *See id.* at 265.

100. *See id.* at 264; *see also* Whinnery v. Thompson, 868 P.2d 1095, 1098-99 (Colo. Ct. App. 1993), *rev'd on other grounds*, 895 P.2d 537 (Colo. 1995). *But see* ALASKA STAT. § 09.45.052(a) (2001) ("[C]onclusively presumed to give title" when adverse possession exists under a color and claim of title for seven years.).

101. Lopez v. Adams, 867 P.2d 427, 430 (N.M. Ct. App. 1993).

102. When a defendant asserts an adverse claim, an action to quiet title is available when the property is subject to a cloud on title, which is "an outstanding instrument, record, claim, or encumbrance which is actually invalid or inoperative, but [which] may

reasoned that where a bare adverse possession claim is brought no basis exists for a slander of title action.[103]

A different court in Montana avoided directly resolving this larger issue, instead opting to recognize that the record titleholder enjoys a qualified privilege as against an adverse possessor.[104] However, in dicta, the court's rationale supports the proposition of denying relief to an adverse possessor prior to the completion of a quiet title action against those with record title.[105] Rather than acknowledge the running of the statute as immediately vesting title in the adverse possessor, the court suggested that the titleholders of record were the owners until declared otherwise.[106] Courts that refuse to recognize a slander of title cause of action for an adverse possessor deny the legal protections these same courts provide to the adversely possessed property by operation of law.

III. THE CASE FOR EXTENDING A SLANDER OF TITLE ACTION TO AN ADVERSE POSSESSOR

Generally, title vests in the adverse possessor as of the expiration of the period of limitation.[107] Although many jurisdictions share this view, the question raised when an adverse possessor alleges slander of title is the extent of the property interest acquired immediately following the running of the statute. A court's recognition that title vests automatically upon the running of the statute does not resolve this controversy however. While title may be said to vest upon satisfying the period of limitations, it remains unclear (1) whether an action for slander is dependent on a court's declaration; or conversely, (2) whether a court simply effectuates what already exists by operation of law independent of subsequent judicial action. In an attempt to resolve this controversy, the better view that emerges mirrors a 1899 District of Columbia statute that characterized the running of the statute as vesting title to the adverse possessor and a subsequent action to quiet title as perfecting it.[108] As applied to the disjunctive perspectives presented above, the court's role in quieting title, at least in the adverse possession context, should be to recognize or perfect

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nevertheless impair the title to property." 65 AM. JUR. 2D *Quieting Title* §§ 12-13 (2001). A property owner has an equitable action to quiet title upon a showing that there exists an instrument suggesting title to the property or something suggesting an encumbrance. *See id.*

103. *See Lopez*, 867 P.2d at 429-30.

104. *See* Herring v. Behlmann, 734 S.W.2d 311, 313 (Mo. Ct. App. 1987).

105. *See id.* at 314.

106. *See id.*

107. *See* Gorte v. Mich. Dep't. of Transp., 507 N.W.2d 797, 801 (Mich. Ct. App. 1993).

108. *See* 1899 D.C. STAT. § 111, *quoted in* Gwin v. Brown, No. 1242, 1903 U.S. App. LEXIS 5484 (D.C. Cir. 1903).

all the property interests that already exist, rather than establish a new legal relationship. Based upon the legal operation and policy considerations of adverse possession, once an individual satisfies the jurisdiction's adverse possession requirements, the interest that immediately vests should be sufficient to allow a remedy for slander of title when one's interest in an adversely possessed parcel of property is disparaged.

A. The Strength of Adverse Possession as Recognized by Law

A bare claim of adverse possession is a legally recognizable property interest that can be used to assert claims in other causes of action either offensively or defensively. For example, proof of adverse possession may be used defensively in an action for ejectment, even against the original owner.[109] As a related matter, the possessory interest of an adverse possessor, even prior to the running of the statute, trumps that of a trespasser whose presence is subject to an action for ejectment and whose conduct is not deemed to have interrupted the running of the statute.[110] After the statute expires, the title thus acquired is divestible only by conveyance or disseisin, and cannot be divested by an oral statement, abandonment, or subsequent legislation.[111]

An adverse possessor's claim, even without prior recordation, is sufficient enough to defeat a tax lien that preceded the running of the statute,[112] so long as one can demonstrate the strength of the title acquired by adverse possession and not rely on any deficiencies of the adversary's title or interest.[113] The property interest-related causes of action to which an adverse possessor is entitled suggest that not only a claim of right exists, but also that without such recognition, the claimant is likely to incur pecuniary loss since adverse possession vests by operation of law a number of property interests in the adverse possessor. Consequently, the legal interests society already affords an adverse possessor necessitates that a slander of title action be extended to an adverse possessor in order for those interests to be protected and fully realized.

The law of adverse possession recognizes that once the requirements are satisfied, the adverse possessor enjoys legal protections centered-around property interests. Given the minimal interest required to assert a slander of title action, the adverse possessor has a number of legal devices

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109. 4 TIFFANY, *supra* note 78, § 1172; *see also* Davis v. Haines, 182 N.E. 718, 722 (Ill. 1932) (acknowledging that the wrongful presence of trespassers is not sufficient to destroy an adverse possessor's interest).

110. *See* L-M Co. v. Blanchard, 197 So. 2d 178, 182 (Lo. Ct. App. 1967).

111. *See* 4 TIFFANY, *supra* note 78, at § 1172.

112. *See* 3 AM. JUR. 2D *Adverse Possession* § 300 (2002).

113. *See id.*

automatically available to protect one's property interests, which should satisfy enough of an interest to allow for a disparagement action. With the combination of property-related interests flowing to an adverse possessor, a type of title arises that resembles a definition of title that Lefcoe provided: "a combination of all the possessory and statutory rights which the political philosophy of the jurisdiction permits to be held by persons."[114]

At the core of these legal protections is the individual who's society deems to have acquired not only the physical estate, but also all the rights and obligations to which it is attached. Adverse possession, as distinguished from an easement, entails an eventual transformation in the relationship between the individual and the estate, which the law immediately recognizes once all of the elements are satisfied. What follows from this transformation is a measurably significant property interest that should be sufficient to allow a slander of title claim. A slander of title action, which aims to protect an individual's legal property interests must immediately be allowed under adverse possession in order to effectuate fully the legally recognized relationship afforded by operation of law.

An adverse possessor can use proof of adverse possession not only as a shield to protect or sword to assert one's interests in the estate but also, in most jurisdictions, can receive legal protection after contracting for the sale of an estate. Unless a contract for the sale of land provides to the contrary, title acquired by adverse possession constitutes marketable title,[115] upon convincing and readily available proof.[116] Typically, if a contract for the sale of land requires record title[117] a claim solely resting on proof of adverse possession is insufficient.[118] An individual with uninterrupted adverse possession can sell and bind a purchaser where the contract calls for marketable title,[119] which also applies to purchases in which the

114. Lefcoe et al., *supra* note 69, § 91.02(a).

115. *See* Bryan v. Osborne, 1878 WL 2777, at *3 (Ga. 1878); Brown v. Davis, 131 A. 142, 143 (Del. Ch. 1925).

116. *See, e.g.*, Lucas v. Meek, 300 S.W.2d 593, 596 (Ark. 1957); Hinton v. Martin, 236 S.W. 267, 269-70 (Ark. 1922); Greer v. Int'l Stock Yards Co., 96 S.W. 79, 82 (Tex. Civ. App. 1906); *see also* Lefcoe et al., *supra* note 69, § 91.09(a)(4). The time at which the court determines this issue is at the termination of the suit, rather than its commencement. *See* Barger v. Gery, 53 A. 483, 485 (N.J. Ch. 1902).

117. *See* Lefcoe et al., *supra* note 69, § 91.09(a)(4).

118. *See Hinton*, 236 S.W. at 269-70.

119. *See, e.g.*, Medusa Portland Cement Co. v. Lamantina, 44 A.2d 244, 246 (Pa. 1945); *Brown*, 131 A. at 143; *Hinton*, 236 S.W. at 269; Core v. Wigner's Heirs, 9 S.E. 36, 38 (W. Va. 1889); *Greer*, 96 S.W. at 82; Plauchak v. Boling, 653 A.2d 671, 677 (Pa. Super. Ct. 1995) (in dicta); *see also* Lefcoe et al., *supra* note 69, § 91.09(a)(4).

running of the statute occurs anytime following a sales agreement.[120] In striving for a definition of marketable title, the Texas Court of Civil Appeals wrote

> a threat, or even the possibility of a contest, will not suffice to cast a reasonable doubt on the title. The doubt must be 'considerable and rational, such as would and ought to induce a prudent man to pause and hesitate; not based on captious, frivolous, and astute niceties, but such as produce real bona fide hesitation ....'[121]

The fact that a court will enforce a sale of property that had been adversely possessed as marketable strongly suggests the requisite interest for an action for slander of title and illustrates the potential for injury from a lost sale or, at least, a lower sale's price. Although doubt to an adverse possessor's interest may be removed by a separate, subsequent action to quiet title, irreparable damages absent a judicial remedy may have already occurred in the form of a foregone sale or in persistent doubt despite the existence of a valid record in-fact.

For those jurisdictions refusing to recognize an estate acquired by adverse possession as marketable, title can elevate itself over time to such status. At least one court is of the view that once sufficient time elapses after the running of the statute, the rights of those potential claimants with disabilities are barred.[122] Similarly, title acquired by adverse possession, once subject to lingering doubts regarding the uncertain prospect of future claims, may over time ripen into marketable title.[123] This result, as advocated by an appeals court in New York, is driven by common sense and public policy.[124] On the common sense side, the chances are minimal that an individual will assert a claim of title after the statute of limitations has run.[125] On the public policy side, easing the restrictions of vendibility

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120. *See id.*; *see also* McLaren v. Irvin, 1879 WL 2501, at *4 (Ga. 1879). While an adverse possessor can avoid having to file a separate court action to record title, this privilege, in some jurisdictions terminates upon the sale and obliges the purchaser to quiet title. *See* CUNNINGHAM ET AL., *supra* note 8, § 11.7, at 807-08 n.1. This is because as a matter of our recording system, acquired title through adverse possession is not public record until so declared by a court, which at some time, courts hold, should be made. *See* BOYER ET AL., *supra* note 17, § 4.2.

121. *Greer*, 96 S.W. at 82. A Delaware court maintained that marketable title exists when "the title is not to be considered in such doubt as to justify a refusal of relief." *Brown*, 131 A. at 143. *But see* Friend v. Mahin, No. 21, 550, 1916 WL 2528, at *2 (Ill. App. Ct. 1916) (holding that where a contract calls for merchantable title, the buyer is not bound where title to part of the estate is based on adverse possession).

122. *See Hinton*, 236 S.W. at 269.

123. *See* Taccone v. DiRenzi, 401 N.Y.S.2d 722, 727 (Sup. Ct. 1978).

124. *See id.*

125. *See id.*; *see also* Wickliffe v. Lee, 1846 WL 3180, at *3 (Ky. App. Ct. June 26,

of adversely possessed property encourages alienation of land.[126] Allowing a recovery for disparagement prior to any formal legal action facilitates the transfer of land to the extent it (1) lessens the burden on the vendor who does not first have to obtain a decree prior to a sale; (2) properly compensates a vendor whose property interests have been slandered; and (3) acts as a deterrent to those who might otherwise engage in slanderous publication. Similarly, providing individuals with immunity to disparage another's property prior to a judicial decree ignores the common sense and public policy reasons society relies on in granting property interests to an adverse possessor.

Based on the legal effect and operation of adverse possession, the adverse possessor, as a matter of jurisprudential consistency, should be entitled to an action for slander of title without prior legal recognition. Indeed, a claim of adverse possession is sufficient to use as a defense to a slander of title action.[127] The Missouri Court of Appeals in *Butts v. Long* held that uninterrupted adverse possession provides evidence of good faith against an allegation of disparagement of another's property.[128] Similarly, an individual who first can demonstrate to a court that title was acquired through prescription enjoys an absolute privilege from a slander of title action with respect to statements made prior to the judicial decree.[129]

While the above illustrations regarding privilege, admittedly, explain the scope of the privilege more than the presence of a property interest, they also suggest that courts likely would not experience difficulty with determining the validity of an adverse possessor's claim as a condition precedent to allowing a slander to title action. A court's factual inquiry into adverse possession overlaps that of slander of title insofar as the court must determine the parties' status and relationship to each other before reaching a factual finding under either claim. Moreover, courts consider slander of title along with other claims that require a fact-intensive inquiry, as when a claimant pleads slander of title and requests that the court interpret a deed so that it can also enter a declaratory judgment quieting title.[130] While a court's entering into a declaratory judgment may require that the court undergo a factual determination,[131] it appears no different in terms of its factually dependent nature from other actions to quiet title

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1846).

126. *See Taccone*, 401 N.Y.S.2d at 727.

127. *See, e.g.*, L-M Co. v. Blanchard, 197 So. 2d 178, 182 (Lo. Ct. App. 1967).

128. 80 S.W. 312, 313 (Mo. App. Ct. 1904).

129. *See* Mecimore v. Cothren, 428 S.E.2d 470, 473-74 (N.C. Ct. App. 1993).

130. *See, e.g.*, Gillmor v. Cummings, 904 P.2d 703, 707 (Utah Ct. App. 1995).

131. *See* Lefcoe et al., *supra* note 69, § 91.09(a)(4).

when an adverse or contrary claim is asserted.[132] Importantly, extending slander of title to include adverse possession without prior legal formality would neither place courts in an unfamiliar situation nor, due to the pre-existing requirement of showing pecuniary damages, create an undue administrative burden on the courts. Courts, therefore, should consider slander of title and adverse possession coextensively to the extent that property interests are at stake. A court, upon a finding of adverse possession, should allow a slander of title action when a plaintiff's gravamen for adverse possession can be supported.

B. The Policy Rationale To Justify an Action for Slander of Title

Central to the claim of slander of title is proof of some property interest.[133] The availability of a slander of title action we accord to someone with a bare claim of adverse possession reflects our judgment of the relationship between possession and property rights. Possession, viewed as a symbolic act of "separat[ing] ... oneself ... from the great commons of unowned things,"[134] is the essence of property, advancing important principles of placing others on notice and rewarding one's labor.[135] To appreciate fully the importance of notice in the adverse possession context is to view the act of possession as a "clear act" that can be understood and taken seriously by those to whom it is most relevant.[136] Along these same lines, the advancement of strong public policy reasons support entitling an adverse possessor with a slander of title action based upon property interests thereby acquired following the running of the statute that may be best effectuated by allowing an action for slander of title.

Arguments justifying adverse possession include those centered on the individual—rewarding diligence and encouraging use and enjoyment; and on broader policy interests—clarifying boundaries and permanently allocating land to those willing to utilize its productive capacities.[137] Those arguments, however persuasive, leave unresolved the question of the interest to which an adverse possessor should be entitled prior to legal

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132. *See* 65 AM. JUR. 2D *Quieting Title* § 8 (2001).

133. *See* Miller v. Albert Hanson Lumber Co., 63 So. 883, 885 (La. 1913).

134. Carol M. Rose, *Possession as the Origin of Property*, *in* PERSPECTIVES IN PROPERTY LAW 189 (Robert C. Ellickson et al. eds., 2d ed. 1995).

135. *See id.* at 182-83.

136. *See id.* at 187; *see also* Barger v. Gery, 53 A. 483, 485 (N.J. Ch. 1902).

137. CUNNINGHAM ET AL., *supra* note 8, § 11.7, at 814; *see also* Rose, *supra* note 134, at 184. Rose also suggests that adverse possession, apart from rewarding the fruits of one's labor, advances communicative ends. *See* Rose, *supra* note 134, at 185. *See generally* Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, *in* PERSPECTIVES IN PROPERTY LAW 194-95 (Robert C. Ellickson et al. eds., 2d ed. 1995).

recognition. Many of the reasons offered in support of the doctrine of adverse possession do not neatly correspond to justify a slander of title action to lie for an adverse possessor who has not yet quieted title.

The above advantages merely suggest that a regime be in place that provides individuals who satisfy the requirements of adverse possession with a method of obtaining legal entitlement to the property. At first glance, the individual and societal based reasons stated above—especially that we should reward diligence and clarify boundaries—might initially suggest that the most effective method of achieving these goals would be to require an adverse possessor to quiet title before becoming eligible to recover for slander of title. This additional step, the argument goes, would have the benefits of clarifying property rights and enabling courts to better gauge one's desire to put the property to productive uses.

Such a conclusion, however, ignores the fact that the individual and societal justifications are advanced at the moment when an individual satisfies the requirements of adverse possession from continued use and enjoyment of the estate. An additional procedural requirement necessary for the law to recognize the property interest as valid does not significantly advance the individual and societal advantages any more than requiring that the adverse possessor run for local office. As the previous example illustrates, this additional procedural requirement is tangential and not directly related to the individual's relationship with the property.

Support for extending a slander of title action can be found in the number of legal interests immediately protected once the statutory requirements are met, which, by no small measure, have a direct effect on the relationship between the individual and the estate. Also, the individual and societal reasons focus on the individual's conduct as an expression of dominion over a piece of property, whereas a decision to obtain legal recognition is less relevant of an individual's use or enjoyment of the estate while under adverse possession. Second, to realize fully the benefits of adverse possession the adverse possessor's interests should take effect immediately following the running of the statute. Without protection of the adversed possessor's property, the adverse possessor's interest is vulnerable to slander or other acts inconsistent with that person's interest in the estate. Third, the difficulties with which an adverse possessor must undergo in satisfying all of the elements are sufficiently conspicuous in providing notice through the act of possession, and sufficiently rigorous in ensuring that the adverse possessor is serious and will put the estate to sufficiently productive uses. While obtaining legal recognition might further clarify property rights and put others on notice, these ends are sufficiently achieved through satisfying the elements of adverse possession, yet they do not come at the expense of undermining the amount of protection to the adverse possessors' property interests.

Absent these public policy based justifications, an important goal is advanced in recognizing an adverse possessor's claim of slander of title as it relates to the dignity of the person. As Oliver Wendell Holmes recognized, the theoretical underpinnings of the doctrine of adverse possession take on a more fundamental importance than improving the lot of the individual and society.[138] At the center of possession is a realization that something,

> which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came to it. The law can ask no better justification than the deepest instincts of man.[139]

The idea that possessing property involves an act of internalizing that which we own so that our association with our "things" becomes inextricably linked to our understanding of self bring us to a philosophical justification. To deny an action for disparagement to an adverse possessor who already has, as indicated above, some property interest, gives others a privilege to undermine one's association with that property, both in terms of the resulting emotional separation from the disparagement involved and its effect on an individual's ability to enjoy rights necessary to realize maximum association. The rights and privileges one enjoys with respect to property are only realizable to the extent that others recognize and respect such rights and privileges.

Recognizing an action for slander of title in this context reinforces the importance we place on the property interests of an adverse possessor and, in effect, provide the means for an individual to receive damages, which symbolically may serve as declaratory relief when in many cases no other remedy would be available. Denying a slander of title claim, on the other hand, denies to the individual the existence of one's relationship with the property and, in doing so, undermines the dignity of the person. With the support of policy, allowing a slander of title claim to an adverse possessor is necessary in order to ensure these property interests are realized and to bring in line our treatment of adverse possession with our treatment of an adverse possessor whose property interests have been disparaged.

CONCLUSION

Whether one who satisfies the requirements of adverse possession should be allowed to recover for another's disparaging conduct or

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138. *See* Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 476–77 (1897).

139. *Id.* at 477.

statements raises fundamental questions regarding the role of adverse possession in property law. The title acquired through adverse possession, while not yet recorded, enjoys certain protections, which acknowledges, at a minimum, the existence of property interests ranging from using the property interest obtained to defend against tax liens to using the property interest to bind a purchaser of an estate sold with marketable title.

In addition, to disallow a claim for slander of title is inconsistent with the policy justifications of allowing an adverse possessor's claim of title to ripen into a property right. Notwithstanding the privilege granted to holders of record title during the pleading and proof stages, actual economic loss due to the disparagement is a very real threat since an adverse possessor has many property interests at stake—among them, the potential diminishment of marketable title, which itself can be used to bind purchasers. Disregarding the adverse possessor's vested right in the property, however small, not only denies that person recovery for the economic injury sustained to one's property, but also undermines the importance of possession, adverse or otherwise, in our conceptualization of property and self.

Undoubtedly, one of the purposes of adverse possession is to bar stale claims, which has the effect of extinguishing the owner's title. This concession, however, does not necessarily, and should not, lead to a conclusion that this is the only material effect that follows the expiration of the statute. Since the adverse possessor was the owner against the whole world except for the original owner and is no longer subject to the original owner's claim to title, the adverse possessor's interest logically should become recognized in a slander of title action by virtue of the extinguishment of the former owner's title and its corresponding acquisition by the adverse possessor.

COMMENTS

Pfaff v. Wells Electronics, Inc.: Are You Risking Your Right to Patent Your Software?

> "[I]t is a condition upon an inventor's right to a patent that he shall not exploit his discovery competitively after it is ready for patenting; he must content himself with either secrecy, or legal monopoly."[1]
> – Judge Learned Hand

I. INTRODUCTION

The 1998 United States Supreme Court case *Pfaff v. Wells Electronics, Inc.*[2] set a new standard for determining when an invention is "on sale"[3] within the meaning of the statutory bar provisions of the Patent Act.[4] This Comment shows how this new standard, "ready for patenting,"[5] is so vague that it makes it extremely difficult for software developers to determine when they should apply for a patent, and as a result, they risk forfeiting their right to obtain a patent.

A summary of the relevant background of patent law is included in Part II. This discussion includes the constitutional and statutory bases for the on sale bar and a history of the tests used by the courts, prior to *Pfaff*, to apply this statutory bar provision. Part II then provides a detailed history of *Pfaff* and explains the new ready for patenting test developed by the Supreme Court.

Part III of this Comment provides a summary of the relevant aspects of software development, including a description of four common software development process models and the activities associated with software

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1. Metallizing Eng'g Co., Inc., v. Kenyon Bearing & Auto Parts Co., Inc., 153 F.2d 516, 520 (2d Cir. 1946).

2. 525 U.S. 55 (1998), *reh'g denied*, 525 U.S. 1094 (1999) (mem.).

3. 35 U.S.C. § 102(b) (1994). *See infra* Parts II.A-B (discussing on sale bar).

4. Patent Act of 1952, 35 U.S.C. §§ 1-376 (1994 & Supp. V 1994). The statutory bar provisions are listed in § 102(b) of the Patent Act. 35 U.S.C. § 102(b) (1994).

5. *Pfaff*, 525 U.S. at 67-68.

development. Part III shows that the ready for patenting test is not well-suited to software patents, because the on sale bar may apply at different times depending upon the software process model that is used and the software development activities that are carried out.

Four post-*Pfaff* patent infringement cases are reviewed in Part IV, to determine how the courts have applied the ready for patenting test to software patents. Part IV shows that this test has been both difficult to use in software patent infringement cases, and unfair and inconsistent in its results.

Part V of this Comment provides three recommendations for software inventors who do not want to risk forfeiting their patent rights: (1) patent early; (2) document the software development process; and (3) closely monitor sales, marketing, and investment activities.

II. BACKGROUND: PATENT LAW

A. Constitutional and Statutory Basis for the On Sale Bar

This section provides a brief history of the on sale bar, includes a discussion of the Constitutional basis for patent law itself, provides an overview of the current Patent Act, and traces the development of the on sale bar.

1. Constitutional Basis

The origin of United States patent law is the Intellectual Property Clause, Article I, Section 8, Clause 8 of the United States Constitution,[6] which authorizes Congress to "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."[7] Congress has used this authorization to enact a succession of Patent Acts, beginning with the Patent Act of 1790.[8]

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6. U.S. CONST. art. I, § 8, cl. 8.

7. *Id.* Patents were one of the features of the English system of law that were carried over to the American colonies. As an indication of the importance of patents to the newly formed United States, this provision was passed unanimously and without debate after it was proposed at the Constitutional Convention in 1787. *See* DONALD S. CHISUM ET AL., PRINCIPLES OF PATENT LAW: CASES AND MATERIALS 15-17 (2d ed. 2001).

8. *See* Patent Act of 1952, 35 U.S.C. §§ 1-376 (1994 & Supp. V 1994); Patent Act of 1939, ch. 450-452, 53 Stat. 1212-1213 (1939); Patent Act of 1870, ch. 230, 16 Stat. 198-199 (1870); Patent Act of 1839, ch. 88, 5 Stat. 353-355 (1839); Patent Act of 1836, ch. 357, 5 Stat. 117-125 (1836); Patent Act of 1793, ch. 11, 1 Stat. 318-323 (1793); Patent Act of 1790, ch. 7, 1 Stat. 109-112 (1790). *See also* William G. Phelps, Annotation, *When Does On-Sale Bar of 35 U.S.C.A. § 102(B), Which Denies Patentability to Invention That Has*

2. Current Statutory Basis: The Patent Act of 1952

The current law is the Patent Act of 1952, which is codified in Title 35 of the United States Code.[9] Sections 101, 102, and 103 of the Patent Act list and define the three required elements of patentability: novelty, utility, and nonobviousness.[10] Section 101 requires an invention or discovery to be both novel and useful.[11] Section 102 defines the concept of novelty and adds a set of statutory bars to patentability.[12] Section 103 requires an invention or discovery to be a nonobvious improvement over the prior art.[13]

3. Statutory Bar Provisions of § 102(b)

The statutory bar provisions listed in § 102(b) are a set of events that prohibit patentability if they occur more than twelve months before the date the patent application is filed with the United States Patent Office.[14] The

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Been On Sale For More Than One Year Prior to Date of Patent Application, Prevent Issuance of Valid Patent, 155 A.L.R. FED. 1, 39-40 (1999) (providing additional detail on the Patent Acts of 1793, 1836, 1839, 1939, and 1952).

9. *See* 35 U.S.C. §§ 1-376 (1994 & Supp. V 1994).

10. *See id.* §§ 101-103.

11. *See id.* § 101. "Whoever invents or discovers any *new and useful* process, machine, manufacture, or composition of matter, or any *new and useful* improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title." *Id.* (emphasis added).

12. *See id.* § 102. The novelty requirement is contained in subsections (a), (e), and (g). Section 102(a) states that an invention is novel unless "the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent." *Id.* § 102(a). "Prior art," as used in patent law, "refer[s] broadly to known technical information." CHISUM, *supra* note 7, at 93. Section 102(e) defines two forms of prior art that may prohibit patentability. Section 102(e)(1) permits a published patent application, which was filed in the United States, to function as prior art from the time of its publication. *See id.* § 102(e)(1). Section 102(e)(2) permits secret prior art to defeat patentability. *See id.* § 102(e)(2). Secret prior art is defined as a patent application, filed in the United States, which is confidential because it has not yet been published. The confidential application may act as prior art if it anticipates the claimed invention and eventually results in an issued patent. Section 102(g) provides the statutory basis for the use of secret prior art. *See id.* § 102(g). The statutory bars are contained in § 102(b), which states that an invention may be patented unless it "was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States." *Id.* § 102(b).

13. *See id.* § 103. Section 103(a) defines a patent to be obvious if "the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains." *Id.* § 103(a).

14. *See* 35 U.S.C. § 102(b) (1994).

term "critical date" is associated with the date twelve months prior to patent application.[15] Under § 102(b), even if a patent applicant is the first to invent, he may not receive a patent if, before the critical date, he or a third party: (1) patents the invention in the United States or a foreign country; (2) describes the invention in a printed publication in the United States or a foreign country; (3) sells or offers to sell the invention in the United States; or (4) publicly uses the invention in the United States.[16]

Congress introduced the on sale and public use[17] bars in the Patent Act of 1836.[18] This Act, however, did not provide the inventor with any grace period.[19] As a result, if the inventor gave his permission for the invention to be on sale or in public use at any time before filing his patent application, he would not be granted a patent. This absolute bar to patentability was eliminated in the Patent Act of 1839,[20] which introduced a two-year grace period to the on sale and public use statutory bars.[21] The grace period was decreased to one year in the Patent Act of 1939, and has not been changed since.[22]

B. Court Interpretation of the On Sale Bar

Since the introduction of the on sale statutory bar, the courts have

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15. CHISUM, *supra* note 7, at 326. The critical date is "[t]he earliest date of which the inventor may claim the benefit under the statute. In a typical § 102(b) case, the *critical date* is not the date of invention [as it would be in a typical § 102(a) case], but is one year prior to the filing of the patent application." *Id.*

16. *See* 35 U.S.C. § 102(b) (1994).

17. *Id.* "Most courts consider the on-sale bar of § 102(b) and the 'public use' bar of § 102(b) to be two separate bars. It has been held that although the 'public use' and on-sale bars are undeniably related, they are not interchangeable." Phelps, *supra* note 8, at 37. The public use statutory bar under § 102(b) is "any use of [a claimed] invention by a person other than the inventor who is under no limitation, restriction or obligation of secrecy to the inventor." *In re* Smith, 714 F.2d 1127, 1134 (Fed. Cir. 1983) (citing Egbert v. Lippmann, 104 U.S. 333, 336 (1881)). The public use statutory bar does not apply, however, to a "use necessarily open to public view, if made in good faith solely to test the qualities of the invention, and for the purposes of experiment." *Egbert*, 104 U.S. at 336 (citing City of Elizabeth v. Am. Nicholson Pavement Co., 97 U.S. 126, 134 (1877)).

18. Patent Act of 1836, ch. 357, § 6, 5 Stat. 117, 119 (1836). This Act provided that a patent would not be granted if the invention was "at the time of his application for a patent, in public use or on sale, with his consent or allowance, as the inventor or discoverer." *Id. See also* Vincent J. Allen, *The On Sale Bar: When Will Inventors Receive Some Guidance?*, 51 BAYLOR L. REV. 125, 127-29 (1999) (describing the constitutional and statutory bases for the on sale bar).

19. *See* Patent Act of 1836, ch. 357, § 6, 5 Stat. 117, 119 (1836).

20. Patent Act of 1839, ch. 88, § 7, 5 Stat. 353, 354 (1839).

21. *See id.*

22. Patent Act of 1939, ch. 450, 53 Stat. 1212 (1939).

applied a number of different tests to determine whether an invention has been on sale within the meaning of § 102(b), including: the on hand test;[23] the reduction to practice test;[24] the totality of the circumstances test;[25] the completed invention test;[26] the substantially complete test;[27] and the current ready for patenting test[28] developed in *Pfaff*. A short description of each of the tests that preceded the ready for patenting test follows.[29]

1. Interpretations of the On Sale Bar Prior to *Pfaff*

a. The On Hand Test

The on hand test required that an invention both physically exist and be available for sale to an actual or potential customer before it would be considered to be on sale within the meaning of the statute.[30] The test was introduced in 1912 in *McCreery Engineering Co. v. Mass. Fan Co.*[31], in which the invention in question was a ventilating apparatus that existed only in completed drawings and specifications.[32] The court distinguished the executory contract to build the invention from plans and deliver it at a future date, from the anticipated "completion of the transaction by delivery and acceptance,"[33] and concluded that the inventor did not place the

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23. *See* Burke Elec. Co. v. Indep. Pneumatic Tool Co., 234 F. 93, 93 (2d Cir. 1916).

24. *See* Timely Products Corp. v. Arron, 523 F.2d 288, 302 (2d Cir. 1975).

25. *See* UMC Electronics Co. v. United States, 816 F.2d 647, 656 (Fed. Cir. 1987).

26. *See* Seal-Flex Inc. v. Athletic Track and Court Constr., 98 F.3d 1318, 1324 (Fed. Cir. 1996).

27. *See* Micro Chem., Inc. v. Great Plains Chem. Co., Inc., 103 F.3d 1538, 1545 (Fed. Cir. 1997).

28. *See* Pfaff v. Wells Electronics, Inc., 525 U.S. 55, 67-68 (1998).

29. *See* Timothy R. Holbrook, *The More Things Change, The More They Stay the Same: Implications of* Pfaff v. Wells Electronics, Inc. *and the Quest for Predictability in the On-Sale Bar*, 15 BERKELEY TECH. L.J. 933, 941-50 (2000) (providing detailed descriptions of the tests applied prior to the ready for patenting test). *See also* Allen, *supra* note 18, at 131-38 (providing a detailed chronology of the application of the on sale bar by the courts); Phelps, *supra* note 8, at 41-52 (providing a summary of judicial decisions relative to the on sale bar).

30. *See* Burke Elec. Co. v. Indep. Pneumatic Tool Co., 234 F. 93, 93 (2d Cir. 1916). "If patented articles are *on hand* ready to be delivered to any purchaser, they are on sale, whether any of them has been sold or not. But, if they are not, they cannot be said to be on sale within the meaning of the [Patent] [A]ct ...." *Id.* (emphasis added). *See also* Daniel J. Whitman, *The "On-Sale" Bar to Patentability: Actual Reduction to Practice Not Required in* Pfaff v. Wells Electronics, Inc., 32 AKRON L. REV. 397, 400-01 (1999) (describing the on hand doctrine).

31. 195 F. 498, 500-02 (1st Cir. 1912).

32. *See id.* at 499-500.

33. *Id.* at 502.

invention on sale by merely accepting an offer and entering into a contract.[34] The court reasoned that the term on sale was analogous to the term public use because of their proximity in the statute.[35] As such, the court held that the on sale provision only applied to "actual and completed transactions, and not to agreements which contemplate both a future production and a future transfer of title."[36]

b. The Reduction to Practice Test

The reduction to practice test required that the subject invention actually be complete.[37] The test was introduced in 1975 in *Timely Products Corp. v. Arron*,[38] in which the invention in question was an electrically heated sock.[39] The sock had been advertised in a national magazine more than one year before the patent application was filed, although the socks were not actually available for delivery until after the critical date.[40] The court rejected the on hand test of *Burke*,[41] relying instead on the legislative history of § 102(b)[42] and the decisions in *Philco Corp. v. Admiral Corp.*[43] and *Metallizing Engineering Co. v. Kenyon Bearing & Auto Parts Co.*[44] The court concluded that the on hand test amounted to unfair competition,

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34. *See id.* at 503.

35. *See id.* at 502.

36. *Id. See also* B.F. Sturtevant Co. v. Mass. Hair & Felt Co., 124 F.2d 95, 97 (1st Cir. 1941) (applying on hand test and stating that "[t]he critical date, then, is not the date when the first [invention] was ordered but the date when the order for it was filled").

37. *See* Timely Products Corp. v. Arron, 523 F.2d 288, 302 (2d Cir. 1975). "[A]n invention cannot be offered for sale until it is completed, which requires not merely its conception but its *reduction to practice*." *Id.* (emphasis added). *See also* Whitman, *supra* note 30, at 401-02 (describing the reduction to practice test).

38. 523 F.2d 288, 302 (2d Cir. 1975).

39. *See id.* at 291.

40. *See id.* at 299.

41. *See* Burke Elec. Co. v. Indep. Pneumatic Tool Co., 234 F. 93, 93 (2d Cir. 1916). *See also Timely Products*, 523 F.2d at 302.

42. 35 U.S.C. 102(b) (1994). The court relied on a law review article that assessed the legislative policy underlying § 102(b) and criticized the trilogy of cases upholding the on hand standard. *See* Patrick J. Barrett, *New Guidelines for Applying the On Sale Bar to Patentability*, 24 STAN. L. REV. 730, 736-38 (1972).

43. 199 F. Supp. 797, 814-18 (D. Del. 1961). "[T]he solicitation of orders, even for goods to be produced later, would be 'clearly a competitive use' and, if it did not start the running of the one-year grace period ... would be no less an effective 'extension of the patent monopoly.'" *Timely Products*, 523 F.2d at 301 (citations omitted).

44. 153 F.2d 516, 520 (2d Cir. 1946). "[A]n inventor should not be allowed to use an invention commercially ... for more than one year prior to his application, because this would effectively extend the limited monopoly created by the patent laws." *Timely Products*, 523 F.2d at 301.

because it effectively extended the limited monopoly granted by a patent.[45] The reduction to practice test applied if "an application for [a] patent [is] filed more than one year after the solicitation of an order for a specific article to be produced later" and if three conditions were met.[46] First, "[t]he complete invention claimed must have been embodied in or obvious in view of the thing offered for sale."[47] Second, "[t]he [completed] invention must have been tested sufficiently to verify that it is operable and commercially marketable."[48] Third, the alleged sale of the invention "must [have been] primarily for profit rather than for experimental purposes."[49]

c. *The Totality of the Circumstances Test*

The totality of the circumstances test broadened the reduction to practice test by requiring courts to look at "*[a]ll of the circumstances* surrounding the sale or offer to sell ...."[50] The test was introduced in *UMC Electronics Co. v. United States*[51] in 1987, where the subject invention was an aviation sensor that had been offered for sale to the Navy more than one year before the patent application had been filed.[52] Although "no complete embodiment of the invention existed at the time of the sale," the court concluded that the on sale bar applied after considering the "commercial activities [of the inventor], coupled with the extent to which the invention was developed, the substantial embodiment of the invention, the testing which was sufficient to satisfy the inventor that his later claimed invention would work, and the nature of the inventor's contribution to the art ...."[53] The court held that reduction to practice should not be an absolute bar to

45. *See Timely Products*, 523 F.2d at 301-02.

46. *See id.* at 302.

47. *Id.* (citations omitted).

48. *Id.* (citations omitted).

49. *Id.* (citations omitted).

50. UMC Electronics Co. v. United States, 816 F.2d 647, 656 (Fed. Cir. 1987) (emphasis added). *See also* Whitman, *supra* note 30, at 403-04 (describing the totality of the circumstances test); Barmag Barmer Maschinenfabrik AG v. Murata Mach., Ltd., 731 F.2d 831, 836 (Fed. Cir. 1984) (stating that "[o]ffers to sell can be made whether or not products are actually on hand, and we reject [patent holder's] position that an inventory of products should be made a requirement of the legal standard ... *[i]t is no more than a factor to be taken into consideration*") (emphasis added); Gen. Elec. Co. v. United States, 654 F.2d 55, 60-61 (Ct. Cl. 1981) (addressing the issue, in dicta, of whether § 102(b) required reduction to practice). "[T]here seems to be a conflict among the few authorities which have touched on this question [of whether or not proof of reduction to practice is required], and there is as yet no controlling authority." *Id.* at 61.

51. 816 F.2d 647, 656 (Fed. Cir. 1987).

52. *See id.* at 657.

53. *Id.* at 656-57.

patentability, and that the circumstances of the sale should be "considered and weighed against the [public policy considerations] underlying [S]ection 102(b)."[54]

d. The Completed Invention Test

The completed invention test was an extension of the reduction to practice test, in that it required that the subject invention not only be completed, but that it also had been "known to work for its intended purpose."[55] The test was introduced in 1996, in *Seal-Flex, Inc. v. Athletic Track and Court Construction*,[56] in which the invention in question was an all-weather running track that was still being assessed.[57] The court relied heavily on the public policy considerations underlying the on sale bar, and determined that while it was important to allow an inventor sufficient time for testing and evaluation, an inventor may not continue to make changes indefinitely.[58] The lower court was also criticized for applying a vague standard that would not allow an inventor to know when his invention was "sufficiently complete" such as to trigger the on sale bar.[59]

e. The Substantially Complete Test

The substantially complete test was introduced in 1997, in *Micro Chemical, Inc. v. Great Plains Chemical Co., Inc.*[60] The invention in question was an apparatus for adding ingredients to livestock or poultry feed.[61] While the invention was not complete at the time the offer was made, three prototypes had been built.[62] The court ruled that the offer to sell did not meet the requirements of the on sale bar, and focused on the fact that the invention in question was "clearly not completed" when the

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54. *Id.* at 656. *See also supra* notes 117-23 and accompanying text (discussing public policy considerations underlying the "on sale" bar).

55. *See* Seal-Flex Inc. v. Athletic Track and Court Constr., 98 F.3d 1318, 1324 (Fed. Cir. 1996). "The general rule is that the on-sale bar starts to accrue when a *completed invention* is offered for sale." *Id.* (emphasis added). Conversely, if "the inventor was continuing to develop and evaluate the invention ... [or] merely exploring the market," the invention would not be considered "on sale." *Id.*

56. 98 F.3d 1318 (Fed. Cir. 1996).

57. *See id.* at 1320.

58. *See id.* at 1324.

59. *Id.* at 1323. "The standard of 'sufficiently complete,' applied by the district court, is unworkable, for the inventor will not know, until informed by a judge, at what stage his experimental method became, with judicial insight based on hindsight, sufficiently complete to start the time bar to patentability." *Id.*

60. 103 F.3d 1538, 1545 (Fed. Cir. 1997).

61. *See id.* at 1540.

62. *See id.* at 1544.

inventor made the offer to sell it.[63] The court interpreted *UMC Electronics*[64] to require an invention to be substantially complete because "even though the technical requirements of a reduction to practice have not been met, a sale or a definite offer to sell a substantially completed invention, with reason to expect that it would work for its intended purpose upon completion, suffices to generate a statutory bar."[65]

2. Interpretation of the On Sale Bar by the Supreme Court in *Pfaff*

a. Factual Background of Pfaff[66]

In November 1980, Wayne Pfaff (Mr. Pfaff), the owner of Plastronics, Inc. (Plastronics), began work on a leadless chip socket, a "new device for mounting and removing semiconductor chip carriers" at the request of representatives of Texas Instruments (TI).[67] After meeting with TI, Mr. Pfaff made "detailed engineering drawings."[68] Mr. Pfaff sent these drawings to a manufacturer three or four months later, in February or March of 1981, without first making or testing any prototypes of his invention.[69] On March 17, 1981, TI placed a verbal order with Plastronics, and the order was confirmed in writing on April 8, 1981.[70] The manufacturer completed the order in July 1981, and the sockets were delivered to TI in August 1981.[71] The sockets were not tested until after

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63. *See id.*

64. *See* 816 F.2d at 656-57.

65. *Micro Chem.*, 103 F.3d at 1545.

66. Pfaff v. Wells Electronics, Inc., 525 U.S. 55 (1998). *See also* Whitman, *supra* note 30, at 405-10; Jonathan Pavlovcak, *The Clock Starts Running Before Substantial Completion*–Pfaff v. Wells Electronics, Inc., 17 TEMP. ENVTL. L. & TECH. J. 177, 177-79 (1999) (providing factual summary and procedural history of the *Pfaff* case).

67. *Pfaff*, 525 U.S. at 58. *See also* Pfaff v. Wells Electronics, Inc., No. S86-449, 1988 WL 156744, at *2 (N.D. Ind. July 26, 1988). At the time, the semiconductor industry, "in response to the need for high-density packaging for integrated circuit devices ... developed a package that dispense[d] with the need for conventional leads in favor of terminal lands, or contact pads, around the periphery of a ... housing known in the art as [a] leadless chip carrier." *Id.* at *1.

68. *Pfaff*, 525 U.S. at 58. *See also Pfaff*, 1988 WL 156744, at *2. The drawings "described the design, the dimensions, and the materials to be used in making the socket." *Pfaff*, 525 U.S. at 58.

69. *See Pfaff*, 525 U.S. at 58.

70. *See id. See also Pfaff*, 1988 WL 156744, at *2. The order was for 30,100 sockets for $91,155. *See Pfaff*, 525 U.S. at 58.

71. *See Pfaff*, 525 U.S. at 58. *See also Pfaff*, 1988 WL 156744, at *2.

they were shipped to TI.[72] One of the conditions of the order was that the sockets perform to TI's satisfaction.[73] Mr. Pfaff filed his patent application on April 19, 1982 and the '377 patent was issued on January 1, 1985.[74]

b. *The District Court's Ruling in* Pfaff*: Patent Valid, Invention was not On Sale*

On July 31, 1986, Mr. Pfaff filed a patent infringement suit against Wells Electronics, Inc. (Wells), a competitor of Plastronics, for selling similar sockets.[75] Wells filed a counterclaim against Mr. Pfaff contending that the '377 patent was invalid for a number of reasons, including "its development more than one year before application for a patent."[76] Wells pointed to two facts to show that the '377 patent was on sale before the critical date of April 19, 1981 (one year prior to filing the patent application): (1) TI's written purchase order confirmation of April 8, 1981; and (2) the detailed engineering drawings that had been completed in March or April of 1981.[77]

The district court used the reduction to practice test of *Timely Products*[78] to conclude that the '377 patent was not on sale prior to the April 19, 1981 critical date.[79] The court stated, "the information was merely described on paper in the form of mechanical drawings ... [n]o component parts had been manufactured or assembled; no testing was done until after delivery

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72. *See Pfaff*, 1988 WL 156744, at *2.

73. *See id.*

74. *See Pfaff*, 525 U.S. at 57, 59. Mr. Pfaff's patent was officially titled U.S. Patent No. 4,491,377. *See id.* at 59. Patents are abbreviated by using the last three digits of the number assigned by the U.S. Patent Office, hence the '377 patent. *See* CHISUM, *supra* note 7, at 94 n.13.

75. *See* Pfaff v. Wells Electronics, Inc., No. S86-449, 1988 WL 156744, at *1, *4 (N.D. Ind. July 26, 1988). Mr. Pfaff contended that Wells' devices infringed the '377 patent in two ways: literally and through the doctrine of equivalents. *See id.* The doctrine of equivalents has been used by the courts to find infringement "when an accused infringing device ... is an equivalent to that claimed in the patent." CHISUM, *supra* note 7, at 873-74. The doctrine is used to "extend the scope of a patentee's right to exclude beyond the literal language of the patent claims" by discounting minor changes and substitutions in the accused infringing device. *Id.*

76. *Pfaff*, 1988 WL 156744, at *8. Wells claimed that the '377 patent was invalid because it: (1) lacked novelty under § 102(a); (2) was obvious under § 103; (3) violated the on sale bar of § 102(b); and (4) was not fully disclosed under § 112. *See id.* at *8, *10, *13.

77. *See id.* at *13.

78. *See* Timely Products Corp. v. Arron, 523 F.2d 288, 302 (2d Cir. 1975).

79. *See Pfaff*, 1988 WL 156744, at *13. The district court concluded that Wells did not literally infringe Mr. Pfaff's patent, nor did Wells infringe under the doctrine of equivalents. *See id.* at *1. The court also held that the '377 patent was not invalid for lack of novelty or because it was obvious. *See id.* at *10, *12.

... Wells has shown only that a concept of the invention existed before the critical date...."[80]

c. *The Federal Circuit's Ruling in* Pfaff: *Patent Invalid, Invention was On Sale*

On appeal, the Federal Circuit discussed two issues relative to the on sale bar: first, whether or not the socket had been commercialized prior to the critical date, and second, if it had been commercialized, whether or not the socket had been substantially complete at the time.[81]

The Federal Circuit ruled that the socket had been commercialized prior to the critical date because there had been a definite sale or offer for sale before April 19, 1981.[82] In addition to the oral purchase order and written confirmation, the court pointed to a note, hand-written by Mr. Pfaff on February 25, 1981 on one of the engineering drawings, indicating the size of the first order.[83] Mr. Pfaff also testified that the deal with TI was not for evaluation or testing, but strictly for commercial reasons.[84]

Regarding the second issue, the Federal Circuit concluded that the socket had been substantially complete at the time it had been commercialized.[85] Instead of the reduction to practice test used by the district court, the Federal Circuit applied the substantially complete test of *Micro Chemical*.[86] "[T]he appropriate question is whether the invention was substantially complete at the time of sale such that there was 'reason to

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80. *Pfaff*, 1988 WL 156744, at *13. Mr. Pfaff appealed this judgment, and the United States Court of Appeals for the Federal Circuit affirmed the infringement part of the judgment but vacated the validity part of the judgment. *See* Pfaff v. Wells Electronics, Inc., 1989 WL 100063 (Fed. Cir. Aug. 31, 1989), 884 F.2d 1399 (Fed. Cir. 1989). Mr. Pfaff subsequently commenced an infringement suit in Texas in 1991, and in 1992 the Texas court granted summary judgment to Wells. On appeal, the Court of Appeals for the Federal Circuit reversed the district court's summary judgment and remanded the case. *See* Pfaff v. Wells Electronics, Inc., 5 F.3d 514, 515 (Fed. Cir. 1993). On remand, the district court held that two claims of the patent were invalid, but that Wells had infringed other claims. This judgment was also appealed, and is discussed in the next section. *See* Pfaff v. Wells Electronics, Inc. 124 F.3d 1429 (Fed. Cir. 1997).

81. *See Pfaff*, 124 F.3d at 1433-34.

82. *See id.* at 1433.

83. *See id.* The hand-written note stated that the first order was for 25,000 sockets, although the subsequent written purchase order was for 30,100 sockets. *See id.* at 1432-33.

84. *See id.* at 1433. "[Mr.] Pfaff acknowledged in his testimony that, as a result of his meetings with TI, he had a 'go' situation and that they had a 'deal' prior to the critical date." *Id.*

85. *See id.* at 1435.

86. *See* Micro Chem., Inc. v. Great Plains Chem. Co., Inc., 103 F.3d 1538, 1545 (Fed. Cir. 1997). *See also* Pfaff v. Wells Electronics, Inc., 124 F.3d 1429, 1434 (Fed. Cir. 1997).

expect that it would work for its intended purpose upon completion.'"[87] As evidence, the court pointed to the completed engineering drawings, which contained exact dimensions and material requirements, accurately portrayed the claimed invention, and were very similar to the drawings submitted in the patent application.[88]

Two arguments were made by Mr. Pfaff to counter the substantially complete conclusion. First, the invention could not have been substantially complete because the customized tooling needed to manufacture the sockets was not ready.[89] Second, there was no proof that the invention actually worked at the time the sockets were sold, because there was no prototype and because testing had not been completed.[90]

In response to the first argument, the court noted that this customized tooling was underway at the time of the sale, and that it would be a routine matter to complete whatever steps were uncompleted.[91] "Under all of the circumstances, including the completion of engineering drawings, the ordering of production tooling, and the commencement of fabrication of the tooling necessary to manufacture the invention for a specific customer, it is clear that more than a mere concept was on sale."[92]

In response to the second argument, the court pointed to the fact that while Mr. Pfaff had never built or tested a prototype, this was his regular business practice, his inventions were almost always successful, and Mr. Pfaff himself was confident that the invention would work.[93] The court also noted that testing "is not always necessary for the completion of an

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87. *Pfaff*, 124 F.3d at 1434 (citing *Micro Chem.*, 103 F.3d at 1545).

88. *See id.*

89. *See id.*

90. *See id.* at 1435.

91. *See id.* at 1434.

92. *Id.*

93. *See Pfaff*, 124 F.3d at 1434.

Mr. Pfaff testified as follows at his deposition:

> Q. Now, at this time [late 1980 or early 1981] did we [sic] have any prototypes developed or anything of that nature, working embodiment?
>
> A. No.
>
> Q. It was in a drawing. Is that correct?
>
> A. Strictly in a drawing. Went from the drawing to the hard tooling. That's the way I do my business.
>
> Q. 'Boom-boom'?
>
> A. You got it.
>
> Q. You are satisfied, obviously, when you come up with some drawings that it's going to go – 'it works'?
>
> A. I know what I'm doing, yes, most of the time.

Pfaff v. Wells Electronics, Inc., 525 U.S. 55, 58 n.3 (1998).

embodiment of an invention."[94] The only test that Mr. Pfaff performed was a 'fatigue test,' to demonstrate "that the socket would work repeatedly under intensive use," and not a 'functionality test,' which would have shown whether or not "the socket would work for its intended purpose."[95]

In summary, the court concluded that the invention was on sale within the meaning of § 102(b), and therefore, the 377 patent was invalid.[96]

d. The Supreme Court's Ruling in Pfaff: *Patent Invalid, Invention was On Sale*

The Supreme Court granted certiorari to resolve the single issue of "whether the commercial marketing of a newly invented product may mark the beginning of the 1-year period even though the invention has not yet been reduced to practice."[97] The Court declared that "reduction to practice is sufficient evidence of completion," but not "necessary in every case" to show that an invention is complete.[98]

In its analysis, the Court first interpreted the word "invention" within the context of the Patent Act[99] as "unquestionably refer[ing] to the inventor's conception rather than to a physical embodiment of that idea."[100] To back up this definition, the Court noted that the term "reduced to practice" does not appear at all in § 102(b), nor does it appear within the definitions of the Patent Act itself.[101] Indeed, these words appear only once in the statute, in § 102(g)(2), which defines the standard used to determine which of two or more claimants is entitled to a patent in a priority contest.[102] The Court also

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94. Pfaff v. Wells Electronics, Inc., 124 F.3d 1429, 1435 (Fed. Cir. 1997) (citation omitted).

95. *Id.*

96. *See Pfaff*, 124 F.3d at 1435.

97. *Pfaff*, 525 U.S. at 57. The Court defined reduction to practice as follows: "[a] process is reduced to practice when it is successfully performed. A machine is reduced to practice when it is assembled, adjusted and used. A manufacture is reduced to practice when it is completely manufactured. A composition of matter is reduced to practice when it is completely composed." *Id.* at 57, n.2 (citation omitted).

98. *See id.* at 66. *See also* Whitman, *supra* note 30, at 410-19 (providing four reasons why the Supreme Court's decision in *Pfaff* was correct); Pavlovcak, *supra* note 66, at 179-82 (providing analyses of Supreme Court's holding in the case).

99. *See* Patent Act of 1952, 35 U.S.C. §§ 1-376 (1994 & Supp. V 1994).

100. *Pfaff*, 525 U.S. at 60.

101. *See id.* at 60-61. *See also* 35 U.S.C. § 100 (1994) (providing definitions used within the Act).

102. *See* 35 U.S.C. § 102(g)(2) (Supp. V 1994):

> In determining priority of invention under this subsection, there shall be considered not only the respective dates of conception and *reduction to practice of the invention*, but also the reasonable diligence of one who was first to conceive

used precedent to show that "[i]t is well settled that an invention may be patented before it is reduced to practice."[103] In 1888, the Supreme Court upheld the validity of Alexander Graham Bell's telephone patent,[104] although at the time the patent was granted, Bell had not completed a working telephone.[105]

The Court concluded that Mr. Pfaff's socket could have been patented at the time he accepted the purchase order from TI, and as a result, the invention was on sale within the meaning of § 102(b) and the patent was invalid.[106]

In response, Mr. Pfaff argued that a special interpretation of the word "invention" in § 102(b) was needed in order to "provide[] inventors with a definite standard for determining when a patent application must be filed."[107] The Supreme Court agreed with Mr. Pfaff in one sense—the Federal Circuit's substantially complete test from *Micro Chemical*[108] did not provide the certainty that inventors needed.[109] In its place, the Court articulated a two-part ready for patenting test.[110]

Under the Court's new test, a patent will be held invalid under § 102(b) if two conditions have been met before the critical date: first, the invention must have been "the subject of a commercial offer for sale," and second, "the invention must be ready for patenting."[111] The first prong of the test may be satisfied by a single unrestricted sale,[112] or simply by placing the

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and last to *reduce to practice*, from a time prior to conception by the other.

Id. (emphasis added). The Court also noted that the phrase "substantial completion," a reference to the test applied by the Federal Circuit, was also not in the text of § 102(b). *Pfaff*, 525 U.S. at 60.

103. *Pfaff*, 525 U.S. at 61.

104. Dolbear v. American Bell Tel. Co., 126 U.S. 1 (1888).

105. *See Pfaff*, 525 U.S. at 61-62.

> The law does not require that a discoverer or inventor, in order to get a patent for a process, must have succeeded in bringing his art to the highest degree of perfection. It is enough if he describes his method with sufficient clearness and precision to enable those skilled in the matter to understand what the process is, and if he points out some practicable way of putting it into operation.

Dolbear, 126 U.S. at 536.

106. *See Pfaff*, 525 U.S. at 68-69.

107. *Pfaff*, 525 U.S. at 63, 65.

108. Micro Chem., Inc. v. Great Plains Chem. Co., Inc., 103 F.3d 1538, 1545 (Fed. Cir. 1997).

109. *See Pfaff*, 525 U.S. at 65-66.

110. *Id.* at 67-68.

111. *Id.* at 67.

112. *See, e.g.*, *In re* Blaisdell, 242 F.2d 779, 783 (C.C.P.A. 1957).

invention on sale and offering it to potential customers.[113] The Court reasoned that there was no uncertainty with respect to this aspect of the test because an inventor can control when his invention is offered for sale.[114]

There are two ways to satisfy the second prong of the test: first, by evidence that the invention had been reduced to practice, or second, by evidence that "the inventor had prepared drawings or other descriptions of the invention that were sufficiently specific to enable a person skilled in the art to practice the invention."[115] The Court held that Pfaff's invention was "ready for patenting" because the engineering drawings satisfied the second criteria.[116]

C. Underlying Policies of the On Sale Bar

One of the effects of the statutory on sale bar is to put the inventor on notice; if he does not file his patent application within twelve months of invention, he runs the risk that some event will occur that will invalidate his patent application.[117] The apparent purpose of the on sale bar and the corresponding one-year grace period is "an attempt by Congress to balance the interests of the inventor with the interests of the public."[118] The United States Court of Claims has identified four fundamental policies for the on sale bar; three benefit the public, while the fourth benefits the inventor.[119] First, an inventor needs sufficient time after a sale to determine whether he should invest the time and resources into obtaining a patent.[120] On the other hand, the inventor should not be allowed to gain an unfair competitive advantage by extending the commercial monopoly inherent in a patent beyond the statutorily permitted time period.[121] Third, the public needs to

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113. *See, e.g.*, Akron Brass Co. v. Elkhart Brass Mfg. Co., 353 F.2d 704, 709 (7th Cir. 1965).

114. *See Pfaff*, 525 U.S. at 67.

115. *Id.* at 67-68.

116. *Id.* at 68.

117. *See* 35 U.S.C. § 102(b) (1994). *See also* UMC Electronics Co. v. United States, 816 F.2d 647, 659-61 (Fed. Cir. 1987) (Smith, J. dissenting). "Section 102(b) is in the nature of a statute of limitations, enacted to implement the policy that those who seek the benefits of the patent grant must act promptly after the invention has been placed in possession of the public. Failure to act ... forfeits the opportunity to obtain a patent." *Id.* at 659.

118. Gould Inc. v. United States, 579 F.2d 571, 580 (Ct. Cl. 1978).

119. *See* Gen. Elec. Co. v. United States, 654 F.2d 55, 61 (Ct. Cl. 1981). *See also* Holbrook, *supra* note 29, at 943; Allen, *supra* note 18, at 129-31 (describing the policies underlying the on sale bar).

120. *See Gen. Elec.*, 654 F.2d at 61. By allowing an inventor time to decide whether or not a patent would be a worthwhile investment, the public "benefits ... because it tends to minimize the filing of inventions with only marginal public interest." *Id.*

121. *See id.* "The 'on sale' bar forces the inventor to choose between seeking patent

be protected from relying to its detriment on an invention that it reasonably believes is freely available because of prolonged sales activity.[122] Finally, there is the general policy of disclosure inherent in the concept of a patent; new inventions should be disclosed to the public to advance the state of the art.[123]

In *Pfaff*, the Supreme Court applied these policy considerations to § 102(b).[124] The Court concluded that this provision served the public interest by: (1) limiting the duration of the patent monopoly to the statutory twenty-year term; and (2) preventing ideas that are already in the public domain from being removed via patent protection.[125]

D. Summary

Over the years, the courts have used a number of different tests to apply the on sale statutory bar provision of the Patent Act,[126] leading up to the current ready for patenting test, developed by the Supreme Court in *Pfaff*.[127] While some commentators contend that this new ready for patenting test "reduces some uncertainty concerning the on-sale bar,"[128] others believe that the new standard needs clarification "so that the inventor can determine the critical date of a particular invention without the aid of

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protection promptly following sales activity or taking his chances with his competitors without the benefit of patent protection." *Id.* (citation omitted).

122. *See id.*

123. *See id.* "The inventor is forced to file promptly or risk possible forfeiture of his invention rights due to prior sales." *Id.* (citation omitted).

124. *See* Pfaff v. Wells Electronics, Inc., 525 U.S. 55, 63-64 (1998). *See also* 35 U.S.C. § 102(b) (1994).

125. *See Pfaff*, 525 U.S. at 64. *See also* Whitman, *supra* note 30, at 415-17 (addressing Supreme Court's policy discussion in *Pfaff*).

126. *See* Patent Act of 1952, 35 U.S.C. §§ 1-376 (1994 & Supp. V 1994). *See also* Burke Elec. Co. v. Indep. Pneumatic Tool Co., 234 F. 93, 93 (2d Cir. 1916) (defining the on hand test); Timely Products Corp. v. Arron, 523 F.2d 288, 302 (2d Cir. 1975) (defining the reduction to practice test); UMC Electronics Co. v. United States, 816 F.2d 647, 656 (Fed. Cir. 1987) (defining the totality of the circumstances test); Seal-Flex Inc. v. Athletic Track and Court Constr., 98 F.3d 1318, 1324 (Fed. Cir. 1996) (defining the completed invention test); Micro Chem., Inc. v. Great Plains Chem. Co., Inc., 103 F.3d 1538, 1545 (Fed. Cir. 1997) (defining the substantially complete test).

127. *See* Pfaff v. Wells Electronics, Inc., 525 U.S. 55 (1998).

128. Breffni X. Baggot, *Have You Bargained Away Patent Rights?*, *at* http://www.vcapital.com (last visited Mar. 11, 2003). *See also* Whitman, *supra* note 30, at 418-19 "[T]he actual reduction to practice test proposed by [Mr.] Pfaff would not have provided a clear 'bright line' for determining when the one year grace period began, but instead would have resulted in years of litigation to determine when the invention was actually reduced to practice." *Id.*.

hindsight."[129] As a result, "the *Pfaff* rule fails ... to give the inventor unequivocal notice as to when the grace period begins in order to help her avoid the forfeiture of her patent," especially as it applies to software patents.[130]

III. APPLYING *PFAFF*'S READY FOR PATENTING TEST TO SOFTWARE PATENTS

The ready for patenting test developed in *Pfaff* is not well suited to software patents because the on-sale bar may apply at different times depending upon the software development process used and the software development activities conducted. Before attempting to apply the ready for patenting test, it is important to understand what software is and how it is developed. Part III.A defines software and briefly explains why software is patentable subject matter. Part III.B lists and defines a set of activities that may be carried out during software development. Each software development process uses its own mix of activities to form a variety of software development models. Part III.C describes four common software development models, then applies the ready for patenting test of *Pfaff* to each model.

A. What is Software?

Software has been defined as anything that is not hardware,[131] or more

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129. *See* Allen, *supra* note 18, at 147. *See also* Holbrook, *supra* note 29, at 966 ("[a]lthough the Supreme Court intended to provide clarity and predictability to the on-sale bar, ... numerous issues still obfuscate this area of the law").

130. Kongphanh Santivong, *The Policy of the On Sale Bar After* Pfaff v. Wells Electronics, *at* http://www.law.syr.edu/studentlife/pdf/santivong1.pdf (last visited Mar. 21, 2003) (stating that the Supreme Court's decision in *Pfaff* is inconsistent with the underlying policies of the on sale bar).

131. *See* Andy Johnson-Laird, *The Infringement of Software Patents: Views from an Expert*, A.L.I.—A.B.A. COURSE OF STUDY: TRIAL OF A PATENT CASE 133, 137-38 (1999).

> In general terms ... computer hardware as found in a typical personal computer can be classified as follows:
>
> > 1. The "motherboard": The one or more printed circuit boards which contain the integrated circuits for the main computer. The motherboard(s) normally include the central processor unit(s) ("CPU") with the main arithmetic and logic unit responsible for executing instructions, and memory for storing instructions about to be executed, instructions currently being executed and intermediary results. The motherboard(s) may also include supporting integrated circuits providing data highways between the CPUs and external storage such as Random Access Memory (RAM). RAM is used for storage of the computer program(s) being executed and for intermediary results, and is often found either on or directly attached to the

precisely, as the "data, as programs, routines, and symbolic languages, essential to the operation and maintenance of computers."[132] Software may be classified into the following categories: application software, utility software, system software, device drivers, or firmware.[133] Until recently, software was considered to be unpatentable subject matter within the definition of § 101 of the Patent Act.[134] In 1988, however, the Federal

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motherboard(s). The motherboard(s) often have connectors for various "add in" printed circuit boards, such as video controllers to manage the task of displaying color images on the screen. The motherboard(s) may also include access ports for mouse pointers and telecommunications access for sending data via telephone or local area network (LAN) to and from other computers.

2. External storage: This includes such devices as floppy disks, hard disks, CD-ROM (Compact Disk–Read Only Memory), DVD (Digital Versatile/ Video Disks), and magnetic tapes.

Id. at 138. *See also* ONLINE COMPUTING DICTIONARY, *at* http://www.instantweb.com/foldoc (last visited Jan. 20, 2003) [hereinafter DICTIONARY].

132. WEBSTER'S II NEW RIVERSIDE DICTIONARY 656 (1984). *See also* DICTIONARY, *supra* note 131.

133. *See* Johnson-Laird, *supra* note 131, at 137-38.

1. Application software: The programs that perform the useful work of transforming a general-purpose computer into a specific task-oriented unit. For example, Microsoft Word and Corel WordPerfect are application programs that transform a computer into a word processing unit.

2. Utility software: The programs that perform more general housekeeping functions on a computer. For example, a program that prints a directory listing of the computer files stored on a computer, or a program that searches a computer's hard disk for a file containing the text "software patent," are utility programs.

3. System software: The programs that supervise the operation of Application and Utility programs, allocating both software and hardware resources in response to requests from these programs. For example, the [products in the] Microsoft Windows operating system family are system software ....

4. Device drivers: The detailed software routines, often embedded within the operating system itself, that are responsible for intermediating requests from the operating system for the physical hardware of the computer (that is, the electronics and electromechanical devices) to perform useful work ....

5. Firmware: ... [E]ither system software or device drivers ... embodied in a form of computer memory that remains stored in the computer when the power is switched off. Firmware differs from software primarily in its embodiment.

Id. See also DICTIONARY, *supra* note 131.

134. *See* 35 U.S.C. § 101 (1994). "Whoever invents or discovers any new and useful *process, machine, manufacture, or composition of matter* ... may obtain a patent therefor, subject to the conditions and requirements of this title." *Id.* (emphasis added). Historically, the courts have excluded "laws of nature, natural phenomena, and abstract ideas" from being patented. Diamond v. Diehr, 450 U.S. 175, 185 (1981) (citations omitted). When

Circuit opened the door for software patents in *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*,[135] when it ruled that the patentability of software depends on whether the software produces a "useful, concrete and tangible result"[136] and not "on which of the four [statutory] categories of subject matter a claim is directed to."[137] In *State Street*, the Federal Circuit determined that the software in question, a data processing system, was patentable because it produced just such a result, "a final share price ... accepted and relied upon by regulatory authorities and in subsequent trades."[138]

B. Software Development Activities

There are a number of different activities that may be conducted in the course of developing software including, but not limited to, definition, design, code, and test.[139] A brief description of each of these activities follows.

1. Definition

The first step in the software development process, after determining that a customer[140] or market opportunity exists, is to describe the problems

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considering software, the courts have cited three reasons to explain why they considered it unpatentable. First, "the software patent recited a mathematical algorithm." Indira Saladi, *Computer Software: Patentable Subject Matter Jurisprudence Comes of Age*, 18 J. MARSHALL J. COMPUTER & INFO. L. 113, 113 (1999). Second, "the software did not have physical aspects or perform physical transformations." *Id.* Third, "the software fell within the business methods exception." *Id.*

135. 149 F.3d 1368 (Fed. Cir. 1988).

136. *Id.* at 1373 ("the transformation of data ... by a machine through a series of mathematical calculations ... constitutes a practical application of a mathematical algorithm, formula, or calculation, because it produces a 'useful, concrete and tangible result'"). *See also* Saladi, *supra* note 134, at 113-14, 129-39 (describing the background, decision, and implications of the Federal Circuit's holding in *State Street*); Steven L. Friedman et al., State Street Bank & Trust Company v. Signature Financial Group Inc. *At the Intersection of Technology, Commerce and the Law*, 17 No. 3 INTELL. PROP. L. NEWSL. 8 (1999) (discussing the history of patentable subject matter and the decisions of the district court and Federal Circuit in *State Street*).

137. *State Street*, 149 F.3d at 1375. The four statutory categories are "process, machine, manufacture, or composition of matter." 35 U.S.C. § 101 (1994).

138. *Id.* at 1373.

139. *See* NEAL WHITTEN, MANAGING SOFTWARE DEVELOPMENT PROJECTS: FORMULA FOR SUCCESS 23-24 (2d ed. 1995). *See also* DICTIONARY, *supra* note 131.

140. The term "customer" in this context refers both to (1) customers that are internal to the company that is developing the software and (2) customers that are external to or outside of the company developing the software. *See* WHITTEN, *supra* note 139, at 225.

to be solved and the needs to be satisfied by the software.[141] These product requirements[142] are used to create the product objectives,[143] which describe, at a high-level, the solution to the identified problems and needs.

The product specifications flesh out the details of the product objectives and provide a baseline for subsequent development activities.[144] The emphasis is on the externalities of the software—what it will do and how it will look—from the customer's perspective.[145] While the goal is to develop a "reasonably complete and accurate description of the product,"[146] the product specifications will likely be modified as the software development process continues.[147]

2. Design

There are two levels of design: high-level design and low-level design.[148] The high-level design activity is the first step in establishing how the software will meet the product specifications. This level of design emphasizes the technical internals of the software and defines each of the major pieces or components, how they function internally, with one

141. *See id.* at 225-26. "Problems tend to be associated with the big picture. Needs are specific tasks or functions that a customer *needs* to be able to perform as part of solving the *problem*." *Id.* "For example, if a customer's *problem* is low productivity because the word processors used in the company do not satisfy the *needs* of employees, then the customer may seek out a new word processor." *Id.* (emphasis in original). Examples of needs might include "support[ing] special letter templates that can be shared among all employees through a local area network, automatically address[ing] labels for mass mailings, and perform[ing] automatic backups of data at user-selected frequencies ...." *Id.*

142. "The [goal of the product requirements] is to present the underlying problem and the supporting needs that later must be satisfied by the solution that will be proposed in a product objectives document." WHITTEN, *supra* note 139, at 239. *See also id.* at 235-40 (providing detailed description of the subjects to be addressed in the product requirements). Product requirements are sometimes called system requirements, when the software is part of a larger system, or simply software requirements, when they focus specifically on the software. *See* ROGER S. PRESSMAN, A MANAGER'S GUIDE TO SOFTWARE ENGINEERING 372-73 (1993).

143. "Product objectives are a crisp statement of direction, or framework, from which the project's money, people, material, and time will be committed." WHITTEN, *supra* note 139, at 262-63. *See also id.* at 248-55 (providing a detailed description of the aspects to be addressed by the product objectives).

144. *See id.* at 37. *See also* DICTIONARY, *supra* note 131.

145. *See* WHITTEN, *supra* note 139, at 37. "Every function, command, screen, prompt, and other user interface items must be documented ...." *Id.*

146. *Id.* at 273. *See also id.* at 273-76 (providing a detailed description of the aspects to be addressed by the product specifications).

147. *See id.* at 262.

148. *See id.* at 37-40.

another, and with the surrounding hardware and software.[149] The high-level design closely tracks the product specifications.[150]

The low-level design activity is a refinement of the high-level design, exposing more details on how the software is to be built and how it will function. The low-level design defines the modules that make up each of the components identified in the high-level design.[151] At this level, the internals of each of the modules and the interactions between the modules are defined.[152]

a. Code

This activity translates the low-level design into an actual implementation expressed in source code. The source code is the actual set of instructions that are assembled or compiled into instructions that can be recognized by the computer.[153] The code for each module may be written in a low-level language such as machine-specific assembly language[154] or a high-level language such as C or Ada.[155]

b. Test

There are a number of levels of testing: unit test; function test; component test; system test; regression test; alpha test; and beta test. After coding, unit tests are conducted on each module to verify each of the

149. *See id.* at 37-38. High-level design is also sometimes called top-level design, which is defined as "the determination and description of the overall software architecture and of the interfaces between the major [components] within that architecture." KEN SHUMATE & MARILYN KELLER, SOFTWARE SPECIFICATION AND DESIGN: A DISCIPLINED APPROACH FOR REAL-TIME SYSTEMS 392 (1992).

150. *See* WHITTEN, *supra* note 139, at 264.

151. *See id.* at 39.

152. *See id.* The low-level design "identifies each programming decision path and may be documented by using a design language, graphic flows, and so on, or simply by writing English narratives." *Id.* Low-level design is also sometimes called detailed design. *See* SHUMATE & KELLER, *supra* note 149, at 387.

153. *See* WHITTEN, *supra* note 139, at 40. *See also* DICTIONARY, *supra* note 131.

154. Assembly language is the "symbolic representation of the machine language of a specific computer. Assembly language is converted to machine code by an assembler." DICTIONARY, *supra* note 131.

155. A high-level language is a "programming language which provides some level of abstraction above assembly language. These normally use statements consisting of English-like keywords such as 'FOR,' 'PRINT' or 'GOTO,' where each statement corresponds to several machine language instructions." *Id.* C and Ada are two examples of high-level languages. *See id.* A compiler is a "program that converts another program from some source language (or programming language) to machine language." *Id.*

logical paths through the module.[156] One or more modules are then combined to test product functions.[157] If the software is developed piecemeal, the modules may be combined into components, and one or more components are combined and used to test the external features of the product, typically after unit and function tests are completed.[158] The system test is used to test the major functions of the software as a whole, after the required subset of the components have been combined and tested.[159] The regression test is the final product test and consists of a set of scripts that are run against the software on the supported hardware platform.[160] The alpha test is the first stage of release testing,[161] often conducted by the customer at the developer's location.[162] The beta test is the second stage of release testing,[163] usually conducted by the customer at the customer's location.[164]

C. Software Development Process

Software is developed by an individual or an organization through the utilization of a software development process. A software development process may be defined as "an ordered set of [software development] activities that, after completed, results in a software 'product' that is delivered to a customer."[165]

While there are many different software development process models,[166] and variations of those models, almost all of the models are based on one of these four basic process models: the "code-and-fix model;" the "waterfall

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156. *See* WHITTEN, *supra* note 139, at 40-41.

157. *See id.* at 40.

158. *See id.* at 41.

159. *See id.* at 42.

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

161. *See* DICTIONARY, *supra* note 131.

162. *See id.*

163. *See id.*

164. *See id.*

165. WHITTEN, *supra* note 139, at 15. "[Software development] can be implemented in different ways, even though generic phases always exist." PRESSMAN, *supra* note 142, at 24. "[A software development process] identifies the overall development philosophy; establishes the amount of sequentiality, iteration, and parallelism; specifies the distinct technical steps that will be required to produce the software; and, by implication, suggests the milestones and deliverables that will be required to manage a software project." *Id.* at 25.

166. *See* PRESSMAN, *supra* note 142, at 25-27 (describing a number of common software development paradigms). *See also* DICTIONARY, *supra* note 131 (defining the "software life cycle" and component phases).

model;" the "incremental model;" and the "iterative model."[167] Further, each of these process models may utilize a different set of software development activities, or use the same software development activities in a different sequence.[168] The following sections describe each of these four basic models, list the software development activities that would likely be used in that model, and finally, postulate how *Pfaff*'s ready for patenting test would be applied to that model.

1. The Code-and-Fix Model

In the code-and-fix model[169] the software developer[170] starts coding with little or no advance planning or preparation.[171] After some code is written, it is tested, and any problems that are discovered are fixed.[172] The cycle then continues—code, test, and fix—until the software product is completed.[173]

Many of the software development activities listed previously may be carried out only informally, or not at all.[174] For example, product requirements, product objectives, and product specifications will possibly be combined and communicated to the software developer orally or via a short written document; high-level and low-level design activities will probably not be conducted at all; and there will likely be only one testing activity.[175]

The ready for patenting test appears difficult to apply to the code-and-fix model. The first way of establishing that the invention was ready for patenting, by proof of reduction to practice, could be interpreted to require

167. WHITTEN, *supra* note 139, at 19-22.

168. *See id.*

169. *See id.* at 19. "This model is most [often used] for very small and simple projects. Because advance planning is usually lacking and an informal development style usually accompanies the implementation of this model, the quality of the overall product ... is lower than the quality resulting from the implementation of other models." *Id.* An additional downside of this model is that "the code often is difficult to maintain because the product's design was not carefully planned and documented." *Id.*

170. The software developer should be distinguished from the "person of ordinary skill in the art" that is used in the context of patents. A software developer may range from a relatively junior, inexperienced coder to a very senior software architect. The "person of ordinary skill in the art ... is the intended reader of a patent with sufficient general knowledge, experience and training that he or she could read a software patent and proceed to practice the invention." Johnson-Laird, *supra* note 131, at 139.

171. *See* WHITTEN, *supra* note 139, at 19.

172. *See id.*

173. *See id.*

174. *See id.*

175. *See id.*

that the software function as claimed in the patent.[176] However, many of the details of the software may not be decided upon until numerous code, test, and fix cycles have been completed, since in this model the software evolves over time. As a result, it would be difficult to establish the exact point in time when the software came into existence and functioned per the patent claims.

Alternatively, the software could be considered reduced to practice when the code activity is completed, even before testing activity begins.[177] Again, the cyclic nature of this model makes it difficult to establish precisely when the software, as claimed in the patent, was completely coded.

With respect to the second way of establishing that the invention was ready for patenting, by "proof that ... the inventor had prepared drawings or other descriptions of the invention that were sufficiently specific to enable a person skilled in the art to practice the invention,"[178] the lack of formal written documentation inherent in the code-and-fix model would likely present an evidentiary issue.

There may also be an issue as to the interpretation of "a person skilled in the art," because the software developer may be under the supervision of a much more senior architect.[179] While the senior architect will likely have a vision of the completed product at the outset, the junior developer may not be privy to the "big picture."

2. The Waterfall Model

The waterfall model consists of a series of stages of development: definition, design, code, and test.[180] After one stage is completed, the development continues to the next stage.[181] Ideally, the planning and preparation for each stage is completed before starting that stage.[182] This model also incorporates feedback loops to previous stages to accommodate changes.[183]

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176. *See* Pfaff v. Wells Electronics, Inc., 525 U.S. 55, 67-68 (1998).

177. *Id.*

178. *Id.*

179. *Id.* at 67.

180. *See* WHITTEN, *supra* note 139, at 20. "[This] model generally is suited for medium to large projects with well-defined requirements. This model ... operates best when the change activity ... does not result in major changes to the definition and design of the product." *Id. See also* PRESSMAN, *supra* note 142, at 372-74 (describing the classic life-cycle model, a very similar linear and sequential approach to software development).

181. *See* WHITTEN, *supra* note 139, at 20.

182. *See id.*

183. *See id.*

Most of the software development activities described previously will likely be carried out when this model is used, although some activities may be merged to shorten the entire process.[184] Product requirements, product objectives and product specifications will probably be fully documented during the definition phase, both high-level and low-level design will likely be completed, and multiple levels of testing—unit, function, system, regression, alpha and beta tests—will probably be conducted after the code is completed.[185]

The ready for patenting test may be easier to apply to the waterfall model than to the code-and-fix model because of the likelihood of additional software development activities, corresponding written documentation, and the sequential nature of the process.[186]

If the first way of establishing that the invention was ready for patenting, by proof of reduction to practice, is interpreted to mean that the software actually be functional, this point may occur after the coding activity is complete and the testing activities have begun.[187] It is unclear, however, at which exact phase of testing—unit test, function test, system test, regression test, alpha test, or beta test—the software, as claimed in the patent, would be considered functional.

Alternatively, if the software is considered to be reduced to practice simply when the code activity is completed, this point is well defined, barring significant functional changes to the software during the testing phases.[188]

As to the second way of establishing that the invention was ready for patenting, by "proof that ... the inventor had prepared drawings or other descriptions of the invention that were sufficiently specific to enable a person skilled in the art to practice the invention," this point could be established when the product specifications are completed.[189] However, if the requirements are not well developed at the outset, and significant changes occur during development, the product specifications may not accurately reflect the software as claimed in the patent.

In addition, the design documents, and not the product specifications, appear to be more analogous to the "drawings or other descriptions" required by the Court in *Pfaff*.[190] The issue then becomes whether the high-

184. *See id.*

185. *See id.*

186. *See* Pfaff v. Wells Electronics, Inc., 525 U.S. 55, 67-68 (1998). *See also* WHITTEN, *supra* note 139, at 19-20.

187. *See Pfaff*, 525 U.S. at 67-68.

188. *See id.*

189. *Id.* at 67-68.

190. *Id.* at 67-68.

level or low-level design documents are sufficient, and the resolution may again turn on the interpretation of "a person skilled in the art," since high-level design may be carried out by more experienced software developers than the low-level design.[191]

3. The Incremental Model

The incremental model is similar to the waterfall model, except that the software product is developed in pieces.[192] The pieces are produced more or less in parallel, and each piece is developed in a manner similar to the waterfall model but with an additional step-component test.[193] After the unit and function testing of each piece is completed, that piece is combined with the other completed pieces in a system test activity, where all the pieces are eventually integrated and tested as a whole before the software product is delivered.[194]

In addition to the potential difficulties described above for the waterfall model, the ready for patenting test may be difficult to apply to the incremental model because of the parallel nature of this software development process—the development activities overlap in the incremental model, while the activities are sequential in the waterfall model.

In attempting to establish that the invention was ready for patenting, one complication arises if reduction to practice is interpreted to mean that the software must be functional. In the incremental model, the software could be considered functional at any time after all the coding activity is completed and testing has begun, as is the case with the waterfall model. However, this point is not as well defined as in the waterfall model, because of the multiple, roughly parallel, code, unit, and function test activities.

On the other hand, the software may not be considered functional until system test is completed and the pieces are integrated into a whole. It is not until this point that the software could produce all of the results outlined in the product specifications, and consequently, perform as claimed in the patent.

A second complication, in attempting to establish that the invention was

191. *Id.* at 67.

192. *See* WHITTEN, *supra* note 139, at 20-21. "A popular advantage [of this model] is that the pieces of the product can be developed largely in parallel to one another. Thus, development activities overlap, which has the benefit of potentially reducing the technical risk of product disaster by demonstrating operational code earlier in the development cycle. It also allows the increments ... to be made available for early users of the product." *Id.*

193. *See id.* at 20-21.

194. *See id.*

ready for patenting by "proof that ... the inventor had prepared drawings or other descriptions that were sufficiently specific to enable a person skilled in the art to practice the invention," arises if the low-level design documents are considered equivalent to the "drawings or other descriptions" required by the Court in *Pfaff*.[195] The problem occurs because of the multiple sets of low-level design documents created in the incremental model, as compared to the single set created in the waterfall model.[196]

4. The Iterative Model

The iterative model is similar to the incremental model except that as each piece is completed, the entire process—definition, design, code, unit test, function test, and component test—is repeated to develop the next iteration of the software product.[197] The system test activity only occurs after the last iteration is complete.[198]

If the first way of establishing that the invention was ready for patenting, by "proof of reduction to practice," means that the software must be functional, this point may not occur until system test is completed and the final version of the software is available.[199] On the other hand, if reduction to practice means simply that the coding activity is completed, this point does not occur until the coding activity for the last iteration is completed.[200]

As to the second way of establishing that the invention was ready for patenting, by "proof that ... the inventor had prepared drawings or other descriptions of the invention that were sufficiently specific to enable a person skilled in the art to practice the invention," this model is more complicated than any of the others because of the multiple sets of definition documents that are created.[201]

5. Summary

As shown above, applying the ready for patenting test to the software

195. *See Pfaff*, 525 U.S. at 67-68.

196. *See* WHITTEN, *supra* note 139, at 20-21.

197. *Id.* This model "is particularly suited for use when the requirements and product definition are not well understood and there is a need to begin development more quickly and create a very early version that will demonstrate the look and feel of the product." *Id. See also* PRESSMAN, *supra* note 142, at 375-80 (describing two additional models, prototyping and spiral, that are similar in some respects to the iterative model).

198. *See* PRESSMAN, *supra* note 142, at 375-80.

199. *See Pfaff*, 525 U.S. at 67-68.

200. *See id.*

201. *Id.*

development process, regardless of which model is used, is problematic. First, it is not clear how to interpret the reduction to practice required by *Pfaff*.[202] Does *Pfaff* require the software to be functional, or only that the coding activity be completed?

If reduction to practice means only that the coding activity be completed, this point may be well defined in the waterfall model, where the development activities follow in lock step, but it is not so clear in the other models. For example, the relatively amorphous nature of the code-and-fix model makes it difficult to draw the line between adding features and fixing problems.[203] If an incremental model or iterative model is used, the challenge is to identify the point at which all the elements of the claimed invention are completely coded.[204] Because of the piece-meal nature of these models, the elements of the patent may exist all in one piece, or across multiple pieces of the software.

If, on the other hand, reduction to practice means that the software must be functional, it may be difficult to agree on the exact point in time at which the software embodies all the elements of the claimed invention.[205] This is especially true in the code-and-fix model, where the process is relatively unstructured and the software evolves over time.[206] In the waterfall model, the incremental model, and the iterative model, however, the software might not be considered functional until after the coding activity is completed and some level of testing is done.[207] But, if this is the case, then what level of testing suffices to demonstrate that functionality?

In the waterfall model, the incremental model, and the iterative model, each stage of the test activity—unit test, function test, component test, system test, regression test, alpha test, and beta test—is used to verify different attributes of the product, possibly to different audiences.[208] Must the testing demonstrate just the logical paths through the software, or the external features, or the major functions as a whole? Must the software be ready for customer testing, or must customer testing be completed? Further, if a problem is discovered in testing, how serious must that problem be before the corresponding feature is considered non-functional?

Second, it is not clear how to interpret the *Pfaff* requirement of "proof that ... the inventor had prepared drawings or other descriptions of the invention that were sufficiently specific to enable a person skilled in the art

202. *See id.* at 67.
203. *See* WHITTEN, *supra* note 139, at 19.
204. *See id.* at 20-22.
205. *See Pfaff*, 525 U.S. at 67.
206. *See* WHITTEN, *supra* note 139, at 19.
207. *See id.* at 20-22.
208. *See id.* at 21-22.

to practice the invention."[209] There are two sub-issues here: (1) what level of documentation satisfies *Pfaff*, and (2) how should "a person skilled in the art" be interpreted?[210]

The choice of software development model affects the quality and the quantity of documentation that is produced. For example, little or no documentation may be created if a code-and-fix model is used; the only documentation may well be the code itself. At the other extreme, if an iterative model is used, multiple sets of definition documents and design documents may be created. The question here is which documents—product requirements, product objectives, product specifications, high-level design, low-level design, or even the code itself—satisfy the *Pfaff* test.[211] In addition, if the software is produced piece-meal, as in the incremental model and the iterative model, then multiple sets of documentation may exist. Does any one set satisfy the *Pfaff* test, or will only the complete collection suffice?

A large software project may require the skills of multiple software developers, ranging from very junior to very senior, and different skill levels may be required for different activities in the software development process. For example, product specifications may be drafted by a very senior architect, while the high level design may be carried out by a mid-level developer and coding left to the least experienced. The definition of "a person skilled in the art" may vary depending upon which level of documentation is determined to satisfy *Pfaff*.[212]

IV. POST-*PFAFF* SOFTWARE PATENT INFRINGEMENT CASES

While it is unclear how the Supreme Court would apply the *Pfaff* ready for patenting test to software patents, this section provides four examples of how the lower courts have applied the test. All four cases are patent infringement suits, in which the defendant claimed the patent was invalid as an affirmative defense.

A. *Isogon Corp. v. Amdahl Corp.*[213]

Isogon filed suit against Amdahl alleging that Amdahl had infringed two patents owned by Isogon.[214] Both patents related to Isogon's SoftAudit

209. Pfaff v. Wells Electronics, Inc., 525 U.S. 55, 67-68 (1998).

210. *Id.* at 67.

211. *See id.*

212. *Id.*

213. 1997 WL 759435 (S.D.N.Y. Dec. 10, 1997).

214. *Id.* at *1. In addition to direct infringement, the suit alleged that Amdahl: (1) induced its customers to infringe; and (2) contributorily infringed both patents. *See id.* Amdahl filed a motion to dismiss all three claims, but the motion was denied. *See id.* at *5.

program, a software asset management tool.[215] In a motion for summary judgment, Amdahl claimed that Isogon's two patents were invalid because the invention, SoftAudit, was sold or offered for sale prior to the critical date, in violation of the on sale bar of § 102(b).[216] While the district court denied summary judgment because there were issues of material fact that needed to be resolved, the court applied the ready for patenting test of *Pfaff* in its analysis.[217]

Amdahl argued that SoftAudit was ready for patenting under both of the *Pfaff* tests.[218] Under the first test, Amdahl claimed that SoftAudit had been reduced to practice before the critical date of January 12, 1993.[219] To support its argument, Amdahl pointed to the following: (1) as of October 1992, Robert Barritz, the inventor, had completed the "overall structure of SoftAudit;"[220] (2) the developer who took over from Barritz, Steven Youchnow, admitted that the software was working on a limited operating system environment in 1992;[221] and (3) SoftAudit had been released to a

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The two patents, the '340 patent and the '056 patent, disclose a "method and apparatus for computer program usage monitoring." *Id.*, at *1; U.S. Patent No. 5,499,340 (issued Mar. 12, 1996) and U.S. Patent No. 5,590,056 (issued Dec. 31, 1996).

215. *See SoftAudit & SoftAudit Services*, *at* http://www.isogon.com/softaudit_&_softaudit_services.htm (last visited Jan. 21, 2003). SoftAudit "identifies software vendor and in-house products and their usage patterns." *See id.* According to the Declaration of Robert Barritz, the inventor of the patents and President of Isogon, SoftAudit is:

> [A]n amalgam of four basic software components. The first component, the "surveyor," is a software program "capable of combing through computer program files stored on a main frame computer to create an inventory list of all the stored programs" expressed by their commercial product names. [The second] component is the "monitor" consisting of "software that is capable of insinuating itself into the OS (operating system) of the computer being monitored, to monitor and track the usage of various computer programs within the computer." The third component is the "reporter" which "produces reports that allow individuals to determine the meaning and implication of the results produced by the surveying and monitoring components." The fourth component is the "knowledge base" which is a database containing information about thousands of different file names used by different computer programs and a correlation of those files names with the corresponding commercial product names associated with each.

Isogon Corp. v. Amdahl Corp., 47 F. Supp. 2d 415, 417 n.1 (S.D.N.Y. 1998).

216. *See Isogon*, 47 F. Supp. 2d at 417. *See also* 35 U.S.C. § 102(b) (1994).

217. *See Isogon*, 47 F. Supp. 2d at 420-23, 425. *See also* Pfaff v. Wells Electronics, Inc., 525 U.S. 55, 67-68 (1998).

218. *See Isogon*, 47 F. Supp. 2d at 420; *Pfaff*, 525 U.S. at 67-68.

219. *See Isogon*, 47 F. Supp. 2d at 420; *Pfaff*, 525 U.S. at 67.

220. *Isogon*, 47 F. Supp. 2d at 420.

221. *See id.* at 420-21. Steven Youchnow testified as follows:

> A: It was working on my very limited platform.

potential customer, Aetna, for testing in the fall of 1992.[222] Isogon, however, contended that (1) when Youchnow took over for Barritz, only ten percent of the code had actually been completed;[223] (2) SoftAudit had not been fully tested as of October 1992,[224] and that the company "still needed to ascertain whether SoftAudit was operable for its intended purpose in its intended environment;"[225] (3) one year later, in October 1993, Aetna had still not gone beyond initial testing because of the number of problems with SoftAudit;[226] and (4) it was not until March 1993 that SoftAudit was "released for presentation to customers."[227]

Under the second of *Pfaff*'s ready for patenting tests, Amdahl claimed that Isogon "had prepared drawings or other descriptions of the invention that were sufficiently specific to enable a person skilled in the art to practice the invention," because of a drawing included in a 1992 User's Manual.[228] The drawing, entitled "How SoftAudit Works," was essentially the same as one contained in a 1993 manual, and showed how three of the main elements of SoftAudit were connected.[229]

The court appeared to have trouble applying the ready for patenting test. First, the court acknowledged that there was "conflicting evidence

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Q: And that was GIS?
A: Right, and only in my own uniquely defined universe.
Q: In that unique universe of GIS with that operating system, it produced one or more reports?
A: Yes.
Q: But with all those characterizations, you would say it was operating or working in that environment, that GIS environment, is that fair?
A: My corner of the GIS environment, yes.

Id. at 421 (citations omitted).

222. *See id.* at 422.

223. *See Isogon*, 47 F. Supp. 2d at 420. Barritz had completed "approximately 15,000 lines of code compared to over 150,000 [in 1998]." *Id.*

224. *See id.* at 420-21. Youchnow testified that, at the time he took over from Barritz, SoftAudit was "a barely working software product, in its [alpha] phase," and that Barritz had "hardly tested it" before turning it over. *Id.*

225. *Id.* at 421. According to Barritz, "[t]he task in October 1992 was to secure the cooperation of one or more operators of large main frame facilities to allow Isogon access to main frame computers to thoroughly test the software, and to obtain from such facilities product data information for the knowledge base." *Id.*

226. *See id.* at 421-22. According to one Aetna employee, "[o]n paper, the product sounds wonderful ... [i]n reality, we have gained nothing in a year of effort." *Id.* at 422.

227. *Id.* at 421.

228. *Id.*; *Pfaff*, 525 U.S. at 67-68.

229. *Isogon*, 47 F. Supp. 2d at 421. The drawing showed the Surveyor, Monitor, and Reporter components. *See id.*

concerning SoftAudit's patentability as of October 1992."[230] Second, after considering "*the nature and complexity* of SoftAudit," the court said that "*it would be difficult to say, as a matter of law*, that the 1992 User's Manual was sufficiently specific to enable a person to actually use the product and hence satisfy the second prong of the newly articulated standard for patentability."[231] Other issues in the case had already precluded summary judgment, and the issue of patentability was never decided.[232]

B. *Articulate Systems, Inc. v. Apple Computer Inc.*[233]

Articulate Systems sued Apple Computer for infringing Articulate's voice recognition software patent.[234] Apple submitted a motion for summary judgment, claiming that Articulate's patent was invalid under § 102(b).[235] Specifically, Apple claimed that Articulate's product, Voice Navigator, was in public use and on sale in the United States more than one year before the patent filing date.[236] The district court denied the motion because Apple had not provided "clear and convincing evidence of [the] invalidity" of Articulate's patent.[237]

Apple claimed that, before the critical date, June 23, 1988, Articulate had received "an order, a letter of intent to purchase, and a written expression of interest" from three parties.[238] Articulate conceded that it had conducted demonstrations of a prototype of Voice Navigator for at least four potential customers, including the parties named by Apple, as early as March and April of 1988.[239] Articulate, however, "steadfastly den[ied]"

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230. *Id.* at 422. "Amdahl alleges that the invention was reduced to practice by this time while Isogon claims that [SoftAudit] was in a developmental stage in need of testing in its natural environment." *Id.*

231. *Id.* at 422-23 (emphasis added).

232. *See id.* at 423. Summary judgment was "already precluded by issues of commercialization and experimentation." *Id.*

233. 53 F. Supp. 2d 62 (D. Mass. 1999).

234. *See id.* at 64. Articulate's '303 patent (U.S. Patent No. 5,377,303) "allows a computer's operating system to recognize voiced utterances and convert them into recognizable commands, thus permitting the user to command the operating system through the use of his or her voice." *Id.* Apple's alleged infringing software product is called PlainTalk. *See id.*

235. *See id.* at 64-65. Apple filed four motions for summary judgment or partial summary judgment; two claimed that Articulate's patent was invalid, but only one motion, invalidity under § 102(b), was addressed by the court in this opinion. *See id.* at 64-65.

236. *See id.* at 65.

237. *Id.* at 64.

238. *See id.* at 68.

239. *See Articulate Systems*, 53 F. Supp. 2d at 68. Apple claimed that the prototype

that it sold, or made offers to sell, Voice Navigator prior to the critical date.[240] Articulate further claimed that it did not even have a product that could have been sold at the time of the demonstrations.[241] The limited purpose for the demonstrations, said Articulate, was to acquire a "baseline for further development work" and to "get some information as to the possible market for a voice recognition product before going on with the project."[242]

The court applied both prongs of the *Pfaff* on sale test. With respect to the first prong, whether the invention had been "the subject of a commercial offer for sale," the court reviewed the evidence of the four prototype demonstrations.[243] The first demonstration, in March 1988, was to ClinMan, Inc.[244] In April 1988, via letter, ClinMan "expressed an interest in entering into a business relationship with Articulate."[245] ClinMan and Articulate did not agree to a distribution agreement, however, until October 1988, and ClinMan did not purchase its first Voice Navigator product until 1989 or 1990.[246] Further, the ClinMan employee who wrote the letter stated that, at the time, he knew that Voice Navigator was not available commercially.[247] The court stated that the evidence available for the second demonstration was "even more sparse" and that "[d]etails concerning the third demonstration are also in short supply."[248] The fourth demonstration was to RimpexChile.[249] The evidence here included a May 4, 1988 letter from RimpexChile to Articulate, in which RimpexChile "confirm[ed] a commitment for 2000 units / for the first year ... [t]he amount committed obey to the product features and specifications demonstrated at my visit to Boston, April 14 til 16."[250] The court noted that Articulate's account of the demonstration was "characteristically, ... short

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used in the demonstrations "embodied at least some of the claims (and the only independent claim) set forth in the '303 patent." *Id.* at 67.

240. *See id.* at 68.

241. *See id.* at 68-69. Voice Navigator was released commercially in October 1988. *See id.* Ivan Mimica, President and Chief Executive Officer of Articulate, said that Articulate "did not deem Voice Navigator to be a commercially viable product prior to October 1988." *Id.*

242. *Id.* at 69.

243. *See Articulate Systems*, 53 F. Supp. 2d at 69-73; *Pfaff*, 525 U.S. at 67; 35 U.S.C. § 102(b) (1994).

244. *See Articulate Systems*, 53 F. Supp. 2d at 69.

245. *Id.*

246. *See id.* at 70.

247. *See id.* at 69.

248. *Id.* at 70-71.

249. *See id.* at 72.

250. *Articulate Systems*, 53 F. Supp. 2d at 72.

and uninformative," but "unequivocal in its insistence that ... Articulate did not sell or offer to sell anything to RimpexChile during the demonstration or at any other time prior to the critical date."[251]

In each case, the court was unable to conclude whether "a definite sale or offer to sell" Voice Navigator was made prior to the critical date, because "the evidence concerning what actually happened during the four demonstrations is sparse."[252]

Apple offered two other types of evidence to support its claim that the invention was on sale prior to the critical date: (1) in November of 1988, Articulate applied for a federal trademark on Voice Navigator;[253] and (2) a trade press article, published in July of 1988, reported that NASA was already using a Voice Navigator prototype.[254] In both cases, the court considered the evidence insufficient to grant summary judgment based on the on sale bar.[255]

With respect to the second prong of the *Pfaff* analysis, whether the invention was ready for patenting, the court held that there was insufficient evidence to show that the features of the product, as claimed in the patent, "were demonstrated prior to the critical date."[256]

C. *Novadigm, Inc. v. Marimba, Inc.*[257]

Novadigm brought an action against Marimba, alleging that Marimba infringed Novadigm's patent for Enterprise Desktop Management (EDM) software.[258] Marimba, in its defense, claimed that Novadigm committed inequitable conduct during the patent's prosecution.[259] Marimba claimed that Novadigm failed to disclose two transactions to the Patent Office, and because both transactions occurred before the critical date, the patent was

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251. *Id.*

252. *Id.* at 68, 75.

253. *See id.* at 74. Articulate's trademark application stated that "Articulate first used the Voice Navigator trademark on goods in interstate commerce on May 31, 1988." *Id.*

254. *See id.* at 71-72. The article in *MacWeek* also stated that "Articulate did not intend to release Voice Navigator until the following fall." *Id.* at 71.

255. *See Articulate Systems*, 53 F. Supp. 2d at 74-75. *See also* 35 U.S.C. § 102(b) (1994).

256. *Articulate Systems*, 53 F. Supp. 2d at 69. *See also Pfaff*, 525 U.S. at 67-68.

257. 2000 WL 228356 (N.D. Cal. Feb. 15, 2000).

258. *See id.* at *1. Novadigm's '764 patent, (U.S. Patent No. 5,581,764) disclosed "an automated configuration process" to determine "the resource needs of individual distributed computers." *Id.*

259. *See id.* at *2. "Marimba filed a counterclaim for a declaratory judgment of unenforceability as a result of the inequitable conduct of the named inventors ... and asserted inequitable conduct as an affirmative defense against Novadigm's infringement allegations." *Id.* at *1.

invalid under § 102(b).[260]

The first transaction was a test site agreement that allowed Novadigm to develop prototypes of its EDM software on a potential customer's computers.[261] The test site agreement allowed Novadigm to have "access to [Prudential's] computing and networking facilities" in exchange for Prudential's "access to the resulting Software."[262] The second transaction was an offer to sell Novadigm's EDM software.[263] Specifically, Novadigm and J.B. Hunt signed a license agreement, in which J.B. Hunt paid Novadigm $100,000 for the right to use the EDM software.[264] The district court applied *Pfaff*'s on sale bar test, although Marimba argued that the *Pfaff* test should not apply because the '764 patent was issued in 1996, two years before the Supreme Court's *Pfaff* decision.[265]

In applying the first prong of the on sale analysis, whether the invention had been "the subject of a commercial offer for sale," the court noted that the EDM software had been developed in three generations, and each generation had different features.[266] Prior to the critical date, and at the time of the test site agreement and the offer for sale, the first two generations were available.[267] However, only the third generation of the EDM software "practice[d] the claimed invention."[268] As such, neither the test site agreement nor the offer for sale actually included the patented invention.[269]

As to the second prong of the on sale analysis, whether the invention

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260. *See id.* at *2. Marimba also claimed that Novadigm failed to disclose prior art to the Patent Office during the '764 patent prosecution. *See id.* The prior art, a computer program called Teleview, was "an earlier computer management product" developed during the 1980's by the same inventors. *Id.*

261. *See Novadigm*, 2000 WL 228356, at *4-5.

262. *Id.* at *4. By this agreement, Novadigm granted Prudential "a paid-up, perpetual, nonexclusive, nontransferable license to use such commercially released Software." *Id.*

263. *See id.* at *7.

264. *See id.*

265. *See Novadigm*, 2000 WL 228356, at *1, *4 n.2. Marimba "contend[ed] that the 'totality of the circumstances' standard, outlined in *UMC Electronics Co. v. United States* [citation omitted] is the relevant standard." *Id.* The court disagreed, however, and pointed out that the Federal Circuit had previously used the *Pfaff* ready for patenting test in cases where the patents in question were prosecuted prior to 1988. *See id. See also* Pfaff v. Wells Electronics, Inc., 525 U.S. 55, 67-68 (1998); 35 U.S.C. § 102(b) (1994).

266. *See Novadigm*, 2000 WL 228356, at *5. The different generations "reflect[ed] [the software's] transmutation over time." *Id.* The first generation did not embody any of the claims of the '746 patent, and the second generation of the software embodied only some of the claims. *See id.* at *3, *5. *See also Pfaff*, 525 U.S. at 67; 35 U.S.C. § 102(b) (1994).

267. *See Novadigm*, 2000 WL 228356. at *5, *7.

268. *Id.* at *5.

269. *See id.* at *5, *7.

was ready for patenting, the court simply stated that neither prong of the *Pfaff* test had been satisfied.[270]

D. *Robotic Vision Systems, Inc. v. View Engineering, Inc.*[271]

Robotic Vision Systems sued View Engineering for infringement of Robotic's '227 patent.[272] Robotic appealed the lower court's finding of invalidity under the on sale bar of § 102(b).[273] The Federal Circuit agreed with the district court's finding that the "patented method was the subject of a commercial offer for sale prior to the critical date."[274] The issue on appeal was whether the district court's finding, that the software claimed in the patent was ready for patenting prior to the critical date, was clearly erroneous.[275] On appeal, the Federal Circuit held that the lower court's factual findings were not clearly erroneous, and the patent claim was therefore invalid.[276]

The facts in the case were as follows: prior to the critical date, June 24, 1991, one of the patent's co-inventors, William Yonescu, "explained the invention" to one of Robotic's software developers, Daniel Briceno.[277] Briceno subsequently "completed the software program pursuant to

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270. *See id.* at *5. The court found "no evidence that the patented invention had been reduced to practice before the critical date or that prior to the critical date the inventors had prepared drawings or other descriptions of the invention that were sufficiently specific to enable a person skilled in the art to practice the invention." *Id. See also Pfaff*, 525 U.S. at 67-68; 35 U.S.C. § 102(b) (1994).

271. 249 F.3d 1307 (Fed. Cir. 2001).

272. *See id.* at 1309. The '227 patent (U.S. Patent No. 5,463,227) "discloses a method of scanning the leads on integrated circuit devices that are arranged in rows and columns on a multi-pocketed tray." *Id.* The patent application was filed on June 24, 1992, and the patent was issued on October 31, 1995. *See id.* Robotic filed the original infringement suit on the same day that the patent was issued. *See id.*

273. *See Robotic Vision Sys.*, 249 F.3d at 1308-09. View had filed a motion for summary judgment, which the court granted, finding that the patent was invalid because: (1) the patent application did not "disclose the best mode of carrying out [the] invention;" and (2) the "claimed invention was on sale prior to the critical date." *Id.* at 1309. The district court granted summary judgment and Robotic appealed. *See id.* at 1308-09. The Federal Circuit vacated the lower court's decision as to summary judgment with respect to invalidity under the on sale bar and "remanded the case for further fact-finding on the sole issue [of] whether the requisite software for Robotic's full-tray scanning method was completed before the critical date." *Id.* at 1309. On remand, the district court held that the '227 patent was invalid because the claimed invention was on sale and ready for patenting before the critical date. *See id.* at 1310. *See also* 35 U.S.C. § 102(b) (1994).

274. *Robotic Vision Sys.*, 249 F.3d at 1310-11.

275. *See id.* at 1311. *See also Pfaff*, 525 U.S. at 67-68.

276. *See Robotic Vision Sys.*, 249 F.3d at 1313.

277. *See id.* at 1309-11.

Yonescu's description."[278]

Using *Pfaff*'s ready for patenting test, the Federal Circuit concluded that Yonescu's explanation to Briceno was a "disclosure," and further, that this disclosure satisfied the requirement of "drawings or other descriptions."[279] In addition, the Federal Circuit concluded that Yonescu's explanation was "sufficiently specific to enable ... a person skilled in the art, to practice the invention" because Briceno was able to take over where Yonescu left off.[280]

Robotic had argued that the claimed invention was not ready for patenting because: (1) Yonescu's explanation to Briceno was not actually a "disclosure" because "more work was needed to determine whether the invention would work for its intended purpose; and (2) the software needed to implement the method claimed in the patent did not actually exist when Yonescu explained the invention to Briceno.[281]

The Federal Circuit did not find either argument persuasive. First, the court interpreted *Pfaff* to require only a "disclosure that is sufficiently specific to enable a person skilled in the art to write the necessary source code to implement the claimed method," and that Briceno was such a person.[282] Second, *Pfaff* "interpreted the term 'invention' as requiring a complete *conception*," not a completed invention.[283]

E. Summary

These cases have a number of features in common. First, there was little discussion in any of the opinions as to which software development model was used or what software development activities were carried out. From reading these opinions, one might infer that the only activities ever conducted are coding and testing, with little or no advance definition or design. There appears to be a lack of understanding as to how complex software products are brought to market. The impression is that software development is an art, not a science, and not amenable to careful planning and execution.

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278. *Id.* at 1311.

279. *Id. See also Pfaff*, 525 U.S. at 67-68.

280. *See Robotic Vision Sys.*, 249 F.3d at 1311.

281. *See id.* at 1311-12. In the first appeal, the Federal Circuit had applied the substantially complete test, and concluded that there was a "genuine issue as to whether the making of the device was substantially completed before the critical date." Robotic Vision Sys., Inc., v. View Eng'g, Inc., 112 F.3d 1163, 1167 (Fed. Cir. 1997). *See also Pfaff*, 525 U.S. at 67-68.

282. *Robotic Vision Sys.*, 249 F.3d at 1311 n.2. "[U]nder *Pfaff*, actual completion of such software is not required." *Id.* at 1311.

283. *Id.* at 1312 (citation omitted).

In *Isogon*, the court mentions only that the "overall structure" of the product had been completed before another employee "took over."[284] It is not clear whether this "overall structure" was the product of detailed definition and design activities or merely a prototype that resulted from limited coding and testing activities.[285] It seems improbable, however, that the resulting 150,000 line, four-major-component software program was developed and tested without any process in place. Even the court noted that the product was "complex."[286]

Similarly, in *Robotic Vision Systems*, the developer took over where the inventor left off.[287] The implication is that no formal definition or design activities were conducted before or after the hand-off. The court only states that the inventor "explained the invention" and the developer "completed the software program."[288] Again, given the complexity of the resulting software product, a "method of scanning the leads on integrated circuit devices that are arranged in rows and columns on a multi-pocketed tray," it seems unlikely that no definition or design activities were conducted, or that testing activities were carried out haphazardly.[289]

In *Novadigm*, however, it is possible to infer that an iterative development model was used because of the discussion of the three generations of the EDM software, although there is no detail in the opinion.[290] Similarly, there was no discussion of models or activities in *Articulate*; the opinion mentions only that a prototype was demonstrated, and that there was insufficient evidence to determine whether or not the software product was ready for patenting.[291]

A second feature common to these opinions is the limited discussion relative to documentation. One might infer that software products simply materialize, and are merely documented after the fact for the benefit of customers and users.

In *Isogon*, the only documentation mentioned in the opinion is a User's Manual, but a single drawing could not possibly describe such a complex

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284. Isogon Corp. v. Amdahl Corp., 1997 WL 759435 (S.D.N.Y. Dec. 10, 1997). *See supra* notes 220-21 and accompanying text.

285. *See supra* note 220 and accompanying text.

286. *See supra* notes 215, 223 & 231 and accompanying text.

287. *See Robotic Vision Sys.*, 249 F.3d at 1307. *See also supra* notes 277-78 and accompanying text.

288. *See supra* notes 277-78 and accompanying text.

289. *See supra* note 272.

290. *See* Novadigm, Inc., v. Marimba, Inc., 2000 WL 228356, at *1 (N.D. Cal. Feb. 15, 2000). *See also supra* notes 266-67 and accompanying text.

291. *See* Articulate Sys., Inc., v. Apple Computer, Inc., 53 F. Supp. 2d 62, 64 (D. Mass. 1999). *See also supra* notes 239-42 & 251-52 and accompanying text.

150,000-line program.[292] Further, it is not clear how, with only ten percent of the final product coded, and no other documentation, a court could conclude that the invention's "conception" had been completed and ready to patent.[293] In *Robotic Vision Systems*, the court considered an "explanation" to be sufficient disclosure for what appears to be a complex product.[294] There is no mention of documentation in the other two cases, *Novadigm* and *Articulate*.

Third, it is difficult to determine the relative skill levels of the inventors and developers from the opinions. As noted previously, software developers range in experience and expertise, and teams develop most complex software products.[295] One might infer from these opinions, however, that software just happens, fabricated by a few brilliant minds. In *Robotic Vision Systems* and *Isogon*, for example, the implication is that only two people were responsible for all the technical effort.[296]

In summary, the *Pfaff* ready for patenting test appears difficult to use in software patent infringement cases, perhaps because of the lack of understanding of software development. As previously discussed, the choice of software process model and development activities greatly influences when and how the ready for patenting test is applied. Unfortunately, this lack of understanding may lead to unfair and inconsistent results, as shown by the discussion of the four post-*Pfaff* software patent infringement cases. As a result of this new standard, "[t]he risk of losing patent rights by virtue of the on-sale bar is now higher than ever."[297]

V. CONCLUDING RECOMMENDATIONS

This Comment offers three recommendations for reducing the risk of forfeiting patent rights: (1) file patent applications early; (2) document the software development process; and (3) closely monitor sales, marketing, and investment activities.

As stated previously, it is not clear how to interpret the reduction to practice requirement.[298] As the *Robotic Vision Systems* court noted, proof

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292. *See* Isogon Corp. v. Amdahl Corp., 1997 WL 759435, at *1 (S.D.N.Y. Dec. 10, 1997). *See also supra* notes 223-29 and accompanying text.

293. *See supra* notes 223 & 228-32 and accompanying text.

294. *See* Robotic Vision Sys., Inc. v. View Eng'g, Inc., 249 F.3d 1307, 1309 (Fed. Cir. 2001). *See also supra* notes 277-83 and accompanying text.

295. *See supra* note 170.

296. *See Robotic Vision Sys.*, 249 F.3d 1307; *Isogon*, 1997 WL 759435.

297. Knobbe, Martens, Olson & Bear, LLP, *Supreme Court Defines New Standard in Patent Law*, *at* http://www.kmob.com/Pages/newslet1.htm (last visited Mar. 12, 2003).

298. *See supra* notes 202-08 and accompanying text.

of a complete invention is not required, only proof of a complete "conception."[299] Coding a core portion of a software program may suffice, as may a demonstration of a prototype to a potential customer. In any case, it is very likely that a court could find that a software invention was "reduc[ed] to practice" long before it was commercially viable.[300]

It is also not clear how to interpret the requirement of "proof that ... the inventor had prepared drawings or other descriptions of the invention that were sufficiently specific to enable a person skilled in the art to practice the invention."[301] An undocumented conversation between an inventor and a developer might satisfy the requirement, as might formal definition and design documentation. It would seem prudent to accurately document each stage of the software development process, even if that process is relatively unstructured.[302]

Finally, while not the main topic of this Comment, the *Novadigm* case highlights another risk inherent in the patenting process—whether the software has been "the subject of a commercial offer for sale" prior to the critical date.[303] Inventors must be extremely careful when giving demonstrations to potential customers or investors, and when entering into license or test agreements.[304]

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299. *See Robotic Vision Sys.*, 249 F.3d 1307 (Fed. Cir. 2001). *See also supra* note 283 and accompanying text.

300. *See Pfaff*, 525 U.S. at 67. *See also* Robert Platt Bell, *The Real Lessons of* Pfaff v. Wells Electronics: *File Early, File Often, File Provisional*, *at* http://users.starpower.net/robertbell.marksee/articles/Pfaff.html (last visited Mar. 12, 2003) ("[t]he solution is to file early ... [t]his simple and sound advice is often lost on Patentees, who let immediate concerns (such as budgets, product introductions, and the like) delay patenting of inventions"); Steven Hultquist, *Adopting a Conservative Approach to On-Sale Exposure in the Aftermath of* Pfaff v. Wells Electronics, Inc., *at* http://www.iptl.com/articles/pfaff.htm (last visited Mar. 12, 2003) ("[f]ile at the earliest possible point in time after conception of the invention").

301. *Pfaff*, 525 U.S. at 67-68. *See also supra* notes 209-12 and accompanying text.

302. "Inventors, patent attorneys and plaintiff's attorneys will have to evaluate thoroughly whether any description of the invention, such as drawings, lab notebooks, dictations, computer models, or even an oral presentation at a conference or trade show ... would enable one skilled in the art to practice the invention." Ronald Schutz & Peter Reyes, *Are You "Ready for Patenting?"* Pfaff *and the New On-Sale Bar Test*, *at* http://www.rkmc.com/news.articles.read1.cfm?AID=25 (last visited Mar. 12, 2003).

303. *See* Novadigm, Inc., v. Marimba, Inc., 2000 WL 228356 (N.D. Cal. Feb. 15, 2000). *See also Pfaff*, 525 U.S. at 67.

304. "Avoid situations that may be construed as communicating to others, prior to the critical date, any commercial availability (for purchase, distribution, or any other commercial exploitation), of an invention, regardless of whether the invention has been tangibly embodied, or is simply an operative concept in its inventor's mind." Hultquist, *supra* note 300. *See also* Ray Edwards, *Is an Idea on Paper an Invention?*, *at* http://kmworld.com (last visited Mar. 12, 2003). "The bottom line ... is communication.

In conclusion, while the ready for patenting test is not well-suited to software patents, and has been difficult to use in software patent infringement cases, the software inventor may mitigate the associated risk by filing early, documenting the development process, and closely monitoring non-development activities.

Kathryn Vesco Chelini

Marketing and patenting cannot each be done in a vacuum. R&D needs to send the same messages to legal and marketing. The legal department must know what is being offered for sale, and the marketing department must know what is to be patented." *Id.*

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Bergman v. Chin: Why an Elder Abuse Case is a Stride in the Direction of Civil Culpability for Physicians Who Undertreat Patients Suffering from Terminal Pain

"I think we are at a new place in law and medicine ... [where] [f]ailure to treat pain can now be something that physicians are held accountable for."[1]

I. INTRODUCTION

Reducing pain and suffering may be the most important reason students attend medical school. However, the truth is that numerous studies have shown that pain and suffering are routinely ignored or undertreated in most medical specialties.[2] Now, more than ever, progress in the area of medical care is dependent on a powerful combination of technology and humanity.[3] It is shocking to many that, even in today's morally advanced society, patients continue to suffer the adverse consequences that arise, and the discomfort associated with, terminal illness and chronic pain.[4]

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1. Susan Okie, *Calif. Jury Finds Doctor Negligent in Managing Pain*, WASH. POST, June 15, 2001, at A2, *available at* 2001 WL 23174418 (quoting Kathryn Tucker, the director of legal affairs at the Compassion in Dying Federation in regards to *Bergman v. Chin*, No. H205732-1 (Cal. Super. Ct. June 13, 2001), and its legal impact on how the medical field treats pain).

2. *See* Paul M. Paris, *No Pain, No Pain*, 7 AM. J. EMERGENCY MED. 660, 660 (1989). *See also infra* notes 73-104 and accompanying text.

3. *See id.*

4. *See* ARTHUR CAPLAN, *In Health Care Reform Think of Patient Comfort Too, in* MORAL MATTERS: ETHICAL ISSUES IN MEDICINE AND THE LIFE OF THE SCIENCES 42 (1995). An author recalling the experience of his terminally ill father's last days in the hospital is tormented by the fact that "health care reform" does not consider patient comfort. *See id.* He finds it troubling that although physicians allowed his father full control of medical technology and immediately agreed to a no resuscitation order, it could disturbingly take a nurse up to a half an hour to administer a shot to relieve pain. *See id.* Beverly Bergman commented on the last days of her father's life at the Eden Medical Center, "[e]very time I saw my father, he was in pain ... I had to ... get the nurse and ask her to give my dad a pain shot." Susan Okie, *Doctor's Duty to Ease Pain at Issue in Calif. Lawsuit; Physicians are*

This Comment addresses the inability of a patient to assert a claim in medical malpractice seeking a meaningful remedy for inadequate treatment of pain. Part II provides an overview of pain and why failure to treat pain is not a legitimate medical malpractice claim.[5] Part III discusses the public and professional perceptions of pain and pain treatment.[6] Part IV discusses the defendant's and the plaintiffs' respective arguments in *Bergman v. Chin*.[7] Finally, Part V addresses the after-effects of *Bergman* and its impact on the standard of care in California.[8]

II. OVERVIEW

Pain is defined as "a more or less localized sensation of discomfort, distress, or agony, resulting from the stimulation of specialized nerve endings."[9] Oligoanalgesia is the term used to describe the phenomenon that occurs when analgesics[10] are used too infrequently or "at doses insufficient to relieve pain."[11] Pain is a complex experience that involves neurological and psychological components.[12] In assessing patients with pain, it is essential that the physician evaluate the cause of pain, its severity, type, location, quality, duration, and the patient's response to therapies.[13]

Pain is measured by subjective responses.[14] Recognized treatments for pain, other than medication, include: (1) support; (2) placebos; (3) relaxation training; (4) biofeedback; and (5) hypnosis.[15] Currently, physicians are faced with a constant battle between the negative

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Wary in Prescribing Narcotics, WASH. POST, May 7, 2001, at A3, *available at* 2001 WL 17626770.

5. *See infra* notes 21-44 and accompanying text.

6. *See infra* notes 45-128 and accompanying text.

7. No. H205732-1 (Cal. Super. Ct. June 13, 2001) *See infra* notes 129-298 and accompanying text.

8. *See infra* notes 299-303 and accompanying text.

9. DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1304 (29th ed. 2000).

10. An analgesic is "an agent that alleviates pain without causing loss of consciousness." *Id.* at 71. Narcotics are classified as opioids or the class of compounds that binds receptors in the nervous system in order to block the patient's perception of pain or affect the emotional response that the patient has to pain. *See id.*

11. *Id.* at 1259. Additionally, the term "opiophobia" was coined to describe the unscientific and irrational fears of opioids among healthcare professionals and the general public, concerning the dangers and evils of pain medications especially narcotics, which are classified as opioids. *See* Ann M. Martino, *In Search of a New Ethic For Treating Patients With Chronic Pain: What Can Medical Boards Do?*, 26 J. L. MED. & ETHICS 332, 336 (1998).

12. *See* L. Lasagna, *The Management of Pain*, 32 DRUGS 4, 6 (1986).

13. *See id.*

14. *See id.*

15. *See id.*

repercussions of overtreatment and the professional shortcomings of undertreatment.[16] Added difficulty arises based on the different needs, responses, and economic considerations of each individual patient.[17] Recent methods utilized in pain management include self-administration of parenteral[18] drugs, the search for new analgesics, and appreciation of the relationship between age, sex, race, and how those factors play a role in a person's response to analgesics.[19] New drugs have increased a physician's ability to tailor specific drugs to the needs of individual patients.[20]

Much research has been conducted to study why patients continue to suffer from pain despite advances in medicine.[21] Even more shocking is that in the context of pain management, injured patients are given no opportunity to voice their allegations against physicians for the cruelty associated with unnecessary suffering caused by inadequate pain administration.[22] In reality, undertreatment of pain often constitutes the prevailing practice amongst physicians. Therefore, under the legal system of redress, adhering to that practice does not violate any professional duty imposed on the physician.[23] A higher standard that would compel liability on a physician for failing to exercise reasonable care despite adherence to the national medical standard is needed.[24]

A. Why Failure to Treat Pain is not a Legitimate Medical Malpractice Claim

Although physicians face criminal prosecutions for improperly proscribing controlled substances, and can be sanctioned by the medical licensing or other medical board in a disciplinary action, there is no medical malpractice cause of action for failure to adequately treat pain.[25]

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16. *See id.* at 4.

17. *See id.*

18. *See* DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1324 (29th ed. 2000). Parenteral medication refers to a procedure whereby the analgesic is administered not through the mouth and absorbed through the process of digestion, but instead is administered by injection through some other route like subcutaneous, intramuscular, intraorbital, intrascapular, intraspinal, intrasternal or intravenous. *See id.*

19. *See* Lasagna, *supra* note 12, at 5.

20. *See id.* Specifically, tricyclic antidepressants, phenothiazines and the new non-steroidal anti-inflammatory drugs have improved a physician's ability to tailor specific drugs to the needs of individual patients. *See id.*

21. *See infra* notes 105-28 and accompanying text.

22. *See infra* notes 25-37 and accompanying text.

23. *See infra* notes 25-37 and accompanying text.

24. *See infra* note 34 and accompanying text.

25. *See* Barry R. Furrow, *Pain Management and Provider Liability: No More Excuses*, 29 J.L. MED. & ETHICS 28, 30 (2001).

Pain and suffering can appear as an element of an asserted medical malpractice case only where the physician's failure to treat or diagnose a disease was a deviation from the medical standard.[26] While tort liability plays an important role in our society by providing a remedy to a person harmed by negligent or intentional acts of others, there is no such remedy available in the context of pain management. Therefore, patients are unable to voice their civil allegations against physicians for the cruelty associated with unnecessary suffering caused by inadequate pain administration.[27]

Common sense and public policy dictate that to protect the health and lives of the public, physicians must be held liable to their patients for failure to practice medicine with the requisite degree of care, skill, or knowledge.[28] A physician is reasonably expected to possess the medical knowledge commonly possessed in the same specialty or general field of practice throughout the United States.[29] The traditional view, followed by a majority of the jurisdictions, is that the usual and customary practice sets the standard of care for physicians.[30] Because undertreatment of pain often constitutes the prevailing practice amongst physicians, adhering to that practice does not violate any professional duty imposed by law on the physician.[31] There are courts that are moving away from the professional standard to hold physicians accountable for breach of their professional duty even when their actions constituted the customary practice.[32] Currently, however, a physician's failure to adequately treat pain does not expose that physician to liability for medical malpractice.[33]

A superior standard developed to address the liability loophole with respect to undertreatment of pain, for all medical malpractice cases, would impose liability on a physician for failing to exercise reasonable care despite adherence to the national medical standard.[34] This approach was

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26. *See id.*

27. *See id.*

28. *See* Hall v. Hilbun, 466 So. 2d 856, 866-67 (Miss. 1985).

29. *See id.* at 871.

30. *See* Holt v. Godsil, 447 So. 2d 191, 192 (Ala. 1984).

31. *See id.*

32. *See* Nowatske v. Osterloh, 543 N.W.2d 265, 271-72 (Wis. 1996). *See also* Favalora v. Aetna Cas. & Sur. Co., 144 So. 2d 544, 551 (La. Ct. App. 1962).

33. *See* Ladish v. Gordon, 879 S.W.2d 623 (Mo. Ct. App. 1994) (holding that physician's failure to anesthetize or sedate the plaintiff to separate her labial lips during a procedure did not constitute negligence because the plaintiff's expert could not establish that the physician's conduct was a deviation from the standard of care).

34. *See* Darling v. Charleston Comty. Hosp., 211 N.E.2d 253 (Ill. 1965). In the *T.J. Hooper* case, liability for defendant was found even where industry custom did not require vessels to be equipped with a functioning radio for receiving weather reports. *See* T.J. Hooper, 60 F.2d 737 (2d Cir. 1932). The duty of the court to find liability even where

followed in the case of *Helling v. Carney*[35] where the court held that the physician was negligent for failing to utilize a simple, painless, and inexpensive glaucoma test on a thirty-year-old patient even though the standard of care among ophthalmologists did not require the routine administration of the glaucoma test to patients under the age of forty.[36] In that case, the physician's failure to perform a test that could have diagnosed the plaintiff's glaucoma was held to constitute a breach of the duty of care.[37]

B. Palliative Medicine

The National Hospice Organization specializes in palliative pain, which is the pain associated with terminal or other progressive and incurable conditions.[38] Hospice was founded on the principle that controlling pain is central to the care of treating the terminally ill.[39] By administering medication to prevent pain, health care providers allow the patient to focus instead on personal and emotional problems.[40]

Palliative medicine is often considered a more socially acceptable area of pain treatment because the public deems it appropriate to discontinue aggressive curative measures on terminally ill patients where the objective is to maximize the patient's quality of life.[41] However, many physicians do

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defendant adhered to the industry standard is now referred to as the T.J. Hooper Rule and was explained by Judge Learned Hand as follows:

> There are, no doubt, cases where courts seem to make the general practice of calling the standard proper diligence .... Indeed in most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have lagged in the adoption of new and available devices. It may never set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.

See id. at 740. Some courts have embraced the T.J. Hooper Rule of negligence and applied it to cases of medical malpractice. *See, e.g., Nowatske,* 543 N.W.2d at 272. Those courts have held that adherence to custom in the medical community should not prove dispositively that the physician exercised reasonable care and should therefore not be held liable for medical malpractice. *See id.*

35. 519 P.2d 981 (Wash. 1974).

36. *See id.* at 983.

37. *See id.*

38. *See* Robert M. Cunningham, Jr., *The Evolution of Hospice*, 59 HOSPITALS 124 (1985). Hospice is a "centrally administered program of palliative and supportive services which provides physical, psychological, social and spiritual care for dying persons and their families." *Id.* at 125.

39. *See id.* at 126.

40. *See id.* at 125.

41. *See* Vincent Morrissey et al., *Awareness of Hospice Services: Results of a*

not follow the palliative model and instead abide by the curative method whereby patient treatment consists of effectively diagnosing and curing disease.[42] Under the curative model, administering high levels of pain medication may be thought to hasten the patient's death and is therefore inappropriate.[43] While society is more comfortable with adequately treating patients who are in a terminal state because there is no threat of addiction, many patients continue to suffer from inadequate pain relief that cannot be redressed in the current legal system.[44]

III. ANOTHER LOOK AT PAIN

The public's perception of narcotics affects the treatment of patients suffering from pain.[45] The public's irrational fear that the use of narcotics should be avoided because of the threat of addiction causes patients to be treated less effectively for pain and causes pain sufferers to resist the use of narcotics.[46] Stringent state regulations that restrict the use of narcotics help shape society's belief that narcotics are bad or wrong.[47] Within the medical community, misconceptions about pain and its treatment are rampant, resulting in the consistent underestimation of effective dose range, overestimation of the duration of effectiveness, and exaggeration of the dangers of addiction.[48]

A. The Public View of Pain

Historically, narcotics are associated with opium dens and drug addicts.[49] Today, Americans feel that the use of narcotics should be avoided because of the possibility of addiction.[50] States have become

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National Survey, 104 PUBLIC HEALTH REP. 176 (1989) (documenting that hospice in the United States started in 1973, and that by 1989, fourteen hundred hospices were in operation).

42. Ben A. Rich, *A Prescription for the Pain: The Emerging Standard of Care for Pain Management*, 26 WM. MITCHELL L. REV. 1, 23 (2000).

43. *See id.* at 23.

44. *See supra* notes 25-37 and accompanying text.

45. *See infra* notes 53-55 and accompanying text.

46. *See infra* notes 53-55 and accompanying text.

47. *See infra* notes 105-28 and accompanying text.

48. *See infra* notes 73-104 and accompanying text.

49. *See* Charles R. Shuster, *Does Treatment of Cancer Pain with Narcotics Produce Junkies?*, 11 ADVOC. IN PAIN RES. & THERAPY 1, 1-2 (1994). *See also* Rex Greene, M.D., *Towards a Policy of Mercy: Addiction in the 1990s*, 3 STAN. L. & POL'Y REV. 227, 228 (1991) (commenting that while the concern about addiction to "street" drugs such as marijuana and crack cocaine is justified, studies have shown that morphine, a drug often administered for severe pain, is not addictive).

50. *See* Patricia C. Crowly, *No Pain, No Gain? The Agency for Health Care Policy &*

involved by recommending that physicians undergo additional instruction for prescribing controlled substances and by tightening rules on prescribing such drugs as codeine, hydrocodone, and oxycodone—the active ingredient in the controversial painkiller OxyContin.[51] Pharmacy robberies and fatal overdoses linked to OxyContin have fueled the public's ignorance and aversion to analgesic pain medications.[52] Many pain sufferers, however, consider OxyContin a literal lifesaver, making it possible to carry on normal functions that were once impossible because of crippling pain.[53] The social stigma attached to OxyContin has made physicians wary of prescribing the controversial painkiller, and has made pain sufferers wary of continued use.[54] This recent epidemic clearly illustrates the power of public perception to affect the treatment of patients suffering from pain.[55]

The Controlled Substances Act (CSA),[56] administered by the Drug Enforcement Administration (DEA),[57] is the principal federal law that regulates the prescribing of controlled opiates.[58] Heavy regulation of opiates creates public misconceptions. Opiates fall under Schedule II[59] of

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Research's Attempt to Change Inefficient Health Care Practice Withholding Medication from Patients in Pain, 10 J. CONTEMP. HEALTH L. & POL'Y 383, 383 (1994).

51. *See* Carolyn Kleiner, *A Curse and a Cure*, U.S. NEWS & WORLD REP., Aug. 6, 2001, at 42. OxyContin is an "[o]pium-based painkiller that was approved for treating moderate to severe pain in 1995. It quickly became regarded as a major breakthrough thanks to a unique time-released delivery system that produces a steady amount of oxycodone, its active ingredient, in the bloodstream for up to 12 hours." *See id.* Kleiner reports specifically about two chronic pain sufferers who were relieved when they found that OxyContin could adequately relieve their pain. Both sufferers reported that their situations have once again become desperate because their medical care providers will not prescribe OxyContin for pain relief due to the negative publicity surrounding the drug. *See id.*

52. *See id.*

53. *See id.* Some chronic pain sufferers reported that OxyContin worked better than any pain medication they had ever used, making it possible to perform daily activities like bathing and dressing one's self. *See id.*

54. *See id.*

55. *See* Kleiner, *supra* note 51, at 42 (addressing the public's perception that patients using OxyContin are junkies or drug addicts despite studies that show only one percent of patients properly treated with opiates become addicted).

56. P.L. 91-513, 84 Stat. 1242 (1970) (codified as amended at 21 U.S.C. §§ 801-971 (2000).

57. 21 C.F.R. §§ 1306.04(a), 1306.07(c) (1996).

58. *See* Michael J. Reynolds, *Morphine or Malpractice: Should Courts Recognize a Legal Duty to Prescribe Opiates for Treating Chronic Pain*, 15 ST. JOHN'S J. LEGAL COMMENT. 79, 82 (2000).

59. 21 C.F.R. § 1306 (1996). Controlled substances are categorized by the DEA in five different schedules according to their potential for abuse. *See* Reynolds, *supra* note 58, at 82. Schedule I controlled substances are illegal. Schedule II controlled substances can be prescribed by a licensed physician despite their addictive qualities. Morphine, methadone,

the CSA because of their high potential for abuse, further fueling the public perception that opiates are dangerous.[60] This prevalent public attitude persists despite the CSA's implicit recognition that opioids have significant medical value for treating chronic pain[61] and that the CSA and DEA do not define chronic pain patients as addicts.[62] Additionally, CSA regulations do not limit the amount of the drug that a physician can prescribe at one time, indicating that it is appropriate for the physician to use professional judgment when prescribing Schedule II narcotics to patients.[63]

B. How the Experts Perceive Pain

There are many factors that play a role in the widespread inadequacies that exist in relation to pain treatment.[64] The medical community has thoroughly documented, over the past thirty years, that healthcare providers inadequately medicate pain sufferers and severely overestimate the addictive risks associated with pain medication.[65] Studies have confirmed this undertreatment of pain, and have further shown that such undertreatment is often related to the age, sex, or race of the patient.[66]

Another obstacle existing in the medical community is the fear amongst physicians that they will be sanctioned by regulatory boards, including administrative agencies comprised of medical boards, for over-prescribing analgesics.[67] The penalties imposed by state medical boards are harsh, tend to receive a lot of attention, and contribute to the reluctance of physicians to treat their patients suffering from pain.[68] Two noteworthy cases, *Hoover*

Dilaudid, and oxycodone are examples of Schedule II narcotics. *See id.*

60. *See* Reynolds, *supra* note 58, at 82.

61. *See id.*

62. 21 C.F.R. § 1306 (1996).

63. *See id.*

64. *See* Paris, *supra* note 2.

> One can hypothesize multiple factors involved in the widespread institutionalization of inadequate pain therapy: little clinically oriented education in medical schools and residencies; lack of a general understanding of the basic pharmacology of the common analgesics; exaggerated fears of the side effects and abuse potential of narcotics; unproven concerns that narcotics will mask diagnosis; over-generalization from unrewarding clinical interactions with selected pain patients (i.e., chronic back pain, migraine headaches, sickle cell anemia, and pain conditions in narcotics abusers); and lack of training in the communication and interactive skills involved in the "art of Medicine."

Id. at 660.

65. *See infra* notes 73-104 and accompanying text.

66. *See infra* notes 73-104 and accompanying text.

67. *See infra* notes 105-28 and accompanying text.

68. *See infra* notes 105-28 and accompanying text.

v. Agency for Health Care Administration[69] and *Hollabaugh v. Arkansas State Medical Board*,[70] indicate that appellate courts play a key role in the review of medical board findings that grant license revocation or suspension on the basis of wrongful or excessive prescribing.[71] These cases also indicate that medical boards impose overburdening restrictions on physicians,[72] which contribute to the undertreatment of patient pain.

1. Documenting the Undertreatment of Pain

Several studies conducted over the past three decades demonstrate that physicians and other health care providers inadequately medicate patients suffering from pain. The leading study dates to 1973, when it was found that physicians treating patients in a therapeutic dosage range using analgesics consistently underestimated the effective dose range, overestimated the duration of effectiveness, and exaggerated the dangers of addiction.[73] The study consisted of structured interviews with thirty-seven medical inpatients who were being treated with narcotic analgesics and was the first of its kind to show that an overwhelming majority of patients continued to suffer from pain despite their analgesic intake.[74] More alarming were the physicians' misconceptions about pain treatment.[75] The study revealed that the physicians mistakenly overestimated the incidence of withdrawal symptoms and overestimated the incidence of addiction.[76] Physicians erroneously believed that a significant percentage of patients became addicted while on an analgesic regimen.[77] Even when presented with a patient in the terminal phase of metastatic cancer, twenty-one percent of the physicians responded that they would maintain the current dosage of pain medication or start a trial of placebos.[78] These seemingly archaic responses to treating pain continue today and are evidenced by several later studies.

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69. 676 So. 2d 1380 (Fla. Ct. App. 1996)

70. 861 S.W.2d 317 (Ark. Ct. App. 1993)

71. *See infra* notes 105-28 and accompanying text.

72. *See, e.g.*, *Hoover*, 767 So. 2d at 1382; *Hollabaugh*, 861 S.W.2d at 320.

73. *See* R.M. Marks & E.J. Schar, *Undertreatment of Medical Inpatients with Narcotic Analgesics*, 78 ANNALS OF INTERNAL MED. 173-81 (1973). The study was initiated by liaison psychiatrists who noticed that patients with marked emotional responses to pain were being undertreated with analgesics and their emotional responses were not, as originally suspected, the result of personality problems. *See id.* at 173.

74. *See id.* Of the patients studied, thirty-two percent continued to experience severe pain and another forty-one percent were in moderate distress. *See id.* at 174.

75. *See id.*

76. *See id.*

77. *See id.* at 178.

78. *See id.*

Other studies similarly reveal that physicians inadequately treat pain. A review of 198 charts of patients admitted to the emergency department with acutely painful medical and surgical conditions revealed that fifty-six percent received no analgesic medicine.[79] Another study found that Caucasians and Hawaiians received significantly more analgesics than patients of Filipino, Japanese, or Chinese descent.[80] According to the study, "race and its interactions with age and sex accounted for eleven percent of the variance."[81] The study left open the question of whether the inconsistency was attributable to cultural bias in treatment of pain or whether there are actually ethnic differences in analgesic requirements.[82]

The age of a patient also may drastically alter the treatment of pain. Children are notoriously undertreated, which is often attributed to the personal nature of pain and the complexities of assessing pain.[83] A recent study confirmed that age differences alter the administration of pain medication to patients being treated for isolated long-bone fractures.[84] In that study, one group of patients, ages twenty to fifty, was compared to a group of patients older than seventy to identify differences in pain management. The study revealed that non-elderly patients were significantly more likely to receive pain medication in a shorter amount of time and at higher dosages than elderly patients.[85]

Studies that document oligoanalgesic behavior amongst physicians indicate that racial and ethnic disparities are rampant.[86] One study, documenting cancer treatment, found that African American and Hispanic patients were more likely than non-minority patients to receive inadequate treatment using analgesics.[87] One problem identified in a subsequent study of minorities being treated for pain associated with metastatic cancer found

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79. *See* J.E. Wilson & J.M. Pendleton, *Oligoanalgesia in the Emergency Department*, 7 AM. J. EMERGENCY MED. 620-62 (1989).

80. *See* J.W. Streltzer, *The Influence of Cultural Group on the Undertreatment of Postoperative Pain*, 45 PSYCHOSOMATIC MED. 397-403 (1981).

81. *Id.*

82. *See id.*

83. *See* N.L. Schechter, *The Undertreatment of Pain in Children: An Overview*, 36 PEDIATRIC CLINICS N.A. 781-94 (1989) (predicting that changes are occurring and soon it will be socially and medically unacceptable to ignore the suffering of children).

84. *See* J.S. Jones, K. Johnson & M. McMinch, *Age as a Risk Factor for Inadequate Emergency Department Analgesia,* 14 AM. J. EMERGENCY MED. 157-60 (1996).

85. *See id.*

86. *See* Vence L. Bonham, *Race, Ethnicity, and Pain Treatment: Striving to Understand the Causes and Solutions to the Disparities in Pain Treatment*, 29 J. L. MED. & ETHICS 52 (Spring 2001).

87. *See* C.S. Cleeland et al., *Pain and Its Treatment in Outpatients with Metastatic Cancer*, 330 NEW ENG. J. MED. 592, 595 (1994).

that physicians categorically underestimated the severity of their patients' pain when using the pain management index, even when the patient relayed to their physician the need for higher doses of pain medication.[88] Some factors associated with the apparent disparities are the potential for drug abuse, language barriers, and the deficiency on the part of minority patients to aggressively seek pain treatment.[89] The study further stated that financial problems and staffing inadequacies affecting health care facilities must be investigated and considered to fully understand the issues associated with racially and ethnically disparate treatment of pain.[90]

The Systematic Assessment of Geriatric Drug Use via Epidemiology (SAGE)[91] database was used to create an extremely revealing study published in 1998 by the Journal of the American Medical Association that evaluated the pain treatment of 13,625 Medicare recipients.[92] The study found that African Americans were sixty-three percent more likely than Caucasians to have their pain completely untreated.[93] The finding that African American and Hispanic patients were less likely to have their pain recorded in relation to non-Hispanic and Caucasian patients evidenced physician oversight.[94] Title VI[95] of the Civil Rights Act will be a powerful tool to eliminate the racial disparities in relation to pain treatment documented by this study of patients residing in Medicare and/or Medicaid-certified nursing facilities.[96] Progress in this area may be accomplished by the Office for Civil Rights, which established a Racial Disparities Task Force to eliminate, among other things, the racial disparities that exist in health care.[97]

Additionally, other studies show that women are less likely to receive adequate postoperative pain treatment than men.[98] A particularly disturbing

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88. *See id.* at 816.

89. *See id.* at 815.

90. *See id.*

91. SAGE is a computer population database that collects information as part of the Health Care Financing Administration's Multistate Nursing Home Case-Mix and Quality Demonstration Project. *See id.* at 814.

92. *See* R. Bernabei et al., *Management of Pain in Elderly Patients with Cancer,* 279 J. AM. MED. ASS'N 1877, 1877-82 (1998).

93. *See id.* at 1880.

94. *See id.* at 1879.

95. 42 U.S.C. § 2000d (2001) (prohibiting institutions that receive federal assistance from discriminating).

96. *See* Bonham, *supra* note 86, at 52.

97. *See id.* (citing the Office for Civil Rights, U.S. Department of Health and Human Services, OCR Update (Fall 1999): 1-12, 3).

98. *See* Diana E. Hoffman & Anita J. Tarzian, *The Girl Who Cried Pain: A Bias Against Women in the Treatment of Pain,* 29 J. L. MED. & ETHICS 13, 17 (2001).

study revealed that following a coronary bypass graft, men were more likely to be administered narcotics and women were more likely to be administered sedatives, indicating to researchers that physicians perceive women to be suffering from anxiety rather than from actual pain.[99] Several subsequent studies revealed that women were less likely to be adequately treated for pain associated with metastatic cancer[100] and AIDS.[101] A study conducted in 1982 revealed that women treated at pain clinics were, on average, older and had been experiencing pain for longer durations than the men.[102] Additionally, the study exhibited that men were likely to be prescribed opioids, which are more effective than the minor tranquilizers, antidepressants, and non-opioid analgesics that were prescribed to women.[103] The findings of these studies confirm that physicians view the pain symptoms of women to be emotional even when physical proof exists to the contrary.[104]

2. Regulatory Schemes May Perpetuate the Undertreatment of Pain

Another obstacle to proper pain treatment is that physicians fear sanctions from regulatory boards for over-prescribing analgesics.[105] Currently, Oregon is the only state where a physician was found in violation of standards by the board of medical examiners for undertreatment of pain.[106] Many physicians practicing in states that have enacted laws[107] or adopted administrative rules[108] that establish guidelines

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99. *See* K.L. Calderone, *The Influence of Gender on the Frequency of Pain and Sedative Medication Administered to Postoperative Patients*, 23 SEX ROLES 1, 3 (1990).

100. *See* Cleeland et al., *supra* note 87, at 592-96.

101. *See* W. Breitbart et al., *The Undertreatment of Pain in Ambulatory AIDS Patients*, 65 PAIN 243, 243-46 (1994).

102. *See* D.Z. Lack, *Women and Pain: Another Feminist Issue*, 1 WOMEN & THERAPY 55 (1982).

103. *See id.*

104. *See id.* Factors that result in gender-based biases in the treatment of pain, other than the rampant assumption among health care providers that women's pain is emotional, include the cultural stereotyping of women as weak and society's determination of the suitableness of a woman's complaints relating to pain. *See id.* Researchers have come to the ironic conclusion that women are not treated for pain in a comparable manner to men even though women more frequently report pain and generally report greater pain than men do. *See id.*

105. *See* Martino, *supra* note 11, at 332.

106. *See* Okie, *supra* note 4.

107. For example, California enacted the Intractable Pain Treatment Act, CAL. BUS. & PROF. CODE § 2241.5 (West 2000). In California, a physician found to prescribe controlled substances without a physical examination or indication that the drugs were therapeutically required is guilty of unprofessional conduct warranting the revocation of his license to

for the use of narcotic analgesics are hesitant to treat pain adequately for fear they will be sanctioned.[109] Several well publicized cases in the early 1990s contributed to this fear, creating yet another obstacle to adequate treatment of pain.[110]

In many jurisdictions, the authority to revoke or suspend a medical practitioner's license for wrongful or excessive prescriptions is vested in an administrative agency.[111] In reviewing the appropriateness of license revocation or suspension on the basis of wrongful or excessive prescribing, many appellate courts have taken the position that the administrative penalty is to be affirmed unless revocation or suspension under the circumstances would be excessively harsh or shocking.[112] Courts reviewing state board decisions must distinguish between physician conduct that constitutes adequate pain treatment and physician conduct that is in violation of professional standards. Many courts have responded favorably by reversing decisions of various state entities that have imposed restrictions on physicians that are perceived to be overburdening and a contributing factor to the undertreatment of patient pain.[113]

Most notably, the Florida Appellate Court in *Hoover v. Agency for Health Care Administration*[114] overturned that state board's decision requiring Dr. Hoover to serve two years probation, pay a $4,000 fine, and complete continuing medical education for prescribing an abusable medication.[115] Dr. Hoover was alleged to have been over-prescribing narcotic analgesics to patients suffering from intractable pain.[116] Expert

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practice medicine. *See* Kolnick v. Bd. of Med. Quality Assur., 161 Cal. Rptr. 289 (Cal. Ct. App. 1980).

108. For example, Texas adopted title 22 of the Tex. Admin. Code §§ 170.1-170.3 (1996).

109. *See* Martino, *supra* note 11, at 332.

110. *See infra* notes 114-15, 122 and accompanying text.

111. *See infra* notes 114-15, 122 and accompanying text.

112. *See* Widlitz v. Bd. of Regents, 429 N.Y.S.2d 794 (App. Div. 1980) (upholding revocation of physician's license for prescribing controlled substances to known drug addicts without conducting a physical examination because such revocation was not shocking or inappropriate despite the fact that prescriptions were not drawn for monetary gain and the physician's record previously was flawless).

113. *See* Sharon B. Roberts, *All "Pushers" Are Not Created Equal! The Inequities of Sanctions for Physicians Who Inappropriately "Prescribe" Controlled Substances*, 23 NOVA L. REV. 881, 892-93 (1999). *See, e.g.*, Johnson v. Bd. of Med. Exam'rs, 456 So. 2d 939, 942-44 (Fla. Dist. Ct. App. 1984) (reversing medical board's decision to impose sanctions and awarding the physician attorney's fees after physician was improperly found to have over-prescribed opioids for long-term use by chronic pain sufferers).

114. 676 So. 2d 1380 (Fla. Dist. Ct. App. 1996).

115. *See id.* at 1381-82.

116. *See id.* at 1381.

testimony by two physicians was presented stating that Dr. Hoover prescribed excessive, even lethal amounts of narcotics, and had practiced below the standard of care.[117] Neither of the state board's two experts treated chronic pain patients because it was their practice to refer their chronic pain patients to pain management clinics.[118] Additionally, the medical board experts never reviewed the patients' records to determine the diagnosis or prior treatment of the patients.[119] The medical board's decision was overturned on appeal because the agency disciplinary action did not establish by clear and convincing evidence that Dr. Hoover inappropriately or excessively prescribed controlled substances.[120]

In *Hollabaugh v. Arkansas State Medical Board*,[121] an Arkansas appellate court held that Dr. Hollabaugh's suspension for writing prescriptions for controlled substances was improper.[122] The court's decision was based on the supposition that "administrative agencies are better equipped than courts, by specialization, insight through experience, and more flexible procedures to determine and analyze underlying legal issues; ... [particularly] where such issues may be brought up in a contest between opposing forces in a highly-charged atmosphere."[123]

In *Hollabaugh*, the medical board placed Dr. Hollabaugh on one year probation, required her to attend fifty hours of continuing education, ordered her to refrain from writing Schedule II and Schedule III narcotics prescriptions, and subjected her to frequent monitoring by the medical board and the Arkansas State Pharmacy Board for her alleged wrongdoing.[124] Upon examination of the evidence to determine whether it supported the board's decision, the court held that expert testimony presented on behalf of the medical board was insufficient because the experts did not testify that Dr. Hollabaugh's conduct was a violation of the

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117. *See id.* at 1381-82.

118. *See id.* The state board acknowledged that the practice of referring patients to pain management clinics was less a matter of medical practice and was more precisely a way to avoid the legal consequences of prescribing pain medication. *See id.* Dr. Hoover treated indigent patients and was unable to refer them to pain clinics. *See id.*

119. *See* Hoover v. Agency for Health Care Admin., 676 So. 2d 1380, 1382 (Fla. Ct. App. 1996).

120. *See id.* at 1384 (citing Sneij v. Dep't of Prof'l Regulation, Bd. of Med. Examiners, 454 So. 2d 795 (Fla. Ct. App. 1984) (similar case to the one at bar in which evidence presented at disciplinary action was insufficient and the board's decision reflected the board's opinion rather than valid findings of fact).

121. 861 S.W.2d 317 (Ark. App. 1993).

122. *See id.* at 321.

123. *Id.* at 319 (quoting Ark. Alcoholic Beverage Control Bd. v. King, 629 S.W.2d 288, 290 (1982)).

124. *See id.* at 318.

standard of care in her community.[125]

This result is particularly disturbing because a physician cannot be held liable for medical malpractice if the standard in the community is to undertreat pain.[126] This hurdle is further frustrated by medical boards imposing liability for over-prescribing narcotic analgesics even when there is no evidence that the physician's conduct was a deviation from the standard of care.[127] This is clearly illustrated by the case of *Hollabaugh*, where evidence produced by the medical board was held to be inadequate because expert testimony did not establish that Dr. Hollabaugh's conduct was a violation of the standard of care in her community.[128]

IV. THE ANATOMY OF *BERGMAN v. CHIN*: A CASE ASSERTING INADEQUATE TREATMENT OF PAIN

In *Bergman v. Chin*[129] the jury found in favor of the Bergmans on the basis that Dr. Chin's conduct constituted elder abuse.[130] This case will have a notable impact on medical malpractice law and the pain management standards that exist for physicians.[131]

On February 16, 1998, William Bergman, age 85, presented to Eden Medical Center with complaints of severe pain.[132] He had a history of one and one-half years of intractable pain, a long history of smoking, profound recent weight loss of thirty to forty pounds, and bilateral pleural effusion.[133] While in the emergency department, Mr. Bergman was treated

125. *See id.* Expert testimony regarding the type, amount, and frequency of narcotics prescribed by Dr. Hollabaugh was insufficient evidence to warrant the imposition of sanctions without testimony that Dr. Hollabaugh breached the standard of care in the medical community. *See id.* at 321.

126. *See supra* notes 25-37 and accompanying text.

127. *See supra* notes 107-10 and accompanying text.

128. *See Hollabaugh*, 861 S.W.2d at 318. *See, e.g.*, In Re Dileo, 661 So. 2d 162, 167-68 (La. App. 1995) (holding that medical board failed to prove that physician violated state's Medical Practice Act by prescribing pain medication because he did not violate the standard of care); McNeil v. Tenn. Bd. of Med. Exam'rs, No. 01-A-01-9608, 1997 Tenn. App. Lexis 152, at 30 (Tenn. Ct. App. Mar. 5, 1997) (holding medical board's revocation of physician's license for treating patients with narcotics was improper because the physician did not violate the standard of care).

129. No. H205732-1 (Cal. Super. Ct. June 13, 2001).

130. *See infra* notes 237-39 and accompanying text.

131. *See infra* notes 299-303 and accompanying text.

132. *See* Memorandum of Points and Authorities in Support of Plaintiff's Petition for Writ of Mandate/Prohibition or Other Appropriate Relief, Bergman v. Chin, No. H205732-1, at 16 (Cal. Super. Ct. June 8, 2000) (on file with author) [hereinafter Plaintiff's Memorandum].

133. *See id.*

by Dr. Chin, a physician who had not previously cared for him.[134] Although lung tissue tests did not establish conclusively that Mr. Bergman was suffering from cancer, Dr. Chin surmised that Mr. Bergman's cancer had spread to his bones and presumably accounted for the fractures.[135] Beverly Bergman conveyed Dr. Chin's diagnosis to Mr. Bergman, who immediately refused further tests and requested hospice home care.[136]

Dr. Chin prescribed 25 to 50 milligrams of Demerol every three hours and indicated that the medication was to be administered "prn" (as needed).[137] In essence, Mr. Bergman was only permitted to receive pain medication after he demonstrated pain.[138] There was no scheduled pain medication and no regimen designed to relieve Mr. Bergman's pain.[139] While at the hospital, Mr. Bergman was periodically asked to rate his pain on a scale from one to ten. Mr. Bergman reported that his pain ranged between seven and ten, which constitutes moderate to severe pain.[140]

Mr. Bergman's children complained that the nurses at the hospital only intermittently recorded Mr. Bergman's levels of pain.[141] The recording of pain appeared as follows:

> February 17 at 0300 ... 0900 ... 1700: [all] 7 out of 10;
> February 18 at 0500: 9 out of 10 (only recordation);
> February 19 – no recordation;
> February 20 at 0900 ... 1900: [both] 8 out of 10;
> February 21 at 0800 ... 1100 ... 1400: [all] 10 out of 10.[142]

Instead of placing Mr. Bergman on a pain treatment regimen, the hospital administered pain medication only when his family members requested it.[143] However, according to hospital notes made by Dr. Chin, Mr. Bergman reported that he "felt okay" or that his back pain was tolerable.[144]

Mr. Bergman was suffering from intractable pain (ten out of ten) at the time of his discharge, and left the hospital with only Vicodin pills for pain relief even though Beverly Bergman informed doctors that Vicodin had been ineffective for his back pain in the past because Mr. Bergman was

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134. *See id.*

135. *See* Tyche Hendricks, *Patient Never Complained, Says Doctor at Pain Trial*, S. F. CHRON., June 6, 2001, at 1, *available at* 2001 WL 3405560.

136. *See* Okie, *supra* note 4.

137. *See* Plaintiff's Memorandum, *supra* note 132, at 17.

138. *See id.*

139. *See id.*

140. *See* Okie, *supra* note 4.

141. *See* Plaintiff's Memorandum, *supra* note 132, at 17.

142. *See id.*

143. *See id.*

144. *See* Okie, *supra* note 4.

unable to swallow the pills.[145] When Beverly Bergman became aware that Dr. Chin intended to discharge her father, she requested that agents of Eden Hospital contact Dr. Chin.[146] Upon being advised of Beverly Bergman's concern, Dr. Chin prescribed a shot of Demerol for Mr. Bergman and a duragesic patch that took many hours to take effect.[147] Dr. Chin refused to prescribe morphine sulfate or a pain medication of similar potency stating, "it is anticipated that his hospice physician will provide him with narcotic analgesics as indicated."[148] After leaving Dr. Chin's care and coming under another physician's care, Mr. Bergman was promptly prescribed morphine sulfate, which did relieve his pain.[149]

Beverly Bergman was distraught when seeing her father suffer excruciating pain—she even tried unsuccessfully to crush the Vicodin to administer the drug to her father.[150] When Hospice evaluated Mr. Bergman's pain, they determined that it belonged at ten on the pain rating scale, warranting a prescription for liquid morphine, which Dr. Chin refused to prescribe.[151] What particularly disturbed Beverly Bergman was that during her father's five days in the hospital and the following three days at home, he was in absolute agony—despite his last wish to die peacefully.[152]

Beverly Bergman sought help from a nonprofit advocacy group, the Compassion in Dying Federation, after the hospital declined to act on Beverly Bergman's complaints against Dr. Chin.[153] The Bergmans pursued legal action despite the obstacles before them, namely that in California the cause of action for pain and suffering dies with the person.[154] Additionally,

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145. *See id.*

146. *See* Plaintiff's Memorandum, *supra* note 132, at 18.

147. *See id.* at 19.

148. *Id.*

149. *See id.*

150. *See* Okie, *supra* note 4.

151. *See id.*

152. *See* Hendricks, *supra* note 135.

153. *See* Okie, *supra* note 4. The hospital board at Eden Medical Center reviewed Beverly Bergman's case and took no action but did send a letter to the family which read, "[o]ur medical consultant did agree with you that pain management for your father was indeed inadequate. However, there is insufficient evidence at this time to warrant pursuing further action in this case." Mark Crane, *Treating Pain: Damned if You Don't?* MED. ECON. Nov. 19, 2001, *at* http://www.memag.com (last visited Mar. 13, 2003).

154. *See* CAL CIV. PROC. CODE § 377.34 (2001). Under California's civil code:

> [I]n an action ... by a decedent's personal representative ... on the decedent's cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained ... before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the

there is no recognized cause of action for medical malpractice where the physician is following the standard of care; and since undertreatment of pain is the standard in the medical community—as evidenced by numerous studies—Dr. Chin could not be held liable for negligence.[155] Eventually, Beverly Bergman, Robert Bergman, and Alice Edlinger (collectively referred to as "plaintiffs") sought damages from defendants Wing Chin, M.D. and Eden Medical Center for violation of the Elder Abuse and Dependent Adult Civil Protection Act (hereinafter Elder Abuse Act).[156] The plaintiffs settled their claim against Eden Medical Center, and as part of the settlement, the hospital agreed to provide more pain management classes to its staff and doctors.[157] The basis of the plaintiffs' complaint was that Dr. Chin's failure to provide a program of effective pain management to Mr. Bergman was reckless and, therefore, constituted a statutory violation of the Elder Abuse Act.[158]

A. The Battle of the Experts

Pain specialists testifying on behalf of the plaintiffs argued that Dr. Chin improperly chose to prescribe Demerol, a much less potent narcotic, and utilized an as-needed pain treatment regimen instead of prescribing a constant dose of pain medication so that Mr. Bergman's pain did not reach a high point before he could request relief from the nursing staff.[159]

Dr. Chin argued that, although the emergency department treated Mr.

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decedent lived, and do not include damages for pain, suffering or disfigurement.

Id. Put another way, a claim for pain and suffering does not survive the death of the victim. *See* Sullivan v. Delta Air Lines, Inc., 935 P.2d 781, 783 (Cal. 1997). *See also* Kuehn v. Children's Hosp., 119 F.3d 1296, 1298 (7th Cir. 1997) (holding Wisconsin law, which provides that a claim for pain and suffering survives the death of the victim, was the better and less archaic law than California's law).

155. In California, like other jurisdictions, a physician cannot be held liable for medical malpractice where he used the degree of care, skill, and diligence used by other physicians in the same or similar circumstances. *See* N.N.V. v. Am. Ass'n of Blood Banks, 89 Cal. Rptr. 2d 885, 909 (Cal. Ct. App. 1999) (holding that a professional medical association that followed standards could not, as a matter of public policy, face liability for making a choice among competing scientific and medical opinions when the medical and scientific community had not reached a consensus on the proper approach to that medical situation). *See also supra* notes 25-37 and accompanying text.

156. *See* Plaintiff's Memorandum, *supra* note 132 at 3.

157. *See* Okie, *supra* note 4 (quoting Hospital Spokesperson Cassandra Phelps). Eden Medical Center's agreement to provide pain management classes is an interesting form of settlement and encouraging form of resolution because it addresses the underlying inadequacies, rather than narrower resolution for, the specific instance of improper pain treatment.

158. *See* Plaintiff's Memorandum, *supra* note 132, at 3.

159. *See* Hendricks, *supra* note 135, at 2.

Bergman's pain with morphine, a different course of treatment was necessary to avoid breathing problems.[160] Dr. Chin's expert witness testified that Dr. Chin treated Mr. Bergman's pain according to the recognized standard of care and that his decision not to prescribe morphine was based on uncertainty concerning Mr. Bergman's diagnosis and his fear that Mr. Bergman, who suffered from chronic lung disease, could respond adversely to the drug.[161] Dr. Chin insisted at trial that his technique of as-needed treatment was most prudent so that he could properly diagnose Mr. Bergman's illness in order to treat his pain.[162] In response to the allegations that he was not up to date regarding pain management and failed to alleviate patient pain more effectively, Dr. Chin asserted that he feared sanctions.[163] Finally, Dr. Chin broadly refuted the plaintiffs' allegations by maintaining that he had administered morphine throughout his thirty-year career and was quite familiar with the drug and its uses.[164]

B. Breaking Down the Plaintiff's Argument to Reverse Summary Adjudication

A pivotal moment in the *Bergman* case occurred on January 26, 2000, when Dr. Chin filed a motion for summary judgment, or in the alternative, for summary adjudication of issues.[165] In his motion, Dr. Chin argued that the plaintiffs could not demonstrate a triable issue of fact that he had acted recklessly with respect to Mr. Bergman and, in support of this argument, Dr. Chin provided the declaration[166] of Lorne Eltherington, M.D., which opined that Dr. Chin's treatment of Mr. Bergman met the accepted standard of care.[167] It then became necessary for the plaintiffs to advance evidence, which, if believed by a jury, could support a finding of recklessness and preclude a finding for summary judgment or summary adjudication in the defendant's favor.[168]

On February 22, 2000, the plaintiffs filed their opposition to the defendant's motion supported by the declaration of Moira Fordyce, M.D., a

160. *See id.*

161. *See* Okie, *supra* note 4.

162. *See* Hendricks, *supra* note 135.

163. *See id.* at 2.

164. *See id.* at 3.

165. *See* Plaintiff's Petition for Writ of Mandate/Prohibition or Other Appropriate Relief, Bergman v. Chin, No. H205732-1 (Cal. Super. Ct. June 13, 2001), at 6 (on file with author) [hereinafter Plaintiff's Petition].

166. A declaration is a formal written statement, resembling an affidavit but notarized or sworn to, that attests, under penalty of perjury, to facts known by the declarant. BLACK'S LAW DICTIONARY 415 (7th ed. 2000).

167. *See* Plaintiff's Petition, *supra* note 165, at 3.

168. *See id.*

specialist in the field of geriatrics with substantial experience in pain management of the terminally ill.[169] Dr. Fordyce's declaration stated that she had reviewed all of the relevant medical records and depositions, and based upon that review, she concluded that Dr. Chin's conduct was "appalling," fell "profoundly below the standard of care," and amounted to a "disregard ... of Mr. Bergman's pain and suffering."[170] Dr. Fordyce concluded that Dr. Chin's treatment "demonstrated an indifference and deliberate disregard" for Mr. Bergman's continued pain and suffering "and that pain and suffering ... were not necessary and could easily have been avoided by following well accepted pain management techniques."[171]

Dr. Fordyce's opinions were based on the fact that Dr. Chin had used the discredited medication, Demerol, in a weak dose with an improper method of administration, and that Dr. Chin did nothing to adjust or change the medication when it was demonstrated that Mr. Bergman continued to exhibit severe pain.[172] Dr. Fordyce observed from Dr. Chin's deposition that he was ignorant of all the seminal statutory and regulatory guidelines and principles of pain management, including the Pain Patient's Bill of Rights,[173] the California Intractable Pain Act,[174] the AHCPR Clinical Practice Guidelines for Cancer Pain (mailed to all physicians in 1994), the California Medical Board policies relating to prescription of controlled substances, and articles in professional journals concerning treatment of pain.[175] Dr. Fordyce characterized such ignorance as a "serious breach of the standard of care," especially for a physician who regularly treats patients in hospital settings.[176]

According to the plaintiffs, Dr. Fordyce's declaration clearly set forth facts and admissible opinions, which if accepted by a jury, would give rise to a finding of recklessness.[177] However, the court granted summary

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169. *See id.*

170. *Id.* For an explanation of the standard of care applicable in an elder abuse case, see *supra* notes 181-91 and accompanying text.

171. Plaintiff's Petition, *supra* note 165, at 4.

172. *See id.* Dr. Fordyce's expert opinion that Dr. Chin breached the standard of care was based on the fact that that he consciously ignored the pain level observations of nurses, which demonstrated severe pain, and that Dr. Chin attempted to discharge Mr. Bergman without any viable pain medication when his pain level was ten on a scale of ten. *See id.* Furthermore, Dr. Chin's failure to initiate the standard pain management program, which takes a patient out of pain and provides consistency of relief from pain, was a violation of the standard of care. *See id.*

173. CAL. HEALTH & SAFETY CODE § 124960 (West 2000).

174. CAL. BUS. & PROF. CODE § 2241.5 (West 2000).

175. *See* Plaintiff's Petition, *supra* note 165, at 4-5.

176. *Id.*

177. *See id.*

adjudication on the grounds that the plaintiffs had failed to raise a triable issue of material fact showing that the defendant's conduct was reckless and, therefore, constituted a violation of the elder abuse statute.[178] The plaintiffs responded by filing a petition that would later prove crucial in salvaging the plaintiff's claim for elder abuse.[179]

C. The Elder Abuse Statute and the Case of *Delaney v. Baker*[180]

The plaintiffs claimed that Dr. Chin's failure to provide a program of effective pain management was reckless and therefore constituted elder abuse.[181] The California Elder Abuse Act was enacted to protect elders who encounter abuse, neglect, or abandonment.[182] In addition to adopting measures designed to encourage reporting of abuse and neglect,[183] the Act authorizes the court to award attorneys' fees to the prevailing plaintiffs and allows survivors to recover pain and suffering damages in cases of intentional abuse where the elder has died.[184]

Interpretation of California's Elder Abuse Act and its relation to professional malpractice is dictated by *Delaney v. Baker*.[185] In *Delaney*, the plaintiff brought an action on behalf of her deceased mother, who was admitted to the defendant's nursing home facility to recuperate from an ankle injury.[186] While in the facility, the deceased suffered severe neglect, including frequent extended periods when she was left lying in her own urine and feces, which resulted in bedsores that were left untreated.[187] The California Supreme Court addressed whether the general provisions of the Elder Abuse Act were limited by the section governing professional actions, which requires that a cause of action based on professional negligence be governed by laws that specifically apply to professional negligence actions.[188]

Delaney established that health care providers are subject to liability under the Elder Abuse Act and can be held responsible for reckless negligence, abuse, or abandonment, even where the cause of action arises

178. *See id.*

179. *See id.* at 7.

180. 971 P.2d 986 (Cal. 1999).

181. *See* Plaintiff's Memorandum, *supra* note 132 at 3.

182. *See* CAL. WELF. & INST. CODE § 15600 (West 2000). *See also* ARA Living Centers-Pacific, Inc. v. Super. Ct., 23 Cal. Rptr. 2d 224, 226 (Cal. Ct. App. 1993).

183. *See* CAL. WELF. & INST. CODE § 15630 (West 2000).

184. *See Delaney*, 971 P.2d at 987-88.

185. 971 P.2d 986 (Cal. 1999).

186. *See id.* at 988.

187. *See id.*

188. *See id.* at 989.

from the performance of health care services.[189] Furthermore, health care providers who engage in reckless neglect of an elder are subject to the heightened remedies available under the Act because that cause of action is distinct from a cause of action for professional negligence, and thus the restrictions on remedies against health care providers for professional negligence are inapplicable.[190] The plaintiffs faced the daunting task of proving to the appellate judge that evidence existed that, if believed by a jury, could support a finding of recklessness.[191]

1. Plaintiffs' Procedural Argument

On appeal, the Bergmans argued that California law permitted immediate review of the summary adjudication order because no adequate alternative remedy existed at law.[192] The plaintiffs argued that without a writ, they would be forced to proceed to trial without asserting that Dr. Chin violated the Elder Abuse Act—the central claim to their case—which would result in irreparable prejudice to petitioners and present the prospect of multiple trials and duplicative appeals.[193] The plaintiffs relied on statutory law, which provides that "a writ of review may be granted by any court, ... when an inferior tribunal ... has exceeded the jurisdiction of such tribunal ... and there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy."[194] Specifically the statute provided that "a writ must be issued in all cases where there [is] not a plain, speedy, and adequate remedy, in the ordinary course of law" and may be issued upon the "verified petition of the party beneficially interested."[195] In their petition, the plaintiffs stressed the novel and important issue of the standard of liability of a physician for failure to adequately treat pain under the Elder Abuse Statutes.[196]

California case law provides several recognized reasons for allowing a writ of mandate.[197] For example, a writ of mandate would be appropriate if judicial economy could prevent a needless and expensive trial.[198] A writ is

189. *See id. See also* Mack v. Soung, 95 Cal. Rptr. 2d 830, 836 (Cal. Ct. App. 2000).

190. *See Delaney*, 971 P.2d at 989.

191. *See Mack*, 95 Cal. Rptr. 2d at 830.

192. *See* Plaintiff's Memorandum, *supra* note 132, at 10.

193. *See id.* at 11.

194. CAL CIV. PROC. CODE § 1068(a) (West 2000). *See, e.g.*, Powers v. City of Richmond, 893 P.2d 1160, 1175 (Cal. 1995) (clarifying that superior court orders are immediately reviewable by petition to appellate court for issuance of an extraordinary writ).

195. CAL CIV. PROC. § 1086 (West 2000).

196. *See* Plaintiff's Memorandum, *supra* note 132, at 11.

197. *See infra* notes 198-200 and accompanying text.

198. *See* Plaintiff's Memorandum, *supra* note 132, at 11. *See, e.g.*, Fogarty v. Super. Ct., 172 Cal. Rptr. 594, 596(Cal. Ct. App. 1981) (holding that preemptory writ of mandate

also appropriate where the petitioner will suffer irreparable harm or a substantial delay in resolving the lawsuit.[199] Finally, the plaintiffs argued that it was appropriate for the appellate court to reverse summary adjudication by writ of mandate because the order affected the issues of the claim to such an extent as to amount to an effective disposition of the entire action.[200]

2. Plaintiffs' Substantive Argument: Proving Recklessness

The Bergmans argued that they met their burden in opposing a motion for summary judgment by alleging that Dr. Chin was liable for reckless negligence under the Elder Abuse Act and that the degree of defendant's conduct was a question that should be decided by a jury.[201] In California, the burden is on the party moving for summary judgment, or in the alternative for summary adjudication, to submit evidence that justifies a judgment in the movant's favor.[202] The plaintiffs argued that the lower court had improperly weighed the evidence to determine the merit of the issues rather than determining whether an issue of fact existed at all.[203]

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was appropriate to prevent unreasonable delay and expense and proceeding with writ was appropriate because the case concerned a matter of public interest, which if followed could result in unnecessary litigation in other cases).

199. *See* Plaintiff's Memorandum, *supra* note 132, at 11-12. *See also* Chambers v. Super. Ct., 175 Cal. Rptr. 575, 577 (Cal. Ct. App. 1981) (holding that court in its discretion could issue writ of mandate to avoid unnecessary delays, even where petitioner could seek direct appeal because court determined that direct appellate review was not an adequate alternative).

200. *See* Plaintiff's Memorandum, *supra* note 132, at 12. The plaintiffs further argued that the lower court's ruling effectively eliminated the plaintiff's claims for general damages and punitive damages, and affected the ability to obtain attorney's fees because the case consisted of relatively few special damages. *See id.* The plaintiffs argued that the lower court's order "eviscerated" the claim against Dr. Chin. *Id. See also* Nazaroff v. Super. Ct., 145 Cal. Rptr. 657, 658 (Cal. Ct. App. 1978) (emphasizing that where an order of a lower court bars a substantial portion of plaintiff's case from being heard on merits, a petition for writ of mandate to vacate that order is appropriate).

201. *See* Plaintiff's Memorandum, *supra* note 132, at 13.

202. *See* Katz v. Chevron Corp., 27 Cal. Rptr. 2d 681, 687 (Cal. Ct. App. 1994). If the movant can carry its onerous burden, that burden is then shifted to the opposing party to produce sufficient evidence to show that there is a triable issue of fact and declarations and evidence offered must be liberally construed. *See* Sprecher v. Adamson Companies, 636 P.2d 1121, 1129 (Cal. 1981). In fact, a party's declaration will be sufficient to defeat summary judgment if, liberally construed, their claim contains the "germ of a potential cause of action." Jos. Schlitz Brewing Co. v. Downey Distrib., 167 Cal. Rptr. 510, 515 (Cal. Ct. App. 1980).

203. *See* Plaintiff's Memorandum, *supra* note 132, at 14. *See also, e.g.*, Molko v. Holy Spirit Ass'n, 762 P.2d 46, 55 (Cal. 1998). "The function of the trial court on a motion for summary judgment is merely to determine whether such issues of fact exist, and not to

The plaintiffs emphasized that the lower court had erroneously accepted Dr. Chin's argument that the case was one of professional malpractice and, therefore, could not fall under the category of elder abuse.[204] The plaintiffs, on the other hand, asserted that conduct worse than negligence does fall below the standard of care and that intentional conduct, for example, falls well below the standard of care.[205] The plaintiffs contended that even isolated incidences of conduct that may be considered negligent are actually reckless disregard if those acts are repeated or are part of a pattern of consistently poor treatment.[206]

The definition of recklessness became an important issue. Recklessness within the meaning of the Act involves more than "inadvertence, incompetence, unskillfulness, or a failure to take precautions, but rather rises to the level of a conscious choice of a course of action ... with knowledge of the serious danger to others involved in it."[207] The plaintiffs relied on the Restatement Second of Torts, which states that reckless disregard for safety occurs when:

> the actor's conduct is in reckless disregard of the safety of another if he does an act ... which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.[208]

According to the plaintiffs, Dr. Fordyce's declaration constituted unequivocal controverting expert evidence that made it unreasonable to grant summary adjudication because California law dictates that when the plaintiff asserts conflicting expert evidence, the defendants' summary judgment motion must be denied.[209]

In order to prove recklessness, the plaintiffs relied heavily on the facts of

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decide the merits of the issues themselves." *Id.* Similarly, the Bergmans argued that the court improperly granted summary adjudication for the defendant despite Dr. Fordyce's declaration that failure to adequately treat pain did, in fact, constitute elder abuse. *See supra* notes 175-77 and accompanying text..

204. *See* Plaintiff's Memorandum, *supra* note 132, at 15.

205. *See* Delaney v. Baker, 971 P.2d 986, 988 (Cal. 1999).

206. *See* Plaintiff's Memorandum, *supra* note 132, at 15.

207. *Delaney*, 971 P.2d at 988.

208. RESTATEMENT SECOND OF TORTS § 500.

209. *See* Plaintiff's Memorandum, *supra* note 132, at 16. *See also* Monroe v. Regents of the Univ. of Cal., 263 Cal. Rptr. 878, 883 (Cal. Ct. App. 1989) (holding that under California law, once defendant has asserted expert testimony in medical malpractice cause of action, he is entitled to summary judgment unless plaintiff comes forward with conflicting expert evidence).

the case.[210] They claimed that prior to Mr. Bergman's discharge from Eden Medical Center on February 19, 1998, Dr. Chin knew that Mr. Bergman was almost certainly suffering from terminal cancer and wished no further diagnostic or curative treatments for that condition, but rather wished to return to his home for the remainder of his life.[211] Plaintiffs emphasized that Dr. Chin's prescription for Vicodin was grossly inappropriate—particularly since Mr. Bergman suffered from a swallowing dysfunction that made it impossible for him to swallow pills.[212] Finally, the plaintiffs stressed that Dr. Chin knew or should have known that Mr. Bergman was certain to continue suffering from severe pain because of his terminal cancer.[213]

Dr. Fordyce's declaration was crucial to prove recklessness on the part of Dr. Chin. First, the declaration stated that Demerol should not have been used on an elderly patient or a patient with cancer pain or other chronic pain because of its short-acting properties and other disadvantages.[214] Second, in Dr. Fordyce's expert opinion, prescribing Demerol in such a low dosage, or "prn" as needed, fell profoundly below the standard of care.[215] Third, the plaintiffs asserted that even after it became apparent that the Demerol was not providing continuous pain relief, Dr. Chin still did nothing.[216] Lastly, the plaintiffs stressed that Dr. Chin never consulted with a pain management specialist, nor did he pay attention to or rely on the pain level recordation of the nurses.[217]

The plaintiffs argued that at the time Mr. Bergman entered Dr. Chin's care in February 1998, he had rights guaranteed under California law, the United States Constitution, and medical practice and policy to effective treatment of his pain.[218] According to the plaintiffs, Dr. Chin knew or should have known of the rights of his patients to receive attentive and aggressive pain treatment and to be ignorant of, or to refuse to respect, those rights constituted recklessness.[219] A patient's right to receive attentive and aggressive pain care has been established by specific legislative enactments in California, by recent decisions of the United States Supreme Court, and by the California Medical Board Policy and

210. *See* Plaintiff's Memorandum, *supra* note 132, at 16.
211. *See id.* at 18.
212. *See id.*
213. *See id.*
214. *See id.*
215. *See id.*
216. *See* Plaintiff's Memorandum, *supra* note 132, at 19.
217. *See id.* at 20.
218. *See id.*
219. *See id.*

Guidelines.[220]

The plaintiffs relied on statutory codification of patients' rights to support their argument that Dr. Chin's conduct was reckless. In California, the Pain Patients' Bill of Rights guarantees that "[a] patient suffering from severe chronic intractable pain should have access to proper treatment of his or her pain."[221] Further, the legislature provided that "[a] patient suffering from severe chronic intractable pain has the option to request or reject the use of any or all modalities to relieve his or her severe chronic intractable pain."[222] Additionally, the Intractable Pain Treatment Act provides that "[n]o physician and surgeon shall be subject to disciplinary action by the board for prescribing or administering controlled substances in the course of treatment of a person for intractable pain."[223]

The plaintiff also relied on the Supreme Court decision of *Washington v. Glucksberg*[224] and its companion case *Vacco v. Quill*[225], which establish the federal constitutional right to obtain adequate treatment for pain.[226] In *Washington*, terminally ill patients and their physicians asserted that the Washington law banning physician-assisted suicide violated the Due Process Clause of the Fourteenth Amendment.[227] The district court agreed with the petitioners that under *Planned Parenthood of Southeastern Pa. v. Casey*,[228] the Fourteenth Amendment's Due Process Clause extends to a "personal choice by a mentally competent, terminally ill adult to commit physician-assisted suicide."[229] The Court reversed the decision of the district court and held that the asserted right to physician-assisted suicide was not a liberty interest protected by the Due Process Clause and that Washington's ban on physician-assisted suicide was rationally related to legitimate governmental interests.[230] Specifically, the Court addressed the issue of "whether a mentally competent person who is experiencing great suffering has a constitutionally cognizable interest in controlling the circumstances of his or her imminent death."[231] In resolving that issue, Justice O'Connor stated in her concurring opinion that "a patient who is

220. *See id.* at 21-22.

221. CAL. HEALTH & SAFETY CODE § 124960 (West 2000).

222. *Id.*

223. CAL. BUS. & PROF. CODE § 2241.5 (West 2000).

224. 521 U.S. 702 (1997).

225. 521 U.S. 793 (1997).

226. *See* Plaintiff's Memorandum, *supra* note 132, at 22.

227. *See* 521 U.S. at 705.

228. 505 U.S. 833 (1992).

229. *Washington*, 521 U.S. at 708.

230. *See id.*

231. *Id.* at 736 (O'Connor, J., concurring). Justice O'Connor's concurrence also applies to *Vacco*. *See* 521 U.S. at 809.

suffering from a terminal illness and who is experiencing great pain has no legal barriers to obtaining medication, from qualified physicians, to alleviate that suffering, even if to the point of causing unconsciousness and ... death."[232]

Despite the established federal constitutional right to obtain adequate treatment for pain established in *Washington*, the harsh reality is that no real civil recourse exists for patients whose pain is treated inadequately.[233] To oppose the granting of summary adjudication, the Bergmans argued that Dr. Chin should be subject to liability because he knew or should have known that the Supreme Court recognizes a patient's right to palliative care through publication of an article reporting the Supreme Court's ruling in the New England Journal of Medicine, the leading national medical journal.[234]

The California Medical Board issued policies relating to pain control and the U.S. Agency for Health Care Policy and Research issued Clinical Practice Guidelines for Cancer Pain, both of which were disseminated to California physicians.[235] The sources of information were emphasized to

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232. *Id.* at 736-37.

233. *See supra* notes 25-37 and accompanying text. While historically it has been proven that physicians inadequately treat pain, the law fails to provide any meaningful remedy or cause of action in order to act as a method of correction. *See supra* notes 28-33 and accompanying text. If the purpose of the courts is to uphold liberty and establish justice, then it makes sense that in order to restrain physicians from improperly and inadequately administering pain medication, there must be a cause of action in tort against them for such impropriety. *See supra* notes 28-33 and accompanying text. In fact, Justice O'Connor states in her concurring opinion to *Washington v. Glucksberg* that:

> [E]veryone of us at some point may be affected by our own or a family member's terminal illness. There is no reason to think that democratic process will not strike the proper balance between the interests of terminally ill, mentally competent individuals who would seek to end life mistakenly or under pressure. As the Court recognizes, States are presently undertaking extensive and serious evaluation of physician-assisted suicide and other related issues ... [and] [i]n such circumstances, "the ... challenging task of crafting appropriate procedures for safeguarding ... liberty interests is entrusted to the 'laboratory' of the states ... in the first instance."

521 U.S. 702, 737 (1997) (citations omitted).

234. *See e.g.*, Robert A. Burt, *The Supreme Court Speaks: Not Assisted Suicide, But Constitutional Right to Palliative Care*, 337 NEW ENG. J. MED. 1234-36 (1997).

235. *See* Plaintiff's Memorandum, *supra* note 132, at 23. In July of 1994, the California Medical Board issued a formal statement on "Prescribing Controlled Substances for Pain Management." *See* Medical Board of California Action Report 4 (Oct. 1994). The Board acknowledged that pain resulting from trauma, cancer and other causes is undertreated and impacts negatively on sufferers and their families. *See id.* Four years later when Beverly Bergman filed a complaint with the board protesting the undertreatment of her father's pain, the Board conceded that the treatment was inadequate but that no

prove that it was reckless and a violation of the Elder Abuse Statute to allow an individual to suffer severe pain unnecessarily when a caregiver had the means and the responsibility to relieve that pain, and had been repeatedly informed of his responsibility to treat pain aggressively and attentively.[236] The Court of Appeals for the First Appellate District granted the plaintiffs' request and exercised its power to issue a writ ordering correction of the erroneous ruling, restoring the causes of action summarily adjudicated, and permitted the matter to proceed to trial on the grounds of Elder Abuse.[237] Nine out of the twelve jurors[238] agreed that Dr. Chin's treatment of Mr. Bergman was in fact reckless and negligent under the Elder Abuse Act.[239]

D. Dr. Chin's Argument

Dr. Chin attributed the verdict to an emotionally charged jury and claimed that he was used as a scapegoat for the Compassion in Dying Federation to further their agenda for legalized euthanasia.[240] Dr. Chin's attorney was quoted as saying that Dr. Chin:

> did what 95 percent of other internists would have done [and] [i]f he had administered the morphine the plaintiffs experts said was warranted, the patient likely would have died from respiratory distress,

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disciplinary action would be taken against Dr. Chin. *See supra* note 153 and accompanying text. There is a horrible message sent here that although the Board considers adequate treatment of pain to be a priority, they refuse to hold the physician accountable for harm caused to the patient, and the family who is forced to watch the patient suffer. *See id.*

236. *See* Plaintiff's Memorandum, *supra* note 132, at 24. Another source requiring adequate treatment of pain is the American Medical Association Code of Medical Ethics, which states, "physicians have an obligation to relieve pain and suffering and to promote the dignity and autonomy of dying patients in their care. This includes providing effective palliative treatment even though it might foreseeably hasten death." AM. MED. ASS'N, CODE OF MEDICAL ETHICS 40 (1996).

237. *See* Plaintiff's Memorandum, *supra* note 132, at 24.

238. California requires only nine out of twelve votes to reach a verdict in a civil case. *See* Okie, *supra* note 1.

239. *See id.* Jurors remarked that the deliberations were intense and that it was a difficult case. *See id.* Some jurors found the evidence that Dr. Chin had failed to adequately treat pain clear and convincing; however others believed that Dr. Chin treated Mr. Bergman using his best judgment and was therefore not negligent. *See* Matthew Yi, *Doctor Found Reckless for Not Relieving Pain, $1.5 Million Jury Verdict for Family of Cancer Patient Who Went Home to Hayward to Die*, S.F. CHRON., June 14, 2001, at A1 *available at* 2001 WL 3406336 (quoting jurors Carlos Clavel and Sherrie Graston). *See id.* One reason advanced for the jury's verdict and the resulting victory was the fact that juries are often comprised of baby-boomers, who are sympathetic to people suffering from lower back pain). *See id. See also* Okie, *supra* note 4 (quoting Barry R. Furrow).

240. *See* Crane, *supra* note 153.

> and Dr. Chin either could [have been] sued for overmedicating the patient or ... face[d] disciplinary or even criminal charges. This is a very scary verdict.[241]

According to Dr. Chin, the medication Phenergan that was prescribed in the emergency department and referred to by the plaintiffs as "good relief from pain" was in fact the reason why Mr. Bergman had gone into respiratory distress because it restricted Mr. Bergman's breathing for fifteen seconds.[242] Although the nurses' assessment of pain recordation was a significant aspect of the case according to Dr. Chin, Mr. Bergman had reported that he "felt okay or that his back pain was tolerable."[243] This supported Dr. Chin's chief argument that neither Mr. Bergman nor his family complained of pain. Moreover, Dr. Chin argued that "virtually every seriously ill hospitalized patient considers his pain to be in the 7 to 10 range."[244]

E. MICRA: Another Legal Obstacle

In *Bergman*, the jury returned a $1.5 million verdict for pain and suffering against Dr. Chin for failure to adequately treat pain constituting reckless conduct under the Elder Abuse Act.[245] That award exceeded the California cap on noneconomic damages imposed by the MICRA statute, and the verdict contained no punitive damages because the jury deadlocked on whether Dr. Chin was guilty of malice, oppression, or intentional emotional distress.[246]

The plaintiffs initially suspected that they were precluded from asserting a claim on their deceased father's behalf because in California a claim for pain and suffering does not survive the death of the victim[247] and undertreating pain is not a violation of the standard of care in medical malpractice.[248] Instead, the case was asserted under the Elder Abuse Act, which allows survivors to recover pain and suffering damages in cases of intentional abuse where the elder has died.[249] Even after triumphing on the grounds of elder abuse, the plaintiffs' recovery against Dr. Chin was

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241. *Id.*

242. *Id.*

243. Okie, *supra* note 4.

244. Crane, *supra* note 153.

245. *See* 7 VERDICTS, SETTLEMENTS & TACTICS 292 (2001).

246. *See* Rebecca Porter, *Failure to Treat Pain is Elder Abuse, Jury Finds*, 37 TRIAL 87 (Sep. 2001).

247. *See supra* note 154 and accompanying text.

248. *See supra* note 155 and accompanying text.

249. *See supra* notes 180-91 and accompanying text.

severely limited by the Medical Injury Compensation Reform Act[250] (hereinafter MICRA). The MICRA statute was enacted in 1975 in response to a perceived medical malpractice crisis.[251] The MICRA limitation of $250,000 on recovery for noneconomic losses in medical malpractice suits was found to be supported by a rational basis and thus did not "violate the equal protection clause of the Federal Constitution," since reduction of medical malpractice insurance premiums was a legitimate state purpose and it was reasonable to believe that limiting noneconomic damages would help reduce such premiums.[252]

MICRA essentially shortened the statute of limitations for a medical malpractice claim, abolished the collateral source rule, allowed periodic payment of future damages, regulated contingency fee agreements, authorized arbitration clauses in medical services contracts, and placed a $250,000 cap on noneconomic losses.[253] The California courts have not resolved whether MICRA applies to actions other than those for "professional negligence."[254] Under MICRA professional negligence occurs when, in the rendering of professional services, a health care provider's negligent act or omission is a substantial factor in causing personal injury or wrongful death.[255] A medical malpractice action may include theories other than professional negligence, such as battery, breach

250. CAL. CIV. CODE § 3333 (1995). The purpose of a medical malpractice claim is to compensate for pain and suffering and ironically, the California Legislature apparently believes a more important objective is to reduce insurance premiums.

251. Paul F. Arentz, *Defining "Professional Negligence" After* Central Pathology Service Medical Clinic v. Superior Court*: Should California's Medical Injury Compensation Reform Act Cover Intentional Torts?*, 30 CAL. W. L. REV. 221 (1994). The increased cost of medical malpractice insurance, as a result of increased medical malpractice claims, was considered by the legislature to be particularly problematic as a factor endangering the health of the people of California, and a threat to the preservation of hospitals. *See id.* at 221 n.2.

252. Hoffman v. United States, 767 F.2d 1431, 1434 (9th Cir. 1985).

253. *See* Arentz, *supra* note 251, at 221-22.

254. *See* Central Pathology Serv. Med. v. Super. Ct., 832 P.2d 924 (Cal. 1992) (holding that classification of a case as negligence rather than as intentional tort does not prevent application of an analogous provision of the code of civil procedure relating to punitive damages where the injury was directly related to performance of professional services). The case of *Central Pathology* raises the question whether medical malpractice claims should be covered by MICRA even though the case does not directly concern the MICRA statute. *See id.* at 929 (discussing increased evidentiary threshold necessary in order to recover punitive damages despite clear and convincing evidence of "oppression, fraud or malice").

255. CAL. CIV. CODE § 3333.1(c)(1) (West 2000). The MICRA cap on noneconomic damages was applied in *Bergman v. Chin* even though Dr. Chin was guilty of causing further pain and suffering.

of contract, and fraud or deceit.[256] Courts have interpreted the general and specific language of the MICRA statute, which established a cap on noneconomic damages in actions based on professional negligence to extend that limitation to intentional torts.[257]

The California Supreme Court in *Delaney v. Baker* held that the MICRA cap on noneconomic damages applied to nursing home administrators found to have engaged in reckless neglect of a resident under the Elder Abuse Act, but allowed for reasonable attorneys' fees and damages for the pain and suffering endured by the resident prior to her death.[258] In that case, the jury found in favor of the plaintiff on the allegations of negligence and statutory neglect of an elder and found in favor of the nursing home and administrators on the charges of willful misconduct and wrongful death.[259] The plaintiff was awarded special damages for her mother's medical expenses of $15,000, damages for her mother's pain and suffering of $150,000, attorneys' fees of $185,732, and costs of $32,291.[260] To determine whether the MICRA statute applied to cases under the Elder Abuse Act, the California Supreme Court interpreted Section 15657.2 of the Elder Abuse Act, which states that "a cause of action for injury or damage against a *health care provider* ... based on the health care provider's alleged professional negligence, shall be governed by those laws which specifically apply to those professional negligence causes of action."[261]. The court held that while heightened remedies were available to a plaintiff under the Act, the cap on noneconomic damages still applied because the action was in fact "based on" professional negligence.[262]

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256. *See* Herrera v. Super. Ct., 204 Cal. Rptr. 553 (Cal. Ct. App. 1984) (holding that arbitration provision does apply to other medical malpractice causes of action because of language in that particular provision that broadens the scope in arbitration context). *Cf.* Noble v. Superior Court, 237 Cal. Rptr. 38 (Cal. Ct. App. 1987) (holding that MICRA provision regarding tolling of statute of limitations for professional negligence, when notice of intent to sue is served, does not apply to tolling statute of limitations for battery cause of action).

257. *See* Perry v. Shaw, 106 Cal. Rptr. 2d 70 (Cal. Ct. App. 2001) (holding that MICRA's $250,000 cap on noneconomic damages in actions based on professional negligence does not apply to patient's common law battery claim where a patient, who consented to surgery to remove excess skin, brought action against physician who also performed a breast enlargement procedure).

258. *See* Delaney v. Baker, 971 P.2d 986, 1001 (Cal. 1999). Ordinarily, one cannot collect for pain and suffering following the victim's death. *See supra* note 154 and accompanying text.

259. *See Delaney*, 971 P.2d. at 989.

260. *See id.*

261. *Id.* at 988 (emphasis added) (quoting CAL. WELF. & INST. CODE § 15657.2 (West 2000)).

262. *See id.*

The MICRA cap on noneconomic damages for pain and suffering unrelated to the injury precluded the Bergmans from collecting a sizeable recovery. This result runs contrary to public policy because it limits recovery for individuals suffering from pain and fails to penalize those who recklessly treat pain inadequately.[263]

F. Clinical Practice Guidelines and the Standard of Care

The criticism of judicial standard-setting is that courts setting standards of technical performance for other professions, such as the medical profession, run the risk of reaching beyond their competence.[264] However, when clinical practice guidelines developed by nationally recognized experts in the field exist, those guidelines can and should be recognized as the medical standard of care.[265]

The clinical practice guidelines (CPGs) are a good example of already existing data that could be utilized by courts to determine what a physician ought to do rather than inquiring what physicians customarily do.[266] The CPGs, or "systematically developed statements [used] to assist practitioner and patient decisions about appropriate health care for specific clinical circumstances," were developed by managed care institutions and raise the issue of whether guidelines can be used to shape medical malpractice.[267] Interestingly, pain management CPGs could significantly improve the prevailing practice to undertreat pain despite the generalized argument that their purpose is often to reduce health care costs without concern for quality of healthcare administered.[268]

Courts should require physicians to adhere to standards set by guidelines, rather than relying on current standards of care, which are directly linked to the custom and practice of the medical profession.[269] The old approach gives physicians great deference on the basis that only physicians are qualified to determine what constitutes acceptable medical

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263. *See supra* note 245 and accompanying text.

264. *See* Rich, *supra* note 42, at 81 (explaining that *Helling* decision was criticized because court ignored the rate of false positives incident to the test and clinical experience suggested that early detection and treatment did not significantly impede the progression of glaucoma). For discussion of *Helling*, see *supra* text accompanying notes 35-37.

265. *See, e.g.*, American Pain Society Quality of Care Committee, *Quality Improvement Guidelines for the Treatment of Acute Pain and Cancer Pain*, 274 J. AM. MED ASS'N. 1874 (1995).

266. *See* Richard E. Leahy, *Rational Health Policy and the Legal Standard of Care: A Call for Judicial Deference to Medical Practice Guidelines*, 77 CAL. L. REV. 1483, 1525 (1989).

267. *Id.*

268. *See id.*

269. *See supra* note 34 and accompanying text.

practice.[270] Advocates for use of guidelines in the judicial context cite to the fact that recent national medical guidelines for pain management are superior to the standard set in the medical community because they have been developed by specialists in pain management.[271] And although the guidelines do not reflect the practice of most physicians, they are intended to positively influence the behaviors of all physicians who care for patients suffering from pain.[272] Judicial recognition of national CPGs would constitute a shift away from the customary practice standard of care and acknowledge that an entire profession may lag behind in its practices.[273]

The first set of guidelines concerning the management of acute pain arising out of medical or surgical procedures or trauma was written by the Agency for Health Care Policy and Research (AHCPR).[274] Two years later, the AHCPR introduced similar guidelines for the treatment of pain associated with cancer.[275] These guidelines would assist courts in determining whether standards relating to pain management had been met by the physician. For example, in a case where the plaintiff died from a tetanus infection, summary judgment for the physician was reversed because the physician failed to administer tetanus human-immune globulin, which was contrary to the guidelines issued by the Committee on Trauma of the American College of Surgeons, after the physician testified at deposition that he adhered to those guidelines in his practice.[276] One court has even allowed guidelines into evidence as the standard of care.[277]

The Joint Commission on Accreditation of Healthcare Organizations (JCAHO) independently creates standard manuals and conducts surveys of, hospitals, home care organizations, long-term care organizations, ambulatory healthcare organizations, and other health organizations and

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270. *See* Leahy, *supra* note 266, at 1525.

271. *See id.*

272. *See id.*

273. *See* T.J. Hooper, 60 F.2d 737 (2d Cir. 1932).

274. *See* THE AGENCY FOR HEALTH CARE POLICY AND RESEARCH, ACUTE PAIN MANAGEMENT: OPERATIVE OR MEDICAL PROCEDURES AND TRAUMA 1 (1992).

275. *See id.*

276. *See* Pollard v. Goldsmith, 572 P.2d 1201, 1203 (Ariz. Ct. App. 1977). Interestingly, in *Bergman v. Chin* the appeals court factored in the guidelines on the determination regarding summary judgment.

277. *See* Roach v. Springfield Clinic, 585 N.E.2d 1070, 1079 (Ill. App. Ct. 1992), *rev'd on other grounds*, 623 N.E.2d 246 (Ill. 1993). The court admitted a publication by the American College of Obstetricians and Gynecologists into evidence as relevant to the industry standard of care where physician admitted he was familiar with the publication and acknowledged that obstetricians commonly used the publication to prepare for their certification requirements. *See id.*

services.[278] While accreditation is voluntary, the annually published JCAHO Accreditation Manual, containing required standards for performance, has been used by courts to establish the standard of care.[279]

On January 1, 2001, JCAHO began scoring provider compliance with new pain standards during its on-site surveys of health care organizations that provide ambulatory, behavioral health, home, hospice, hospital, and long-term care.[280] The new pain standards are organized into the following six functional chapters of the JCAHO manual: (1) the patient's rights and the organization's ethics; (2) patient assessment; (3) patient care; (4) patient education; (5) continuum of care; and (6) improving organizational performance.[281] To comply with the new standards, health care organizations must involve patients in all aspects of their care, address care at the end of life, assess pain in all patients, develop policies and procedures that support safe patient medication, monitor patients during the post procedure period for pain intensity, educate patients about pain and managing pain as part of treatment, provide for continuing care based on a patient's assessed needs at the time of discharge, and collect data to monitor performance of standards.[282] Most importantly, the standard addresses patient education and requires that organizations instruct patients and their families on understanding pain, the risk associated with pain, the importance of effective pain management, the assessment process, and methods of pain management.[283]

Medical practice guidelines have been proposed and adopted by several states as a major component of tort reform in medical malpractice actions.[284] In *United Blood Services v. Quintana*,[285] the Colorado Supreme Court held that the defendant blood bank was negligent by adhering to outdated professional standards existing in government guidelines, stating that:

> a plaintiff should be permitted to present expert opinion testimony that

278. *See generally*, Joint Commission on Accreditation of Health Care Organizations, *at* http://www.jcaho.org.

279. *See* Darling v. Charleston Cmty. Mem'l Hosp., 211 N.E.2d 253, 256 (Ill. 1965) (highlighting Standards of Hospital Accreditation as a basis for imposing corporate liability).

280. *See* JOINT COMMISSION ON ACCREDITATION OF HEALTHCARE ORGANIZATIONS, PAIN ASSESSMENT AND MANAGEMENT: AN ORGANIZATIONAL APPROACH 3 (2000). For more information regarding the pain management standards see the JCAHO Web site *at* http://www.jcaho.org (last visited Mar. 21, 2003).

281. *See id.*

282. *See id.*

283. *See id.*

284. *See* William R. Trail & Brad A. Allen, *Practice Guidelines: The Opening of Pandora's Box*, 10 J.L. & HEALTH 231, 235 (1995).

285. 827 P.2d 509, 511 (Colo. 1992).

> the standard of care adopted by the school of practice to which the defendant adheres is unreasonably deficient by not incorporating readily available practices and procedures substantially more protective against the harm caused to the plaintiff than the standard of care adopted by the defendant's school of practice.[286]

The court held that where the profession had not been updated, evidence was admissible to show that the continued adherence to the standard constituted negligence.[287] In the context of pain management, plaintiffs should be afforded an opportunity to rebut a claim that traditionally accepted practices within a profession constitute the standard of due care when new relevant scientific data indicates that the standard is insufficient and should be heightened because the traditional standard of care of under-prescribing pain medication is negligent.

The Maine Board of Registration in Medicine promulgated guidelines to "create practice parameters for defined specialties, avoid malpractice claims and increase the defensibility of malpractice claims by creating an affirmative defense for doctors who substantially complied with the published guidelines".[288] In Maine, the guidelines can be introduced as the appropriate standard of care, and plead as an affirmative defense where the physician shows substantial compliance.[289] Most significantly, judges instruct juries that the Maine guidelines are the applicable standard of care in determining malpractice.[290] Also, Florida's Agency for Health Care Administration is required to develop practice guidelines that physicians can voluntarily use as protection against malpractice claims.[291]

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286. *Id.* at 521.

287. *See id.* at 525-26. Finding liability for the blood bank was instrumental in changing the practices of blood banks around the country, benefiting society as a whole by guaranteeing a safer blood supply. *See* Reynolds, *supra* note 58, at 97. A recent study shows that plaintiffs use practice guidelines in medical malpractice disputes more often than physicians. *See* Andrew L. Hyams et al., *Practice Guidelines and Malpractice Litigation: A Two-Way Street*, 122 ANNALS INTERNAL MED. 450, 454-55 (1995) (reporting that guidelines are currently being used for inculpatory as well as exculpatory purposes in medical malpractice litigation). The study also suggests that the growing use and acceptance of guidelines as evidence of the standard of care may have the beneficial effects of reducing the overall number of claims brought against physicians, and facilitate the early settlement of disputes without resorting to trial. *See id.*

288. ME. REV. STAT. ANN. tit. 24, § 2973 (West 1999).

289. *See* ME. REV. STAT. ANN. tit. 24, § 2855 (West 1999) (creating affirmative defense by showing compliance with guidelines).

290. *See* Jennifer Begel, *Maine Physician Practice Guidelines: Implications for Medical Malpractice Litigation*, 47 ME. L. REV. 69 (1995).

291. *See* FLA. STAT. ANN. § 408.02 (West 1998). However, unlike the Maine statute that expressly prohibits a plaintiff from introducing the guidelines as part of their case-in-chief, the Florida statute is silent regarding the plaintiff's ability to use the guidelines

Using guidelines can create problems for either litigating party because the medical establishment has not always accepted the guidelines as the standard of care.[292] One criticism is that guidelines that reflect optimal or ideal treatment measure the physician's conduct against an unattainable standard.[293] For that reason, expert testimony is still required to explain how the guidelines apply to the defendant's conduct.[294] The guidelines still play a major role at trial by supplying the jury with a neutral, impartial tool in assessing the credibility of each party's expert.[295]

Many physicians praise the use of guidelines as creating direction for their practice, and believe that adhering to guidelines provides them an affirmative defense.[296] Even the American Medical Association has strongly endorsed the adoption of medical practice guidelines as an objective standard to assess claims raised in medical malpractice.[297] Unlike the current system, which relies on custom as the measure of the standard of care, an improved system relying on guidelines could positively impact the areas of defensive practice of medicine and settlement of medical malpractice claims.[298]

V. ASSESSING THE AFTER AFFECTS

What is clear from *Bergman* is that the judiciary can act with reasonable prudence and humanitarianism to set the standard of care even where it is not being reflected in the standard of care set by the medical community.[299] Following the *Bergman* verdict, State Assemblywoman Dion Aroner authored a bill that was subsequently signed by California Governor Grey Davis requiring all California doctors to take a pain management course.[300]

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against the physician in proving a malpractice claim. *See* Reynolds, *supra* note 58, at 96.

292. *See* Trail & Allen, supra note 284, at 247.

293. *See id.* at 245-53.

294. *See* Hyams et al., *supra* note 287 at 455.

295. *See id.* Additionally, to prevail in a medical malpractice claim, the plaintiff must also show that he/she was injured and that the defendant caused that injury. Robert S. Bruer, *Loss of a Chance as a Cause of Action in Medical Malpractice Cases*, 59 MO. L. REV. 969, 971 (1994) (discussing tort causation). After using guidelines to establish breach of the standard of care the plaintiff could assert that the defendant's negligence was a substantial factor in prolonging and increasing the plaintiff's pain and deprived the patient of a reasonable chance at a better result. *See id.*

296. *See* Trail & Allen, *supra* note 284, at 235.

297. *See* AMERICAN MEDICAL ASSOCIATION, POLICY ON PRACTICE PARAMETERS, THROUGH DECEMBER 1994, (Policy 410.998).

298. *See* Trail & Allen, *supra* note 284, at 236.

299. *See* Rich, *supra* note 42 at 87.

300. *See* Tyche Hendricks, *Pain Management Classes for Doctors*, S.F. CHRON., Oct. 30, 2001, at A1, *available at* 2001 WL 3418291.

Under the new law, physicians are given four years to complete the course as part of the state requirement that they complete continuing education to renew their license.[301] This law, the first of its kind in the nation, also requires that the state medical board track complaints of doctors mishandling pain care and ensure that those complaints are reviewed by a pain specialist.[302] If, as a result of this law, physicians are able to apply new skill and knowledge that they have obtained from pain specialists, California could become an example for other states to enact similar legislation.[303]

VI. CONCLUSION

Today physicians need only comply with the prevailing standard of care, and since it is abundantly clear that physicians have traditionally failed to alleviate pain, it would be very difficult for the patient as plaintiff to establish that undertreated pain constitutes a departure from the applicable standard of care. The harsh implication that medical professionals fail to adopt and consistently apply readily-available therapeutic methods should be addressed by courts, who should fashion a remedy where the law currently gives none. This is disturbing when deficiencies in the prevailing custom and practice are so inconsistent with a traditionally recognized goal of medicine. This is an area where courts should feel obligated to find the undertreatment of pain constitutes negligence despite the prevailing custom or standard in the medical community.

This Comment has addressed many factors that play a role in the widespread inadequacies that exist in pain treatment.[304] The public's perception of narcotics powerfully affects the treatment of patients suffering from pain.[305] Within the medical community, misconceptions about pain and its treatment are rampant, resulting in the consistent underestimation of effective dose range, overestimation of the duration of effectiveness, and exaggeration of the dangers of addiction.[306] Physicians face criminal prosecutions for improperly prescribing controlled substances and a physician can be disciplined or sanctioned by a state medical board. However, despite the problems that exist, there is no medical malpractice cause of action for failure to adequately treat pain because undertreatment of pain is the prevailing standard amongst the medical community.[307] A

301. *See id.*
302. *See id.*
303. *See id.*
304. *See* Paris, *supra* note 2.
305. *See supra* notes 45-63 and accompanying text.
306. *See supra* notes 64-72 and accompanying text.
307. *See* Furrow, *supra* note 25, at 28.

superior standard should be developed using practice guidelines to address the liability loophole with respect to undertreatment of pain, for all medical malpractice cases, to impose liability on a physician for failing to exercise reasonable care despite adherence to the national medical standard.[308]

In *Bergman*, the jury found in favor of the plaintiffs on the basis that Dr. Chin's conduct of undertreating pain constituted elder abuse.[309] The Bergmans pursued legal action despite the obstacles before them, specifically that in California a cause of action for pain and suffering dies with the person and there is no recognized cause of action for medical malpractice where the physician is following the standard of care. Finally, the MICRA statute precluded the Bergmans from any sizeable recovery or potential for punitive damages against Dr. Chin even though the case was won on the basis of elder abuse, not professional negligence.[310] Despite these obstacles, the willingness of the court of appeals to correct its summary adjudication ruling and restore the plaintiffs' causes of action indicates a marked change on the part of the judiciary to recognize the need to adjudicate claims regarding the undertreatment of pain.[311]

It may have taken an elder abuse case to finally impact the problems inherent in laws that precluded plaintiffs inadequately treated for pain from asserting civil claims against their physician. Although the cause of action in *Bergman* lay in an elder abuse statute, the impact of the case will serve to improve treatment of all patients suffering needlessly from pain. *Bergman* may represent a victory in the area of pain undertreatment, but the statute used only protects a portion of the population. A better solution to the problem of undertreatment would be the imposition of medical practice guidelines.[312] Guidelines can objectively impose a standard that will increase the quality of health care administered and reduce the chances that anyone suffering needlessly from pain will go untreated.

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308. *See* Reynolds, *supra* note 58, at 82.

309. *See supra* notes 180-91 and accompanying text.

310. *See supra* notes 154-55 and accompanying text.

311. *See supra* notes 154-55 and accompanying text.

312. *See supra* notes 154-55 and accompanying text.

Hagen v. Commonwealth: Should Crime Victims in Massachusetts Have a Legally Recognized Interest in the Outcome of Criminal Cases?

> *"Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment."*[1]
> Justice Holmes

I. INTRODUCTION

In 1985, a woman was raped. In 1987, a jury convicted her attacker of rape and indecent assault and battery.[2] In 1988, the defendant was sentenced to two ten-year terms and one five-year term in state prison.[3] The

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1. Brief for Appellee at 22, Hagen v. Commonwealth, 772 N.E.2d 32 (Mass. 2002) (on file with author) [hereinafter Brief for Appellee] (quoting Northern Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting)).

2. *See Hagen*, 772 N.E.2d at 34.

3. *See id. See also* Commonwealth v. Kelly, Nos. 87-00664-666 (Mass. Super. Ct. Apr. 21, 1988) (on file with author); Jack Sullivan, *Why is he Free?; Convicted Rapist Evades Prison Time for 13 Years*, BOSTON HERALD, July 27, 2001, at 1; Commonwealth's Motion to Revoke Stay of Execution Pending Appeal at 1, Commonwealth v. Kelly, Nos. 87-00664-666 (Mass. Super. Ct. Feb. 22, 2001) (on file with author). It should be noted that when this defendant was sentenced in 1988, truth in sentencing laws had not yet been imposed. MASS. GEN. LAWS. ch.127, § 133 (2000). At the time he was sentenced, prisoners were eligible for parole once they had served one-third or two-thirds of their minimum sentence as opposed to the current law, which requires that prisoners are eligible for parole only after they have served the full minimum of their sentence. *See* ch. 127, § 133. *See also* Commonwealth v. Russo, 656 N.E.2d 904, 906 n.2 (1995) (explaining the changes in parole eligibility); David Slade, *Criminal Law: Effects of the "Truth in Sentencing" Law*, MASS. LAW. WEEKLY, May 30, 1994, at 11, 20 (explaining effects of truth-in-sentencing law). Also, at this time, prisoners could be released as a result of so called "statutory good time." *Id.* The changes in the statute took effect on April 12, 1994. *See id.* The appellant acknowledges this in her brief when describing the sentence imposed on the defendant as "meager" due to the fact that a "Concord Ten" often meant release to parole after one year. *See* Brief for Appellant at 36, Hagen v. Commonwealth, 772 N.E.2d 32 (Mass. 2002) (on file with author) [hereinafter Brief for Appellant].

year is now 2003, and the convicted rapist has only now begun serving his sentence.[4]

The victim in this case was Deborah Hagen.[5] In an attempt to see justice served and her attacker put behind bars, she requested that the Massachusetts Supreme Judicial Court (SJC) grant her legal standing to assert a claim independent of the Commonwealth.[6] Ms. Hagen claimed that her right to a "prompt disposition" of the case had been violated and she filed a motion to have the stay of the defendant's sentence revoked. [7] The court was asked whether, and to what extent, the Massachusetts Victim Bill of Rights grants victims of crime a legally-cognizable interest in the outcome of a criminal case.[8] Specifically, the court had to address whether a crime victim in Massachusetts has standing under Massachusetts General Laws chapter 258B, section 3(f), to assert her right to a "prompt disposition" of the case and to seek a remedy independent of the Commonwealth.[9]

The SJC affirmed the decision of the trial court and of the single justice, finding that the victim did not have standing to bring a motion because "she is 'not a party to the proceedings and she has no judicially-cognizable interest in the prosecution of another.'"[10] The court also found, however, that "a victim asserting the right to a prompt disposition under the statute should be provided with an opportunity to address the court when that right is jeopardized."[11] Surprisingly, Ms. Hagen and the Commonwealth both appeared to be pleased with the decision of the court.[12] The victim's lawyer stated, "I just think this is a wonderful new opportunity to kind of reshape the criminal justice system to be a little more user-friendly, accessible,

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4. *See* David Weber, *Rapist in Prison after 16 Years: Judge Orders Him Jailed Despite Claims of Cancer*, BOSTON HERALD, Feb. 4, 2003, at 5. *See also* Sullivan, *supra* note 3.

5. *See Hagen*, 772 N.E.2d at 33-34.

6. *See generally* Appellant's Petition for Relief Pursuant to G.L. c.211, § 3, Hagen v. Commonwealth, 772 N.E.2d 32 (Mass. 2002) (on file with author) [hereinafter Appellant's Petition].

7. *See* Shaun Sutner & Gary V. Murray, *Lawyer Asks Top Court to Jail Rapist,* WORCESTER TELEGRAM & GAZETTE, Aug. 23, 2001, at B1. *See also infra* note 40 and accompanying text (explaining procedure for a stay of execution); MASS. GEN. LAWS ch. 258B, § 3(f) (2000) (providing victims of crime with right to a prompt disposition of the case in which they are involved).

8. *See* ch. 258B. *See also* Appellant's Petition, *supra* note 6, at 11.

9. *See* ch. 258B, § 3(f). *See generally* Brief for Appellant, *supra* note 3; Appellant's Petition, *supra* note 6.

10. Hagen v. Commonwealth, 772 N.E.2d 32, 34 (Mass. 2002).

11. *Id.*

12. *See* Richard Nangle, *SJC Rules Rape Victim Tack Wrong*, WORCESTER TELEGRAM & GAZETTE, Aug. 1, 2002 at A1, A9.

[and] more comfortable to the victim."[13] The district attorney's office felt that "[t]he court basically adopted the position we took all along."[14]

Naturally, compassion lies with the victim and one wonders how a convicted rapist, who was sentenced to two ten-year terms in prison over a decade ago, could still remain free. Fortunately, the court was able to overcome their initial reaction to the unbelievable facts and circumstances of this case and their overwhelming desire to grant the victim's request.[15] The court correctly found that the remedy sought by the victim was not available under the current Victim Bill of Rights in Massachusetts.[16] Also, although not discussed in the court's opinion, standing to enforce her right to a prompt disposition of the case was not the only thing the victim requested. Although the victim did not explicitly state it in her brief, in essence, she was asking the court for specific performance to revoke the defendant's stay of execution of the sentence, thereby imprisoning him.[17]

This was a case of first impression at the appellate level both in Massachusetts and the nation.[18] The court noted the significance of the case, writing "[i]t is important for this court to recognize that its decision in this case could have implications beyond the borders of the Commonwealth."[19] If the victim prevailed, it would have been the first case in the country where it was determined that a victim had a legally recognized interest to enforce her right to a prompt disposition of the criminal case in which she was a victim.[20]

This Comment explores the importance of the Massachusetts SJC's decision in *Hagen v. Commonwealth*, finding that crime victims do not have a legally recognized interest in criminal matters.[21] In order to better understand the issue that was before the court, this Comment first discusses the underlying circumstances and procedural history of the criminal case of *Commonwealth v. Kelly*,[22] which led to the case at hand.[23] The lower court

13. *Id.* at A9.

14. *Id.*

15. *See Hagen*, 772 N.E.2d 32 at 38.

16. *See* MASS. GEN. LAWS ch. 258B § 3 (2000). *See also Hagen*, 772 N.E.2d at 37.

17. *See* Brief for Appellant, *supra* note 3.

18. *See* Brief Amicus Curiae for National Crime Victim Law Institute in Support of Petitioner at 1, Hagen v. Commonwealth, 772 N.E.2d 32 (Mass. 2002) (on file with author) [hereinafter Amicus Brief in Support of Petitioner].

19. Brief on Behalf of Amici Curiae in Support of Appellant at 38, Hagen v. Commonwealth 772 N.E.2d 32 (Mass. 2002) (on file with author) [hereinafter Amici Brief for Appellant].

20. *See* Amicus Brief in Support of Petitioner, *supra* note 18, at 1.

21. *See Hagen*, 772 N.E.2d at 34.

22. Nos. 87-00664-666 (Mass. Super. Ct. Oct. 8, 1987) (on file with author).

23. *See infra* notes 33-54 and accompanying text.

proceedings and decisions that were eventually appealed to the SJC are then described.[24] Next, this Comment briefly explores the background and purpose of victims' rights[25] and then addresses general principles of standing,[26] implied standing,[27] statutory construction, and legislative intent.[28] Finally, this Comment focuses on the significance of the court's decision not to grant victims a legally recognized interest in criminal matters.[29] This Comment addresses issues beyond those addressed in the court's decision, but which are crucial to understand if the legislature is to take any future action on the rights of crime victims to have standing independent of the Commonwealth: specifically, defendants' constitutional rights,[30] prosecutorial discretion,[31] and public confidence in the criminal justice system.[32]

II. FACTUAL BACKGROUND

The underlying case that led to *Hagen v. Commonwealth* was the criminal action of *Commonwealth v. Kelly*.[33] On October 8, 1987, a Worcester Superior Court jury convicted James J. Kelly of two counts of rape and one count of indecent assault and battery against Ms. Hagen.[34] After the guilty verdict was read, and prior to being sentenced, James Kelly "clutched his heart and was whisked away" from the courthouse by ambulance.[35] At this point, the judge suggested a pre-sentence report and continued the case to October 19, 1987.[36]

Prior to the October date, the defendant requested another continuance due to his poor health conditions.[37] After numerous continuances, the

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24. *See infra* notes 55-93 and accompanying text.

25. *See infra* notes 94-121 and accompanying text.

26. *See infra* notes 122-59 and accompanying text.

27. *See infra* notes 160-81 and accompanying text.

28. *See infra* notes 182-213 and accompanying text.

29. *See infra* notes 251-334 and accompanying text.

30. *See infra* notes 253-74 and accompanying text.

31. *See infra* notes 275-303 and accompanying text.

32. *See infra* notes 304-32 and accompanying text.

33. Nos. 87-00664-666 (Mass. Super. Ct. Oct. 8, 1987).

34. *See* Commonwealth's Opposition to Deborah Hagen's Petition for Relief Pursuant to G.L. c. 211, § 3 at 2, Hagen v. Commonwealth, (Mass. Single Justice) (No. 2001-0335) (on file with author) [hereinafter Commonwealth's Opposition Motion].

35. Sullivan, *supra* note 3 at 1.

36. *See* Brief for Appellant, *supra* note 3, at 3.

37. *See id.* at 3-4. Mr. Kelly was not being treated at the cardiac unit, but rather, the psychiatric unit for "major depressive disorder" that was complicated by a possible heart attack. *See* Sullivan, *supra* note 3, at 1. *See also* Brief for Appellant, *supra* note 3, at 4. A physician treating Mr. Kelly wrote to the judge stating that the stress of being put through

defendant was finally sentenced on April 21, 1988, at which time he was sentenced to two ten-year terms and one five-year term in MCI Concord.[38] After imposing the sentence, the judge granted the defendant's motion to stay the sentence pending his current hospitalization.[39]

Subsequently, on April 26, 1988, the defendant filed a motion for a stay of execution of the sentence[40] pending his appeal and motion for new trial, which was granted by the court over the Commonwealth's objection on July 6, 1988.[41] The stay of execution was granted without prejudice and was to be reconsidered when the motion for a new trial was decided.[42]

Records indicate the Commonwealth did not file a response to the defendant's motion for a new trial and the case remained inactive for four years.[43] As a result, the victim wrote a letter to the court inquiring why Mr.

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sentencing at this time would endanger his physical and mental health. *See* Sullivan, *supra* note 3, at 1.

38. *See* Sullivan, *supra* note 3. *See also* Memorandum of Decision and Order on Defendant's Motion for New Trial at 1, Commonwealth v. Kelly, Nos. 87-0664-666 (Mass. Super. Ct. May 1, 1992) (on file with author) [hereinafter Decision on New Trial]. *See also* Commonwealth's Opposition Motion, *supra* note 34, at 2-3.

39. *See* Commonwealth's Opposition Motion, *supra* note 34, at 3.

40. *See* Brief for Appellee, *supra* note 1, at 19 n.6 (explaining that a stay of execution of a sentence pending appeal is appropriate in situations where the defendant does not pose a risk of flight or danger to the community, and he raises on appeal "an issue worthy of presentation to an appellate court, one which offers some reasonable possibility of a successful decision on appeal"). MASS. R. CRIM. P. 31(a) states in pertinent part:

> Stay of Execution; Relief Pending Review: (a) Imprisonment: If a sentence of imprisonment is imposed upon conviction of a crime, the entry of an appeal shall not stay the execution of the sentence *unless the judge imposing it ... determines in his discretion* that execution of said *sentence shall be stayed pending the final determination of the appeal.*

Id. (emphasis added). *See also* Commonwealth v. Senior, 711 N.E.2d 160, 161 (Mass. 1999) (citing Commonwealth v. Hodge (No. 1), 406 N.E.2d 1010, 1012 (Mass. 1980)). A stay of execution of a sentence is a "process whereby a judgment [sentence] is precluded from being executed for a specific period of time." BLACK'S LAW DICTIONARY (citing FED. R. CIV. PROC.). *See also infra* note 47 (matter worthy of consideration by an appellate court).

41. *See* Docket, Commonwealth v. Kelly, Nos. 87-00664-666 (Mass. Super. Ct.) (on file with author).

42. *See* Brief for Appellant, *supra* note 3, at 5. *See also* Decision on New Trial, *supra* note 38, at 1-2. The defendant's motion for new trial was based on the notion that he received ineffective assistance of counsel because his attorney did not inform him that his suppressed statement could be used to impeach him if he took the stand. In the statement that was suppressed, the defendant admitted that the victim performed oral sex on him. At trial, the defendant denied having had any sexual contact with the victim, thereby opening the door for the prosecution to impeach him with the excluded evidence. *See id.* at 5.

43. *See* Brief for Appellant, *supra* note 3, at 5.

Kelly remained free.[44] The letter was forwarded to the District Attorney's Office by the judge.[45] In response to the letter, the Commonwealth filed a motion in opposition to defendant's 1988 motion for new trial.[46]

The court heard the motion for a new trial on May 1, 1992, and denied the motion.[47] On May 22, 1992, the defendant filed a notice of appeal contesting the guilty verdict and the order denying defendant's motion for a new trial.[48] The judge did not make any specific rulings with regard to continuing the stay of execution pending the appeal, however, the defendant did remain free.[49]

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44. *See id.*

45. *See id.*

46. *See id.*

47. Commonwealth's Opposition Motion, *supra* note 34, at 3-4. At the beginning of the hearing, the judge stated:

> Now, this hearing is called to consider the defendant's motion for new trial. That motion appears to be the matter requiring disposition before this case can proceed. I do not intend today to consider any other motion [defendant also filed motion for further stay of execution and motion for revision and revocation of sentence], including any additional motion filed this day because so far as, for example, the motion for stay is concerned, that would be dictated primarily by the decision on the motion for new trial. Obviously if the motion were allowed, no action on that matter would be required, as the matter would simply stand for trial. If on the other hand the motion is denied, *I would certainly be of the position that the matter is a serious one that is worthy of consideration by an appellate court*, and *I don't think that I would change my prior decision* [regarding the stay of execution of the sentence]. Therefore, today we shall proceed to address the defendant's motion for new trial.

Id. at 3-4. (quoting the transcript of the May 1, 1992 hearing (Travers, J., presiding) (emphasis added)).

48. *See id.* at 4.

49. *See* Brief for Appellant, *supra* note 3, at 6-7 n.3 (arguing that comments made by the judge prior to his consideration of the merits—he stated that the defendant had a worthy appeal—should not be construed to mean the judge continued the stay). *But see* Commonwealth's Opposition Motion, *supra* note 34, at 4 (stating "[a]lthough Judge Travers ultimately denied the new trial motion, he granted the additional stay request").

> To the suggestion that Judge Travers' stay was self-terminating—that is, ineffective after his denial of the first Rule 30 motion—this Court responds that, in the circumstances, express judicial action was required to end the stay and trigger the incarceration. When freedom, *even unwarranted freedom*, is to be compromised, *explicit judicial endorsement* is preferred over suppositions drawn from implications.

Memorandum Order Upon Commonwealth's Motion to Revoke Stay of Execution of Sentence Pending Appeal at 3 n.2, (Toomey, J., presiding), Commonwealth v. Kelly, Nos. 87-00664-666 (Mass. Super. Ct. June 26, 2001) (emphasis added) (on file with author) [hereinafter Order on Motion to Revoke Stay].

On October 4, 1994, the notice of assembly of record was mailed to the appeals court.[50] Due to the deficiencies in the record, the appeals court ordered the defendant's appeal premature and remanded it without prejudice to the trial court in order to cure the deficiencies.[51] After this remand in April of 1996, the case again remained inactive until February of 2001.[52] According to the Commonwealth, the stagnant file was discovered during a routine review of appellate files in December, 2000.[53] After review of the file, the prosecution filed a motion to revoke the stay of execution of the defendant's sentence on February 23, 2001.[54]

III. PROCEDURAL STATUS OF CASE

A. Hearing in Superior Court on Motion to Revoke Stay of Execution

Since Mr. Kelly had yet to serve a day of the sentence imposed in 1988, Ms. Hagen claimed her right to a "prompt disposition" of the case had been violated so she also filed a motion to have the stay revoked.[55] When the case resurfaced in February of 2001, Ms. Hagen was given the option of having the case finally resolved.[56] The district attorney's office told Ms. Hagen that if she was willing to assent to the defendant's motion for a new

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50. *See* Docket, Commonwealth v. Kelly, Nos. 87-00664-666 (Mass. Super. Ct.) (on file with author). It appears the delay in the assemblage of the record was due to the absence of an official transcript. Court officials were unable to compile a transcript of the trial after discovering some tape recordings of the trial were missing and otherwise inaudible. *See also Justice Keeps Rapist Free During Appeal, Ruling Says Victim Lacks Standing to Get Man Jailed,* WORCESTER TELEGRAM & GAZETTE, Aug. 24, 2001, at B1. The record that was finally sent to the appellate court was returned on April 17, 1996 after the parties agreed to sixteen continuances, reportedly due to missing transcripts. *See* Brief for Appellant, *supra* note 3, at 8. *See also* Brief for Appellee, *supra* note 1, at 4.

51. *See* Commonwealth's Opposition Motion, *supra* note 34, at 5. *See also* Brief for Appellee, *supra* note 1, at 4.

52. *See* Brief for Appellee, *supra* note 1, at 5.

53. *See id. But see* Brief for Appellant, *supra* note 3, at 8 ("[A]ccording to the prosecutor, *law enforcement officials realized* the Defendant was still free and brought the matter to the attention of the District Attorney. Only at that point did the Commonwealth file a motion to revoke the Defendant's stay of execution.") (emphasis added).

54. *See* Brief for Appellee, *supra* note 1, at 5.

55. *See* Motion of the Victim Pursuant to G.L. c. 258B, § 3(f), to Revoke Defendant's Stay of Execution of Sentence and/or Issue a Warrant Directing that the Defendant be Taken into Custody Forthwith to Begin Serving His Sentence, Commonwealth v. Kelly, Nos. 87-00664-666 (Mass. Super. Ct. May 31, 2001) (on file with author) [hereinafter Victim's Motion to Revoke Stay]. *See also* Shaun Sutner and Gary V. Murray, *Prison Time Sought for Convicted Rapist*, WORCESTER TELEGRAM & GAZETTE, Aug. 23, 2001, at B4.

56. *See* Appellant's Petition, *supra* note 6, at 2-3.

trial—and agree to a sentence of probation—the case could finally be resolved.[57] If the deal for the defendant was consummated, the victim would not have to endure another trial and testify again, thereby finally getting her long awaited closure. Ms. Hagen was displeased with the fact that she was being forced to choose between testifying again and having her rapist be placed on probation rather than serving the original ten-year prison sentence, so she sought independent legal counsel.[58]

At the status hearing in May of 2001, the victim filed her own revocation motion.[59] On this date, the judge raised the issue as to whether "counsel for the victim had standing to file her own revocation motion or otherwise seek relief under c[hapter] 258B."[60] However, since the defendant was not present at this hearing, the judge took no action on the motion filed by the victim nor did he take action on the Commonwealth's motion to revoke the stay of the sentence.[61] The hearing was rescheduled for June 19, 2001.[62]

On June 19, 2001, the superior court judge stated that, in his opinion, the victim did not have standing as a party to assert her rights under chapter 258B.[63] However, the judge did allow the attorney for the victim to address the court on behalf of the victim and assert that the victim's right to a prompt disposition of the case had been denied and therefore the stay of execution of the sentence should be revoked.[64] At this hearing, the victim

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57. *See id.* Ms. Hagen was asked to submit another victim impact statement to the court. *See id.* at 2. "The victim was encouraged by the prosecutor to assert in her statement that she was agreeable to having the court allow the Defendant's new trial motion in exchange for which, the defendant would plead guilty—as long as the victim also agreed that his sentence should be reduced to probation." *Id.* at 2-3. *See also* Brief for Appellant, *supra* note 3, at 9.

58. *See* Brief for Appellant, *supra* note 3, at 9. There is some discrepancy regarding the nature of the conversations that took place between the victim and the district attorney's office. The victim claims she was pressured into taking a deal. *See* Gary V. Murray, *Prosecutor Quits Case After Rift With Victim,* WORCESTER TELEGRAM & GAZETTE, Mar. 30, 2001 at A1. The relationship between the victim and the prosecutor handling the case began to deteriorate as a result of these discussions regarding a deal for Mr. Kelly. *See id.* Consequently, the district attorney's office assigned a new prosecutor to handle the matter. *See id.*

59. *See generally* Victim's Motion to Revoke Stay, *supra* note 55.

60. Appellant's Petition, *supra* note 6, at 7.

61. *See id. See also* Brief for Appellant, *supra* note 3, at 10-11.

62. *See* Appellant's Petition, *supra* note 6, at 7-8.

63. *See id.* at 8-9. *See also* Commonwealth's Opposition Motion, *supra* note 34, at 6 (explaining that judge sustained the Commonwealth's objection to the victim's attorney's motion for party status).

64. *See* Commonwealth's Opposition Motion, *supra* note 34, at 6. "Judge Toomey found the '[O]bjection sustained insofar as Attorney Murphy ... may address the court on behalf of the victim in connection with the victim's thoughts on the pending motion to

acknowledged that the issue of whether a victim had standing to be heard under chapter 258B, raised an issue of first impression in this state.[65] However, the victim argued there was federal case law to support her request that she be granted limited "quasi-party" standing for the limited purpose of asserting her right to a "prompt disposition," particularly due to the fact that the Commonwealth had declined to assert or even acknowledge the victim's right under this statute.[66]

In his written memorandum order, the judge stated that "[a]fter a hearing, at which counsel for *the parties and counsel for victim* offered their thoughts upon the motion, this Court ... [has decided to] deny the 'Commonwealth's Motion to Revoke Stay of Execution Pending Appeal.'"[67] Judge Toomey concluded that although the court was sensitive to the "suffering frustration" of the victim:

> the Court is persuaded that this is not the time to make up for the failings and omissions of the past by careening down the tunnel to incarceration when we are unclear whether the conviction, upon which the incarceration rests, will survive. Justice is not done when one, whose conviction is reasonably suspect, is punished before the conviction is sanctioned by the appellate and Rule 30 process to which we are all entitled by law.[68]

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vacate.'" *Id.* (citing Memorandum Order Upon Commonwealth's Motion to Revoke Stay of Execution of Sentence Pending Appeal at n.1). The judge went on to explain that "[c]ounsel for the victim participated in the hearing *solely by leave of the court* because her request that the victim be afforded quasi-party status had been denied." *Id.* (emphasis added). *See also infra* notes 284-87 and accompanying text (discussing whether the victim *was* granted the equivalent of the limited party status she claimed to be seeking by being allowed to be heard at this hearing).

65. *See* Appellant's Petition, *supra* note 6, at 9.

66. *See id.*

67. Order on Motion to Revoke Stay, *supra* note 49, at 1 (emphasis added). Judge Toomey noted that the primary ground for denying the Commonwealth's motion to revoke the defendant's stay was based on the merits of the defendant's appeal. *See id.* In his written decision he stated:

> Defendant has recently filed a second Rule 30 motion for new trial, asserting that he was deprived, at trial, of the effective assistance of counsel to which our constitution entitles him. This Court has not pre-judged the merits of that motion, but the averments in the motion do state at least a *prima facie*, a colorable case for relief. If defendant's allegations are established by evidence, defendant may well obtain a new trial. Therefore, to execute his sentence at a time when post-conviction, collateral relief may be on the horizon would be short-sighted and, frankly, cruel.

Id. at 3.

68. *Id.* at 3. The "Rule 30 process" refers to a defendant's motion for a new trial, which may be taken by the defendant to the appeals court. *See* MASS. R. CRIM P. 30. On

The Commonwealth did not seek appellate review of the judge's denial of the revocation motion.[69] As a result, the victim filed her own motion seeking relief pursuant to chapter 211, section 3.[70]

B. The Victim Sought Relief under Chapter 211, Section 3 of the Massachusetts General Laws

Chapter 211, section 3 grants the Massachusetts SJC general superintendence of courts of inferior jurisdiction.[71] The Commonwealth argued that this power is disfavored and exercised only in the most exceptional circumstances "to prevent irreparable loss of significant rights when the normal course of trial and appeal will not provide adequate protection or to resolve pressing recurrent issues of proper administration of justice."[72] Further, the Commonwealth argued that "[a] party seeking interlocutory relief [under this statute] must allege and create a record showing a violation of a personal, substantive right [which is] substantial."[73] Additionally, while it must be shown that failure to grant such relief would result in irreparable harm,[74] appeals of this nature, are not usually allowed in criminal cases.[75] Although the Commonwealth claimed that the victim failed to "demonstrate error or abused discretion because ... she does not have standing to prosecute this case,"[76] the victim was granted

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February 6, 2002, the appeals court heard oral arguments for Mr. Kelly's appeal for a new trial based on his claim of ineffective assistance of counsel. *See* Gary V. Murray, *Appeal in 1987 Rape Heard; Leominster Man Hasn't Seen Jail Time*, WORCESTER TELEGRAM & GAZETTE, Feb. 7, 2002 at A1, A13. *See also* Jack Sullivan, *Rapist Who Avoided Prison Makes Appeal for New Trial*, BOSTON HERALD, Feb. 7, 2002 at 4.

69. *See* Brief for Appellant, *supra* note 3, at 14.

70. *See id.* at 14. *See also* MASS. GEN. LAWS ch. 211, § 3 (2000).

71. *See* ch. 211, § 3. This statute states in part:

> [t]he supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent *errors and abuses* therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

Id. (emphasis added). *See also* Appellant's Petition, *supra* note 6, at 11.

72. Commonwealth's Opposition Motion, *supra* note 34, at 8 (quoting Crimmins v. Commonwealth, 460 N.E.2d 610, 611 (Mass. 1984)).

73. *Id.* at 8-9 (citing Dempsey v. Dist. Att'y for Suffolk Dist., 710 N.E.2d 972 (Mass. 1999); Smith v. Commonwealth, 436 N.E.2d 377 (Mass. 1982)).

74. *See id.* at 9 (citing *Dempsey*, 710 N.E.2d at 972; *Smith*, 436 N.E.2d at 382).

75. *See id.* "Interlocutory appeals under G.L. c. 211, sec. 3 'will not ordinarily be allowed in criminal cases.'" *Id.* (quoting Layne v. Commonwealth, 459 N.E.2d 1229, 1230 (Mass. 1984)).

76. *Id.* at 9-10.

a hearing before a single justice under this statute.[77]

C. Hearing Before a Single Justice of the Massachusetts SJC

In her appeal to the single justice, Ms. Hagen asked that she be granted standing to enforce her right to a prompt disposition of the case pursuant to chapter 258B section 3(f).[78] Specifically, she requested the following:

> (1) The issuance of an order directing that the lower court take appropriate steps to cause the Defendant in the underlying criminal case to begin serving his sentence forthwith; (2) The issuance of an order reversing the lower court's order granting a stay of execution in June 2001, which order was issued without explanation or justification; (3) Any other relief deemed appropriate or just.[79]

The single justice held a hearing on August 22, 2001 and issued his ruling denying the victim's petition the following day.[80] The justice held that a crime victim has no legal right to step into the proceedings of a criminal case.[81] In his three paragraph decision, Justice Spina found:

> [n]otwithstanding the fact that a stay of execution of the sentence in the underlying criminal action has been in effect since 1988, ostensibly due to the need to reconstruct portions of the testimony necessary for appellate review (tape recordings of the testimony were lost), *the victim is not a party to the proceedings and she has no judicially-cognizable interest in the prosecution of another.*[82]

In conclusion, Justice Spina found that the language of chapter 258B, section 3(f), did not suggest that the victim was a party to the proceedings.[83] As a result, the superior court judge had correctly decided the motion on the grounds that the victim had no standing to bring the motion.[84]

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77. *See id.* at 9.

78. *See* Appellant's Petition, *supra* note 6, at 20.

79. *Id.*

80. *See* Memorandum and Judgment at 2, Hagen v. Commonwealth (Mass. SJC 2001) (Spina, J., presiding) No. SJ-2001-0335 (Mass. Aug. 23, 2001) (on file with author) [hereinafter Judgment of Single Justice].

81. *See generally id.*

82. Judgment of Single Justice, *supra* note 80, at 1-2 (emphasis added) (citing Commonwealth v. Gonsalves, 739 N.E.2d 1100, 1104 (Mass. 2000); Tarabolski v. Williams, 642 N.E.2d 574 (Mass. 1994); Taylor v. Newton Div. of the Dist. Court Dep't, 622 N.E.2d 261 (Mass. 1993); Shepard v. Att'y Gen., 567 N.E.2d 187, 190 (Mass. 1991); Manning v. Mun. Court of Roxbury Dist., 361 N.E.2d 1274, 1276-77 (Mass. 1977)).

83. *See* Judgment of Single Justice, *supra* note 80, at 2.

84. *See id.* at 1-2.

D. Appeal to the Full Massachusetts SJC

Ms. Hagen appealed the decision of the single justice to the full court.[85] To succeed on appeal, Ms. Hagen had the burden of showing that the single justice either abused his discretion or made a clear error of law by denying her relief pursuant to chapter 211, section 3.[86] Ms. Hagen did not meet this burden.[87]

A recent decision by the Massachusetts SJC referred to the standard used to determine whether in appeals such as Ms. Hagen's the order of the single justice will be disturbed: "We will not disturb an order of a single justice denying relief under G.L. c. 211 § 3, *unless there is an abuse of discretion* or other *error of law*."[88] Ms. Hagen failed to show that Justice Spina, in his decision to uphold the superior court judge's denial of her motion based on lack of standing, abused his discretion or made some other error of law; therefore, the full court did not disturb the ruling of the single justice.[89]

The Commonwealth argued that there was no error or abuse of discretion because chapter 258B, section 3(f) did not give the victim standing and section (g)[90] of the same chapter denied such relief.[91] The Commonwealth also pointed to the fact that nowhere in her brief did the victim argue that the decision of the single justice was an error of law or was beyond his discretion, nor did she even acknowledge that this was the proper standard of review.[92] Ms. Hagen's motion presented the issues that were before the court but did not assert that the single justice abused his discretion.[93] As a result, the Commonwealth's argument succeeded insofar

85. *See generally* Brief for Appellant, *supra* note 3. "When a single justice denies relief from a challenged interlocutory ruling in the trial court and does not report the denial of relief to the full court, the party denied relief may appeal the single justice's ruling to the full court." MASS. SUP. JUD. CT. R. 2:21 (2000).

86. *See* MASS. GEN. LAWS ch. 211, § 3 (2000). *See generally* Brief for Appellee, *supra* note 1.

87. *See generally* Hagen v. Commonwealth, 772 N.E.2d 32 (Mass. 2002).

88. Victory Distrib., Inc. v. Ayer Div. of the Dist. Ct. Dep't, 755 N.E.2d 273, 275 (Mass. 2001) (emphasis added).

89. *See Hagen*, 772 N.E.2d at 34-35.

90. *See* MASS. GEN. LAWS ch. 258B, § 3(g) (2000) (stating in part "[t]he right of the victim to confer with the prosecutor *does not include the authority to direct the prosecution* of the case") (emphasis added). *See also infra* notes 145-50 and accompanying text (discussing the language in this section of the statute as it relates to the issue before the court).

91. *See* Brief for Appellee, *supra* note 1, at 8, 10.

92. *See id.* at 11.

93. *See* Brief for Appellant, *supra* note 3, at 1. The issues presented by the appellant were:

(A) Whether by its plain language and obvious intent, the legislature granted

as the ruling of the single justice was not disturbed. Before going into greater detail as to the impact of the court's decision, a closer look at the rights granted to victims and the purpose behind those rights is necessary.

IV. BACKGROUND AND PURPOSE OF VICTIMS' RIGHTS

Victims' rights as a whole, including the victim's right to a "prompt disposition," have become so prevalent in this country that a "dominant paradigm of criminal law and procedure is being modified to reflect the value of active victim participation."[94] Massachusetts, like many other states, has codified the rights granted to victims.[95] These rights are intended to preserve the dignity of the crime victim and to minimize the likelihood of secondary harm.[96]

The intended purpose of affording victims the rights given under the Massachusetts Victim Bill of Rights is:

> [t]o provide victims a meaningful role in the criminal justice system, victims and witnesses of crime, or in the event the victim is deceased, the family members of the victim, shall be afforded the following basic and fundamental rights, *to the greatest extent possible and subject to the appropriation and to available resources*, with priority for services to be provided to victims of crimes against the person and crimes where physical injury to a person results ....[97]

The rights afforded to victims, and the effort to include them in criminal prosecutions, have left many unanswered questions. Historically, criminal

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> victims standing to seek enforcement of their right to a 'prompt disposition'? (B) Whether the victim has standing to seek enforcement of her 'prompt disposition' right because a more than 13 year delay in the execution of the Defendant's sentence is a legally cognizable injury? (C) Whether denying standing to the victim to enforce her 'prompt disposition' right would violate the federal and state constitutions?

Id.

94. Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model,* 1999 UTAH L. REV. 289, 292 (1999) (explaining how laws of victim participation and protection integrate in pre-existing criminal process and benefit society). *See also* Amicus Brief in Support of Petitioner, *supra* note 18, at 4-5; Amici Brief for Appellant, *supra* note 19; Amicus Brief in Support of Petitioner, *supra* note 18. Douglas Evan Beloof is also named in the Amici Brief as one of the submitting attorneys supporting Ms. Hagen. *See* Amici Brief for Appellant, *supra* note 19.

95. *See* Amicus Brief in Support of Petitioner, *supra* note 18, at 2. *See also infra* note 215 (listing states that codify the rights granted to victims).

96. *See* Amicus Brief in Support of Petitioner, *supra* note 18, at 5 (citing Beloof, *supra* note 94, at 328-29, Appendix A). *See also infra* notes 115-16 (explaining secondary harm).

97. MASS. GEN. LAWS ch. 258B, § 3 (2000) (emphasis added).

prosecutions have been strictly two party actions with two clear competing value systems.[98] These two values have been identified by Professor Packer as the "Crime Control Model" and the "Due Process Model."[99] The value assigned to the Crime Control Model is that of "the efficient suppression of crime."[100] The value assigned to the Due Process model is the "primacy of the defendant and the related concept of limiting governmental power."[101] In his article, Professor Beloof asserts that these two models are no longer sufficient.[102] Rather, as a result of a consensus in the law that creates rights for victims of crime, reflected in all fifty states and the federal system, "victim participation does not rest on the values underlying the Crime Control and Due Process Models; the two models cannot facilitate an understanding of victim participation."[103] Therefore, a third model—"The Victim Participation Model"—is necessary in conjunction with the other two models.[104] Professor Beloof states that "[t]he value underlying the Victim Participation Model is 'implicit in the language'" in the varying state and federal statutes.[105] These concepts, which are included in the language of many statutes and state constitutions with regard to victims, include three core concepts: "fairness to the victim," "respect for the victim," and "dignity for the victim."[106]

Professor Beloof describes the image of the Victim Participation Model as that of:

> the victims following their own case down the assembly line. Victims consult informally with police and the prosecutor. At formal proceedings, *when appropriate* and in an *appropriate manner*, victims may speak and address the court. Victims are heard by the prosecutor and the court before pre-trial dispositions are finalized. Victims may speak at sentencing and release hearings.[107]

The objectives set forth in Professor Beloof's image of the Victim Participation Model are accomplished through the Massachusetts Victim

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98. *See* Beloof, *supra* note 94, at 290.

99. *Id.* at 290 n.5 (citing HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 149-53 (1968) ("developing and explaining two possible models of criminal process")).

100. *Id.* (citing PACKER, *supra*, at 149, 163, 165).

101. *Id.*

102. *See id.*

103. *Id.* at 291-92.

104. Beloof, *supra* note 94, at 292. "[T]he Victim Participation Model ... is needed to complement, but not to replace, Packer's two models." *Id.*

105. *Id.* at 293.

106. *Id.*

107. *Id.* at 296 (emphasis added).

Bill of Rights.[108] Victims are allowed and encouraged to follow their case. In the Commonwealth, each district attorney's office has victim/witness advocates whose primary responsibility is to lead the victim through the criminal process.[109] These advocates serve as liaisons between victims and prosecutors and help victims "cope with the realities of the criminal justice system and the disruption of personal affairs attending a criminal prosecution during a time of personal trauma."[110] Victims are also allowed to consult with prosecutors, be heard prior to pre-trial disposition or sentencing through victim impact statements and "*to be heard at any other time deemed appropriate by the court.*"[111]

In his article, Professor Beloof recognizes that there are significant limits to the victim's role in the criminal system.[112] He acknowledges that "[t]he *victim cannot control the critical decisions* made ... by ... *prosecutors, or judges.*"[113] Further, he also concedes that such participation on the part of the victim "may indirectly result in greater or *lesser efficiency.*"[114]

Some of the rights afforded to victims by the various states and the federal system are by nature, due-process-like rights of participation and are intended to prevent two kinds of harm to which the victim is exposed.[115] This Comment focuses on the secondary harm suffered by the

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108. *See infra* notes 232-38 and accompanying text (discussing rights afforded to victims in the Commonwealth and how these rights allow victims to participate in criminal cases in which they are involved). *See also* MASS. GEN. LAWS ch. 258B, § 3 (2000).

109. *See* ch. 258B, § 5:

> Each district attorney shall create and maintain ... a program to afford victims and witnesses of crimes the rights and services described in this chapter. Those services shall include but not be limited to the following: (a) court appearance notification services ...; (b) informational services relative to the availability and collection of witness fees, victim compensation and restitution; (c) escort and other transportation services ...; (d) case process notification services; (e) employer intercession services; (f) expedited return of property services; (g) protection services; (h) family support services including child and other dependent care services; (i) waiting facilities; and (j) social service referrals.

Id.

110. Commonwealth v. Harris, 567 N.E.2d 899, 905 (Mass. 1991).

111. MASS. GEN. LAWS ch. 258B, § 3(p) (2000) (emphasis added).

112. *See* Beloof, *supra* note 94, at 296.

113. *Id.* (emphasis added). *See also infra* notes 145-59 and accompanying text (discussing the victim's inability to direct the prosecution).

114. Beloof, *supra* note 94, at 296 (emphasis added). *See also* notes 320-26 and accompanying text (discussing impact victim participation may have on the efficiency of criminal justice system).

115. *See* Beloof, *supra* note 94, at 294. "The first harm is primary harm which results from the crime itself. The other harm is secondary harm, which comes from governmental processes and governmental actors within processes." *Id.* "The right to a 'prompt'

victim as a result of going through the criminal process.[116] This is the harm that victim advocates throughout the nation are trying to minimize.[117] The challenge remains, however, how to minimize the secondary harm suffered by the victim while allowing the state to fulfill its duty of prosecuting criminals for the benefit of society as a whole,[118] and still not violate a defendant's constitutional rights?[119]

Case law is extremely limited as to the appropriate remedy for a violation of a victim's rights under chapter 258B. As her remedy, Ms. Hagen sought legal standing to assert her right to a prompt disposition of the case independent of the Commonwealth.[120] The court denied her request stating that "[e]ven if Ms. Hagen had been deprived of a prompt disposition, this deprivation would not confer standing on her to bring the motion at issue here."[121]

V. THE DOCTRINE OF STANDING

Despite legislation by state and federal governments intended to provide crime victims with more rights, victims continue to be excluded by the judicial system (as an independent party) from the criminal process because they lack standing.[122] Many commentators support the view that the

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disposition is a right ... 'not to be victimized yet again through the process by which government bodies prosecute, punish and release the accused or convicted offender.'" *See* Amici Brief for Appellant, *supra* note 19, at 13-14 (quoting *A Proposed Constitutional Amendment to Protect Victims of Crime: Hearings on S.J. Res. 6 Before the Senate Comm. on the Judiciary*, 105th Cong. 11 (1997) (statement of Laurence H. Tribe, Professor of Constitutional Law, Harvard University Law School).

116. *See* Beloof, *supra* note 94, at 297-98 (explaining that "secondary ... harm may mean different things to different victims"). As an example, Beloof describes two scenarios. In the first scenario, "Victim A may choose to exercise all available rights of participation, while B may choose not to exercise any right of participation." *Id.* at 297. That decision should be left to the individual victim. *Id.* Each victim must decide what is in their best interest and whether active participation will contribute to secondary harm. *Id.* However, denying the victim such a choice "is unfair to the victim, disrespectful of the victim, and a great affront to the victim's dignity." *Id.* at 297-98.

117. *See* Amici Brief for Appellant, *supra* note 19, at 13-14.

118. *See infra* notes 275-332 and accompanying text (discussing effect that granting victims standing would have on prosecutorial discretion and the public's confidence in the criminal system).

119. *See infra* notes 253-74 and accompanying text (discussing how granting victims standing could infringe on the constitutional rights of the defendant).

120. *See generally* Brief for Appellant, *supra* note 3.

121. Hagen v. Commonwealth, 772 N.E.2d 32, 37 (Mass. 2002).

122. *See* Sue Anna Moss Cellini, *The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT'L & COMP. L. 839, 856-57 (1997).

"standing doctrine is no more than a convenient tool to avoid uncomfortable issues or to disguise a surreptitious ruling on the merits."[123] However, the federal courts in *United States v. Groundhoefer*[124] "and its progeny [have made] it clear that statutes merely declaring victims have certain rights do not give victims a justiciable interest in vindication of those rights in a criminal proceeding."[125]

The legislature in Massachusetts and other states may be turning a blind eye to the problems that victims face. Legislatures across the nation are well aware that victims are being denied standing to assert the statutory rights expressly granted to them.[126] Further, the legislators are aware that the judiciary is not granting standing based on the language of their statutes.[127] If the legislators wanted a different result, thereby granting standing to victims, they could explicitly confer standing in the statute.[128]

A. Massachusetts Requirements For Standing

In order to have standing in Massachusetts, the SJC requires the victim to show "that she suffers or is in danger of suffering some 'particularized legal harm' or that her 'rights have been impaired' or that she has suffered [a] 'legally cognizable injury.'"[129] Ms. Hagen claimed that she suffered a particularized legal harm because thirteen years did not constitute a prompt disposition, and as a result, she had been unable to find closure and "move

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123. *See id.* at 857 (citing WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531 (2d ed. 1984) (citing a long list of commentators that support that view)). Cellini further argues that courts are using a rigid formalistic view of the standing doctrine in order to avoid uncomfortable issues with regard to victims. *See id.* at 857-58.

124. 916 F.2d 788, 791 (2d Cir. 1990). In *Groundhoefer,* the court decided for the first time that under Article III of the Constitution, a victim lacks standing to challenge the terms of a restitution order pursuant to the Victim and Witness Protection Act. *See id. See also* 18 U.S.C. §§ 3663, 3664 (1988). The court held that "it is *the defendant alone* that suffers the direct consequence of a criminal conviction and sentence. Collateral individuals to the proceedings—like the present [victim]—have not suffered an Article III direct injury sufficient to invoke a federal court's jurisdiction to rule on their claim." *Groundhoefer*, 916 F.2d at 791 (emphasis added). *See also* Cellini, *supra* note 122, at 858.

125. Cellini, *supra* note 122, at 864 (citations omitted). "With unwavering uniformity, the courts have consistently converted each such legislative effort into a hollow statutory promise of a right without a remedy." *Id.*

126. *See id.* at 863. *See also* Lynne Henderson, *Revisiting Victim's Rights*, 1999 UTAH L. REV. 383, 384 (1999).

127. *See* Cellini, *supra* note 122, at 849-56 (discussing the exclusion of victims' rights and the development of the victims' rights movement).

128. *See infra* notes 182-213 and accompanying text (discussing statutory construction and legislative intent).

129. Appellant's Petition, *supra* note 6, at 11 (citing Kaplan v. Bowker, 131 N.E.2d 372, 374 (Mass. 1956); Brookline v. Governor, 553 N.E.2d 1277, 1283-84 (Mass. 1990)).

on with her life."[130] In support of her argument, Ms. Hagen attempted to persuade the court by citing cases in which the court had found a "legally cognizable injury to be implicit in the statutory enactment of a right, even where the legislature was silent on the issue of standing."[131]

However, as recently as September 19, 2001, the Massachusetts SJC denied a private citizen standing to challenge a clerk magistrate's refusal to issue a criminal complaint.[132] In *Victory Distrib., Inc. v. Ayer Div. of the Dist. Ct. Dep't*, a grocery store attempted to file "criminal complaints against customers who had paid for their groceries with 'bad' checks."[133] Despite being supported by probable cause, the clerk magistrate did not issue criminal complaints.[134] A single justice held that the plaintiff (victim) was not entitled to relief "because [the plaintiff] is 'a private citizen having *no judicially cognizable interest in the prosecution of another.*'"[135] The plaintiff in *Victory* appealed the decision to the full court, which upheld its prior decision, writing that "if a judge or clerk-magistrate denies an application for a criminal complaint, *a private party has no constitutional or statutory right to challenge that decision.*"[136] Similarly, in the *Hagen* case the court could have held that the victim did not have a constitutional right to challenge the decision made by two different judges who denied

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130. Victim's Motion to Revoke Stay, *supra* note 55, at 6. *See also* Brief for Appellant, *supra* note 3, at 40-41.

131. Brief for Appellant, *supra* note 3, at 37. In support of her argument, appellant cited to Leardi v. Brown, 474 N.E.2d 1094, 1101-02 (Mass. 1985), which was recently cited with approval in Feijo v. Harte Toyota, Inc., 2000 Mass. App. Div. LEXIS 332, 335 (Dec. 20, 2000), stating:

> Congress may enact statutes creating legal rights the invasion of which creates standing even though no injury would exist without the statute .... There is no reason to conclude that our legislature does not possess a similar authority, and we conclude that ... the legislature exercised its prerogative to create a legal right, the invasion of which, without more, creates an injury.

Brief for Appellant, *supra* note 3, at 38 (citing Kaplan v. Bowker, 131 N.E.2d 372, 374 (Mass. 1956); Brookline v. Governor, 553 N.E.2d 1277, 1283-84 (Mass. 1990)). *Leardi* however, was a civil case. *See also infra* notes 160-81 and accompanying text (discussing implied standing).

132. *See* Victory Distrib., Inc. v. Ayer Div. of the Dist. Ct. Dep't, 755 N.E.2d 273, 278-79 (Mass. 2001).

133. *Id.* at 275.

134. *See id.* at 275-76, 279.

135. *Id.* at 277 (emphasis added). *See also* Taylor v. Newton Div. of the Dist. Ct. Dep't, 622 N.E.2d 261 (Mass. 1993) ("it is settled beyond cavil that a private citizen has no judicially cognizable interest in the prosecution of another [and] [t]he rights which the [petitioner] seeks to enforce criminally are not private but in fact are lodged in the Commonwealth").

136. *Victory Distrib.*, 755 N.E.2d at 278 (emphasis added).

the motions to revoke the stay of the defendant's sentence until the appeal process was complete. As in *Victory*, the decision made by the judge in *Kelly* to deny the motion to revoke the defendant's stay was well within the judge's discretion.[137] The court in *Kelly* simply found that the single justice did not err.[138]

In *Victory*, the court noted that the plaintiff "overlook[ed] the fact that no constitutional or statutory provision entitles [a private citizen] to 'a day' in criminal court; it is *only* entitled to a day in civil court."[139] Therefore, the court's decision in *Hagen* is consistent with the findings in *Victory*. Ms. Hagen is not entitled to a day in criminal court. Her remedy for the harm caused by the defendant lies within the civil court. The *Victory* court also stated that someone in the victim's position is not *entitled* to a judicial remedy: "A citizen complainant has no substantive entitlements in this system, including no entitlement to a correct interpretation of the law, other than a right to court action on its application."[140] The court action in Ms. Hagen's case did not refer to her right to have an action independent of the Commonwealth, rather, it referred to the initial rape complaint which began the criminal process against the defendant.

B. Standing for Crime Victims Under Chapter 258B, Section 3

Chapter 258B, entitled "Rights of Victims and Witnesses of Crime,"[141] "provides victims and witnesses with specific rights *to the greatest extent possible and subject to appropriation and to available resources*" in the criminal justice system.[142] Ms. Hagen that under section 3(f), which requires a "prompt disposition of the case in which they are involved as a victim or a witness," she should be granted legal standing to assert that right.[143] Nowhere in the statute is it stated that a crime victim has standing to assert any of the enumerated rights therein.[144]

In section (g), prosecutors are directed "to inform the court of the victim's position, if known, regarding the prosecutor's sentence

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137. *See generally id. See also* Hagen v. Commonwealth, 772 N.E.2d 32, 34 (Mass. 2002).

138. *See Hagen*, 772 N.E.2d at 34.

139. *Victory Distrib.*, 755 N.E.2d at 279 n.8 (emphasis added).

140. *Id.* at 279.

141. *See* MASS. GEN. LAWS ch. 258B, § 3 (2000). *See also supra* note 97 and accompanying text.

142. ch. 258B, § 3 (emphasis added). *See also* Objection to Filing of Appearance of Counsel and Motion and Request to be Heard on Issue of Stay of Wendy J. Murphy at 1, Commonwealth v. Kelly, Nos. 87-00664-666 (Mass. Super. Ct. June 14, 2001) (on file with author) [hereinafter Objection to Filing of Appearance].

143. ch. 258B, § 3(f).

144. *See generally id.* § 3.

recommendation."[145] Further, this section explicitly states "[t]he right of the victim to confer with the prosecutor *does not include the authority to direct the prosecution* of the case."[146]

Ms. Hagen not only discredited the weight given by appellees to subsection (g) of the statute, but also asserted that it was irrelevant to the issue before the court.[147] She claimed that the language in section 3(g) had no bearing on this issue because the legislature did not include the word "standing," nor did it address the victim's right to be heard.[148] Ms. Hagen tried to persuade the court that section 3(g)[149] merely denied victims *complete control* over the prosecutor on matters covered by that subsection, not all of chapter 258B.[150] However, the statute unambiguously states that victims do not have the right to *direct* the prosecution.[151] The legislature, aware of the difference between the two words, could have used the word "control" rather than "direct," had they intended that to be the meaning of the statute.

Further, Ms. Hagen asserted that the limiting language regarding a victim's inability to direct the prosecution appeared in a section that dealt only with a victim's right to confer with the prosecutor on certain issues.[152] Therefore, she wanted the court to infer that the legislature did not intend for there to be a limitation on the ability of victims to enforce their rights under this section because there was no similar language in section 3(f), which dealt with the right to a prompt disposition.[153] However, it is reasonable to conclude that a victim cannot direct the prosecution in any aspect of the case since it is well established that a criminal case is a two-party matter between the defendant and the prosecuting governmental entity.[154] The victim failed to cite to any case in this Commonwealth or the nation in which a victim was allowed to "direct" the prosecution in any facet of a criminal case.[155] When Ms. Hagen filed a motion asking the

145. *Id.* § 3(g).

146. *Id.* (emphasis added). This section gives the victim the right to confer with the prosecutor before the commencement of the trial, ... before the filing of a nolle prosequi or other act by the commonwealth terminating the prosecution, or before the submission of the commonwealth's proposed sentence recommendation to the court. *See id.*

147. *See* Brief for Appellant, *supra* note 3, at 23-24.

148. *See id.*

149. *See* MASS. GEN. LAWS ch. 258B, § 3(g) (2000). *See also* Brief for Appellant, *supra* note 3, at 24.

150. *See* ch. 258B, § 3.

151. *See id.* § 3(g).

152. *See* Brief for Appellant, *supra* note 3, at 24.

153. *See id. See also* discussion *infra* Parts V.C-D.

154. *See supra* notes 94-98 and accompanying text.

155. *See generally* Brief for Appellant, *supra* note 3.

lower court to "revoke the stay of execution of the Defendant's sentence entered in this case approximately thirteen years ago and/or issue a warrant forthwith *directing* that the Defendant be taken into custody to begin serving his sentence,"[156] she cannot deny that she was attempting to direct the prosecution.[157]

In its decision, the court found that there was "nothing in G.L. c. 258B [which] either alters our long-standing jurisprudence that the victim of a crime does not have a judicially cognizable interest on the prosecution of another or confers on a victim the status of a party to the criminal proceeding."[158] The court further found that the "statute was intended to change the 'traditional view' of victims from virtually silent observers to active participants in the justice process."[159]

C. Implied Standing

"Neither constitutional nor statutory rights [contain] explicit language granting standing to enforce them."[160] Ms. Hagen and amici concluded that under *Marbury v. Madison*,[161] which held that "where there is a legal right, there is also a legal remedy,"[162] crime victims do have limited standing within the criminal justice system to enforce their rights.[163] While it is undisputed that victims should have a remedy, being granted party status, even in a limited capacity, is not the appropriate remedy. Based on basic principles of statutory construction, conferring even limited standing to a victim cannot be implied from the language of the statute.

Ms. Hagen argued that because the only remedy explicitly excluded in the statute was the right of victims to initiate a lawsuit for damages against the state, victims impliedly must have standing to assert all other

156. Brief for Appellee, *supra* note 1, at 13 (citing page 55 of the Appellate record) (emphasis added).

157. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 640 (3d ed.) (defining direct as: "... to guide and supervise; ... to carry out the organizing, energizing, and supervising of esp. in an authoritative capacity ...").

158. Hagen v. Commonwealth, 772 N.E.2d 32, 37-38 (Mass. 2002).

159. *Id.* at 38. *But see id.* at 39 (Cowin, J., concurring). "Contrary to the court's statement that the Legislature 'intended to change the 'traditional view' of victims ... to active participants in the criminal justice process,' the Legislature has not done so. It is only the court's rewriting of the statute that creates this remedy." *Id.*

160. Amicus Brief in Support of Petitioner, *supra* note 18, at 8.

161. 5 U.S. 137 (1803).

162. *See* Amici Brief for Appellant, *supra* note 19, at 7 (quoting *Marbury*, 5 U.S. at 163); Appellant's Petition at 14, *supra* note 6.

163. *See* Amici Brief for Appellant, *supra* note 19, at 7. *See also* Appellant's Petition, *supra* note 6, at 14-15.

enforcement remedies.[164] However, "a statutory expression for one thing is an implied exclusion of other things omitted from the statute."[165] "Nowhere in the statute is a victim afforded party status, the right to file pleadings in the case, or the right to have a lawyer appear before the court and be heard."[166] Due to the legislature's omission of these activities from the lengthy list of rights included in chapter 258B, section 3, it appears such activities are not authorized.[167] The Commonwealth argued that this omission fell under the "statutory interpretation maxim of *expressio unius est exclusio alterius*,"[168] thereby concluding that the statute does not afford a victim standing in criminal matters.[169]

On the other hand, however, the amici used the same maxim to assert that "the General Court intended to give crime victims standing to assert their rights."[170] They based this argument on the fact that the statute explicitly states that "[a] defendant ... shall have *no standing* to object to any failure to comply with this chapter, and the failure to provide a right, privilege or notice to a victim under this chapter shall not be grounds for defendant ... to seek to have the conviction or sentence set aside."[171]

Therefore, the amici argued, the statute's silence regarding standing for a crime victim created a presumption that these victims do in fact have a right to such standing.[172] However, defendants, unlike victims, are a party to a criminal action and therefore do have the right to file pleadings, the right to have an attorney appear before the court, and the right to appeal.[173] As a result, any limitation on the defendant's right to standing must be explicitly stated. A victim, however, has no statutory or constitutional right to standing in the first place; therefore, there is nothing to be taken away.

Based on the language in the statute, it cannot be concluded that the victim has implied standing.[174] Due to the fact Ms. Hagen did not have standing, her remedy did not and could not lie within the hands of the

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164. *See* Brief for Appellant, *supra* note 3, at 18-19.

165. Brief for Appellee, *supra* note 1, at 14-15 (quoting Commonwealth v. Russ R., 744 N.E.2d 39, 44 (Mass. 2001) (quoting Police Comm'r of Boston v. Cecil, 727 N.E.2d 846, 848 (Mass. 2000)).

166. Objection to Filing of Appearance, *supra* note 142, at 2.

167. *Id.*

168. *See id. See also* BLACK'S LAW DICTIONARY 186 (7th ed.1999) Expressio unius est exclusio alterius is defined as "[a] canon of construction holding that to express or include one thing implies the exclusion of the other, or the alternative."

169. Brief for Appellee, *supra* note 1, at 15.

170. Amici Brief for Appellant, *supra* note 19, at 24.

171. *Id.* at 24 (quoting MASS. GEN. LAWS ch. 258B, § 13 (2000)).

172. *See id.*

173. *See* Objection to Filing of Appearance, *supra* note 142, at 2.

174. *See* ch. 258B, § 3.

judiciary. The language in the court's decision was explicitly clear: "[e]ven if Hagen had been deprived of a prompt disposition, this deprivation *would not confer standing on her to bring the motion at issue here.*"[175] The purpose of this statute is to provide "victims with various types of assistance in understanding and dealing with the criminal justice system, it *does not confer* on a victim status as a party or the right to file motions" as Ms. Hagen has done in this case.[176]

"If the legislature had intended otherwise, it could have done so."[177] It is within the sole power of the legislature to confer the right upon the victim by amending the statute or including victims' rights in the state constitution with explicit language that would grant standing to victims and leave no question in the minds of the judicial branch as to the intent of the statute. As the court found, it is not the role of the judiciary to supersede years of common law of the two party criminal system or supersede the intent of the legislature in order to grant victims a legally-cognizable interest in criminal matters.

However, in his concurring opinion, Justice Cowin opined that the court went beyond its judicial powers by allowing the victim to address the court during disposition.[178] "[T]he Legislature did not grant any right to victims to address the court in section 3(f) concerning prompt disposition."[179] Justice Cowin also noted that the "court transform[ed] the Legislature's general statement of principle in [s]ection 3(f) into the creation of a right that is not found in the statute directly or by implication."[180]

In this case, the SJC did not rewrite the statute or create rights not found in the statute. In its opinion, the court should have made a direct reference to section 3(p) of the statute to support its findings.[181] This would have made it clear that they were not creating a right, but simply stating that when a victim's right to a prompt disposition is in jeopardy, a judge may deem it appropriate to allow the victim to be heard.

D. Statutory Construction and Legislative Intent

The basic and fundamental rules of statutory construction require that

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175. Hagen v. Commonwealth, 772 N.E.2d 32, 37 (Mass. 2002) (emphasis added).

176. *Id.*

177. *Id.* (citing Comm'r of Revenue v. Cargill, Inc., 706 N.E.2d 625, 627 (Mass. 1999) (referring to the legislature granting standing to crime victims)).

178. *See Hagen*, 772 N.E.2d at 39. *See also supra* note 159.

179. *Hagen*, 772 N.E.2d at 39.

180. *Id.*

181. *See* MASS. GEN. LAWS ch. 258B § 3(p) (2000) (stating in part that victims may be heard "at any other time deemed appropriate by the court.").

each statute be interpreted as enacted.[182] Courts in this Commonwealth "are constrained to follow the plain language of a statute when its 'language is plain and unambiguous,' and its application would not lead to an 'absurd result,' or contravene the Legislature's clear intent."[183] Application of Chapter 258B, as written, would not lead to an absurd result, or contravene the clear intent of the Legislature. Proper application of the statute led to the same result that the lower court reached: under Chapter 258B a victim in a criminal case does not have a judicially-cognizable interest in the prosecution of another.[184] A basic tenet of our criminal justice system is that a criminal prosecution is a two-party action between the government and the alleged criminal.[185]

Moreover, the court's decision does not contravene the intent of the Legislature. The Legislature is aware of the problems facing crime victims and the battle that confronts victim advocates across the nation who are trying to give victims a voice in the criminal justice system.[186] However, the Legislature has not conferred standing upon this class of citizens. There is nothing in the statute that could lead one to believe that the Legislature "clearly intended" for victims to have standing in criminal matters:

> The general and familiar rule is that a statute must be interpreted according to the intent of the Legislature ascertained from all the words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of it framers may be effectuated.[187]

Furthermore, the lower courts interpretation of the statute did not affect the purpose of the statute. The purpose of the statute is to "provide victims a meaningful role in the criminal justice system."[188] Victims in Massachusetts can, and do, have a meaningful role in the criminal justice system without being granted standing. For example, in this case, even though the judge refused to grant the victim standing, he did allow the victim's attorney to speak on her behalf.[189] The victim's frustration with

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182. *See* Davey Bros., Inc. v. Stop & Shop, Inc., 217 N.E. 2d 751, 754 (Mass. 1966). *See also* Commonwealth's Opposition Motion, *supra* note 34, at 10-11.

183. *Id.* at 10 (quoting Comm'r of Rev. v. Cargill, Inc., 706 N.E.2d 625, 627 (Mass. 1999) (quoting White v. Boston, 700 N.E.2d 526, 529 (Mass. 1998))).

184. *See* Judgment of Single Justice, *supra* note 80, at 1.

185. *See supra* note 98.

186. *See* Henderson, *supra* note 126, at 384.

187. Hanlon v. Rollins, 190 N.E. 606, 608 (Mass. 1934) (citing Commonwealth v. S.S. Kresge Co., 166 N.E. 558 (Mass. 1929).

188. MASS. GEN. LAWS ch. 258B, § 3 (2000).

189. *See* Brief for Appellant, *supra* note 3, at 12-13.

the system and claim that her rights had been denied were heard by the court, thus providing her with a meaningful role. The fact that the victim did not get the specific performance she sought from the court—to revoke the stay of the defendant's sentence—does not mean that her rights were not considered by the judge. The denial of her right to a prompt disposition was one of a number of factors that the judge had to balance when making his decision.[190] In addition to the victim's rights, the judge also had to consider the constitutional rights and liberty interest of the defendant.[191]

In her brief, Ms. Hagen claimed that "[b]y its plain language and obvious intent, the legislature granted victims standing to seek enforcement of their right to a 'prompt disposition.'"[192] In support of this argument, she referred to the statute's preamble,[193] which states that the purpose of the statute is to grant rights to crime victims that are "meaningful" and "enforceable," and as a result can only be achieved by allowing victims to enforce these rights.[194] What Ms. Hagen failed to reference was the rest of the sentence, which states that these rights are not absolute: they are rights that will be afforded "*to the greatest extent possible and subject to appropriation and to available resources.*"[195] The Legislature's use of this limiting language is evidence that they anticipated situations where victims and/or witnesses would not be afforded these rights due to certain circumstances.

With this in mind, the Legislature did not provide a remedy for those situations in which limited resources or other circumstances would result in victims being denied these rights. They did however provide in section 3(p) that victims could be heard "at any ... time deemed appropriate by the court," which is why the victim was allowed to be heard at the revocation hearing, even though she was not granted standing.[196] In its decision, however, the SJC did not discuss section 3(p) of the statute. Rather, the court concluded that a victim "asserting the right of prompt disposition under the statute should be provided with an opportunity to address the court when that right is jeopardized."[197] This conclusion is unnecessary because the language of the statute already provides for victims to be heard when deemed appropriate by the court.[198]

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190. *See infra* notes 263-74 and accompanying text (discussing the need for judges to balance the rights of the victim with those of the defendant).

191. *See generally* Order on Motion to Revoke Stay, *supra* note 49.

192. Brief for Appellant, *supra* note 3, at 18.

193. *See* ch. 258B, § 3.

194. *See* Brief for Appellant, *supra* note 3, at 18.

195. ch. 258B, § 3 (emphasis added).

196. *Id.* § 3(p). *See also infra* note 261 and accompanying text.

197. Hagen v. Commonwealth, 772 N.E.2d 32, 34 (Mass. 2002).

198. *See* § 3(p). *See also supra* notes 178-81 and accompanying text (discussing

The amici argued that the single justice needed to look no further than the direct language in the statute to resolve this case.[199] The amici pointed to the language that states: "victims of crime ... *shall* be afforded the following basic and fundamental rights, to the greatest extent possible."[200] Focusing on the word "shall," the amici argued the statute was written in mandatory terms, thus obligating the lower court to confer standing upon the victim.[201] In a footnote, the amici asserted that the language in the statute is qualified "by requiring that crime victims' rights be afforded 'subject to appropriation and to available resources,'[202] but that this limiting language does not apply to the right to a prompt disposition.[203]

Although the court did not address this argument, the amici separated the language of the statute and took it out of context. When determining the meaning of a statute, one must look at the language in its entirety. The amici correctly stated that the word "shall" is limited by the language in the statute, which refers to "appropriation and available resources."[204] However, what the amici did not acknowledge was that the word "shall" is *also* limited by the language "*to the greatest extent possible.*"[205]

Ms. Hagen and amici failed to recognize the likelihood that the legislature was aware of the ongoing national debate with regard to victims' rights when the statute was written.[206] Assuming arguendo that victim advocates were *not* involved in the writing of the statute—which is highly unlikely—the legislature certainly knew of the efforts by victim advocates across the nation to add a victims' rights amendment to the United States Constitution.[207] Advocacy for a Constitutional amendment stemmed from a prolonged history of the denial of standing to victims as

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concurring opinion, which states that court's decision created "a right of victims to participate in proceeding as a non-party").

199. *See* Amici Brief for Appellant, *supra* note 19, at 21.

200. *Id.* at 21-22 (emphasis included) (quoting MASS. GEN. LAWS ch. 258B, § 3 (2000)).

201. *See id.* at 22.

202. ch. 258B, § 3. *See also* Amici Brief for Appellant, supra note 19, at 22.

203. *See* Amici Brief for Appellant, *supra* note 19, at 22 n.1 "This language is not relevant to the disposition of this case, as there is no credible argument that resource limitations in any way make it impossible to give the victim the right to a prompt disposition." *Id.*

204. *Id.*

205. ch. 258B, § 3 (emphasis added).

206. *See* Henderson, *supra* note 126, at 384.

207. *See generally* Cellini, *supra* note 122; Steven Twist, *The Crime Victims' Rights Amendment and Two Good and Perfect Things*, 1999 UTAH L. REV. 369; Henderson, *supra* note 126.

parties in criminal cases.[208] With this in mind, had the legislature intended for victims to have standing in criminal cases, even in a limited manner, they would have explicitly stated so in the statute.[209] Because such language was absent from the statute, and because the judiciary is constrained by the principles of statutory interpretation, the Massachusetts SJC affirmed the ruling of the lower court.[210] Although it is unfortunate that Ms. Hagen may have been denied her right to a prompt disposition,[211] it cannot be said that the legislature clearly intended for victims or witnesses who were denied one of the rights granted in chapter 258B to be afforded party status as the appropriate remedy.[212] "It is the function of the court to construe a statute as written and an event or contingency for which no provision is made *does not justify judicial legislation.*"[213]

VI. VICTIM'S RIGHT TO A PROMPT DISPOSITION OF THE CASE

The right to a prompt disposition is a right that is commonly granted to victims by states. Some states bestow this right upon their citizens by including it in constitutional provisions.[214] Massachusetts, however, is among a number of other states which grant the right to a prompt disposition by statute.[215] Ms. Hagen claimed her right to a prompt

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208. *See* Cellini, *supra* note 122 at 839.

209. *See* Hagen v. Commonwealth, 772 N.E.2d 32, 34 (Mass. 2002).

210. *See id.*

211. *See infra* notes 214-50 and accompanying text (discussing meaning of "disposition").

212. *See generally* Brief for Appellee, *supra* note 1.

213. *Id.* at 14 (quoting First Nat'l Bank of Boston v. Judge Baker Guidance Ctr., 431 N.E.2d 243, 247-48 (Mass. 1982) (quoting Prudential Ins. Co. of America v. Boston, 340 N.E.2ds 858, 861 (Mass. 1976)) (emphasis added).

214. *See* ARIZ. CONST., art 2, § 2.1(10) (right to speedy trial and disposition)); KAN. CONST., art. 15 § 15 ("justice without delay"); LA CONST. art. I, § 25 (right to "reasonable prompt disposition of the case"); MICH. CONST., art. I, § 24 (right to "timely disposition"); N. M. CONST., art. II, § 24 ("right to timely disposition"); S.C. CONST., art. I, § 24(11) ("prompt and final conclusion of the case"); WIS. CONST. art., I, § 9m ("timely disposition"); CONN. CONST., art. 32, § 8(b)(2) ("timely disposition ... provided no right is abridged"); MO. CONST., art. 32, § (1)(5) (speedy disposition and appellate review, provided that nothing in the right "shall prevent the defendant from having sufficient time to prepare his defense"). *See also* Amicus Brief in Support of Petitioner, *supra* note 18, at 2-3.

215. *See* MASS. GEN. LAWS ch. 258B, § 3(f) (2000) (providing "a prompt disposition of the case in which they are involved as a victim or a witness"). In its brief, the amicus lists a number of other states with similar statutes: CAL. PENAL CODE § 679.02 (10) (granting victims the right to "an expeditious disposition of the criminal action"); COLO. REV. STAT. § 24-4.1-302.5(1)(o) (2001) (crime victims have "[t]he right to be assured that in any criminal proceeding the court, the prosecutor, and other law enforcement officials will take appropriate action to achieve a swift and fair resolution of the proceedings"); FL. STAT.

disposition had been violated.[216] Most would agree that the Legislature did not consider thirteen years to be a timely or prompt amount of time to dispose of a case. However, an examination of what the Legislature considered to be a disposition of the case is also necessary.[217] The Victim Bill of Rights defines disposition as "the *sentencing or determination of penalty or punishment to be imposed upon a person* convicted of a crime or found delinquent or against whom a finding of sufficient facts for conviction or finding of delinquency is made."[218] Nowhere in the statute does it state that the sentence must *actually* be imposed, rather, simply a determination of the sentence *to be* imposed is what constitutes a disposition.[219] Mr. Kelly was convicted and sentenced approximately one year after he was indicted.[220] As a result, the defendant's trial, conviction and sentencing meets the statutory definition of prompt disposition.[221]

Ms. Hagen argued that disposition should not be defined as simply the date of sentencing, but rather as the date the punishment or penalty was actually imposed.[222] Therefore, she asserted, "if a stay of execution of sentence pending appeal is ordered, it cannot logically stand that the sentencing, punishment or penalty has been 'determined' [since] the very nature of a stay means there is a 'likelihood' that the appeal will be successful and the punishment overturned."[223] In support of her argument, Ms. Hagen referred to section 11[224] of the statute which states that the rights and duties under chapter 258B "shall continue to be enforceable until the *final disposition* of the charges, including acquittal or dismissal of charges, all post-conviction release proceedings, post-convictions relief proceedings, [and] all appellate proceedings ...."[225] Ms. Hagen claimed that this was evidence that the Legislature intended that a determination of

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ANN. § 960.001(1)(a)(7) (2002) (crime victims have the right to a "prompt and timely disposition of the case"). For additional examples, see Amicus Brief in Support of Petitioner, *supra* note 18, at 3.

216. *See* ch. 258B, § 3(f).

217. *See* BLACK'S LAW DICTIONARY 484 (7th ed. 1999) (defining disposition in criminal law as "the sentence the defendant receives ...; i.e., the post-adjudicative phase of the criminal proceeding is called the disposition or the dispositionary stage [process]").

218. ch. 258B, § 1 (emphasis added).

219. *See id.*

220. *See* Commonwealth's Opposition Motion, *supra* note 34, at 2.

221. *See id. See also* MASS. GEN. LAWS ch. 258B, § 1 (2000); Hagen v. Commonwealth, 772 N.E.2d 32, 36 (Mass. 2002).

222. *See* Brief for Appellant, *supra* note 3, at 24-25.

223. *Id.* at 25.

224. *See* ch. 258B, § 11.

225. Brief for Appellant, *supra* note 3, at 25 (citing ch. 258B, § 1) (alteration in original) (second emphasis added).

when the underlying criminal matter had been promptly disposed of should be judged using the date when the validity of the conviction was resolved, rather than the date the sentence was imposed, and that to conclude otherwise would result in two different interpretations of the word disposition.[226] Referring to the definition of disposition in section one of the statute, the court agreed with the Commonwealth on this issue, finding that the intent of the Legislature in enacting section 3(f) was to "confer on victims the right to ensure prompt trial and, if convicted, the prompt sentencing of the perpetrators of the crimes against them."[227] The court referred to the definition of disposition in section 1 of the statute.[228]

Another factor supporting the court's determination of the proper meaning of disposition, although not mentioned in its opinion, is the definitional section of chapter 258B, which states, that "[a]s used in the chapter, the following words shall have the following meaning, *unless the context otherwise requires.*"[229] Therefore, the meaning of disposition in section 11[230] is slightly different than the default definition in section one because the context requires it to be.[231] Victims are afforded certain rights after the disposition of the case as defined in section 1, thus the need for the more encompassing definition in section 11.[232] Rights afforded to victims

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226. *See id.* at 26.

227. Hagen v. Commonwealth, 772 N.E.2d 32, 34 (Mass. 2002). *See also supra* note 218 and accompanying text.

228. *See Hagen*, 772 N.E.2d at 34.

229. MASS. GEN. LAWS ch. 258B, § 1 (2000) (emphasis added).

230. *Id.* § 11.

231. An argument could also be made that section 11 refers to a "final disposition," which is different from the meaning of "disposition" otherwise used throughout the chapter. *See* ch. 258B, §§ 1, 11.

232. *See id.* §§ 3(s)-(u). These sections provide, in part, for the following rights:

> (s) for victims, to be informed by the parole board of information regarding the defendant's parole eligibility and status in the criminal justice system;
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> . . . .
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> (t) for victims, to be informed in advance by the appropriate custodial authority whenever the defendant receives a temporary, provisional or final release from custody, whenever a defendant is moved from a secure facility to a less-secure facility, and whenever the defendant escapes from custody. The victim shall be informed by the prosecutor about notification rights and the certification process required to access the criminal offender record information files
>
> . . . .
>
> (u) for victims, to be informed that the victim may have a right to pursue a civil action for damages relating to the crime, regardless of whether the court has ordered the defendant to make restitution to the victim.

Id.

after disposition, for example, include the right to be notified when the defendant is going to be released or moved to a less secure facility and the right to be notified of parole hearings.[233] Consequently, the meaning of disposition as defined in section 11 of the statute, applies only to that section because it is required by the context.[234] In section (f), which grants the right to a prompt disposition, the meaning of the word disposition is as defined in section one.[235]

As previously noted, the statute explicitly limits the rights afforded victims and witnesses under this statute by stating that these rights shall be afforded "*to the greatest extent possible and subject to appropriation and to available resources*."[236] Based on the clear limitations of that language, there would certainly be situations in which the rights in this section would not or could not be upheld. As the *Hagen* court pointed out, "[w]e can fairly assume that the Legislature was aware that the appellate process may be time consuming, but that a sentence lawfully imposed will not be avoided because of some inordinate delay in the processing of the appeal."[237] Again, this further supports the conclusion that the prompt disposition was intended within the trial process and does not "extend to postsentencing proceedings."[238]

Another factor that often causes delays in any governmental agency is monetary restraints.[239] Financial constraints are always a factor in the criminal justice system, especially in the Commonwealth of Massachusetts.[240] Prosecutors must consider these constraints when making decisions on which cases to prosecute, to what extent, and which decisions to appeal.[241] The office of the district attorney does not have an unlimited amount of funds and it often has a high staff turnover.[242] As a result, there are cases in which things may get overlooked, misplaced, or forgotten and victims sometimes suffer because of this.[243] Unfortunately,

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233. *See id.*

234. *See id.* § 11.

235. *See id.* § 1.

236. *Id.* § 3 (emphasis added).

237. Hagen v. Commonwealth, 772 N.E.2d 32, 36 (Mass. 2002).

238. *Id.*

239. *See* Brief for Appellee, *supra* note 1, at 18. *See also infra* text accompanying note 279; *infra* Part VII.B.

240. *See* Commonwealth v. Gonsalves, 739 N.E.2d 1100, 1106 (Mass. 2000). *See also infra* Part VII.B.

241. *See Gonsalves*, 739 N.E.2d at 1106. *See also infra* Part VII.B.

242. *See Gonsalves*, 739 N.E.2d at 1106. *See also infra* Part VII.B.

243. *See* Robert P. Mosteller, *The Unnecessary Victims' Rights Amendment*, 1999 UTAH L. REV. 443, 445 (1999). Unfortunately, "[n]o governmental bureaucracy operates perfectly, and the criminal justice system is hardly an exception. Given this context, it is

the case against Ms. Hagen's rapist was one of those cases that fell through the cracks.[244] The Commonwealth acknowledges that they are partly to blame for the delay.[245] Of course, the fact the office of the district attorney and the court system as a whole is overburdened and financially constrained provides no relief to the victim. Although the excessive delay in this case cannot be attributed to any single factor, there is no excuse for the fact this case went unresolved for thirteen years.[246]

In its decision, the court was appalled by the fact that the "record provide[d] no plausible excuse for a delay of four years in holding the hearing on the defendant's motion for new trial, or a delay of almost nine years between the filing of the notice of the appeal and the Commonwealth's motion to revoke the stay of the defendant's sentence pending appeal."[247] The court criticized the district attorney's office, writing that the "rights of the victim and the public to finality demand more than the Commonwealth has produced here."[248] But as defined in section 1 of the statute, Ms. Hagen was not denied her right to a prompt disposition.[249] "[T]he defendant was tried and sentenced within one year of indictment, and Hagen alleges no delay in that part of the process. The statutory requirement of a 'prompt disposition' thus has been satisfied."[250]

VII. RAMIFICATIONS OF GRANTING, OR NOT GRANTING VICTIMS STANDING

Because the court found that the legislative intent of chapter 258B does not "confer on a victim status as a party or the right to file motions ...," it did not consider the effects of granting victims standing in criminal matters.[251] They properly left it in the hands of the Legislature to change the statute, if in fact granting victims standing was the desired result.[252] If the Legislature chooses to expand the rights of victims and grant them standing in criminal matters, they must carefully consider all of the

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preordained that existing victims' rights are not uniformly enforced." *Id.*

244. *See* Gary V. Murray, *Appeal in 1987 Rape Heard*, WORCESTER TELEGRAM & GAZETTE, Feb. 7, 2002, at A1 (quoting the District Attorney of Worcester County, John Conte, stating that "the case somehow 'fell through the cracks,' in part because of the prosecution's failure to properly monitor defense efforts to get the appeal on track").

245. *See id.*

246. *See supra* notes 37-54 and accompanying text (discussing the various reasons for the extreme delay in this case).

247. Hagen v. Commonwealth, 772 N.E.2d 32, 38 (Mass. 2002).

248. *Id.*

249. *See* MASS. GEN. LAWS ch. 258B, § 1 (2000).

250. *Hagen*, 772 N.E.2d at 32.

251. *Id.*

252. *See id.* "If the Legislature had intended otherwise, it could have done so." *Id.*

possible ramifications of such action.

A. Defendant's Constitutional Rights

Defendants in criminal cases are protected by specific rights afforded under the United States Constitution.[253] By contrast, crime victims have no constitutionally guaranteed rights.[254] Although some states have incorporated victim rights into their state constitutions and others have codified the rights afforded to crime victims, the constitutional rights granted to defendants under the U.S. Constitution are superior to those rights granted to victims by the various states.[255]

A victim's right to a prompt disposition cannot be invoked to abridge a defendant's rights to a fair trial, *post-conviction proceedings*, or appeal.[256] Ms. Hagen claimed that granting her standing to enforce her right to a prompt disposition of the case would not unlawfully interfere with the constitutional rights of the defendant because any federal or state constitutional rights of the defendant would prevail over the victim's statutory protection.[257] Further, she claimed that the defendant did not have a constitutional right to prevent a crime victim from being heard by the court.[258] However, there is no evidence that any of the judges who ruled in this case based their decision on that notion. The trial court judge allowed the victim to be heard, he just did not grant her standing.[259]

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253. *See* Jennifer J. Stearman, *An Amendment to the Constitution of the United States to Protect the Rights of Crime Victims: Exploring the Effectiveness of State Efforts*, 30 U. BALT. L.F. 43, 43 n.2. (1999). Stearman outlines the various rights as follows:

> U.S. CONST. amend. IV (grants freedom from unreasonable searches and seizures and requisite probable cause for issuance of a warrant); U.S. CONST. amend. V (requires a grand jury indictment on trial on a capital offense, prohibits double jeopardy, protects defendants against self-incrimination and guarantees due process of law); U.S. CONST. amend. VI (provides defendant in criminal trials the right to a speedy, public trial by an impartial jury, the right of notice of charges against him, the right to confront witnesses, and the right to an attorney); U.S. CONST. amend. VIII (prohibits cruel and unusual punishment).

Id.

254. *See id.* at 43.

255. *See generally supra* note 214 (identifying states that incorporate victim rights into their state constitution). *See also supra* note 215 (identifying states that have codified these rights).

256. Objection to Filing of Appearance, *supra* note 142, at 3 (emphasis added). Post-conviction proceedings refer to sentencing and appellate procedures.

257. *See* Amicus Brief in Support of Petitioner, *supra* note 18, at 35.

258. *See id.*

259. *See* Brief for Appellant, *supra* note 3, at 13. As discussed above, the victim may be heard "at any time deemed appropriate by the court and in an appropriate manner."

"Unequal treatment of defendants is perhaps the most compelling reason for denying victims the right to participate, because equal treatment of defendants stands against victim participation at virtually every stage of the criminal process."[260] Defendants represented by counsel are treated differently than those without counsel.[261] It follows that victims represented by counsel can exert pressure on prosecutors, who are burdened with heavy caseloads, to pursue a conviction or a harsher sentence for that victim's perpetrator. A victim represented by counsel also has a greater likelihood of publicizing his or her case. By getting media attention on the case, a represented victim can put political pressure on the district attorney's office to aggressively prosecute the case, seek a more severe sentence, and exhaust all appellate remedies. In contrast, an unrepresented victim may not have his or her case brought to the public's attention through the media or have their assailant prosecuted as zealously.

Consequently, one disparity between represented and unrepresented victims leads to unfair and selective prosecution, ultimately violating the defendant's constitutional rights. Furthermore, would a state have the burden of providing an attorney to victims who cannot afford one in order to ensure that a defendant is not unfairly prosecuted? Finally, would witnesses and family members of the victim also be provided with counsel in order to enforce their rights?

Balancing the constitutional rights of the defendant with those granted to victims creates a difficult task for any court. Because the criminal justice system relies on the participation of the victim to "report crime, testify and facilitate prosecution[s]," victims should reasonably expect to be afforded certain rights within the process.[262] As a result of victims being granted more rights, courts are finding it difficult to find the appropriate balance between the defendant's constitutional rights and the rights of the victims.[263]

In *United States v. Broussard*[264] for example, the prosecution sought a court order declaring the case one of "special public importance" in order to expedite the proceeding.[265] The prosecution wanted to expedite the

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MASS. GEN. LAWS ch. 258B, § 3(p) (2000). There is a difference, however, between being heard and having party status to file pleadings or appear before the court.

260. Beloof, *supra* note 94, at 298.

261. *See* Henderson, *supra* note 126, at 421-22 (discussing the fact that indigent and middle class victims may not have the resources to hire an attorney, thereby "increas[ing] the lottery aspect of the criminal justice process ... [that] might exacerbate differences in how victims are treated.").

262. Stearman, *supra* note 253, at 61.

263. *See id.*

264. 767 F. Supp. 1536 (D. Ore. 1991).

265. *See* Amici Brief for Appellant, *supra* note 19, at 36 (citing *Broussard*, 767 F.

proceeding because the victim was a child.[266] The defendant argued that because of the complexity of the case he needed more time to prepare his defense, and that expediting the case would violate his due process rights.[267] In response to the defendant's due process challenges, the *Broussard* court found that the statute allowing for expedited procedures was constitutionally valid.[268] The court in *Broussard,* without ruling on the merits, also noted that a balance should be struck between the child victim's speedy trial interest and the defendant's due process interest.[269]

State appellate courts have also been faced with the issue of how to handle situations in which a victim's rights impede upon the "well-established constitutional rights of the criminal defendant."[270] In most instances, these courts chose to protect the rights of the defendant over those of the victim, since denying a defendant his or her rights creates grounds for appeal.[271] Victims, on the other hand, do not have the same remedies as defendants for violations of such rights.[272]

Because victims do not have the right to appeal such decisions, achieving the proper balance of the rights of both defendants and victims should be the goal of our criminal justice system. Working together, judges and prosecutors can ensure that, at a minimum, the concerns and feelings of the victim are heard. While a judge is bound to rule in favor of the defendant when constitutional rights would be violated, a judge should still strive to minimize secondary harm to the victim.[273] In striving to achieve this balance, judges and prosecutors must also remember that their duty is to the community and not just to a particular victim.[274] They must do what

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Supp. at 1544).

266. *See id.* (citing 18 U.S.C. § 31619(j)) (allowing for expedited proceedings where a child is called to give testimony).

267. *See id.* at 36-37 (citing *Broussard*, 767 F. Supp. at 1536).

268. *See id.* at 37 (citing *Broussard,* 767 F. Supp. at 1536). The appellee in *Hagen* did not argue that the statute was constitutionally invalid, only that the statute did not grant the victim standing to enforce the right. *See id.*

269. *See id.* (citing *Broussard*, 767 F. Supp. at 1536).

270. Stearman, *supra* note 253, at 60 (referring to states which have included victim's rights in their state constitutions).

271. *See id.* at 61 (citing State v. Bible, 858 P.2d 1152 (Ariz. 1993) (holding that although crime victims and their families have certain rights, those rights do not, and must not, conflict with the defendant's right to a fair trial)).

272. *See id.* "No such remedies are provided to the victims of crime. Thus, ... there is no legitimate enforcement mechanism." *Id.*

273. *See supra* note 116 and accompanying text (discussing secondary harm).

274. *See* Commonwealth v. Beal, 709 N.E.2d 413, 416 (Mass. 1999). "[T]he prosecution pursues a conviction on behalf of the Commonwealth as a whole, not on behalf of the individual complainant." *Id.* (citing Manning v. Mun. Ct. of Roxbury Dist., 361 N.E.2d 1274 (Mass. 1977)).

is in the best interest of the public. Unfortunately, in some cases, what is best for the community may not coincide with the feelings of the victim.

B. The Effects that Granting Standing to Crime Victims Would Have on Prosecutorial Discretion

It is well settled that a prosecutor has within his discretion the power to decide which cases to prosecute and to what extent.[275] Moreover, "[a] court is not a prosecuting officer .... Its office is judicial—to hear and determine [cases] *between the Commonwealth and the defendant.*"[276] The law is clear that a prosecution is conducted in the interests of the Commonwealth, not on behalf of a particular victim.[277] A victim focuses on the particular case in which they are involved, whereas a prosecutor is forced to look at the same case in broader terms, which may be influenced by political considerations, monetary restraints, and prosecutorial priorities.[278]

"The district attorney is the people's elected advocate for a broad spectrum of societal interests—from ensuring that criminals are punished for wrongdoing, to allocating limited resources to maximize public protection."[279] "[L]imited prosecutorial resources will always impose certain restraints on prosecutors."[280] Prosecutors must often make difficult decisions that force them to look beyond the case and the victim before them in order to fulfill their duties and obligations to the community at large.

In a majority of cases, the interests of the crime victim parallel the interest of the prosecutor, but in some cases these interests sharply diverge. In such cases, a victim in this Commonwealth still has a voice: Chapter 258B, section 3(p) allows victims to be heard either through oral or written victim impact statements at sentencing or disposition of the case.[281] In this statement, the victim may include their feelings regarding the effect this crime has had on their life, and may voice his or her opinion on the

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275. *See* Commonwealth v. Clerk of Boston Div. of Juv. Ct. Dep't, 738 N.E.2d 1124, 1129 (Mass. 2000) (citing Commonwealth v. Taylor, 704 N.E.2d 170 (Mass. 1999)).

276. *Clerk of Boston Div. of Juv. Ct. Dep't*, 738 N.E.2d at 1129 (emphasis added) (citing Commonwealth v. Gordon, 574 N.E.2d 974 (Mass. 1991) (quoting Commonwealth v. Hart, 20 N.E. 310 (Mass. 1889))).

277. *See Manning*, 361 N.E.2d at 1276. *See also Beal*, 709 N.E.2d at 416; Brief for Appellee, *supra* note 1, at 17.

278. *See* William T. Pizzi, *Victims' Rights: Rethinking Our "Adversary System,"* 1999 UTAH L. REV. 349, 352 (1999).

279. Brief for Appellee, *supra* note 1, at 18 (quoting *Gordon*, 574 N.E.2d at 976).

280. Commonwealth v. Gonsalves, 739 N.E.2d 1100, 1106 (Mass. 2000). *See also* MASS. GEN. LAWS ch. 258B, § 3 (2000) (stating that victims' rights in the criminal justice system are "subject to appropriation and to available resources.").

281. *See* ch. 258B, § 3(p).

sentence recommendations.[282] Most important, the victim may be heard "*at any other time deemed appropriate by the court.*"[283] Therefore, the victim does have the opportunity to be heard at various stages of the proceedings, if deemed appropriate by the court.

Based on the extraordinary facts of Ms. Hagen's case, the superior court judge allowed her attorney to speak at the motion hearing to revoke the stay of the defendant's sentence.[284] Ms. Hagen argued that she did not want to be granted full party status, but rather, that she was merely seeking quasi-party status.[285] Although she was not granted the quasi-party status she requested, her goal was essentially achieved since she was given the opportunity to assert that her right to a prompt disposition had been denied.[286] The Massachusetts SJC found the lower court judge's action appropriate, noting that "even though section 3(f) does not apply to postsentencing proceedings, the Superior Court judge gave proper recognition to Hagen's rights by allowing her counsel to address the court while not permitting her to intervene as a party."[287]

Due to the fact that the Commonwealth, in its discretion, chose not to initiate an appeal of the lower court's decision denying revocation of the defendant's stay of execution, the victim sought standing so that she might appeal the decision on her own initiative.[288] This, however, goes to the heart of prosecutorial discretion. Just as the Commonwealth has the discretion to choose which cases to prosecute, it also has the discretion to decide which cases to appeal.[289] "The decision to seek an appeal remains *exclusively the decision of a district attorney* without interference by the judiciary."[290] These decisions are based on factors that go well beyond the victim in any given case. The Commonwealth must consider where its resources would best serve the entire community.[291] If the Commonwealth deems an appeal fruitless and a waste of resources, it is within its power

282. *See id.*

283. *Id.* (emphasis added).

284. *See* Brief for Appellant, *supra* note 3, at 13.

285. *See id.* at 12.

286. *See* Appellant's Petition, *supra* note 6, at 2 n.2.

287. *See* lthough neither the victim, the commonwealth, the judge, nor the majority of the Massachusetts SJC cited to section (p) of the statute, it is not necessary that the victim be granted quasi-party status in order to be heard "*at any other time deemed appropriate by the court.*" MASS. GEN. LAWS ch. 258B, § 3(p) (2000) (emphasis added).

288. *See* Appellant's Petition, *supra* note 6, at 11.

289. *See* Commonwealth v. Gonsalves, 739 N.E.2d 1100, 1106 (Mass. 2000); Commonwealth v. Clerk of Boston Div. of Juv. Ct. Dep't, 738 N.E.2d 1124, 1129 (Mass. 2000).

290. *Gonsalves*, 739 N.E.2d at 1106 (emphasis added).

291. *See id.*

and discretion not to pursue that appeal.[292] The Commonwealth cannot appeal every adverse decision, as that would burden not only the prosecutors but the court system as a whole. If victims were allowed standing to independently appeal decisions, prosecutors would be forced to pursue the action if the appeal were successful because a victim cannot prosecute a criminal case.[293] Given the result of such action, there can be no credible argument made that the victim was not attempting to "direct the prosecution."[294]

Furthermore, prosecutorial discretion has been regarded as an inherently executive power that should not be judicially altered unless it is clearly inapposite to the *welfare of the public*.[295] The language is clear in Article 30 of the Massachusetts Declaration of Rights, which states:

> In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the *judicial shall never exercise the legislative and executive powers, or either of them*: to the end it may be a government of laws and not of men.[296]

The court is not a prosecuting officer; its office is judicial and its function in criminal cases is to hear cases between the defendant and the Commonwealth.[297] The decision to seek appellate review in criminal cases is exclusively at the hands of the prosecutor "without interference by the judiciary."[298] As a result, the judiciary cannot take away the discretion of the prosecutor, and thereby infringe on the executive powers, in order to grant victims the right to appeal decisions in criminal cases.

Obviously, there are not only cases in which the victim seeks an aggressive prosecution: there are also cases where the victim does not want

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292. *See id.*

293. *See* Victory Distrib., Inc. v. Ayer Div. of Dist. Ct. Dep't, 755 N.E.2d 273, 277 (Mass. 2001).

294. MASS. GEN. LAWS ch. 258B § 3(g) (2000) (stating explicitly that a victim does not have the authority to direct the prosecution of the case). *See also supra* notes 145-59 and accompanying text.

295. *See* Cellini, *supra* note 122, at 863-64 (1997). *See also* Brief for Appellee, *supra* note 1, at 15-16 ("A prosecutor's wide discretion in deciding whether to prosecute a particular defendant is exclusive to the executive branch") (citing Commonwealth v. Pellegrini, 608 N.E.2d 717, 719-20 (Mass. 1993); Commonwealth v. Clerk of Boston Div. of Juv. Ct. Dep't, 738 N.E.2d 1124, 1129 (Mass. 2000)).

296. MASS. CONST. art. XXX (emphasis added). *See also* Brief for Appellee, *supra* note 1, at 18

297. *See supra* note 276 and accompanying text.

298. Commonwealth v. Gonsalves, 739 N.E.2d 1100, 1109 (Mass. 2000). *See also* MASS. CONST. art. XXX.

the case to be prosecuted.[299] If victims were allowed to direct the prosecution and interfere with prosecutorial discretion of the prosecutor in any given case, it would have a chilling effect, especially on the prosecution of violent crimes.[300] For example, if a defendant were aware that a victim was able to direct the prosecution, be represented by counsel, appeal adverse decisions, and have standing to assert claims independent of the Commonwealth, the victim might be forced (by the defendant) to seek counsel for the aforementioned reasons. The defendant could use the victim, through her attorney, to direct the prosecution not to prosecute or to seek a lesser sentence. This would be especially true in cases of domestic violence.[301] A victim would be safer if the defendant knew that he or she could not direct the prosecutor in any way with respect to the decision to prosecute or to appeal:

> [J]ustice in a given case does not always mean charging a defendant with the most serious offense, proceeding without being able to prove a case beyond a reasonable doubt, or demanding the most severe sentence. Similarly, justice does not mean dropping charges or arguing for light sentences, *no matter what the victim wants*. Rather, *a balancing of resources, factual issues, and experience comes into play in prosecutorial decision making*.[302]

In most cases, the victim does not know or care about the factors the prosecutor must consider when making prosecutorial decisions; they simply want to see justice served. Unfortunately, a victim's notion of justice will not always mirror that of the prosecutor. The fact remains, however, that the discretion to determine what is considered justice in any given case belongs to the prosecutor and not the victim.[303]

C. Public Confidence in Criminal Justice System

When justice is excessively delayed, society is negatively impacted through the resulting erosion of public confidence in the judicial system and the integrity of the courts.[304] *Hagen v. Commonwealth* attracted widespread attention in the Commonwealth and throughout the nation. Various newspaper articles and columns were written which negatively portrayed the office of the district attorney and the court system, as a

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299. *See* Henderson, *supra* note 126, at 423-26.

300. *See id.*

301. *See id.* at 426 (discussing proposition that the purpose of mandatory prosecution in domestic violence cases is to protect victims).

302. *Id.* at 422 (emphasis added).

303. *See* Brief for Appellee, *supra* note 1, at 17 (citations omitted).

304. *See* Amici Brief for Appellant, *supra* note 19, at 4; *See also generally* Sullivan, *supra* note 3, at 1.

whole, for their apparent disregard of the fact that a convicted rapist had yet to serve a single day of a sentence that had been imposed over thirteen years earlier.[305]

In August of 2001, District Attorney John Conte responded to the media attacks on him and his office.[306] Mr. Conte stressed the fact that the delays were largely attributable to missing and/or incomplete transcripts that had prevented the appellate proceedings, and the fact that two judges had concluded that Mr. Kelly had a meritorious appeal.[307] Moreover, he stressed that the ill health of the Defendant was not the reason Mr. Kelly was not yet in prison, despite what Ms. Hagen's attorney had suggested.[308] Further, he denied the allegations by Ms. Hagen that his office had pressured her into agreeing to a reduced sentence and had made "veiled threats" to discourage the victim from attending the court hearing.[309] Mr. Conte made clear that he had "great feeling" for the victim and he "fel[t] terrible about this whole thing and want[ed] to bring it to a conclusion."[310] He also explained that his office would argue vigorously against a new trial and would have brought the motion to have the stay of the sentence revoked sooner had the case not been in limbo.[311] Finally, he added that his office had originally recommended a twenty-year sentence after Mr. Kelly

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305. The tone of the articles is evident by the titles. *See e.g.* Gary V. Murray, *Prosecutor Quits Case After Rift with Victim,* WORCESTER TELEGRAM & GAZETTE, (North Ed.) June 1, 2001, at B1; Dianne Williamson, *Jaw-Dropper a New Twist in Long Saga; Prosecutor Argues Against Victim's Stand,* WORCESTER TELEGRAM & GAZETTE, Aug., 28, 2001, at B1; Dianne Williamson, *DA's Office Screams at Victim; Attention of Press Irks Those in Charge,* WORCESTER TELEGRAM & GAZETTE, Mar. 25, 2001, at B1.

306. *See* Gary V. Murray, *Conte Explains Kelly Case: Transcript Caused Delay*, WORCESTER TELEGRAM & GAZETTE, Aug. 3, 2001, at A1.

307. *See id.*

308. *See id.* "She thinks the issue is the man's health. It's not. She's confused as to what the real issue is. The issue is whether or not [Mr. Kelly] had a fair trial." *Id.* (quoting John Conte, District Attorney Worcester County). The Boston Herald claimed that a reporter and a photographer followed Mr. Kelly, and although he had arrived in the courtroom in a wheel chair just two weeks before, he was observed working in is yard and garage and only sometimes using the support of a crutch. *See* Sullivan, *supra* note 3, at 1.

309. *See* Murray, *supra* note 306, at A1. *See also* Sullivan, *supra* note 3, at 1 (stating that victim and her lawyer claimed that officials from Conte's office tried to coerce victim into accepting probation without any explanation). The victim's lawyer also claimed that the assistant district attorney "made a veiled threat that Hagen might be arrested and jailed for an 11-year old civil default warrant for an unpaid $100 credit card debt if she came to Massachusetts for the hearing last month." *Id. See also* Letter from Wendy Murphy, Attorney at Brody, Hardoon, Perkins & Kesten, LLP, to Kathy DelloStrito, Assistant District Attorney for the Commonwealth of Massachusetts (June 18, 2001) (on file with author), at 2-4 (discussing outstanding warrant and prosecution's handling of case).

310. Murray, *supra* note 306, at A1.

311. *See id.*

was convicted and opposed the stay of the sentence in 1988 and 1991.[312]

Mr. Conte acknowledged that the case had fallen through the cracks and accepted responsibility for the prosecution's failure to monitor the defense efforts to get the appeal on track.[313] At the same time, he noted that if there had been a complete record for the appeals court, the case would have gone through the system in its ordinary course.[314]

In her brief, Ms. Hagen claimed that she should be granted standing as a matter of public policy.[315] She argued that since neither the District Attorney's Office nor the Attorney General's Office had asserted her rights—despite the lower court judge's ruling that the "Commonwealth had 'unclean hands' in this matter"—then public policy required that she be given the opportunity to personally assert her rights.[316] However, she later noted that the policy behind victims' rights emanated from the legislature in enacting chapter 258B, thus the public policy debate was no longer timely.[317] As a result, she undermined her own argument by asking the court to rule in her favor based on public policy reasons, yet urging the court not to second-guess the legislature's public policy reasons.

On the other hand, since the victim and the district attorney were both arguing to have the stay of the sentence revoked, it would appear that including the victim's argument in their own would have simply strengthened the district attorney's argument.[318] If the case were such that the interests of the victim and the district attorney's office diverged, and/or the rights of a victim were in jeopardy of being violated, then it would be a case in which the court should deem it appropriate to hear from the victim.[319]

Ms. Hagen further argued that because the integrity of the court was undermined by the excessive delay, it was imperative that the victim be able to enforce her right to a prompt disposition in order to restore confidence in the criminal justice system.[320] However, public confidence in the judicial system could also be negatively impacted if courts granted

312. *See id.*

313. *See id.*

314. *See id.*

315. *See* Brief for Appellant, *supra* note 3, at 19-20.

316. *Id.* at 20.

317. *See id.* at 27-28. "This court may disagree, as a policy matter, with the idea that victims should be heard on certain issues in criminal cases is no justification to thwart the intent of the legislature. The time for policy debate has come and gone." *Id.*

318. In its brief, the Commonwealth never noted why it never included in its argument to revoke the defendant's stay of his sentence that victims are entitled to a prompt disposition. *See generally* Brief for Appellee, *supra* note 1.

319. *See* MASS. GEN. LAWS ch. 258B, § 3(p).

320. *See* Brief for Appellant, *supra* note 3, at 28-33.

crime victims, such as Mrs. Hagen, legal standing. As stated, the victim argued that the right "to a prompt disposition of the case in which [she is] involved,"[321] confers upon her the right "to be represented as a party, and by attorneys other than those in the office of the district attorney."[322] If the victim's interpretation of the statute was correct, a crime victim could appear in court with counsel and be heard at each and every court date involving the matter since each stage of the criminal process may ultimately affect the disposition of the case.[323] As a result, in every criminal matter involving a victim and witnesses, there would be a minimum of three parties instead of two.[324] Moreover, since many cases have multiple victims and witnesses, each action could have a multitude of parties, all asserting their right to be heard at every stage of the process.[325] This would create further delays in the disposition of criminal cases and lead to "unnecessary, unwieldy and unworkable results."[326] Clearly, a prompt disposition in a criminal matter is extremely important to victims,[327] which is one reason the legislature explicitly granted that right to victims.[328] However, granting a victim independent standing in criminal matters may impede rather than expedite the disposition of a case, thus creating more dissatisfaction with the criminal justice system.

Ms. Hagen argued that she was entitled to appellate review on the merits of the revocation matter not because she was granted standing, but because the judge allowed her to be heard on the Commonwealth's motion.[329] She claimed "[w]here there is a right to be heard, there should be a right to seek review ...."[330] If her argument had been accepted by the Massachusetts SJC, even in a limited manner, victims would then have the right to appellate review of decisions on which they have been heard. This would certainly create further delays within the system.[331]

Most people who read the newspaper accounts of this case were naturally appalled by the fact that a convicted rapist remained free for

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321. ch. 258B, § 3(f).

322. Objection to Filing of Appearance, *supra* note 142, at 2.

323. *See id.*

324. *See id.*

325. *See id.*

326. *Id.*

327. *See supra* notes 115-16 (discussing secondary harm).

328. MASS. GEN. LAWS ch. 258B, § 3(f) (2000).

329. *See* Appellant's Petition, *supra* note 6, at 2 n.2. *See also supra* notes 131-37 and accompanying text (discussing *Victory* holding that complaining victim had no constitutional right to appeal decision of clerk magistrate).

330. *Id.* at 2 n.2.

331. *See supra* notes 288-94 and accompanying text (discussing effects of allowing victims right to appeal decisions).

thirteen years after being sentenced. "To a casual observer, the delay is inexplicable."[332] Past the sound bytes, headlines, and the public's frustration, however, the fact remains that the remedy the victim sought was neither constitutionally appropriate nor intended by the Massachusetts Victim Bill of Rights.

D. Blurring the Line Between Civil and Criminal Law

"The same wrongful act may constitute both a crime and a tort. But the crime is held to constitute an offense *against the public pursued by the sovereign*, whereas a tort is a *private* injury to *be pursued by the injured party*."[333] Ms. Hagen undoubtedly suffered great emotional and physical harm because of her attacker, and sadly continued to suffer emotionally for years due to lack of closure because of the prosecutor's mistakes. Mr. Kelly's wrongful act against her constituted both a crime and a tort, making him liable for both criminal and civil actions. The sovereign, however, is responsible for pursuing the criminal action, while Ms. Hagen may choose to pursue her assailant in a civil action. She does not have the right to request appellate review of a decision in a criminal case and by statute, she does not have the right to bring an action against the state, the district attorney's office or any of its employees.[334] Nor does she have the right to seek specific enforcement of her right to a prompt disposition in a criminal case. Any action that is pursued in a criminal case is done so by and at the discretion of the prosecutor, acting for the sovereign.

VIII. CONCLUSION

As written, the Massachusetts Victim Bill of Rights does not grant crime victims a legally cognizable interest in a criminal matter.[335] The remedy that Ms. Hagen sought lies with the legislature, not the judiciary.[336] As the law presently stands, Ms. Hagen's only judicial remedy is a civil action against the defendant for the harm he caused her.

One of the goals of the criminal justice system is, or at least should be,

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332. Brief for Appellee, *supra* note 1, at 18.

333. 21 AM. JUR. 2d *Criminal Law* § 2 (1998) (emphasis added).

334. MASS. GEN. LAWS ch. 258B, § 10 (2000). "Nothing in this chapter shall be construed as creating an entitlement or a cause of action on behalf of any person against any public employee, public agency, the commonwealth or any agency responsible for the enforcement of rights and provision of services set forth in this chapter." *Id. See also supra* note 290 and accompanying text (noting that decision to appeal is exclusively district attorney's).

335. *See* ch. 258B.

336. *See* Hagen v. Commonwealth, 772 N.E.2d 32, 38 (Mass. 2002).

to avoid or minimize secondary harm to victims.[337] In order to achieve this goal, Massachusetts enacted a Victim Bill of Rights.[338] In most cases, these rights achieve that goal of minimizing secondary harm. Although *Hagen* is an exception, the judiciary was correct in not allowing their "immediate overwhelming interest which appeals to the feelings ... distort[ ] the[ir] judgment"[339]

The judiciary has been very clear that they do not want to be the ones to confer standing upon a class of citizens which has historically not been recognized.[340] In its decision, the Massachusetts Supreme Court followed the trend of other state appellate courts and the federal courts across the nation, which have denied standing to crime victims.[341]

It is undisputed that victims should have a voice in the criminal justice system. Their feelings with regard to sentencing and disposition should be made known to the court and be considered by the prosecution when making their recommendations. In the instant case, and cases to follow, it would seem appropriate that district attorney's offices, when applicable, incorporate the rights of the victims into their arguments in the courtroom. For example, the Commonwealth should have included the fact that under chapter 258B, section 3(f), Ms. Hagen had the right to a prompt disposition of the case in its argument to revoke the stay of the defendant's sentence.[342] At that point, it would be left to the judge's discretion to balance the rights of the defendant with that of the victim.[343] The victim however should not have the right to appeal the judge's decision as that is exclusively within the discretion of the prosecutor.[344] If the case were one in which the interests of the victim and the Commonwealth were adverse, the prosecutor should make that known to the court. The judge would then make the decision whether it was appropriate that the victim be heard on the matter before the court.[345]

In the case at hand, although Ms. Hagen was not granted standing, the court did allow her to be heard through her attorney.[346] As a result, the

337. *See supra* notes 115-16 and accompanying text (discussing secondary harm).

338. *See* ch. 258B, § 3.

339. *See supra* note 1 and accompanying text.

340. *See Hagen*, 772 N.E.2d at 37;

341. *See supra* notes 122-25 and accompanying text (noting that federal courts continually deny standing to crime victims).

342. *See* MASS. GEN. LAWS ch. 258B, § 3(f) (2000).

343. *See supra* notes 262-74 and accompanying text (discussing need to balance rights of victim with those of defendant).

344. *See supra* notes 288-90 and accompanying text (noting that right to appeal lies with prosecutor).

345. ch. 258B, § 3(p).

346. *See* Brief for Appellant, *supra* note 3, at 12-13.

court was aware of Ms. Hagen's dissatisfaction with the handling of the case by the Commonwealth and the fact that she felt her right to a prompt disposition had been denied. This is exactly what this court intended when it stated that "victim[s] ... should be provided with an opportunity to address the court when that right is jeopardized."[347] Granting Ms. Hagen standing was not the remedy intended by the legislature or within the power of the judiciary to confer upon her.[348] The court did not go beyond its judicial powers by allowing the victim to be heard in this limited circumstance because section 3(p) clearly states that victims "*be heard at any other time deemed appropriate by the court.*"[349]

Gretchen N. Monopoli

347. Hagen v. Commonwealth, 772 N.E.2d 32, 34 (Mass. 2002).

348. *See* ch. 258B, § 3. *See also* MASS. CONST. art XXX.

349. ch. 258B, § 3(p).

NOTES

Felony Drinking and Driving Convictions as Crimes of Violence Under 18 U.S.C. § 16(b): What the Words Really Mean for Aliens

I. INTRODUCTION

Over the past decade, the United States Congress has enacted a number of new laws that affect the immigration system and those who are part of it.[1] These new laws have expanded the basis for removal,[2] causing aliens who might have spent their entire lives in the United States to be faced with mandatory removal, leaving their family and friends in the United States.[3] This Note focuses on the removal of aliens for drinking and driving convictions, and the reasons why courts should not hold a Driving While Intoxicated (DWI)[4] conviction by an alien to be a "crime of violence," and

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1. *See* Immigration Act of 1990, Pub. L. No. 101-649 § 501(a), 104 Stat. 4978, 5048 (1990); Immigration and Nationality Technical Corrections Act of 1994 (INTCA), Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4320 (1994); Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440, 110 Stat. 1214, 1277 (1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 321, 110 Stat. 3009-546, 3009-627 (1996).

2. *See* Gail Pendleton, *Removal Proceedings*, *in* NATIONAL LAWYERS GUILD, STRATEGY AND PRACTICE UNDER THE NEW IMMIGRATION LAWS, 13, 13 (1996). With the enactment of IIRIRA in 1996, deportation and exclusion proceedings were consolidated into one removal proceeding. *See id.*

3. *See* Lory D. Rosenberg & Nelson A. Vargas-Padilla, *Immigration Consequences of Crimes: Current Administrative Decisions Affecting Criminal Aliens*, 75 INTERPRETER RELEASES 793, 793-95 (1998). *See also* Lory D. Rosenberg & Nelson A. Vargas-Padilla, *Immigration Consequences of Crimes in the 1990s: An Update on Current Administrative Decisions Affecting Criminal Aliens*, 76 INTERPRETER RELEASES 837, 837-41 (1999); Lory D. Rosenberg & Nelson Vargas-Padilla, *Immigration Consequences of Crimes on the Doorstep of the Twenty-First Century*, 77 INTERPRETER RELEASES 685, 685-86 (2000); Lea McDermid, Comment: *Deportation is Different: Noncitizens and Ineffective Assistance of Counsel*, 89 CAL. L. REV. 741, 756-57 (2001).

4. Throughout this Note, Driving While Intoxicated (DWI) will be used to refer generally to all drinking and driving offenses, although state drinking and driving offenses

thus not an "aggravated felony;" thereby allowing aliens convicted of a DWI to remain in the United States.

Part II of this Note provides background information on who is considered an alien, the basics of the immigration system, and the applicable statutes that govern removal. Part III discusses the string of recent cases dealing with the removal of aliens for DWI convictions. Part IV demonstrates that the majority of the circuit courts have been correct in holding that a felony DWI conviction is not a crime of violence, and therefore, that aliens should not be subjected to removal proceedings for these convictions. Part V applies the reasoning of the circuit courts, as well as the most recent Board of Immigration Appeals (BIA) decision, to state DWI statutes in order to explore what future circuits may and should hold on the issue.

II. BACKGROUND

A. Aliens Under United States Law and the United States Constitution

An alien is any person who is "not a citizen[5] or [a] national[6] of the United States."[7] "[T]here are four broad classes of aliens: (1) persons seeking admission to the United States; (2) persons admitted permanently as immigrants (also called permanent residents or green card holders); (3) persons admitted temporarily as non-immigrants; and (4) undocumented persons or 'illegal' aliens who are here without permission from the federal government."[8]

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are not always referred to as a DWI. *See* discussion *infra* Part IV.B.

5. A citizen is (1) a "person[] born in the United States or in certain territories;" (2) a "person[] born outside the United States if one or both parents are American citizens and the child and/or parent meets certain residency requirements;" or (3) a "person[] born in possessions of the United States or in foreign countries who is then naturalized as a citizen of the United States." DAVID CARLINER ET AL., THE RIGHTS OF ALIENS AND REFUGEES: THE BASIC ACLU GUIDE TO ALIEN AND REFUGEE RIGHTS 1 (2d ed. 1990).

6. Naturalized citizens are "[p]ersons born as aliens who acquire citizenship under laws enacted by Congress." *Id.* Nationals, as referred to in the Immigration and Nationality Act, are persons who owe "permanent allegiance" to a state. Immigration and Nationality Act of 1952, ch. 477, Pub. L. No. 82-414, § 101 (a)(21), 66 Stat. 163. "The term national of the United States means (A) a citizen of the United States, or (B) a person who, though not a citizen of the United States, owes permanent allegiance to the United States." *Id.* § 101 (a)(22).

7. 8 U.S.C. § 1101(a)(3) (2001).

8. STEPHEN W. YALE-LOEHR, BASIC IMMIGRATION LAW 13 (2001). The term "alien" is used in the broadest sense, so as to encompass all classifications of aliens, since under the statutes being analyzed, no difference is made as to whether the person is a legal or illegal

Even though aliens are not citizens of the United States, once they gain entrance they are subject to the laws of the United States and are also afforded some protection by the United States Constitution.[9] Protection is only extended to aliens under certain provisions of the United States Constitution, which use the term "persons" rather than "citizens."[10] This limits the amount of protection that aliens are afforded.

Even though aliens are legally admitted to the United States and have some protection under the Constitution and laws, this does not mean they are exempt from removal.[11] Aliens, of any of the four classes, do not possess any constitutional right to stay in the United States, thus they are removable any time after admission.[12] In order to determine who is admitted and when, as well as who is removed and why, the federal government established an immigration system and laws.

B. Immigration System

The enforcement of immigration laws is the responsibility of the United States Attorney General. However, much of this responsibility has been delegated to the Department of Justice.[13] Under the Department of Justice there are two important branches that deal with immigration: the Immigration and Naturalization Service (INS) and the Executive Offices of Immigration Review (EOIR).[14]

The INS is the agency that is responsible for enforcing immigration laws and regulations and administering immigration-related services.[15] The INS consists of four regional offices and thirty-four district offices, which are

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alien, or even whether the alien is a permanent resident. *See* MARGARET C. JASPER, THE LAW OF IMMIGRATION 58 (2d ed. 2000); 8 U.S.C. § 1227(a)(2)(A)(iii) (2001).

9. *See* YALE-LOEHR, *supra* note 8, at 13.

10. *See* JASPER, *supra* note 8, at 20. The United States Constitution makes reference to both citizens and persons, sometimes in the same provision, as is the case in the Fourteenth Amendment. *See* U.S. CONST. amend. XIV. *See also* Plyler v. Doe, 457 U.S. 202, 210 (1982) (indicating aliens "recognized as 'persons' are guaranteed due process of law by the Fifth and Fourteenth Amendments").

11. *See* JASPER, *supra* note 8, at 20.

12. *See* YALE-LOEHR, *supra* note 8, at 13.

13. *See id.*

14. *See id.*

15. *See* IMMIGRATION AND NATURALIZATION SERVICE, *This is INS Overview at* http://www.ins.gov/graphics/aboutins/thisisins/ overview.htm (last visited Feb. 14, 2003). The enforcement aspect includes: "[b]order control, [p]ort-of-entry inspections, [d]etention and removal of criminal aliens, [w]orksite enforcement, [a]pprehension of illegal aliens and workers, [d]eportations and exclusions [removal], [d]enial of benefits to ineligible applicants, [and] [d]ocument fraud." *Id.* The administration aspect includes "[i]mmigrant and non-immigrant sponsorship, [a]djustment of status, [w]ork authorization and other permits, [n]aturalization, [and] [r]efugees and asylum." *Id.*

the "working units" of the INS.[16]

The EOIR contains two separate subdivisions: Immigration Judges and the Board of Immigration Appeals (BIA).[17] Under the EOIR, removal hearings are the main responsibility of the immigration judges, while the BIA acts as the administrative appeals body for these decisions.[18] The BIA is "separate and independent from the INS, and directly accountable to the Attorney General."[19] "The BIA is empowered to make a de novo review of the record," thus the BIA makes "its own findings as to the legal sufficiency of the evidence."[20] Decisions rendered by the BIA do not hold any precedential value unless the Board designates so.[21] Since the BIA has nationwide jurisdiction, all precedential "[d]ecisions of the Board are binding on all INS officers and immigration judges unless modified or overruled by the Attorney General or a federal court."[22]

C. Removal Procedure for Aggravated Felonies—The Applicable Statutes

Immigration judges, in considering removal decisions, and the BIA, in their review of such orders, are governed by the immigration laws.[23] This Note will next examine how the term "aggravated felony" developed with respect to the applicable immigration laws.

The notion of an aggravated felony was first developed in the Anti-Drug Abuse Act of 1988.[24] Ironically, "[t]he term 'aggravated felony' is an immigration law concept, not a criminal law concept."[25] It was not until the

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16. YALE-LOEHR, *supra* note 8, at 13. The district offices decide matters such as extension of stay, requests for permission to work, and applications for adjustment of status. *See id.*

17. *See id.*

18. *See id.* The BIA "is the highest administrative body for interpreting and applying immigration laws." *Board of Immigration Appeals Information at* http://www.usdoj.gov/eoir/biainfo.htm (last visited Jan. 25, 2002) [hereinafter BIA Information].

19. YALE-LOEHR, *supra* note 8, at 13.

20. JASPER, *supra* note 8, at 67. "The BIA is directed to exercise its independent judgment in hearing appeals." BIA Information, *supra* note 18. While making its decision the BIA applies the law that exists at the time of review. *See* JASPER, *supra* note 8, at 67.

21. *See* YALE-LOEHR, *supra* note 8, at 13. Therefore, the only binding decisions made by the BIA are those that the Board itself decides to publish. *See id.*

22. BIA Information, *supra* note 18.

23. *See id.*

24. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469 (1988). *See also* JAMES G. CONNELL, III & RENE L. VALLADARES, CULTURAL ISSUES IN CRIMINAL DEFENSE § 11.5[a] (2000). The Act "included murder, drug trafficking, and trafficking in firearms or destructive devices." *Id.*

25. CONNELL, *supra* note 24, § 11.5[a].

passage of the Immigration Act of 1990,[26] however, that a conviction for a crime of violence was included under the definition of an aggravated felony.[27] From 1994 through 1996, three laws were passed that significantly expanded the definition of an aggravated felony.[28] As the term aggravated felony expanded, it became clear that a conviction for an aggravated felony would subject aliens to the "harshest immigration consequences at the time of the conviction and for the rest of their lives."[29]

Currently, 8 U.S.C. § 1227 governs classes of removable aliens.[30] An aggravated felony is defined in 8 U.S.C. § 1101(a)(43)(F) as "a crime of violence (as defined in section 16 of title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year."[31] 18 U.S.C. § 16 defines a crime of violence as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.[32]

The removal procedure is put in motion after the alien has been convicted of a crime that the INS or the EOIR classifies as an aggravated felony.[33] The Attorney General, and in turn the INS, has broad discretion in

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26. Immigration Act of 1990, Pub. L. No. 101-649 § 501(a), 104 Stat. 4978, 5048 (1990).

27. *See* CONNELL, *supra* note 24, § 11.5[a].

28. *See id.* Laws that have expanded grounds for removal include: the Immigration and Nationality Technical Corrections Act of 1994 (INTCA), Pub. L. No. 103-416, § 222, 108 Stat. 4305, 4320 (1994); the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440, 110 Stat. 1214, 1277 (1996); and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 321, 110 Stat. 3009-546, 3009-627 (1996).

29. CONNELL, *supra* note 24, § 11.5[a].

30. *See* 8 U.S.C. § 1227 (2000). "Any alien who is convicted of an aggravated felony at any time after admission is deportable." *Id.* § 1227(a)(2)(A)(iii).

31. *Id.* § 1101(a)(43)(F). Under the current law, the definition of an aggravated felony is applied to all offenses, regardless of whether they violate state or federal law. *See* CONNELL, *supra* note 24, § 11.5[b].

32. 18 U.S.C. § 16 (2000). "The term 'by its nature' refers to the statutory definition of the crime rather than the particular circumstances under which this particular defendant committed this charged crime." CONNELL, *supra* note 24, § 11.5[b] n.81. "Thus, the question is whether the elements of the offense of conviction involve violence, or the potential for violence, not what occurred in an individual client's case." *Id.*

33. *See* YALE-LOEHR, *supra* note 8, at 93. If an alien had a previous (pre-1996) conviction for which she had already served time, she may still be subject to the removal process if the crime for which she was convicted falls within the definition of an aggravated

deciding whether and when to pursue a removal proceeding against an alien, and it is within the Attorney General's or INS's discretion to refrain from instituting proceedings even though grounds for commencing such a proceeding exist.[34]

If the immigration judge orders removal,[35] the alien must seek review by the BIA before the alien can seek judicial review.[36] There are significant limitations on when an alien can appeal to the federal court system from a BIA decision.[37] Federal courts do not have jurisdiction over removal orders that are based on aggravated felony convictions.[38] However, there are instances in which a court of appeals may hear removal cases even though they are based on aggravated felony convictions.[39] In these cases, the court of appeals only retains jurisdiction in order to determine whether they do or do not have jurisdiction; thus the courts also decide the merits of the case, because, when an alien is convicted of an aggravated felony under 8 U.S.C. § 1227(a)(2)(iii),[40] the question of jurisdiction and the merits collapse into one: the jurisdiction question is based upon the merits.[41] Additionally, the federal courts of appeal may also retain jurisdiction in an aggravated felony case if the alien has been convicted, is removed, re-enters the country illegally, and is then prosecuted for illegal re-entry.[42]

A conviction for an aggravated felony at any time in an alien's life is detrimental to their ability to remain in the United States, since a conviction for an aggravated felony any time after entry into the United States can

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felony, even though it was committed before the new laws were enacted. *See* Nancy Morawetz, Symposium: *Understanding the Impact of the 1996 Deportation Laws and the Limited Scope of Proposed Reforms*, 113 HARV. L. REV. 1936, 1937 (2000).

34. *See* Sousa v. Reno, 135 F. Supp. 2d 75, 79-84 (D. Mass. 2001).

35. In order for the alien to be removed, the INS must prove by "clear and convincing evidence" that the alien is removable. *See* YALE-LOEHR, *supra* note 8, at 20.

36. *See* JASPER, *supra* note 8, at 68.

37. *See* 8 U.S.C. § 1252 (2000).

38. *See id.* § 1252(a)(2)(C). "Notwithstanding any other provision of law, no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in" 8 U.S.C. § 1227(a)(2)(A)(iii). *Id.*

39. *See* Dalton v. Ashcroft, 257 F.3d 200, 203 (2d Cir. 2001). *See also* Bazan-Reyes v. INS, 256 F.3d 600, 604 (7th Cir. 2001).

40. *See* § 1227(a)(2)(A)(iii); § 1101(43)(F). *See also supra* notes 30-31 and accompanying text.

41. *See Bazan-Reyes*, 256 F.3d at 604.

42. *See* United States v. Trinidad-Aquino, 259 F.3d 1140, 1142 (9th Cir. 2001). *See also* United States v. Chapa-Garza, 243 F.3d 921, 923 (5th Cir. 2001). In these instances the original conviction, which was for an aggravated felony, becomes an issue because the penalty for illegal re-entry is increased by sixteen levels. *See id.* at 923. *See also Trinidad-Aquino*, 259 F.3d at 1140; U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(C) (2002).

place that person in danger of being removed.[43] With a conviction for an aggravated felony comes a string of other problems: the conviction is a bar to political asylum, it precludes an alien from being eligible for re-entry for the next twenty years, it substantially increases any future penalties for re-entry after removal, and it bars all aliens—even those who are lawful permanent residents that have lived in the United States their entire lives—from cancellation of removal.[44]

As has been shown, the effects of a conviction for an aggravated felony can bring numerous problems to an alien who is attempting to remain or return to the United States. This leads to the question of why Congress has enacted such harsh laws and penalties for those convicted of certain crimes.

D. Why Removal

A conviction for a crime classified as a "crime of violence" is also deemed an aggravated felony for which an alien can be removed, and since removal is "a dreadful punishment, abandoned by the common consent of all civilized peoples,"[45] an examination of Congress' authority to remove aliens is warranted. The Constitution does not expressly give Congress the authority to remove aliens; but rather, the Supreme Court has implied this authority from both the power to regulate foreign commerce and the assumed "inherent power of sovereignty."[46] The Supreme Court has repeatedly sustained Congress' authority to remove aliens.[47] The Court has justified this power as being inherent in our nation's sovereignty.[48] While there are constitutional grounds for challenging removal, none of the courts have agreed with any of the reasons presented to them thus far.[49] In

43. *See* CONNELL, *supra* note 24, § 11.5[d]. This means that any non-U.S. citizen who has ever been convicted of a crime that is now defined as an aggravated felony can be removed. *See id. See also supra* note 33 and accompanying text.

44. *See* CONNELL, *supra* note 24, § 11.5[d]. "Cancellation of removal ... is a discretionary general waiver of deportability." *Id.* § 11.6[a]. It is available to permanent residents (but not those who have committed an aggravated felony) who have seven consecutive years of lawful unrelinquished domicile in the United States, at least five of which were as a lawful permanent resident. *See id.* § 11.6[a]. It can also be available to a non-permanent resident if he or she is able to meet certain criteria. *See id.*

45. Klonis v. Davis, 13 F.2d 630, 630 (2d Cir. 1926) (referring to how deplorable it would be to deport an alien who "knows no other language, no other people, no other habits .... However heinous his crimes, deportation is to him exile.")

46. CARLINER, *supra* note 5, at 102. *See also* Fong Yue Ting v. United States, 149 U.S. 698, 705-07 (1892) (discussing the power to remove aliens).

47. *See* YALE-LOEHR, *supra* note 8, at 19.

48. *Id.*

49. *See* Lieggi v. INS, 389 F. Supp. 12, 16-19 (7th Cir. 1976) (discussing the uncertainty of constitutional protections afforded to aliens).

rejecting constitutional challenges to Congress's removal authority, the courts have held that removal is a civil sanction rather than a criminal one so as to preclude certain constitutional claims.[50]

Even though Congress has the power to remove aliens, it is still a severe form of punishment that should carefully be weighed. "Deportation is a drastic measure and at times the equivalent of banishment or exile. It is the forfeiture for misconduct of a residence in this country. Such a forfeiture is a penalty."[51] Additionally, the purpose behind removal is an important consideration. If the purpose of removal is to rid the country of wrongdoers, the INS records prove that removal has not been effective and removal does not justify the cost or impact upon aliens and their families.[52] This is especially true in instances where the reason an alien is removed would result in a substantially less dramatic punishment for a United States citizen.[53]

The number of aliens removed has been increasing over the years as the grounds for removal have expanded.[54] The number of alien defendants prosecuted in 1999 went up twenty-six percent from 1998.[55] The number of convictions also increased, so that in 1999, forty percent of those prosecuted were convicted.[56] Additionally, in 1999, more than 69,000 aliens were removed due to criminal convictions.[57] Through the Institutional Reform Program, the INS has ensured that incarcerated criminals are placed in removal proceedings.[58] Therefore, with Congress' numerous additions to the aggravated felony list, the stiffening of penalties, and the diminished availability of review by the federal courts, the INS has

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50. *See* YALE-LOEHR, *supra* note 8, at 19.

51. Dalton v. Ashcroft, 257 F.3d 200, 208 (2d Cir. 2001) (citing Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)).

52. *See* CARLINER, *supra* note 5, at 3. The purposes of removal are to protect the integrity of the admissions process, penalize aliens who commit certain crimes, and to target aliens who become public charges within five years of entering the United States. *See* YALE-LOEHR, *supra* note 8, at 19.

53. *See* McDermid, *supra* note 3, at 758. For example, a DWI conviction "often yields no more than a slap on the wrist for wealthy white United States citizens," yet for non-citizens such a conviction may mean "removal and exclusion from the United States." *Id.*

54. *See supra* note 28 and accompanying text. For example, Congress amended the sentence requirement for an aggravated felony by reducing the number of years of the imposed sentence from five years to only one year. *See* McDermid, *supra* note 3, at 757. There are six broad categories for removal. *See* 8 U.S.C. § 1227 (2001).

55. *See* Statistical Yearbook of the Immigration and Naturalization Service, *Fiscal Year 1999 Statistical Yearbook,* INS Statistical Reports, *at* http://www.ins.usdoj.gov/graphics/aboutins/statistics/99enfsect.htm (last visited Jan. 15, 2003).

56. *See id.*

57. *See id.*

58. *See id.*

made removal a certainty for a number of aliens. Unfortunately, due to the pressures placed upon prosecutors to have criminal aliens removed,[59] the INS has been successful in removing many aliens due to felony DWI convictions.[60]

The BIA's original interpretation of 18 U.S.C. § 16(b) and how it applies to felony DWI convictions received a fair amount of criticism as the issue made its way to the circuit courts, leading to the BIA's re-interpretation of § 16(b).[61]

III. RECENT DECISIONS

A split in the circuit courts has developed as courts have tried to determine whether a DWI conviction should be considered a crime of violence. The majority of jurisdictions that have decided the issue have held that a DWI conviction does not constitute a crime of violence.[62] Yet, two circuits have held that a DWI conviction is a crime of violence.[63] Additionally, a few courts have not yet ruled on this specific issue, but have alluded to it in similar cases.[64] Moreover, the reasoning behind the circuit

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59. *See* Morawetz, *supra* note 33, at 1949. For example, in Atlanta the INS began to train local district attorneys to seek criminal dispositions in cases involving aliens, and encouraged prosecutors to seek one year suspended sentences, which would lead to mandatory removal. *See Atlanta INS District Office Instructs Prosecutors on Removal of Illegal Aliens at* http://www.immigrationlinks.com/news/news297.htm (last visited Feb. 14, 2003) (letter from the Atlanta INS district office to all district attorneys and U.S. attorneys in Georgia). Similarly, in 1998 a local enforcement initiative in Texas led to the arrest of five hundred legal permanent residents with old DWI convictions. *See* Morawetz, *supra* note 33, at 1949; *How Dry I Am ... INS Goes After Drunk Driver Aliens, at* http://www.usvisanews.com/memo227.html (last visited Feb. 14, 2003).

60. *See* Morawetz, *supra* note 33, at 1949.

61. *See* United States v. Chapa-Garza, 243 F.3d 921 (5th Cir. 2001); Dalton v. Ashcroft, 257 F.3d 200 (2d Cir. 2001); United States v. Trinidad-Aquino, 259 F.3d 1140 (9th Cir. 2001); Bazan-Reyes v. INS, 256 F.3d 600 (7th Cir. 2001). *But see* Tapia-Garcia v. INS, 237 F.3d 1216 (10th Cir. 2001). *See also In re* Ramos, 23 I. & N. Dec. 336 (B.I.A. Apr. 4, 2002).

62. *See Bazan-Reyes*, 256 F.3d at 602 (holding that a DWI conviction, including homicide by intoxicated use of a vehicle, is not a crime of violence under 18 U.S.C. § 16(b)); *Trinidad-Aquino*, 259 F.3d at 1146 (holding that a DWI conviction is not a crime of violence as defined by 18 U.S.C. § 16(b)); *Chapa-Garza*, 243 F.3d at 928 (holding that a DWI conviction is not a crime of violence under 18 U.S.C. § 16(b)); *Dalton*, 257 F.3d at 208 (holding that a DWI conviction is not a crime of violence under 18 U.S.C. § 16(b)).

63. *See Tapia-Garcia*, 237 F.3d at 1222 (holding that driving under the influence fits the statutory definition of a crime of violence under 18 U.S.C. § 16(b)); Le v. Att'y Gen., 196 F.3d 1352, 1354 (11th Cir. 1999) (holding that a conviction of driving under the influence that causes serious bodily injury is a crime of violence under 18 U.S.C. § 16(a)).

64. *See* United States v. Parson, 955 F.2d 858 (3d Cir. 1992) (stating in dicta that a felony DWI conviction under Pennsylvania law would not be a crime of violence).

courts' holdings has a new importance in light of the most recent BIA decision on the issue.

A. Relevant BIA Decisions

The BIA's most recent interpretation of 18 U.S.C. § 16 as it applies to DWI convictions is found in *In re Ramos*.[65] The defendant, Luis Ramos, was a lawful permanent United States resident when he was convicted in Massachusetts of operating a motor vehicle while under the influence.[66] Once the defendant was convicted, the INS began removal proceedings because the DWI conviction was an aggravated felony.[67]

On reconsideration, the BIA withdrew their decisions in *In re Puente*[68] and *In re Magallanes*[69] and held that the offense of driving under the influence is not a crime of violence under 18 U.S.C. § 16(b).[70] In doing so, the BIA stated that they would follow the interpretation in those circuits that had already addressed the issue, but:

> [i]n those circuits that have not yet ruled on the issue, [the BIA] will require that the elements of the offense reflect that there is a substantial risk that the perpetrator may resort to the use of force to carry out the crime before the offense is deemed to qualify as a crime of violence under § 16(b).[71]

B. Circuit Courts Holding that a Felony DWI Is Not a Crime of Violence

The majority of jurisdictions have held that a DWI conviction is not a crime of violence.[72] These circuits have stated a variety of reasons for their decisions, but the most convincing of these reasons is the intent problem that arises when analyzing 18 U.S.C. § 16(b) and the various state DWI

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65. 23 I. &. N. Dec. 336 (B.I.A. Apr. 4, 2002).

66. *See id.* at 337. *See also* MASS. GEN. LAWS ch. 90, § 24(1)(a)(1) (2000). The defendant was a native and citizen of Portugal. *See Ramos*, 23 I. & N. Dec. at 337.

67. *See Ramos*, 23 I. & N. Dec. 337.

68. 22 I. & N. Dec. 1006 (B.I.A. Sept. 29, 1999) (holding that Texas DWI conviction is a crime of violence), *overruled by Ramos*, 23 I. & N. at 336.

69. 22 I. & N. Dec. 1 (B.I.A. Mar. 19, 1998) (holding that DWI conviction under Arizona law is a crime of violence), *overruled by Ramos*, 23 I. & N. at 336.

70. *See Ramos*, 23 I. & N. Dec. at 347.

71. *Id.* (citations omitted). The BIA further "require[s] that the offense be committed at least recklessly to meet this requirement." *Id.*

72. *See* Bazan-Reyes v. INS, 256 F.3d 600 (7th Cir. 2001); United States v. Trinidad-Aquino, 259 F.3d 1140 (9th Cir. 2001); United States v. Chapa-Garza, 243 F.3d 921 (5th Cir. 2001); Dalton v. Ashcroft, 257 F.3d 200 (2d Cir. 2001). *But see* Tapia-Garcia v. INS, 237 F.3d 1216 (10th Cir. 2001); Le v. Att'y Gen., 196 F.3d 1352 (11th Cir. 1999).

statutes.[73] This next section will highlight the decisions of these circuit courts.

1. *United States v. Chapa-Garza*[74]

The Fifth Circuit was the first to directly address the issue of whether a felony DWI fits the description of a crime of violence.[75] In *Chapa-Garza*, the five defendants had been convicted under Texas law for driving while intoxicated.[76] The defendants were removed from the United States after an immigration judge held that they were removable under 8 U.S.C. § 1227(2)(A)(iii), based on an aggravated felony conviction.[77] The defendants re-entered the country illegally and plead guilty to unlawfully being in the United States after removal.[78] The district court, over the objections of the defendants, applied a sixteen level increase in their sentencing because the convictions for which they were removed were aggravated felonies.[79]

However, on appeal the Fifth Circuit found that under the Sentencing Guidelines[80] a Texas felony DWI was not an aggravated felony because the conviction did not fall within the definition of a crime of violence as found in 18 U.S.C. § 16.[81] The court stated that § 16(b) requires "there be a

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73. *See Bazan-Reyes*, 256 F.3d 600; *Trinidad-Aquino*, 259 F.3d 1140; *Chapa-Garza*, 243 F.3d 921; *Dalton*, 257 F.3d 200.

74. 243 F.3d 921 (5th Cir. 2001).

75. *See id.*

76. *See id.* at 922. The Texas DWI statute simply states that, "[a] person commits an offense if the person is intoxicated while operating a motor vehicle in a public place." TEX. PENAL CODE ANN. § 49.04 (2001).

77. *See Chapa-Garza*, 243 F.3d at 923. *See also supra* note 30 and accompanying text.

78. *See Chapa-Garza*, 243 F.3d at 923.

79. *See id. See also* U. S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(C) (2002) (providing that if convicted of an aggravated felony, the base offense sentence is to be increased by eight levels). The application notes provide that for the purposes of the guideline, the definition of an aggravated felony is as found in 8 U.S.C. § 1101(a)(43). *See* U. S. SENTENCING GUIDELINES MANUAL § 2L1.2 Application Note 2 (2002); *Chapa-Garza*, 243 F.3d at 923. *See also supra* note 31 and accompanying text.

80. *See* U. S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) (2002).

81. *See* United States v. Chapa-Garza, 243 F.3d 921, 928 (5th Cir. 2001). *See also supra* note 32 and accompanying text. The court gave three main reasons why a DWI conviction should not be a crime of violence under 18 U.S.C. § 16(b). *See id.* at 924. The first reason was that to do so would "require[] that section 16(b) be construed the same as U.S.S.G. § 4B1.2(a)(2), which now contains significantly broader language" than does 18 U.S.C. § 16(b). *Id. See also infra* notes 188-200 and accompanying text. The second reason the court gave was that the "'substantial risk that physical force ... may be used' contemplates only reckless disregard for the probability that *intentional* force may be

substantial risk that the defendant will *use* physical force against another's person or property *in the course of committing the offense*."[82] Furthermore, the court reasoned that "section 16(b) applies only when the nature of the offense is such that there is a substantial likelihood that the perpetrator will *intentionally* employ physical force against another's person or property in the commission thereof."[83]

2. *Bazan-Reyes v. Immigration and Naturalization Service*[84]

Four months later, the Seventh Circuit in *Bazan-Reyes* similarly held that defendants were not removable because a DWI conviction is not a crime of violence under 18 U.S.C. § 16(b)[85] The *Bazan-Reyes* decision was a consolidation of three cases dealing with the same basic issue but from the three different states in the Seventh Circuit.[86] All of the defendants had been convicted of a DWI offense, and removal proceedings began shortly after their convictions.[87] The circuit court heard their cases on appeal from the BIA by retaining jurisdiction in order to determine whether the court had jurisdiction, and therefore, decided the case on the merits.[88] The court determined that the type of physical force and intent required by § 16(b) was not present in the respective DWI statutes.[89] The Seventh Circuit illustrated this by stating that "opening the car door or pressing the

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employed." *Chapa-Garza*, 243 F.3d at 924. The third reason was that "the physical force described in section 16(b) is that 'used in the course of committing the offense,' not that force that could result from the offense having been committed." *Id. See also infra* notes 172-85 and accompanying text.

82. *Chapa-Garza*, 243 F.3d at 925. *See also supra* note 32 and accompanying text.

83. *Chapa-Garza*, 243 F.3d at 925.

84. 256 F.3d 600 (7th Cir. 2001).

85. *See id.* at 602.

86. *Id.* at 602-05. In 1999, Bazan-Reyes, a Mexican citizen, was convicted under Indiana law of "a Class D felony of operating while intoxicated." *Id.* at 602. *See* IND. CODE ANN. § 9-30-5-3 (Michie 1998). In 1998, Maciasowicz, a citizen of Poland and a lawful permanent resident of the United States, was convicted under Wisconsin law of homicide by intoxicated use of a vehicle. *See Bazan-Reyes*, 256 F.3d at 603. *See* WIS. STAT. § 940.09 (2001). In 1997, Gomez-Vela, a Mexican citizen and a lawful permanent resident of the United States, was convicted under Illinois law of aggravated driving under the influence. *See Bazan-Reyes*, 256 F.3d at 603-04; 625 ILL. COMP. STAT. 5/11-501(d)(1) (1997).

87. *See Bazan-Reyes*, 256 F.3d at 603-04. *See also supra* note 86 and accompanying text.

88. *See* Bazan-Reyes v. INS, 256 F.3d 600, 604 (7th Cir. 2001). *See also supra* note 39-41 and accompanying text.

89. *See Bazan-Reyes*, 256 F.3d at 612. None of the state DWI statutes in these three cases require proof of a mens rea element for conviction. *See id. See also* 625 ILL. COMP. STAT. 5/11-501(d)(1) (1997); IND. CODE § 9-30-5-1 (Michie 1998); WIS. STAT. § 940.09 (1996).

accelerator does not constitute the use of physical force as required by the statute."[90]

The Seventh Circuit further noted that even in the case of homicide by intoxicated use of a vehicle, the necessary intent would be lacking to qualify as a crime of violence.[91] The court stated that the only requirement in homicide by intoxicated use of a vehicle is that the person hit someone while intoxicated; the offense does not require that the person intentionally use force to achieve that result.[92]

3. *Dalton v. Ashcroft*[93]

Similar to the Seventh Circuit, the Second Circuit also held that a DWI conviction was not a crime of violence, and thus not an aggravated felony.[94] In *Dalton,* the defendant[95] was convicted several times under New York law for operating while intoxicated.[96] Mr. Dalton was ordered removed by an immigration judge for having committed an aggravated felony.[97] The BIA upheld the ruling on the basis that the felony DWI was a crime of violence under 18 U.S.C. § 16(b).[98]

The Second Circuit, however, vacated the removal order on appeal.[99] The court differentiated between "risk of injury" and "risk of use of

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90. *See Bazan-Reyes*, 256 F.3d at 611.

91. *See id.* The court addressed this issue since one of the defendants had been convicted under Wisconsin law for homicide by intoxicated use of a vehicle. *See id.* at 603.

92. *See Bazan-Reyes*, 256 F.3d at 609. The homicide by intoxicated use of a vehicle only requires that the death is caused by the operation of a vehicle and that the person operating the vehicle was either under the influence or that the person had a prohibited alcohol concentration. *See* WIS. STAT. § 940.09 (1996).

93. 257 F.3d 200 (2d Cir. 2001).

94. *See id.* While concluding that a felony DWI is not a crime of violence, the court also emphasized the seriousness of the offense and that its decision was not to undermine that seriousness. *See id.* at 208. However, the court noted, "by shoehorning such reprehensible conduct into criminal statutes that were not designed to hold it, we risk an equivalent harm of usurping federal and state legislative roles." *Id.*

95. Dalton was a Canadian citizen who had been living in the United States as a lawful permanent resident since 1958—before he was even one year old; his parents and siblings also resided in the United States. *See Dalton*, 257 F.3d at 202.

96. *See id. See also* N.Y. VEH. & TRAF. LAW § 1192.3 (McKinney 1998). In the most recent incident, the violation was enhanced to a Class D felony. *See Dalton*, 257 F.3d at 202; N.Y. VEH. & TRAF. LAW § 1192.10(c)(ii) (McKinney 1998).

97. *See Dalton*, 257 F.3d at 203. *See also supra* note 31 and accompanying text.

98. *See Dalton*, 257 F.3d at 203. *See also supra* note 32 and accompanying text. The BIA had made no finding as to whether a DWI conviction met the elements of § 16(a) and on appeal it was not disputed that the conviction failed to meet the requirements of § 16(a). *See Dalton*, 257 F.3d at 203.

99. *Dalton*, 257 F.3d at 202.

physical force,"[100] writing that "while it may be true that all driving involves some risk of an accident and drunk driving increases that risk ... this reasoning begs the question of whether an accident is something that can be referred to as involving the 'use of physical force.'"[101]

Furthermore, the court held that an intention to drive is not the same as driving:[102] "Just as many good intentions are crushed by reality, so too can reality felicitously crush bad intentions."[103] The court pointed out that § 16(b)[104] defines a crime of violence as real, substantial risks and stated that "deportation cannot be based upon hypothetical harms."[105]

4. *United States v. Trinidad-Aquino*[106]

The Ninth Circuit joined the Fifth and Seventh Circuits when it decided *Trinidad-Aquino*.[107] Mr. Trinidad-Aquino was removed after being convicted under California law for driving under the influence of alcohol and causing bodily injury.[108] After being convicted for illegally re-entering the United States, the district court applied a sixteen level increase to his sentence because his prior removal was based on an aggravated felony.[109]

On appeal, the circuit court reversed because the California statute he was convicted under could be violated through negligence alone; thus a violation of the statute was not a crime of violence.[110] The court held that the defendant must intentionally or recklessly, but not negligently, risk using physical force against someone or something in order to commit a crime of violence.[111]

5. Other Decisions

At least two Third Circuit decisions contain dicta indicating that, if confronted with the issue, that court would join the circuits that have held

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100. *Id.* at 207.

101. *Id.*

102. *See id.* at 206.

103. *Id.*

104. 18 U.S.C. § 16(b) (2001). *See also supra* note 32 and accompanying text.

105. Dalton v. Ashcroft, 257 F.3d 200, 206 (2d Cir. 2001).

106. 259 F.3d 1140 (9th Cir. 2001).

107. *See id.*

108. *Id.* at 1142. The California statute requires that the person be under the influence and "concurrently do any act forbidden by law or neglect any duty imposed by law in driving the vehicle," and that the act or neglect "proximately causes bodily injury to any person other than the driver." CAL. VEH. CODE § 23153 (Deering 2001).

109. *See Trinidad-Aquino*, 259 F.3d at 1142.

110. *See id.* at 1146.

111. *See id.* at 1145.

that a felony DWI is not a crime of violence.[112] In *United States v. Parson*,[113] the court suggested that a felony DWI is not a crime of violence because 18 U.S.C. § 16(b) requires a willingness to risk having to commit a crime of specific intent.[114] Additionally, in *Francis v. Reno*, the Third Circuit suggested that § 16(b) requires intent on the part of the defendant.[115] In *Francis*, the defendant had been convicted in Pennsylvania for causing a traffic accident that killed two people.[116] The court held that a state misdemeanor conviction for vehicular homicide is not a crime of violence under 18 U.S.C. § 16 because the statute required the crime to be a felony.[117] The *Francis* court further stated that even if the violation was considered a felony the court would still have concluded that the conviction was not a crime of violence.[118] The court noted that § 16(b) requires the crime to be one that "'by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.' Homicide by vehicle in Pennsylvania is not such an offense."[119]

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112. *See* United States v. Parson, 955 F.2d 858, 864-75 (3d Cir. 1992) (discussing Sentencing Guidelines and 18 U.S.C. § 16(b) definitions of crime of violence). *See also* Francis v. Reno, 269 F.3d 162, 171-75 (3d Cir. 2001) (explaining that even if 18 U.S.C. § 16(b) did encompass misdemeanor convictions, defendant's conviction for vehicular homicide would still not be a crime of violence because there is no intent required in order to violate the statute).

113. 955 F.2d 858 (3d Cir. 1992).

114. *See id.* at 864-75. *See also supra* note 32 and accompanying text.

115. *See Francis*, 269 F.3d 162 at 171-75.

116. *See id.* at 164. The defendant was a citizen of Jamaica although he had lived in the United States for more than twenty-five years as a legal resident. *See id.* The defendant was found in violation of 75 PA. CONS. STAT. ANN. § 3732, which states:

> any person who unintentionally causes the death of another person while engaged in the violation of any law of this Commonwealth or municipal ordinance applying to the operation or use of a vehicle or to the regulation of traffic except section 3731 (relating to driving under [the] influence of alcohol or controlled substance) is guilty of homicide by vehicle, a misdemeanor of the first degree, when the violation is the cause of death.

75 PA. CONS. STAT. ANN. § 3732 (West 1996). The Pennsylvania statute has since been amended to make the offense a third degree felony. *See* 75 PA. CONS. STAT. ANN. § 3732 (West 1996 & Supp. 2002).

117. *See* Francis v. Reno, 269 F.3d 162, 170-71 (3d Cir. 2001). *See also supra* note 35 and accompanying text. The immigration judge had ruled that the violation was not a crime of violence, however, on appeal the BIA disagreed and ordered Francis removed. *See Francis*, 269 F.3d at 165.

118. *See Francis*, 269 F.3d at 171.

119. *Id.* (citations omitted). Francis' conviction did not meet this requirement since he had been charged with unintentional conduct. *See id.* at 172.

C. Circuits Holding that a Felony DWI Conviction is a Crime of Violence

While the majority of courts have held that a felony DWI conviction is not an aggravated felony because the crime does not fit the definition of a crime of violence, two circuit courts have let the BIA's interpretation of a crime of violence stand.[120]

1. *Tapia-Garcia v. Immigration and Naturalization Services*[121]

In *Tapia-Garcia*, the Tenth Circuit upheld the immigration judge's decision to remove the defendant under 18 U.S.C. § 16 on the grounds that sub-section (b) does not require intentional conduct.[122] The immigration judge held that the Idaho Code section 18-8004(5) "involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense."[123]

The Tenth Circuit relied on cases that discussed the definition of crime of violence as it is used in the Career Offender Section of the Federal Sentencing Guidelines.[124] However, as the Tenth Circuit recognized, the wording of 18 U.S.C. § 16 and § 4B1.2(a) of the Sentencing Guidelines are not identical.[125] Nevertheless, the Tenth Circuit did not let the difference

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120. *See* Tapia-Garcia v. INS, 237 F.3d 1216, 1222 (10th Cir. 2001) (holding that "BIA reasonably construed 18 U.S.C. § 16(b) to include an offense for driving under the influence of drugs or alcohol."); Le v. Att'y Gen., 196 F.3d 1352, 1354 (11th Cir. 1999) (holding that driving under the influence with serious bodily injury is a crime of violence under 18 U.S.C. § 16(a)). *But see* United States v. Chapa-Garza, 243 F.3d 921 (5th Cir. 2001); Dalton v. Ashcroft, 257 F.3d 200 (2d Cir. 2001); United States v. Trinidad-Aquino, 259 F.3d 1140 (9th Cir. 2001); Bazan-Reyes v. INS, 256 F.3d 600 (7th Cir. 2001).

121. 237 F.3d 1216 (10th Cir. 2001).

122. *See id.* at 1222. *See also supra* note 32 and accompanying text. The defendant, a Mexican citizen and a lawful permanent resident of the United States, was convicted of a felony DWI under § 18-8004(5) of the Idaho Code. *See Tapia-Garcia*, 237 F.3d at 1219. *See also* IDAHO CODE § 18-8004 (Michie 2000). The circuit court held that the immigration judge's interpretation of 18 U.S.C. § 16(b) was reasonable. *See Tapia-Garcia*, 237 F.3d at 1222.

123. *Tapia-Garcia*, 237 F.3d at 1221. Idaho Code § 18-8004 provides in relevant part: "[i]t is unlawful for any person who is ... under the influence of any other drug or any combination of alcohol ... [to] drive or be in actual physical control of a motor vehicle within this state." IDAHO CODE § 18-8004-(5) (Michie 2000).

124. *See Tapia-Garcia*, 237 F.3d at 1222. Section 4B1.2(a) of the Sentencing Guidelines defines a crime of violence as any crime, federal or state, which is "punishable by imprisonment for a term exceeding one year, that—(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) ... otherwise involves conduct that presents a serious potential risk of physical injury to another." U. S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (2002).

125. *See* Tapia-Garcia v. INS, 237 F.3d 1216, 1223 (10th Cir. 2001). *See also* 18

interfere with its reasoning in *Tapia-Garcia*.[126]

2. *Le v. Attorney General*[127]

The Eleventh Circuit has essentially joined the Tenth Circuit in determining that a felony DWI conviction is a crime of violence.[128] Mr. Le was convicted of driving under the influence and causing serious bodily injury and driving with a suspended license and causing serious bodily injury.[129] The INS began removal proceedings against Mr. Le since he was an alien convicted of an aggravated felony.[130] The court held that because one element of the offense included the actual use of physical force, the conviction met the requirement of 18 U.S.C. § 16(a).[131]

IV. ANALYSIS

The majority of circuits that have directly confronted the issue of whether a DWI conviction is a crime of violence have determined that it is not.[132] However, there still is a question whether that should be the prevailing interpretation of 18 U.S.C. § 16(b)[133] because the reasoning of the various courts have differed and concentrated on different aspects of the statute.[134] In analyzing the outcomes from these various circuit courts, it is difficult to determine exactly which court is correct. Each court has given a different reason for their decision, and each state has a different DWI

U.S.C. § 16 (2000); U. S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (2002). The sentencing guideline only requires that the crime "involves conduct that presents a serious potential risk of physical injury to another." U. S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (2002). Conversely, 18 U.S.C. § 16(b) requires that the crime, "involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b) (2000).

126. *See Tapia-Garcia*, 237 F.3d at 1222-23. The court reasoned that while 18 U.S.C. § 16(b) and § 4B1.2(a) of the Sentencing Guidelines are not identical, "the well-documented danger inherent in drunk driving supports the conclusion that a DUI offense may also constitute a crime of violence under §16(b) because the generic elements of the offense present 'a substantial' risk that physical force ... may be used." *Id.* at 1223 (omission in original).

127. 196 F.3d 1352 (11th Cir. 1999).

128. *See id.* at 1352.

129. *Id.* at 1353. *See also* FLA. STAT. ANN. §§ 316.193(3), 322.34(3) (West 1996).

130. *See Le*, 196 F.3d at 1353. *See also supra* note 31 and text. Le's legal status in the United States was not noted in the opinion, only that he was a citizen of Vietnam. *See Le*, 163 F.3d at 1353.

131. *See Le*, 196 F.3d at 1354. *See also* FLA. STAT. ANN. § 316.193(3) (West 2001); *supra* note 32 and accompanying text.

132. *See* discussion *supra* Part III.A.

133. *See supra* note 32 and accompanying text.

134. *See* discussion *supra* Part III.A.

statute that may contain different elements.

This part of the Note will first explore exactly how the courts have interpreted the different words found within 18 U.S.C. § 16(b),[135] and what those words mean in ordinary English as well as in the legal field. The next part examines the DWI laws of those states in which the circuit courts have made a decision, comparing and contrasting the decisions and analyzing whether the decisions of other jurisdictions influenced the respective court's holding. Finally, the DWI statutes of states in those circuits that have not yet made a determination on the issue will be discussed in an effort to determine how those circuit courts may rule when the issue arises.

A. The Meaning of the Words

After a close look at the definitions of the words found within § 16(b), it is difficult to conclude that a felony DWI falls within the statute's scope. Circuit courts have scrutinized the meaning of the words "substantial risk," "physical force," and "used against" to determine what is actually covered by the phrase crime of violence.[136]

1. Substantial Risk

First, the meaning of "substantial risk" in both ordinary English and the legal field must be determined. "Substantial" is an adjective meaning "of ample or considerable amount, quantity, size."[137] With respect to § 16(b),[138] "substantial" qualifies the noun "risk," which is defined as

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135. *See supra* note 32 and accompanying text.

136. *See generally* Dalton v. Ashcroft, 257 F.3d 200 (2d Cir. 2001) (examining meaning of "use" and "risk of physical force" to determine what constitutes a crime of violence); United States v. Chapa-Garza, 243 F.3d 921 (5th Cir. 2001) (contemplating definition of "use" in determining that DWI is not a crime of violence); Bazan-Reyes v. INS, 256 F.3d 600 (7th Cir. 2001) (discussing definition of "use of physical force" and "substantial risk" in holding that DWI is not a crime of violence); United States v. Trinidad-Aquino, 259 F.3d 1140, 1145 (9th Cir. 2001) (analyzing definition of "use ... against a person or property" of another in deciding that DWI is not a crime of violence). However, the courts that have held that a felony DWI is a crime of violence have not delved into the meaning of the words in the statute. *See generally* Tapia-Garcia v. INS, 237 F.3d 1216 (10th Cir. 2001) (relying on cases analyzing crime of violence as found under the Sentencing Guidelines). *See also* Le v. Att'y Gen., 196 F.3d 1352 (11th Cir. 1999) (determining felony DWI with resulting serious bodily injury is a crime of violence under 18 U.S.C. § 16(a), therefore no need to determine what is meant in § 16(b)). *See also* Michael G. Salemi, *DUI as a Crime of Violence Under 18 U.S.C. § 16(b); Does a Drunk Driver Risk "Using" Force?*, 33 LOY. U. CHI. L.J. 691, 739-40. *But see* Julie Anne Rah, *The Removal of Aliens who Drink and Drive: Felony DWI as a Crime of Violence under 18 U.S.C. § 16(b)*, 70 FORDHAM L. REV. 2109, 2135-44 (2002).

137. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1897 (2d ed. 1987).

138. 18 U.S.C. § 16(b) (2000).

"exposure to the chance of injury or loss; a hazard or dangerous chance."[139] Additionally, in the legal field, "risk" is defined as "[t]he chance of injury, damage, or loss; danger or hazard."[140] Accordingly, substantial risk in § 16(b) refers to a considerable amount of chance being involved.

The Fifth Circuit, in *Chapa-Garza*,[141] found that "substantial risk" referred to a "substantial likelihood."[142] In the recent case of *Montiel-Barraza v. INS*,[143] the government argued that where the defendant was convicted under a statute requiring three or more separate violations within seven years,[144] "a person who has violated section 23175 is presumptively aware of the life-threatening nature of the activity and the grave risks involved."[145] However, the court held that "section 23175 is an enhancement statute" and therefore it "does not alter the elements of the underlying offense."[146] However, in *Dalton*[147] it was argued—although unsuccessfully—that the risk of an accident involving physical force is substantial when driving drunk and therefore § 16(b)'s definition of crime of violence would apply.[148]

The risk to which the statute refers is not clear to the courts. Usually, in the context of DWI cases, the risk is causing an accident or injury to someone.[149] In *Tapia-Garcia*,[150] the court pointed out that, "[t]he risk of injury from drunk driving is neither conjectural or speculative .... Drunk driving is a reckless act that often results in injury, and the risks of driving intoxicated are well known."[151] Additionally, the Tenth Circuit cited the "well-documented danger inherent in drunk driving" as support for

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139. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1660 (2d ed. 1987).

140. BLACK'S LAW DICTIONARY 1328 (7th ed. 1999).

141. 243 F.3d 921 (5th Cir. 2001). *See also* discussion *supra* Part III.B.1.

142. *Id.* at 926.

143. 275 F.3d 1178 (9th Cir. 2002).

144. *See* CAL. VEH. CODE § 23550 (formerly § 23175) (West 2001).

145. Montiel-Barraza v. INS, 275 F.3d 1178, 1180 (9th Cir. 2002). *See also* CAL. VEH. CODE § 23550 (formerly § 23175) (West 2001).

146. *Montiel-Barraza*, 275 F.3d at 1180 (reasoning that Ninth Circuit Court's decision in *Trinidad-Aquino* applies in this case). For a discussion of *Trinidad-Aquino*, see *supra* Part III.B.4.

147. 257 F.3d 200 (2d Cir. 2001). *See also* discussion *supra* Part III.B.3.

148. *See id.* at 210 (Walker, C.J., dissenting). The dissent also argues that because the offense requires two prior DWI convictions, the risk is greater since it is more likely that an injury will occur on one of the three occasions. *See id.*

149. *See id.* at 206. The Second Circuit held that the risk associated with drunk driving is that of causing an accident, not that physical force will be used by the driver of a vehicle. *See id.*

150. 237 F.3d 1216 (10th Cir. 2001). *See also supra* Part III.C.1.

151. *Id.* at 1222 (quoting United States v. Farnsworth, 92 F.3d 1001, 1008-09 (10th Cir. 1996)).

concluding that a felony DWI conviction was a crime of violence.[152] However, the Second Circuit held that "the language of 16(b) fails to capture the nature of the risk inherent in drunk driving," since § 16(b) requires substantial risk that physical force be used, not substantial risk that injury occur.[153] Thus, in determining whether there is a substantial risk, the meaning of physical force must also be deciphered. However, as the Second Circuit pointed out, "in the context of driving a vehicle, it is unclear what constitutes the 'use of physical force.'"[154]

2. Physical Force

As the previous section suggested, there is uncertainty on the meaning of risks associated with driving, particularly whether such risks necessarily involve physical force.[155] Force is defined as "strength or power exerted upon an object; physical coercion; violence; unlawful violence threatened or committed against persons or property."[156] Furthermore, in a legal context, force is defined as "[p]ower, violence, or pressure directed against a person or thing."[157] Additionally, force is defined as "physical acts or the threat of physical acts intentionally used to do an act or to commit a crime."[158] Physical force, also referred to as actual force, is defined as "[f]orce consisting in a physical act, esp[ecially], a violent act directed against a robbery victim."[159]

Therefore, as § 16(b)[160] indicates, physical injury alone does not necessarily mean that physical force was used.[161] Courts holding that a felony DWI conviction is not a crime of violence have taken the opportunity to differentiate between the risk of physical force and the risk of injury.[162] "[These] courts have also recognized the logical fallacy inherent in reasoning that simply because all conduct involving a risk of the use of physical force also involves a risk of injury then the converse must

152. *See id.* at 1223.

153. *See* Dalton v. Ashcroft, 257 F.3d 200, 206 (2d Cir. 2001). *See also supra* note 32 and accompanying text.

154. *Dalton*, 257 F.3d at 206 (citation omitted).

155. *See supra* notes 137-53 and accompanying text.

156. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 748 (2d ed. 1987).

157. BLACK'S LAW DICTIONARY 656 (7th ed. 1999).

158. BARRON'S LAW DICTIONARY 205 (4th ed. 1996).

159. BLACK'S LAW DICTIONARY 656 (7th ed. 1999).

160. 18 U.S.C. § 16(b) (2000).

161. *See id. See also* Dalton v. Ashcroft, 257 F.3d 200, 207 (2d Cir. 2001).

162. *See Dalton*, 257 F.3d at 206; Bazan-Reyes v. INS, 256 F.3d 600, 606-08 (7th Cir. 2001); United States v. Chapa-Garza, 243 F.3d 921, 927 (5th Cir. 2001); United States v. Trinidad-Aquino, 259 F.3d 1140, 1146 (9th Cir. 2001).

also be true."[163] The Second Circuit specifically pointed out that "[t]here are many crimes that involve a substantial risk of injury but do not involve the use of force."[164]

Since there is a distinction between physical injury and physical force, the physical force present in a DWI case must be examined. Courts have struggled with the difficult task of precisely defining "physical force" in terms of driving a vehicle.[165] It is not reasonable to say that a "foot on the accelerator or a hand on the steering wheel" is enough to be considered physical force; "[o]therwise, all driving would, by definition, involve the use of [physical] force."[166] In *Dalton*, the government argued that the physical force used in a DWI case was "speeding, crashing, harming others and/or possessing an out-of-control car."[167] However, the court noted that all of those examples of physical force seemed to be associated with an accident.[168] Thus, the court found that if it were to apply the government's definition of physical force, the result would be that physical force could only be present when an accident occurred.[169]

In short, the majority of circuit courts that have addressed this issue have agreed that the act of driving while intoxicated does not constitute physical force.[170] The next step in analyzing § 16(b) is to determine if the physical force is "used in the course of committing the offense," or if it occurs only as a result of the committed offense.[171]

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163. *Dalton*, 257 F.3d at 207 (citing *Chapa-Garza*, 243 F.3d at 926 and United States v. Parson, 955 F.2d 858, 866 (3d Cir. 1992)).

164. *See Dalton*, 257 F.3d at 207. The Second Circuit noted that "crimes of gross negligence or reckless endangerment" involve the risk of injury but not the use of physical force. *Id.* For example, leaving an infant near a pool involves a substantial risk that the infant will suffer physical injury, but there is no physical force used on the part of the person who left the infant near the pool. *See id.*

165. *See Dalton*, 257 F.3d at 206.

166. *Id. See also Bazan-Reyes*, 256 F.3d at 611. The Second Circuit doubted that Congress, when enacting 18 U.S.C. § 16, intended for all driving felonies to be considered crimes of violence, which would be the case if the court defined physical force broadly. *See Dalton*, 257 F.3d at 206.

167. *Dalton*, 257 F.3d at 206.

168. *See id.*

169. *See id.* This definition caused problems for the court since it contradicted the "commonsense understanding [that] an accident, by definition, is something that is neither planned nor foreseen ...." *Id.*

170. *See* discussion *supra* Part III.B.

171. *See* United States v. Chapa-Garza, 243 F.3d 921, 924 (5th Cir. 2001).

3. The Meaning of "Used in the Course of Committing the Offense"

In order to determine whether "physical force may be used against the person or property of another," attention must be given to what is meant by "used against." Most courts have determined that "used," as it appears in § 16(b), requires some level of intent.[172] The Fifth Circuit concluded "[t]he requirement that the defendant use physical force against the person or property of another is most reasonably read to refer to intentional conduct, not an accidental, unintended event."[173] The Ninth Circuit determined that "[i]n ordinary, contemporary, and common parlance, the 'use' of something requires a volitional act."[174] In order to conclude that "used" requires a volitional or intentional act, the definition of "used" must be established.

In the English language, "used" as a verb means "to employ for some purpose; put into service; make use of; to avail oneself of; apply to one's own purpose; to expend."[175] Legally, "used" refers to "the application or employment of something."[176] Therefore, "[i]t does not make sense to say that a person is volitionally using physical force against someone or something when he neither intended to hit the person or thing nor consciously disregarded the risk that he may do so."[177]

Since § 16(b) can be read to require intent, there must be an application of force involved when a person violates a state DWI statute, not just an increased likelihood of force.[178] The Ninth Circuit stressed the point "that there must be a volitional feature with regard to the impact or collision, and not simply with regard to the use of physical force itself."[179] Under this interpretation of use, the Second Circuit was more comfortable saying that an accident involved physical force, rather than a person used physical

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172. *See id.* at 927 (holding that "use" requires a volitional act). *See also* Bazan-Reyes v. INS, 256 F.3d 600, 608 (7th Cir. 2001) (holding that "the word 'use' implies intentional availment"); United States v. Trinidad-Aquino, 259 F.3d 1140, 1145 (9th Cir. 2001) (holding that "use" requires a volitional act in regards to the impact). *But see* Tapia-Garcia v. INS, 237 F.3d 1216, 1222 (10th Cir. 2001) (upholding BIA conclusion that 18 U.S.C. § 16(b) does not require an intentional act).

173. *Chapa-Garza,* 243 F.3d at 926.

174. *Trinidad-Aquino*, 259 F.3d at 1145.

175. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 2097 (2d ed. 1987).

176. BLACK'S LAW DICTIONARY 1540 (7th ed. 1999).

177. *Trinidad-Aquino*, 259 F.3d at 1145.

178. *See* Dalton v. Ashcroft, 257 F.3d 200, 207 (2d Cir. 2001).

179. *Trinidad-Aquino*, 256 F.3d at 1145. The court came to this conclusion because § 16(b) states "use[d] ... against the person or property of another." *Id. See also supra* note 32 and accompanying text.

force in an accident.[180] Similarly, in *United States v. Rutherford*, the Seventh Circuit determined that "a drunk driving accident is not the result of plan, direction, or purpose but of recklessness at worst and misfortune at best. A drunk driver who injures a pedestrian would not describe the incident by saying he 'used' his car to hurt someone."[181]

However, there is the argument that "use of force" should be interpreted in a broader sense.[182] The dissent in *Dalton* argued for a broader interpretation by concluding that a "driver necessarily intends to use mechanized force to propel the vehicle to its destination. In an accident, that force does not stop being 'used'; but for the driver's use of force to propel the vehicle, the collision with another vehicle or a pedestrian would not have occurred."[183] The majority, however, found that the government's argument that use of physical force was involved in a DWI case essentially showed just the opposite.[184] The court found that the government, by using the passive voice in trying to make their point, revealed that § 16(b) requires a crime of violence to "involve the *application* of force."[185]

Furthermore, § 16(b) requires that there be "substantial risk that physical force ... may be used in the course of committing the offense."[186] This strengthens the argument that a felony DWI is not a crime of violence because it requires that at some point between beginning to drive and when the person stops driving there was a substantial risk that physical force may have been intentionally used.

As the next section will demonstrate, the argument that § 16(b) requires intent because of the definition of "used against" is further supported by the courts' interpretation of crime of violence under the Sentencing Guidelines.[187]

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180. *Dalton*, 257 F.3d at 206 (stating, "one cannot be said to *use* force in an accident as one might use force to pry open a heavy, jammed door").

181. 54 F.3d 370, 372 (7th Cir. 1995) (analyzing definition of crime of violence under the Sentencing Guidelines).

182. *See Dalton*, 257 F.3d at 209-10 (Walker, C.J., dissenting).

183. *Id.* at 210.

184. *See Dalton*, 257 F.3d at 206-07.

185. *Dalton*, 257 F.3d at 206-07. The court pointed out a specific example of this when the government wrote, "'it is undeniable that driving while intoxicated greatly increases the likelihood that one will inflict harm on others via the use of force,' and that 'the crashing of the drunk driver's automobile ... constitutes the force that is likely to be used.'" *Id.* at 206 (omission in original).

186. *See supra* note 32 and accompanying text.

187. *See* discussion *infra* Part IV.A.4.

4. "Crime of Violence" as Defined in Sentencing Guidelines[188]

In determining what is meant by the definition of "crime of violence" under 18 U.S.C. § 16, some courts have turned to the interpretation of crime of violence found in the Sentencing Guidelines.[189] However, in analyzing the two definitions, the courts recognized that there was a substantial difference between 18 U.S.C. §16(b) and the second prong of the Sentencing Guidelines.[190] The difference is that the Sentencing Guidelines include any crime that "presents a serious potential risk of physical injury to another."[191] Unlike §16(b), the Sentencing Guidelines do not require that "physical force against the person or property of another ... be used in the course of committing the offense."[192] Therefore, in the second prong of the Sentencing Guidelines, "criminals whose actions merely risk causing physical injury may have a lower mens rea of 'pure' recklessness: they may lack an intent, desire or willingness to use force or cause harm at all."[193] Sub-section (b), however, "focuse[s] on a defendant's

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188. *See* U. S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (2001). The Sentencing Guidelines define crime of violence as:

> any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Id.

189. *See* Tapia-Garcia v. INS, 237 F.3d 1216 (10th Cir. 2001); United States v. Chapa-Garza, 243 F.3d 921 (5th Cir. 2001); United States v. Trinidad-Aquino, 259 F.3d 1140 (9th Cir. 2001); Dalton v. Ashcroft, 257 F.3d 200 (2d Cir. 2001). The Sentencing Guidelines state:

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time of the instant offense, (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U. S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2001).

190. *See Bazan- Reyes*, 256 F.3d at 608 (recognizing difference between the two definitions); *Chapa-Garza*, 243 F.3d at 925 (recognizing that intent requirement for second prong of Sentencing Guideline is broader than that found in 18 U.S.C. § 16(b)). *See also supra* notes 32 & 188 and accompanying text.

191. *See supra* note 188 and accompanying text.

192. *See Chapa-Garza*, 243 F.3d at 926 (citing United States v. Parson, 955 F.2d 858, 866 (3d Cir. 1992)). *See also supra* note 188 and accompanying text.

193. *Chapa-Garza*, 243 F.3d at 926 (quoting United States v. Parson, 955 F.2d 858, 866 (3d Cir. 1992) (stating that a drunk driver risks causing serious injury to others when driving on the road; however, that person does not intend to use force to harm others). *See also supra* note 188 and accompanying text.

conduct *itself*," thus "physical force described in section 16(b) is that 'used in the course of committing the offense,' not that force that could result from the offense having been committed.'"[194]

Moreover, another significant difference is that the Sentencing Guidelines' "otherwise clause,"[195] "concerns only the risk of one particular *effect* (physical injury to another's person or property) of the defendant's conduct."[196] In 18 U.S.C. § 16(b), however, the focus is on the defendant's conduct.[197] There is no requirement of a substantial risk of injury to a person or another's property. Instead, the statute requires a substantial risk that the defendant will use physical force against a person or another's property while committing the offense.[198]

The difference in the wording of the two statutes is especially significant when viewed in light of the legislative history.[199] In November, 1989, Congress changed the definition of "crime of violence" in the Sentencing Guidelines from a reference to 18 U.S.C. § 16(b) to its present appearance, which is further evidence that these two statutes should not be interpreted the same way.[200] However, not all courts have recognized the difference between these two definitions. In *Tapia-Garcia*,[201] for example, the Tenth Circuit classified a felony DWI as a crime of violence and interpreted the language of 18 U.S.C. § 16(b) the same way that courts have interpreted a crime of violence under the Sentencing Guidelines.[202]

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194. United States v. Chapa-Garza, 243 F.3d 921, 924-25 (5th Cir. 2001).

195. The "otherwise clause" of the Sentencing Guidelines includes any crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." U. S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2) (2002). *See also supra* notes 32 & 188 and accompanying text.

196. *Chapa-Garza*, 243 F.3d at 925.

197. *See supra* note 32 and accompanying text.

198. *See Chapa-Garza*, 243 F.3d at 925. *See also supra* note 32 and accompanying text.

199. *See Chapa-Garza*, 243 F.3d at 925. *See also supra* notes 32 & 188 and accompanying text.

200. *See Chapa-Garza*, 243 F.3d at 926. *See also Parson*, 955 F.2d at 863-66 (discussing evolution of "crime of violence" in Sentencing Guidelines in relation to 18 U.S.C. § 16).

201. 237 F.3d 1216 (10th Cir. 2001).

202. *See id.* at 1222. *See also supra* note 188 and accompanying text. The court acknowledged that the definition of crime of violence in 18 U.S.C. § 16(b) and § 4B1.2(a)(2) of the Sentencing Guidelines differ slightly, yet still relied upon the definition supplied in the Sentencing Guidelines in holding that a DWI is a crime of violence as defined in 18 U.S.C. § 16(b). *See Tapia-Garcia*, 237 F.3d at 1222-23.

5. Violence

In lay terms, violence is defined as "swift, intense force; rough or injurious physical force, action, or treatment; violent act or proceeding."[203] Legally, violence is defined as "[u]njust or unwarranted use of force, usu[ally] accompanied by fury, vehemence, or outrage; physical force unlawfully exercised with the intent to harm."[204] Since the legal definition specifically includes an intent to harm,[205] the only logical interpretation of § 16(b) must also include a determination of intent. This argument is similar to the one proposed for physical force.[206]

These considerations lead to the next issue: whether the particular language used in a state statute determines whether DWI is a crime of violence. As shown in Part V, virtually every state's DWI law requires the same elements, and each law can be violated in the same way, giving weight to the argument that there should be a universal application of 18 U.S.C. § 16(b) to drunk driving convictions such that they should not qualify as a crime of violence.

V. APPLICATION TO STATE DWI STATUTES

While the meaning of the particular words found in 18 U.S.C. § 16(b)[207] is essential to how the statute is interpreted by the courts, it is also important to examine the particular DWI statutes under which the defendants in each particular case were convicted. To accomplish this, the courts determine "whether the generic elements of the offense satisfy the statutory definition of [a] crime of violence."[208] In *Ramos*, the BIA held that in order for a felony DWI conviction to qualify as a crime of violence under § 16(b), "the elements of the offense [must] reflect that there is a substantial risk that the perpetrator may resort to the use of force to carry out the crime."[209] Thus, those circuits that held that a DWI conviction was not a crime of violence were correct,[210] while the Tenth and Eleventh Circuits improperly determined that a DWI conviction was a crime of violence.[211] Furthermore, those circuits that have not yet addressed the

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203. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 2124 (2d ed.1987).

204. BLACK'S LAW DICTIONARY 1564 (7th ed. 1999).

205. *See id.*

206. *See supra* notes 155-71 and accompanying text.

207. *See* discussion *supra* Part IV.A. *See also supra* note 32 and accompanying text.

208. *Tapia-Garcia*, 237 F.3d at 1222.

209. 23 I. & N. Dec. 336, 346 (B.I.A. Apr. 4, 2002).

210. *See* Bazan-Reyes v. INS, 256 F.3d 600 (7th Cir. 2001); United States v. Chapa-Garza, 243 F.3d 921 (5th Cir. 2001); Dalton v. Ashcroft, 257 F.3d 200 (2d Cir. 2001).

211. *See* Tapia-Garcia v. INS, 237 F.3d 1216 (10th Cir. 2001); Le v. Att'y Gen., 196 F.3d 1352 (11th Cir. 1999).

issue should follow the majority of circuits, apply the current BIA interpretation, and hold that a felony DWI is not a crime of violence because the DWI statutes do not reflect a substantial risk of the use of force.

A. DWI Statutes of States in Circuits that Hold that a DWI Conviction is *Not* a Crime of Violence

In Massachusetts, a person violates the DWI statute by "operat[ing] a motor vehicle while under the influence of intoxicating liquor upon any way or in any place to which the public has a right of access, or upon any way or in any place to which members of the public have access as invitees or licensees."[212] The BIA determined that the Massachusetts DWI statute did not fall within the meaning of 18 U.S.C. § 16(b).[213] As a result, aliens convicted of felony DWI are not subject to removal.[214] Further, since other states within the First Circuit[215] have similar DWI statutes, an alien convicted under any of these states' DWI laws is not subject to removal.[216]

The Second Circuit[217] has interpreted New York's DWI statute and held that a felony DWI is not a crime of violence.[218] The DWI laws of Vermont and Connecticut are similar to New York's in that all that is required for a violation to occur is that a person drives a vehicle while under the influence.[219] In each of these states, there is no requirement of a substantial

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212. MASS. GEN. LAWS ANN. ch. 90 § 24(1)(a)(1) (West 2002).

213. *See In re* Ramos, 23 I. & N. Dec. 336, 338 (B.I.A. Apr. 4, 2002).

214. *See id.*

215. The First Circuit encompasses Maine, Massachusetts, New Hampshire, Puerto Rico, and Rhode Island. *See* DONALD R. SONGER ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS 6-7 (2000) (providing geographical boundaries for United States Circuit Courts of Appeal).

216. *See* ME. REV. STAT. ANN. tit. 29-A § 2411 (West 2001) (unlawful if a person "operates a motor vehicle ... [w]hile under the influence of intoxicants"); N.H. REV. STAT. ANN. § 265:82 (2002) ("[n]o person shall drive or attempt to drive a vehicle upon any way: (a) [w]hile he is under the influence of intoxicating liquor"); 9 P.R. LAWS I ANN. § 1041 (1999) ("[i]t shall be unlawful for any person who is under the influence of intoxicating drinks to drive or operate any motor vehicle"); R.I. GEN. LAWS § 31-27-2 (2001) (unlawful when anyone "drives or otherwise operates any vehicle in the state while under the influence of any intoxicating liquor").

217. The Second Circuit includes the states of Connecticut, New York, and Vermont. *See* SONGER, *supra* note 215, at 6-7.

218. *See* Dalton v. Ashcroft, 257 F.3d 200, 202 (2d Cir. 2001). *See also supra* notes 93-105 and accompanying text.

219. *See* CONN. GEN. STAT. ANN. § 14-227a (West 2001) ("[a] person commits the offense of operating a motor vehicle while under the influence of intoxicating liquor ... if such person operates a motor vehicle ... while under the influence of intoxicating liquor"); N.Y. VEH. & TRAF. LAW § 1192(1)-(3) (McKinney 1998) (unlawful if a person operates a

risk that the individual will resort to the use of force in order to violate the statute. Thus, in applying the standard from *Ramos*, the Second Circuit correctly held that a felony DWI is not a crime of violence.[220]

The Fifth Circuit[221] held that a Texas felony DWI conviction does not constitute a crime of violence.[222] The Texas DWI statute, which states it is unlawful "if the person is intoxicated while driving or operating a motor vehicle in a public place," is similar to the DWI laws of the other states within the Fifth Circuit.[223] Therefore, the Fifth Circuit correctly determined that a DWI conviction did not constitute a crime of violence, nor did the statute meet the requirement of *Ramos* to be determined a crime of violence.[224]

The Seventh Circuit[225] is the only circuit court thus far to rule that a felony DWI is not a crime of violence based on the DWI laws of every state within its jurisdiction.[226] In *Bazan-Reyes*, the court held a felony DWI under Illinois law, a homicide by intoxicated use of a vehicle under Wisconsin law, and an aggravated DWI under Indiana law were not crimes of violence as the term is defined in 18 U.S.C. § 16(b).[227] In deciding the cases together, the court stated that "[b]ecause 'intentional force ... is virtually never employed to commit' any of the offenses for which [the] petitioners were convicted," none of the convictions were held to constitute

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motor vehicle and "is impaired by the consumption of alcohol" or is "in an intoxicated condition"); VT. STAT. ANN. tit. 23 § 1201 (2001) ("[a] person shall not operate, attempt to operate, or be in actual physical control of any vehicle on a highway ... when the person is under the influence of intoxicating liquor").

220. *See In re* Ramos, 23 I. & N. Dec. 336, 343 (B.I.A. Apr. 4, 2002).

221. The Fifth Circuit encompasses Louisiana, Mississippi, and Texas. *See* SONGER, *supra* note 215, at 6-7.

222. *See* United States v. Chapa-Garza, 243 F.3d 921, 923 (5th Cir. 2001).

223. *See* LA REV. STAT. ANN. § 14:98 (West 2001) (requires that a person operates a vehicle and is under the influence); MISS. CODE ANN. § 63-11-30 (2001) (unlawful for "any person [to] drive or otherwise operate a vehicle ... who (a) is under the influence of intoxicating liquor"); TEX. PENAL CODE ANN. § 49.04(a) (Vernon 2001).

224. *See Chapa-Garza,* 243 F.3d at 928; *Ramos*, 23 I. & N. Dec. at 341.

225. The Seventh Circuit includes Illinois, and Indiana, and Wisconsin. *See* SONGER *supra* note 215, at 6-7.

226. *See* Bazan-Reyes v. INS, 256 F.3d 600, 602-04 (7th Cir. 2001).

227. *See id. See also* 625 ILL. COMP. STAT. 5/11-501(a) (2001) (unlawful if "[a] person ... drive[s] or [is] in actual physical control of any vehicle ... while ... (2) under the influence of alcohol"); IND. CODE ANN. § 9-30-5-1(a) (Michie 2001) (unlawful when, "[a] person ... operates a vehicle with an alcohol concentration equivalent to at least eight-hundredths (0.08) gram of alcohol"); WIS. STAT. § 346.63(1) (2000) ("[n]o person may drive or operate a motor vehicle while: (a) [u]nder the influence of an intoxicant"). *See also supra* note 86 and accompanying text.

a crime of violence.[228] All three of the state statutes are generically the same in respect to the elements of the crime.[229] They all require that the person driving or in some type of control of the vehicle have a specified amount of alcohol in his or her system, or such an amount as to be under the influence of alcohol.[230] The language of the statutes concerning bodily injury or death caused by intoxicated driving differs slightly, but the same generic elements are present. The *Bazan-Reyes* court looked at the Wisconsin statute, which states "[a]ny person who ... (a) [c]auses the death of another by the operation or handling of a vehicle while under the influence of an intoxicant [or] (b) ... while the person has a prohibited alcohol concentration" is guilty of a Class B felony.[231] The Illinois version of this statute goes even a bit further and specifically states that the statute covers unintentional acts.[232] Additionally, the Indiana statute is the same as those in Illinois and Wisconsin, and all three are violated when a person causes the death of another while operating a vehicle under the influence.[233]

In general, the statutes within the states of the Seventh Circuit are considerably similar. Additionally, the *Bazan-Reyes* decision, since it took into account all three of the different statutes, made it clear that the reasoning of the court was to be applied broadly.[234]

The Ninth Circuit[235] held that a conviction for driving under the influence of alcohol with resulting injury to another did not constitute a crime of violence.[236] The *Trinidad-Aquino* decision specifically looked at a conviction for DWI under California law.[237] Since the *Trinidad-Aquino* decision, the Ninth Circuit also has held that, "[a] conviction for DUI, whether with priors or not, contains no intent requirement in California law; a violation may occur through negligence."[238] The California DWI

228. *Bazan-Reyes*, 256 F.3d at 612 (omission in original) (internal citations omitted).

229. *See supra* note 227.

230. *See supra* note 227.

231. 256 F.3d at 600 (quoting WIS. STAT. § 940.09(1) (2000)).

232. *See* 720 ILL. COMP. STAT. 5/9-3(2001) ("a person who unintentionally kills an individual" and is under the influence commits a Class 3 felony).

233. *See* IND. CODE ANN. § 9-30-5-5(a) (Michie 2001).

234. *See Chapa-Garza*, 243 F.3d at 921. *See also supra* notes 84-92 and accompanying text.

235. The Ninth Circuit includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. *See* SONGER, *supra* note 215, at 6-7.

236. *See* United States v. Trinidad-Aquino, 259 F.3d 1140 (9th Cir. 2001). *See also supra* notes 106-11 and accompanying text.

237. *See Trinidad-Aquino,* 259 F.3d at 1140 (citing CAL. VEH. CODE § 23153(a) (Deering 2001)).

238. United States v. Portillo-Mendoza, 273 F.3d 1224, 1228 (9th Cir. 2001).

statute only requires that a person drive a vehicle and be under the influence; there is no intent required.[239] The other states within the Ninth Circuit have similar statutes.[240]

The fact that the same language is used in the statutes for states within the Ninth Circuit raises an interesting question when looking at what other courts have held in regard to these same statutes. The Tenth Circuit, in *Tapia-Garcia v. INS*, held that under the Idaho DWI statute, the defendant had been convicted of a crime of violence.[241] Yet, the Ninth Circuit has held that a conviction under the California DWI statute (both with and without bodily injury) was not a crime of violence.[242] Thus, there may even be a conflict within the Ninth Circuit, as well as between circuits.

B. DWI Statutes of States in Circuits that Hold that a DWI Conviction *is* a Crime of Violence

Only two courts of appeals have held that a DWI conviction is a crime of violence.[243] In those two circuits, the courts looked at the DWI statutes of Florida and Idaho.[244] The Tenth Circuit's[245] decision in *Tapia-Garcia*

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239. *See* CAL. VEH. CODE § 23152(a) (Deering 2001) ("[i]t is unlawful for any person who is under the influence of any alcoholic beverage ... to drive a vehicle").

240. *See* ARIZ. REV. STAT. § 28-1381(A)(1) (2001) ("[i]t is unlawful for a person to drive or be in actual physical control of a vehicle in this state ... [w]hile under the influence of intoxicating liquor"); IDAHO CODE § 18-8004(1)(a) (Michie 2000) ("[i]t is unlawful for any person who is under the influence of alcohol ... to drive or be in actual physical control of a motor vehicle within this state"); MONT. CODE ANN. § 61-8-401(1)(a) (2001) ("[i]t is unlawful ... for a person who is under the influence of: (a) alcohol to drive or be in actual physical control of a vehicle"); WASH. REV. CODE ANN. § 46.61.502(1)(b) (West 2002) (it is unlawful if a person "drives a vehicle ... while the person is under the influence of or affected by intoxicating liquor").

241. *See* 237 F.3d 1216, 1222 (10th Cir. 2001). *See also* ALASKA STAT. § 28.35.030(a)(1) (Michie 2001) (it is unlawful if a "person operates or drives a motor vehicle ... while under the influence of intoxicating liquor"); HAW. REV. STAT. ANN. § 291E-61 (Michie 2001) (it is unlawful when a person "operates or assumes actual physical control of a vehicle: (1) while under the influence of alcohol in an amount sufficient to impair the person's normal mental faculties or ability to care for the person and guard against casualty [or] ... impairs the person's ability to operate the vehicle in a careful and prudent manner"); OR. REV. STAT. § 813.010(1)(b) (2001) ("[a] person commits the offense of driving while under the influence of intoxicants if the person drives a vehicle while the person ... is under the influence of intoxicating liquor"); *supra* notes 121-26 and accompanying text.

242. *See Trinidad-Aquino*, 259 F.3d at 1140; United States v. Portillo-Mendoza, 273 F.3d 1224 (9th Cir. 2001).

243. *See* discussion *supra* Part III.B.

244. *See* Tapia-Garcia v. INS, 237 F.3d 1216 (10th Cir. 2001); Le v. Att'y Gen., 196 F3d 1352 (11th Cir. 1999).

245. The Tenth Circuit includes Colorado, Kansas, New Mexico, Oklahoma, Utah, and

presents an interesting twist to this situation because the court held that a felony DWI conviction is a crime of violence, but they did so based on a conviction of a DWI state statute that was not within the Tenth Circuit.[246] The Tenth Circuit's decision to classify a DWI conviction as a crime of violence is incorrect since the elements of the DWI statutes contained within the Tenth Circuit decisions do not provide that a substantial risk will be present that will lead the individual to resort to the use of physical force in order to violate the statute.[247]

The Eleventh Circuit[248] held in *Le* that a conviction for driving under the influence of alcohol that caused serious bodily harm constituted a crime of violence under Florida law, since one of the elements of the offense included the actual use of physical force.[249] The Florida DWI statute provides that the person is under the influence while operating a vehicle and that bodily injury results from operating a vehicle while under the influence.[250] However, the *Le* decision did not answer the question of whether a DWI conviction without bodily injury would be a crime of violence.[251] Under Florida law, "[a] person is guilty of the offense of driving under the influence ... if the person is driving or in actual physical control of a vehicle within this state and ... is under the influence of alcoholic beverages."[252] The DWI statutes of Alabama and Georgia are violated in the same manner as the Florida statute: being in actual physical

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Wyoming. *See* SONGER, *supra* note 215, at 6-7.

246. *See Tapia-Garcia*, 237 F.3d at 1222-23.

247. *See In re* Ramos, 23 I. & N. Dec 336, (B.I.A. Apr. 4, 2002). *See also* COLO. REV. STAT. ANN. § 42-4-1301 (West 2001) (it is a crime "for any person who is under the influence of alcohol ... to drive any vehicle"); KAN. STAT. ANN. § 8-1567(a)(3) (2001) ("[n]o person shall operate or attempt to operate any vehicle ...while ... under the influence of alcohol to a degree that renders the person incapable of safely driving a vehicle"); N.M. STAT. ANN. § 66-8-102A (Michie 2001) ("[i]t is unlawful for any person who is under the influence of intoxicating liquor to drive any vehicle within this state"); 47 OKLA. STAT. tit. 47, § 11-902(A) (2002) (unlawful for "any person ... [to] drive, operate, or [be] in actual physical control of a motor vehicle within this state ... under the influence of alcohol"); UTAH CODE ANN. § 41-6-44(2)(a)(ii) (2001) ("[a] person may not operate or be in actual physical control of a vehicle within this state if the person ... is under the influence of alcohol"); WYO. STAT. ANN. § 31-5-233(b)(ii)(A) (Michie 2001) ("[n]o person shall drive or have actual physical control of any vehicle within this state if the person ... [is] under the influence of alcohol").

248. Alabama, Florida, and Georgia make up the Eleventh Circuit. *See* SONGER, *supra* note 215, at 6.

249. *See* Le v. Att'y Gen., 196 F.3d 1352 (11th Cir. 1999); FLA. STAT. ANN. § 316.193(3)(a) (West 2001). *See also supra* notes 127-31 and accompanying text.

250. *See Le*, 196 F.3d at 1354. *See also* FLA. STAT. ANN. § 316.193(3) (West 2001).

251. *See Le*, 196 F.3d at 1354.

252. FLA. STAT. ANN. § 316.193(1) (West 2001).

control of the vehicle and being under the influence of alcohol.[253]

C. DWI Statutes of States in Circuits that Have *Not Yet Addressed* the Issue

Since *Ramos*, the elements of an individual state's DWI law are critical to the determination of whether the DWI constitutes a crime of violence.[254] The *Ramos* decision requires that the elements of the offense reflect that there is "a substantial risk that the perpetrator may resort to the use of force to carry out the crime before the offense is deemed to qualify as a crime of violence under § 16(b)."[255] Thus, state laws in those circuits can be analyzed to determine whether the courts will hold a felony DWI conviction to be a crime of violence.

The DWI laws of the states within the Third Circuit[256] have comparable elements.[257] If the issue were raised there, a DWI conviction, regardless of which state's statute was violated, would most likely not qualify as a crime of violence under § 16(b) because none of the laws contain a specific element requiring there be a substantial risk of use of force in carrying out the crime.[258]

Likewise, the DWI laws in the states of the Fourth Circuit[259] all can be violated without a substantial risk that the offender use force to commit the offense.[260] Thus, the INS and BIA in the Fourth Circuit should follow the

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253. *See* ALA. CODE § 32-5A-191(a)(2) (2001) (unlawful when a person "drive[s] or [is] in actual physical control of any vehicle while ... [u]nder the influence of alcohol"); GA. CODE ANN. § 40-6-391(a)(1) (2001) ("[a] person shall not drive or be in actual physical control of any moving vehicle while ... [u]nder the influence of alcohol to the extent that it is less safe for the person to drive").

254. *See In Re* Ramos, 23 I. & N. Dec. 336, 346 (B.I.A. Apr. 4, 2002).

255. *Id.* at 336.

256. The Third Circuit encompasses the states of Delaware, New Jersey, and Pennsylvania. *See* SONGER, *supra* note 215, at 6.

257. *See* DEL. CODE ANN. tit. 21, § 4177 (1995) ("no person shall drive a vehicle: (1) when the person is under the influence of alcohol"); N.J. STAT. ANN. § 39:4-50(a) (West 2002) (unlawful when an individual "operates a motor vehicle while under the influence of intoxicating liquor"); 75 PA. CONS. STAT. ANN. § 3731(a) (West 2002) (unlawful to "drive, operate or be in actual physical control of the movement of a vehicle ... [w]hile under the influence of alcohol to a degree which renders the person incapable of safe driving").

258. *See Ramos*, 23 I. & N. Dec. at 341. *See also supra* note 257 and accompanying text.

259. The Fourth Circuit is comprised of Maryland, North Carolina, South Carolina, Virginia, and West Virginia. *See* SONGER, *supra* note 215, at 6.

260. *See Ramos*, 22 I. & N. Dec. at 346. *See also* MD. CODE TRANSP. § 21-902 (2002) ("(a) [a] person may not drive or attempt to drive any vehicle while under the influence of alcohol [and] (b) [a] person may not drive or attempt to drive any vehicle while impaired by alcohol"); N.C. GEN. STAT. § 20-138.1(a) (2001) ("[a] person commits the offense of

holding of *Ramos* that a felony DWI is not a crime of violence.[261] The same would be the case in the Sixth and Eighth Circuits, neither of which have ruled on the issue. The states of the Sixth Circuit[262] have similar DWI statutes, none of which require that the offender resort to the use of physical force in carrying out the offense.[263] The states of the Eighth Circuit[264] also have similar DWI laws, thus a felony DWI conviction would not constitute a crime of violence in these states, under the *Ramos* reasoning.[265]

Accordingly, since state DWI statutes have the same elements and can be violated in the same manner without a substantial risk that the offender use physical force to violate the statute, then the remaining circuits should

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impaired driving if he drives any vehicle upon any highway, any street, or any public vehicular area within this State: (1) [w]hile under the influence of an impairing substance"); S.C. CODE ANN. § 56-5-2930(1) (Law. Co-op. 2001) (unlawful to drive if "under the influence of alcohol to the extent that the person's faculties to drive are materially and appreciably impaired"); VA. CODE ANN. §18.2-266 (Michie 1996) (unlawful if a person "drive[s] or operate[s] any motor vehicle ... under the influence of alcohol"); W.VA. CODE ANN. § 17C-5-2(c)(1)(A) (Michie 2002) (unlawful when any person "[d]rives a vehicle ... under the influence of alcohol").

261. *See Ramos*, 22 I. & N. Dec. at 346. *See also supra* note 209 and accompanying text.

262. The Sixth Circuit has jurisdiction over the states of Kentucky, Michigan, Ohio, and Tennessee. *See generally* SONGER, *supra* note 215, at 6.

263. *See* K.Y. REV. STAT. ANN. § 189A.010(1) (Michie 2001) ("[a] person shall not operate or be in physical control of a motor vehicle anywhere in this state ... [w]hile under the influence of alcohol"); MICH. COMP. LAWS ANN. § 257.625(1) (West 2002) (a person "shall not operate a vehicle ... under the influence of intoxicating liquor"); OHIO REV. CODE ANN. § 4511.19(A)(1) (Anderson 2002) (prohibiting persons from operating any vehicle if "[t]he person is under the influence of alcohol"); TENN. CODE ANN. § 55-10-401(a) (Lexis 2001) ("[it] is unlawful for any person to drive or to be in physical control of any automobile ... while [u]nder the influence of any intoxicant").

264. The Eighth Circuit includes the states of Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota. *See* SONGER, *supra* note 215, at 6.

265. *See In Re* Ramos, 22 I. & N. Dec. 336, 34 (B.I.A. Apr. 4, 2002). *See also* ARK. CODE ANN. § 5-65-103(a) (Michie 2001) ("[i]t is unlawful ... for any person who is intoxicated to operate or be in actual physical control of a motor vehicle"); IOWA CODE ANN. § 321J.2 (West 2002) (unlawful when a "person operates a motor vehicle ... [w]hile under the influence of an alcoholic beverage"); MINN. STAT. § 169A.20 (2001) [i]t "is a crime for any person to drive, operate, or be in physical control of any motor vehicle ... when the person is under the influence of alcohol"); NEB. REV. STAT. ANN. § 60-6,196 (Michie 2001) ("unlawful for any person to operate or be in the actual physical control of any motor vehicle while under the influence of alcoholic liquor"); N.D. CENT. CODE § 39-08-01(1) (2002) (unlawful if a person drives or is "in actual physical control of any vehicle [and] that person is under the influence of intoxicating liquor"); S.D. CODIFIED LAWS § 32-23-1 (Michie 2001) ("[n]o person may drive or be in actual physical control of any vehicle while under the influence of an alcoholic beverage").

follow the majority and hold that a felony DWI is not a crime of violence. This would create a universal application of 18 U.S.C. § 16(b) to state DWI laws.

VI. CONCLUSION

This Note makes clear that the weight of the authority requires courts to hold that that a felony DWI conviction is not a crime of violence. The immigration system is one of ever-changing laws, as is evident by the wave of new laws that Congress has enacted—particularly post-September 11th. With the new laws come new challenges to the judicial system: judges and attorneys must sift through the laws to determine their applicability and convey the plain meaning to those affected by the laws. The judicial system has been required to closely examine the meaning of a crime of violence in the immigration context to determine whether a felony DWI meets the definition of § 16(b). If it does not, then there is no conviction for an aggravated felony, and thus no removal. The courts that have held such have done so after a careful assessment of both the statutory language found within § 16(b) and the respective state DWI law.

Unfortunately, there is not yet a uniform interpretation of a crime of violence for purposes of § 16(b). As a result, aliens face inconsistent consequences—some are removed for committing the same crime as others who are allowed to stay. While each state has its own DWI statute, the language of most does not vary enough to justify such inconsistencies. With the re-interpretation by the BIA of § 16(b)'s requirements, the results may be more uniform. However, the BIA's decision did not change the fact that in at least two circuits aliens can still be removed for felony DWI convictions. Until some action is taken, the unclear statute will continue to affect not just those who are illegally in the country, but also, and in a greater amount and a more damaging way, those who are legal permanent residents and consider the United States their only home.

Kelly L. Lancaster

Soldiers of Misfortune: The Justiciability of Injunctive Relief Actions in the Federal Courts and the U.S. Military's Mandatory Anthrax Inoculation Program

I. INTRODUCTION

In the wake of the terrorist attacks of September 11, 2001, Americans, particularly those working in government buildings and post offices, are faced with a new terrorist threat: anthrax.[1] While antibiotics are effective upon early detection of anthrax exposure, delayed diagnosis is often fatal.[2] Although a licensed U.S. manufacturer of the anthrax vaccine exists, the government has yet to make the vaccine available to the public.[3]

What if the vaccine was widely available? How many of us would choose to undergo the inoculation regimen?[4] Would we change our decision if we were told that inoculation could result in testicular failure,[5]

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1. *See* Lauran Neergaard, *Few People Take Anthrax Vaccination*, Associated Press, Dec. 31, 2001, *at* 2001 WL 32162966. In the fall of 2001, there were 18 confirmed cases of anthrax attacks by mail, resulting in five deaths. *See id.* The Centers for Disease Control (CDC) describes anthrax as an "acute infectious disease caused by the spore-forming bacterium *Bacillus anthracis*." http://www.bt.cdc.gov (last visited Nov. 11, 2002) [hereinafter CDC Website]. There are three serious forms of anthrax: inhalation, cutaneous, and intestinal. *See id.*

2. *See* CDC Website, *supra* note 1.

3. *See id.* Bioport, Inc. purchased the anthrax vaccine manufacturing facility from the state of Michigan in 1998. *See* Sue Ellen Christian, *Maker of Anthrax Vaccine Gets OK to Supply Military*, CHI. TRIB., Feb. 1, 2002, *at* 2002 WL 2618820. In December 2001, the U.S. government offered the vaccine to postal workers and congressional employees who may have been exposed to the virus during the recent string of anthrax mailings. *See* Stacey Schultz, *A Shot-in-the Dark Vaccine*, U.S. NEWS & WORLD REP., Dec. 31, 2001, *at* 2001 WL 30366406.

4. The Food and Drug Administration (FDA)-licensed vaccination program involves a series of six shots during an 18-month period. *See* Randall D. Katz, *Friendly Fire: The Mandatory Military Anthrax Vaccination Program*, 50 DUKE L.J. 1835, 1841-42 (2001) (detailing the vaccine's uses and the inoculation regimen). However, the course of shots for those potentially exposed to anthrax in the fall of 2001 was reduced to three. *See* Schultz, *supra* note 3.

5. *See Anthrax Vaccine Immunization Program—What Have We Learned?: Hearing Before the House Comm. on Gov't Reform*, 106th Cong. (2000) [hereinafter *Anthrax*

autoimmune disorders,[6] or even death?[7] Fortunately, most Americans are free to assess the risks and make informed decisions.[8] The men and women who serve in the Armed Forces, however, enjoy no such freedom.

A. The Vaccine Controversy

The anthrax vaccine was among the series of inoculations administered to military personnel deployed to the Middle East during the Gulf War.[9] Critics of the vaccine suspect that it is a contributing cause of Gulf War Syndrome (GWS), a mysterious illness that has afflicted thousands of veterans.[10] GWS victims and their families have brought suit against the United States alleging negligence in the government's failure to warn service personnel of the potentially hazardous effects prolonged exposure to certain chemicals could have on their health and the health of their future offspring.[11] These suits have been dismissed based on the *Feres* doctrine,

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Vaccine Hearing] (statement of Army officer Jon Irelan whose testicles shrunk to peanut size one day after receiving the fourth of six shots) at 2000 WL 23833399.

6. *See id.* (statement of Air Force Captain James Gallagher, Jr., who became symptomatic following the fourth of six shots).

7. *See id.* (testimony of Nancy Rugo, sister of Army officer Sandra Larsen who developed a blood disorder one month after completing inoculation regimen and ultimately died).

8. Because the anthrax vaccine's viability as a treatment for those already exposed to anthrax is unknown, the CDC has warned civilians who wish to receive the inoculation that the vaccine is experimental and may cause side effects. *See* Neergaard, *supra* note 1. Potential side effects listed on the consent form include joint pain and nausea. *See* Schultz, *supra* note 3. Of the estimated thousands of post office and congressional employees potentially exposed to anthrax during the recent outbreak, fewer than 100 opted to receive the vaccine. *See* Neergaard, *supra*, note 1.

9. *See* Greg Gordon, *Capitol Connection//Minnesota's Link to Washington*, STAR TRIB. (Minneapolis-St. Paul), Aug. 24, 2001, at 18A, *at* 2001 WL 9635275.

10. *See id.* Symptoms of GWS include respiratory problems, neurological damage, memory loss, bowel and bladder incontinence, and hair loss. *See* Kevin J. Dalton, Comment, *Gulf War Syndrome: Will the Injuries of Veterans and Their Families be Redressed?*, 25 U. BALT. L. REV. 179, 181 (1996) (discussing both wide range of symptoms connected to GWS and monies expended for government research into its root causes). Of the estimated 695,000 soldiers deployed to the Middle East during the Gulf War, 45,000 have developed one or more symptoms of GWS. *See id.* "[T]he FDA has found trace amounts of squalene [a substance used to accelerate the vaccination process] in the anthrax vaccine." *Study of Gulf War Veterans' Illness: Hearing Before the House Sub-Comm. on Nat'l Sec., Veterans Affairs, and Int'l Relations*, 106th Cong. (2000) (testimony of U.S. Representative Jack Metcalf), *at* 2000 WL 23833198. Although squalene has not received FDA approval, critics contend that it is being used in the manufacture of the anthrax vaccine. *See id.*

11. *See, e.g.*, Minns v. United States, 155 F.3d 445 (4th Cir. 1998) (alleging that fathers' chemical exposure in Persian Gulf was proximate cause of children's birth defects). *See also* Dalton, *supra* note 10, at 184-85 (discussing spread of GWS to family members of

which prohibits the courts from granting monetary relief to injured Armed Forces personnel.[12]

Despite concerns about the vaccine's safety and the absence of compensatory relief for those adversely affected, Secretary of Defense William Cohen instituted a mandatory anthrax vaccination program (AVIP) in 1998.[13] While the program's ultimate objective was the inoculation of the entire military force,[14] a production shortage, caused by the manufacturer's failure to pass government inspection, severely curtailed the program less than two years after its inception.[15]

Since the AVIP's inception, there have been more than 1,500 complaints of adverse reactions from service personnel, two hundred of which have been characterized as fatal, life threatening, or resulting in hospitalization or permanent disability.[16] As a result, AVIP has been the subject of congressional hearings and heated debate.[17] In March of 2001, Connecticut

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service personnel). The Federal Tort Claims Act (FTCA) authorizes tort suits against the United States in situations where the government would be amenable to suit were it a private party. *See* 28 U.S.C. § 1346(a)(2) (2000). For discussion of the FTCA and its application to the military, see *infra* notes 40-53 and accompanying text.

12. *See Minns*, 155 F.3d at 451. In *Feres v. United States*, the Supreme Court held that the United States' waiver of sovereign immunity under the FTCA did not apply to tort claims by members of the U.S. Armed Forces who sustain injury incident to their service. *See* 340 U.S. 135, 146 (1950). Despite the fact that the plaintiffs were not soldiers, the *Minns* court held that *Feres* applied to derivative injuries as well as direct injuries, and the suit was dismissed as non-justiciable. *See Minns*, 155 F.3d at 449. *See also* Part II, *infra* notes 40-83 and accompanying text (examining *Feres* doctrine's historical development).

13. *See* News Release 255-98, U.S. Dept. of Defense, Total Force Anthrax Vaccination Decision Announced (May 22, 1998), *at* http://www.defenselink.mil/news/May1998/b05221998_bt255-98.html (last visited Nov. 11, 2002).

14. *See id.*

15. *See* Thomas D. Williams, *Departing National Guard Troops Won't Receive Anthrax Vaccinations*, HARTFORD COURANT, June 13, 2001, *at* 2001 WL 4568922. In 2000, the Defense Department announced that the vaccine's use would be limited to service members in areas susceptible to terrorism or enemy attack. *See id.* A year later, the continued shortage resulted in restriction of the vaccine to certain special-mission units and vaccine researchers. *See id.* In January of 2002, BioPort received FDA approval to reinitiate production of the vaccine. *See* Christian, *supra* note 3. On June 28, 2002, the Department of Defense announced AVIP's re-implementation. *See* Memorandum of the Deputy Secretary of Defense Announcing Reintroduction of the Anthrax Vaccine Immunization Program (AVIP) (June 28, 2002), *at* http://www.anthrax.osd.mil/media/pdf/resumptionpolicy.pdf (last visited Nov. 2, 2002).

16. *See* Thomas D. Williams, *Anthrax Vaccine Complaints on the Rise*, HARTFORD COURANT, June 2, 2001, *at* 2001 WL 4567446. The FDA estimates that only ten percent of those adversely affected by inoculations actually report their complaints. *See id.*

17. *See Anthrax Vaccine Hearing*, *supra* note 5 (opening statement of Chairman Dan Burton detailing the Government Reform Committee's efforts to curtail the inoculation

Attorney General Richard Blumenthal called upon the FDA to change the vaccine's classification, a move that would require the Pentagon to obtain a service person's informed consent prior to inoculation.[18] Attorney General Blumenthal's request, and similar appeals from Congress,[19] remains unanswered, as the FDA maintains that the anthrax vaccine is non-investigative.[20] Despite the controversy, Pentagon spokesman Jim Turner has insisted that the vaccine is a "safe and effective means" of protection against the "lethal consequences of weaponized anthrax."[21]

Fearing that they, too, could be vulnerable to an adverse reaction to the anthrax vaccine, several active-duty service members have challenged AVIP and refused inoculation.[22] In response to these acts of perceived insubordination, the Pentagon has offered those that refuse the vaccine the choice of discharge from service or military court martial.[23] Subsequent challenges to the Pentagon's hard-line stance, brought before military appeals courts, have been wholly unsuccessful.[24]

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program).

18. *See* Gordon, *supra* note 9. The Department of Defense Authorization Act prohibits the Pentagon from administering any drug classified as investigative to members of the armed forces unless the service person consents to inoculation after being given full notice of the potential side effects. *See* 10 U.S.C. § 1107(a)(1) (2000). The notice required under the statute includes:

> (1) Clear notice that the drug being administered is an investigational new drug or a drug unapproved for its applied use.
> (2) The reasons why the investigational new drug or drug unapproved for its applied use is being administered.
> (3) Information regarding the possible side effects of the investigational new drug or drug unapproved for its applied use, including any known side effects possible as a result of the interaction of such drug with other drugs or treatments being administered to the members receiving such drug.
> (4) Such other information that, as a condition of authorizing the use of the investigational new drug or drug unapproved for its applied use, the Secretary of Health and Human Services may require to be disclosed.

Id. § 1107(d).

19. *See* Katz, *supra* note 4, at 1845 (discussing political firestorm that vaccine controversy ignited).

20. *See id.* (detailing FDA's evidentiary support for its conclusion that vaccine is safe).

21. *See* Gordon, *supra* note 9.

22. *See* Thomas D. Williams, *Report Offers No Answer on Anthrax Vaccine Safety*, HARTFORD COURANT, July 3, 2001, *at* 2001 WL 4572420.

23. *See* Gordon, *supra* note 9.

24. *See* United States v. Washington, 54 M.J. 936, 940-41 (2001) (denying request for review of bad-conduct discharge after plaintiff refused anthrax vaccination); Perry v. Wesely, NMCM 200001397, 2000 CCA LEXIS 244, at *11 (N.M. Ct. Crim. App. Nov. 29, 2000) (upholding lower court's refusal to allow plaintiff to present duress as a defense to his

B. Purpose of the Note

Because of the legal and constitutional implications of the anthrax inoculation program and the unsuccessful challenges to the program in military tribunals, aggrieved service personnel have begun to seek review in the civilian courts.[25] This Note focuses on the justiciability of these suits[26] and considers the question of whether a federal court is the proper forum for redress of military personnel grievances?[27] Does the Constitution's grant to Congress the power to "make Rules for the Government and Regulation of the land and naval Forces"[28] indicate that the judiciary's only role in this area is to "apply the law as it comes to them from the hands of others?"[29] Or do the courts have a constitutional duty to vindicate the rights of our citizens, regardless of where they are situated?[30]

In reaching the justiciability question, this Note outlines the *Feres*

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refusal to submit to anthrax inoculation); Ponder v. Stone, 54 M.J. 613, 616-17 (2000) (denying plaintiff's challenge of AVIP's legality on grounds that anthrax vaccine has received FDA approval).

25. *See* O'Neil v. Sec'y of the Navy, 76 F. Supp. 2d 641, 641 (W.D. Pa. 1999) (challenging Marine Corps' denial of hardship discharge request following plaintiff's refusal to take anthrax vaccine). In October 2001, Army Major Sonnie Bates and Air Force Sergeant John Buck brought suit in the D.C. Circuit challenging AVIP's legality after they were discharged from the service for refusing the anthrax inoculation. The suit is still pending. For more information on the case and Major Bates' crusade to end the military anthrax inoculation program, see http://www.majorbates.com (last visited Mar. 6, 2003).

26. Justiciability as used in this Note refers to a federal court's ability to exercise jurisdiction over a certain claim.

27. It is the author's position that an aggrieved serviceperson, who has exhausted the military's avenues of redress, may seek judicial review of personnel action taken against him following his refusal to submit to the anthrax vaccine, under the Administrative Procedure Act. *See* 5 U.S.C. §§ 702-704 (2000). However, the reviewing court's grant of relief should be limited to the confines of the congressionally-mandated remedial scheme and should not be granted in the absence of arbitrariness, capriciousness, abuse of discretion, or illegality by the military tribunal. *See* §§ 702(2), 706(2)(A)-(F). If, however, AVIP's implementation is deemed a 'combat decision,' the APA would preclude judicial review altogether. *See* § 701(b)(1)(G).

28. U.S. CONST. art. I, § 8, cl. 13.

29. ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 4 (1991) (discussing judiciary's role in our country's tripartite system of government). Some have questioned whether the Constitution's Framers intended any limitation on Congress' authority over the military. *See* James Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177, 211-12 (1984) (proposing that theory of broad congressional power over military establishment is rooted in Constitution's framework).

30. *See* Earl Warren, *The Bill of Rights of the Military*, 37 N.Y.U. L. REV. 181, 188 (1962). "[O]ur citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." *Id.*

doctrine's historical development to discern its effect on the rights of U.S. military personnel seeking injunctive relief in the federal courts.[31] While the *Feres* doctrine dictates that dismissal is appropriate where a service person seeks monetary damages, the question of the proper judicial response to suits for non-monetary relief remains unanswered.[32] As a result of the Supreme Court's silence on the issue, the circuit courts of appeals are decidedly split on the question of which legal standard applies to such claims, leaving potential plaintiffs without a consistent system of redress.[33] This Note examines the advantages and disadvantages of the various circuit court approaches and concludes that the congressional floor, as opposed to the federal courthouse, is the proper forum for retroactive relief claims stemming from military personnel grievances.[34]

Although no circuit split exists on the issue, this Note also includes a brief exploration of the potential merits of a serviceperson's suit for enjoinment of the anthrax inoculation program (AVIP) on constitutional grounds.[35] AVIP raises legal, ethical and constitutional concerns about the use of untrustworthy drugs on our Armed Forces personnel without their consent.[36] While the Supreme Court has yet to articulate a standard of review for retroactive claims by military personnel, the Court has made it clear that constitutional challenges to the application of military regulations

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31. *See* Parts II.A, II.B, II.C, *infra* notes 40-83; Part III, *infra* notes 84-129; Parts IV.A, IV.B, *infra* notes 134-251. Injunctive relief, as used in this Note, refers to both retroactive and prospective relief claims.

32. *See* Speigner v. Alexander, 248 F.3d 1292, 1296 (11th Cir. 2001). "Despite the Supreme Court's attempt in *Stanley* to harmonize the approaches of the courts of appeal, implementation of *Stanley* has been inconsistent in cases for injunctive relief." *Id. See also* Knutson v. Wis. Air Nat'l Guard, 995 F.2d 765, 770 (7th Cir. 1993). "As far as injunctive relief is concerned, the Supreme Court has not come up with a per se rule exempting military decisions from judicial review." *Id.*

33. *See* Lieutenant Commander E. Roy Hawkens, *The Justiciability of Claims Brought by National Guardsmen Under the Civil Rights Statutes for Injuries Suffered in the Course of Military Service*, 125 MIL. L. REV. 99, 100–01 (1989) (criticizing Supreme Court's failure to articulate a consistent standard of review and unfairness the Court's silence creates for potential litigants). *See also* Note, *Judicial Review and Soldiers' Rights: Is the Principle of Deference a Standard of Review?*, 17 HOFSTRA L. REV. 465, 468 (1989) (arguing that the "fundamental inadequacy" of the Supreme Court's military jurisprudence is "its failure to provide any meaningful guidance to servicemembers, the lower federal courts, and the bar").

34. *See* Parts IV.A, IV.B, *infra* notes 134-251 and accompanying text.

35. *See* Part III, *infra* notes 84-129 and accompanying text.

36. *See* Katz, *supra* note 4, at 1865. "AVIP is analogous to 'friendly fire' on American service members." *See also* George J. Annas, *Protecting Soldiers from Friendly Fire: The Consent Requirement for Using Investigational Drugs and Vaccines in Combat*, 24 AM. J.L. & MED. 245, 258 (1998). "Soldiers are not pieces of equipment. They have numbers, but they retain their humanity and basic human rights." *Id.*

are cognizable in federal court, albeit from a more deferential standard.[37] A similar challenge to AVIP's constitutionality should be heard in civilian court.[38] However, it is the author's contention that both Supreme Court precedent and the potential policy implications of judicial intrusion in this area support the proposition that AVIP will withstand constitutional challenge.[39]

II. HISTORICAL DEVELOPMENT OF THE FERES DOCTRINE

Absent congressional consent, suits against the United States are prohibited under the sovereign immunity doctrine.[40] The Federal Tort Claims Act (FTCA)[41] is one example of Congress' waiver of sovereign

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37. *See* Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (denying First Amendment challenge to Air Force dress code regulation that prohibited plaintiff from wearing yarmulke while in uniform). "Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society." *Id. But see* Barry Kellman, *Judicial Abdication of Military Tort Accountability: But Who is to Guard the Guards Themselves?*, 1989 DUKE L.J. 1597, 1652 (1989) (criticizing Court's level of deference as the equivalent of judicial abdication):

> There have to be limits to this concept of judicial deference. If there are no limits, then the threat of an external enemy, ever vigilant to destroy us if our military is at all constrained, will be used to justify the loss of the very freedom and security that we seek.

Id.

38. The District of Columbia Circuit exercised jurisdiction over a similar claim during the Gulf War. *See* Doe v. Sullivan, 938 F.2d 1370, 1370 (D.C. Cir. 1991) (challenging FDA regulation that granted Department of Defense authority to waive informed consent requirement for use of investigational drugs in combat-related situations).

39. *See* Part III, *infra* notes 84-129 and accompanying text. Major Sonnie Bates' legal challenge of the inoculation program, distinct from the constitutional question posed here, focuses on the question of whether the anthrax vaccine is being utilized in a manner inconsistent with its manufacture. *See supra* note 25 and accompanying text. This Note does not address the potential merits of that claim.

40. Sovereign immunity bars suits against the federal government "unless such immunity is expressly waived by statute or by necessary inference from legislative enactment." BLACK'S LAW DICTIONARY 1396 (6th ed. 1990). Despite an express grant of jurisdiction under Art. III of the Constitution over "[c]ontroversies to which the United States shall be a Party", courts have long recognized the doctrine. U.S. CONST. art. III, § 2. *See* United States v. Lee, 106 U.S. 196, 207 (1882). "[T]he principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine." *Id.*

41. 28 U.S.C. § 1346(b) (2000). Under the FTCA, the district courts:

> shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful

immunity,[42] but its applicability to suits for damages by military personnel remained unclear until the Supreme Court's *Feres* decision.[43] In the year preceding *Feres*, tort claims by injured service members were brought before three separate circuit courts of appeals.[44] In reaching varied results, each court applied its own interpretation of the FTCA.[45] To resolve the controversy, the Supreme Court consolidated the three cases in *Feres*.

Due to an absence of guiding legislative history, the *Feres* Court looked to the FTCA's purpose in order to establish what role, if any, Congress

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> act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Id.

42. The Tucker Act, which governs non-tort monetary claims against the United States, is another example of Congress' waiver of sovereign immunity. *See* 28 U.S.C. § 1346(a)(2) (2000). Similarly, the Administrative Procedure Act (APA) authorizes non-monetary relief actions against the United States. *See* 5 U.S.C. § 702 (2000). For further discussion of the APA and its applicability to suits by military personnel, see *infra* Part IV.A-B, notes 134-251 and accompanying text.

43. Feres v. United States, 340 U.S. 135 (1950).

44. In the Fourth Circuit, a serviceman suffered serious injury following Army doctors' failure to remove an Army-issue towel from his abdomen during an operation. *See* Jefferson v. United States, 178 F.2d 518, 518-19 (4th Cir. 1949), *cert. granted*, 339 U.S. 910 (1950). The widow of an Army Lieutenant Colonel brought suit in the Tenth Circuit alleging that negligence by Army surgeons was the proximate cause of her husband's death. *See* Griggs v. United States, 178 F.2d 1, 1 (10th Cir. 1949), *cert. granted*, 339 U.S. 951 (1950). In the Second Circuit, Army Lieutenant Feres' executrix brought suit alleging negligence in the Army's decision to quarter Feres in a barracks that eventually caught fire, causing his death. *See* Feres v. United States, 177 F.2d 535, 535 (2d Cir. 1949), *cert. granted*, 339 U.S. 910 (1950).

45. The Second and Fourth Circuit courts dismissed the suits, but the Tenth Circuit allowed Mrs. Griggs' suit to go forward. *See Feres*, 177 F.2d at 536; *Jefferson*, 178 F.2d at 518; *Griggs*, 178 F.2d at 3. In determining that Congress did not intend to exclude the military in its waiver of sovereign immunity, the *Griggs* court pointed to the plain language of the FTCA, holding that:

> [t]he terms of the statute are clear, and [plaintiff's] action for a money judgment based upon the negligence of army surgeons states a cause for relief under the [FTCA], unless it falls within one of the twelve exceptions specifically provided therein .... Only two of the exceptions could be pertinent to our question. Subsection (a) excludes claims based upon the exercise or performance or the failure to exercise or perform a discretionary function and subsection (j) exempts any claim arising out of the combatant activities of the armed forces. It is manifestly plain that the alleged acts of negligence, while involving skill and training, were non-discretionary. The claim arose after hostilities had ceased, and the Government makes no contention that it falls within exemption (j).

Griggs, 178 F.2d at 2-3 (citations omitted).

intended the statute to play in the adjudication of tort claims by military personnel.[46] Passage of the FTCA, the Court determined, marked the "culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit."[47] Prior to enactment of the FTCA, parties injured by the negligence of government agents and employees were left without any remedy under the doctrine of sovereign immunity.[48] In contrast, Congress had historically protected Armed Forces members through a comprehensive system of relief designed to provide for them in case of injury.[49]

The *Feres* Court questioned whether Congress' intended purpose in passing the FTCA could be reconciled with a simultaneous congressional grant of uniform compensation to those in the armed services.[50] If a dual system of relief were intended, the Court asked, would Congress have included within the FTCA a provision geared towards adjusting the two remedies to each other?[51] Congress' failure to do so, according to the Court, indicated "that there was no awareness [on Congress' part] that the [FTCA] might be interpreted to permit recovery for injuries incident to military service."[52] In the absence of congressional approval to do so, the

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46. *See Feres*, 340 U.S. at 138-39.

47. *Id.* at 139.

48. *See id.* at 139-40.

49. *See id.* at 140. The Veterans' Administration had already awarded Sergeant Jefferson over $3,600 before he filed his suit. *See id.* at 145. His expected lifetime benefit would exceed $31,000. *See id.* Mrs. Griggs, as Lieutenant Griggs widow, received death benefits in excess of $4,500. *See Feres*, 340 U.S. at 145. Her total future pension payments were estimated at $18,000. *See id.* Had Mrs. Griggs brought suit under Illinois state law, the maximum damage award to which she would be entitled was $15,000. *See id. But see* Kevin J. Mahoney, Comment, United States v. Stanley*: Has the* Feres *Doctrine Become a Grant of Absolute Immunity?*, 23 NEW ENG. L. REV. 767, 806 (1989) (questioning whether Congress could feasibly have developed a compensation scheme for every conceivable service-related injury).

50. *See Feres*, 340 U.S. at 140. According to the Court, Congress' purpose in enacting the FTCA was to "extend a remedy to those who had been without." *Id.*

51. *See id.* at 144. Congress' omission left the Court with the statutory authority to exercise one of four options. "We might say that the claimant may (a) enjoy both types of recovery, or (b) elect which to pursue, thereby waiving the other, or (c) pursue both, crediting the larger liability with the proceeds of the smaller, or (d) that the compensation and pension remedy excludes the tort remedy." *Id.*

52. *Id.* The FTCA's plain language, however, does not support the Court's conclusion. Since § 2680(j) of the FTCA specifically exempts combat injuries from the list of allowable claims, it is entirely reasonable to infer that Congress did, in fact, contemplate tort recovery by military personnel when it drafted the FTCA. *See* 28 U.S.C. § 2680(j) (2000). The *Griggs* court reached that same conclusion. *See supra* note 44 and accompanying text. *See also* United States v. Johnson, 481 U.S. 681, 692 (1987) (Scalia, J., dissenting) (arguing that subsection (j) demonstrates that "Congress specifically considered,

Feres Court refused to extend tort relief to the plaintiffs and subsequently dismissed the suit.[53]

A. The Feres Doctrine's Extension to Constitutional Claims

While the *Feres* Court based its decision largely on the belief that Congress did not intend a dual compensation scheme for tort injuries sustained incident to military service, subsequent courts began to list new justifications in the *Feres* doctrine's defense.[54] By 1983, it appeared that the original *Feres* rationales had been all but replaced by the military necessity rationale, under which a court examines a proposed suit's potential effect on military discipline and effectiveness before exercising jurisdiction.[55] This deferential posture formed the basis of the Court's decision in *Chappell v. Wallace*,[56] where the *Feres* doctrine was extended to bar constitutional claims by service personnel, even though the Court had already created a private cause of action and damages remedy for constitutional violations by federal officials where none had previously existed.[57]

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and provided what it thought needful for, the special requirements of the military"). Similarly, the FTCA's "discretionary function" exception, if applied, would obviate the need for a blanket prohibition of all tort claims arising out of service activity, by barring suits stemming from those activities that strike at the heart of military decision-making. *See* 28 U.S.C. § 2680(a) (2000).

53. *See Feres*, 340 U.S. at 146.

54. *See* United States v. Muniz, 374 U.S. 150, 162 (1963). *Feres* "seems best explained by 'the peculiar and special relationship of the soldier to his superiors, [and] the effects of the maintenance of such suits on discipline.'" *Id.* (quoting United States v. Brown, 348 U.S. 110, 112 (1954)). Two factors central to the *Feres* Court's holding (the existing compensatory program for injured service personnel and the geographical inconsistencies that could arise when a distinctly federal entity like the military is subjected to state tort law) were described as "no longer controlling" by the Court in *United States v. Shearer*. 473 U.S. 52, 58 n.4 (1985).

55. *See* Robert Cooley, Note, *Method to this Madness: Acknowledging the Legitimate Rationale Behind the* Feres *Doctrine*, 68 B.U. L. REV. 981, 988 (1988) (explaining that military necessity rationale is considered to be the most important justification for the *Feres* doctrine and outlining its consistent use by the Court in defense of *Feres*). *But see* Brown v. Glines, 444 U.S. 348, 369 (1980) (Brennan, J., dissenting) (criticizing military necessity doctrine's "dangerous plasticity" as "seductively broad"). "Because they invariably have the visage of overriding importance, there is always a temptation to invoke security 'necessities' to justify an encroachment upon civil liberties." *Id.* In *Glines*, the plaintiffs mounted a First Amendment challenge to an Air Force regulation that required service personnel to obtain approval prior to circulating petitions on Air Force bases. *See id.* at 349. The Court held that the First Amendment did not protect the right to "unrestricted circulation" of petitions on Air Force bases and ultimately upheld the regulation. *Id.* at 360-61.

56. 462 U.S. 296 (1983).

57. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403

While stopping short of denying military personnel any and all redress in civilian courts,[58] the *Chappell* Court focused on the need for strict discipline and consistency in the military setting.[59] In the Court's view, Congress' duty to formulate procedures for review of personnel grievances arose out of its constitutionally granted authority over the land and naval forces.[60] In the face of this express textual commitment to a coordinate branch, the Court reasoned that the judiciary's proper role is to insure that military personnel exhaust the congressionally established avenues of redress before seeking review by the courts.[61] Even where review is proper, the Court continued, the granting of a judicial remedy for constitutional violations is "plainly inconsistent" with Congress' authority in the field.[62]

U.S. 388 (1971) (challenging an unlawful search and seizure by federal agents and seeking monetary damages). The *Bivens* Court held that a damages remedy for constitutional violations by federal officials existed absent any "special factors counseling hesitation." *Id.* at 396. In *Chappell*, the military's "unique disciplinary structure" constituted one such "special factor," which ultimately led to the Court's denial of plaintiff's request to extend *Bivens* to the military context. Chappell v. Wallace, 462 U.S. 296, 304 (1983).

58. *See Chappell*, 462 U.S. at 304. "This Court has never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." *Id.*

59. *See id.* at 300. "The special nature of military life—the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel—would be undermined by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command." *Id.* at 304.

60. *See id.* at 300-01. Under Article 138 of the Uniform Code of Military Justice:

> Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of[.]

10 U.S.C. § 938 (2000).

61. *See Chappell*, 462 U.S. at 303. The Board for Correction of Naval Records was appointed by the Secretary of the Navy to hear such complaints. *See id.* An aggrieved party had the right to request a hearing before the Board. *See id.* In the event that the Board denied his request, the board members were required to provide a statement outlining the reasons for that denial. *See id.* Board decisions were also subject to reversal by civilian courts if deemed arbitrary, capricious or not based on substantial evidence. *See id.* The *Chappell* Court's rationale should be extended to injunctive relief suits in the military context. *See* Part IV.A.1, *infra* notes 139-169 and accompanying text.

62. *See Chappell*, 462 U.S. at 304. *But see Judicial Review and Soldiers' Rights*, *supra* note 33, at 473 (suggesting that Court's interpretation runs contrary to the "basic assumption that soldiers retain Bill of Rights protections").

B. Present Day Application of the Feres Doctrine

As applied to constitutional claims, the military discipline and necessity rationale garnered the *Chappell* Court's unanimous approval.[63] Two years later, when applied to a *Feres*–type tort claim, that rationale proved the only grounds upon which a divided Court could agree.[64] So, in *United States v. Johnson*,[65] when the Court abandoned military necessity and discipline as a justification for the *Feres* doctrine and returned to the original *Feres* decision's bright-line rule of non-justiciability for any injury sustained incident to service, another round of heated debate over the *Feres* doctrine's viability was ignited.[66]

While conceding that all of the cases decided under *Feres* involved allegations of negligence by members of the military, the *Johnson* Court concluded that the alleged tortfeasor's status as an Armed Forces entity was not a crucial element of the *Feres* doctrine's application.[67] Rather, the Court reasoned, the proper focus of a court's inquiry should be the *soldier's* status at the time of injury.[68] Where such injury stems from activity

63. *See Chappell*, 462 U.S. at 296.

64. *See* United States v. Shearer, 473 U.S. 52, 53 (1985). In *Shearer*, the mother of an Army private killed by a fellow soldier brought suit against the military alleging that the Army's failure to supervise her son's killer was the proximate cause of his murder. *See id.* at 53-54. Chief Justice Burger delivered the opinion for the eight-member Court, but only four Justices joined in his entire opinion. *See id.* at 53. Justices Brennan, Blackmun, and Stevens concurred in the judgment and supported that portion of Chief Justice Burger's opinion that conveyed military necessity and discipline as a rationale in defense of *Feres*. *See id.* at 59 (Brennan, J., concurring). Justice Marshall, who admittedly had never been a "firm supporter" of *Feres*, also concurred with the Chief Justice's opinion in so far as it conveyed military necessity and discipline as a rationale in defense of *Feres*. *Id.* at 59-60 (Marshall, J., concurring).

65. 481 U.S. 681 (1987).

66. *See id.* at 703 (Scalia, J., dissenting). In *Johnson*, the fact that Lieutenant Commander Horton W. Johnson was killed during the course of an activity "incident to his service" for the U.S. Coast Guard proved dispositive of his wife's negligence claim, even though the acts complained of occurred at the hands of the Federal Aviation Administration, a civilian agency. *Id.* at 703 (Scalia, J., dissenting). *See also* Cooley, *supra* note 55, at 992 (criticizing Court's retreat back to original *Feres* rationale).

67. *See Johnson*, 481 U.S. at 686-88 (discussing *Feres* doctrine's development). "[T]he language of the [*Feres*] opinion, viewed as a whole, is broad: '[w]e know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers *or the Government he is serving*.'" *Id.* at 686 n.7 (quoting Feres v. United States, 340 U.S. 135, 141 (1950)).

68. *See Johnson*, 481 U.S. at 689. "Where a service member is injured incident to service—that is, because of his military relationship with the Government—it 'makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to [the] serviceman.'" *Id.* (quoting Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 672 (1977)).

incident to his service, the appropriate remedy is found in the pre-existing veteran's benefit programs that provide a ceiling for governmental liability, not in the uncertainty of tort litigation.[69]

The *Johnson* Court's reliance on *Feres* rationales that previous courts deemed "no longer controlling"[70] did not escape the dissenting Justices' scrutiny.[71] Similarly, the majority's concern that judicial review could potentially disrupt military discipline, "in the broadest sense of the word[,]"[72] appears misplaced as it is unclear what negative effect a judgment in favor of Lt. Johnson's widow would have had on his fellow soldiers.[73] What is clear, however, is that the *Johnson* Court had done that which the previous courts expressed unwillingness to do: reduce the *Feres* doctrine to a series of bright line rules.[74]

The application of the *Feres* doctrine's bright-line incident to service rule has resulted in the dismissal of cases where judgment for the plaintiff would have had little or no effect on military discipline.[75] Cases like these serve as vivid reminders that application of the *Feres* doctrine, in its original form, can oftentimes result in harsh, and seemingly unjust, outcomes.[76] Despite the almost universal criticism, however, Congress has not amended the FTCA to include an explicit grant of jurisdiction to the

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69. *See id.* at 689-90 (outlining benefits available to injured service members). "It hardly need be said that predicting the outcome of any damages suit—both with respect to liability and the amount of damages—is hazardous, whereas veterans' benefits are guaranteed by law. *Id.* at 688 n.9.

70. *See* United States v. Shearer, 473 U.S. 52, 58 n.4 (1985).

71. *See Johnson*, 481 U.S. at 694-98 (Scalia, J., dissenting). "[T]he *Feres* rule is now sustained only by three disembodied estimations of what Congress *must* (despite what it enacted) have intended. They are bad estimations at that." *Id.* at 695.

72. *Johnson*, 481 U.S. at 691.

73. *See id.* at 700 (Scalia, J., dissenting). *See also* Mahoney, *supra* note 49, at 810 (describing as "superficially appealing," but "inherently flawed" a court's "presumption that a serviceman's knowledge that certain rights may be asserted will reduce his inclination 'to obey authority'").

74. *See Shearer*, 473 U.S. at 57. "The *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases." *Id.*

75. *See* Minns v. United States, 155 F.3d 445, 451 (4th Cir. 1998) (extending *Feres* doctrine to derivative suits by children of service personnel). The fact that Sergeant Brad Minns was serving the U.S. Army when he was unwittingly administered investigational drugs proved dispositive to his wife's claim that the couple's son's severe birth defects were the direct result of his father's exposure. *See id.* at 452.

76. *See generally* Gregory Higgins, *Persian Gulf War Genetic Birth Defects and Inherited Injustice in* Minns v. United States, 34 WAKE FOREST L. REV. 935, 935-61 (1999) (criticizing the *Minns* court's extension of *Feres* to suits by people with no ties to military authority).

federal courts over damages suits by military personnel, and the Court has yet to overrule *Feres*.[77] In fact, the *Feres* doctrine has been extended to preclude Armed Forces members from receiving the protection of other federal statutes, including the American with Disabilities Act,[78] the Age Discrimination in Employment Act,[79] and the Title VII Civil Rights statutes.[80]

Because *Feres* and its progeny clearly bar a post-adverse reaction suit for monetary damages, the only avenues left open for service members facing inoculation under the U.S. military's anthrax inoculation program (AVIP) are injunctive relief actions in the federal courts.[81] These suits can be brought in one of two ways: prospectively, in instances where a service member seeks to enjoin further implementation of the inoculation program on the grounds that the program itself is unconstitutional;[82] or retroactively, in instances where a service member appeals the disciplinary action taken against him for refusing the vaccine.[83] This Note will now examine those avenues in light of the present circuit court split over the justiciability of injunctive relief actions by U.S. military personnel.

III. PROSPECTIVE RELIEF AND AVIP'S CONSTITUTIONALITY

Upon hearing that the American Civil Liberties Union was setting out to compose a handbook detailing Armed Forces personnel's constitutional rights, a wise observer reportedly quipped, "[i]t must be a very short book."[84] As civilians, we bask in the comfort and security that our nation's military force provides for us, but do we ever stop and wonder how many

77. *See Johnson*, 481 U.S. at 700–01 (Scalia, J., dissenting) (providing ample secondary support for Justice Scalia's contention that *Feres* was wrongly decided).

78. *See* Gordon v. Ill. Army Nat'l Guard, No. 99-2326, 2000 U.S. App. LEXIS 4068, at *2 (7th Cir. Mar. 9, 2000) (dismissing suit by National Guardsman alleging that dismissal from unit based on sleep disorder violated federal law).

79. *See* Kawitt v. United States, 842 F.2d 951, 953 (7th Cir. 1988) (holding that federal statute does not protect uniform military personnel from age discrimination).

80. *See* Gonzalez v. Dep't of the Army, 718 F.2d 926, 928 (9th Cir. 1983) (dismissing civil rights claim by service personnel). *See generally* Hawkens, *supra* note 33, at 111-21 (providing in-depth review of civil rights litigation by National Guardsmen in federal courts).

81. *See supra* notes 40-80 and accompanying text.

82. *See* Part III, *infra* notes 84-129 and accompanying text.

83. *See* Part IV, *infra* notes 130-252 and accompanying text.

84. ROBERT S. RIVKIN, THE RIGHTS OF SERVICEMEN: THE BASIC ACLU GUIDE TO SERVICEMENS' RIGHTS, 11 (1972) (outlining constitutional protections for military personnel and suggesting proper responses to military commanders' attempts to infringe upon those rights).

of their liberties are sacrificed for the protection of our rights?[85] When the Supreme Court reminds us that "[t]he essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service,'"[86] how many of us ask which of our freedoms we would forfeit for the sake of military efficiency.[87] How about your right to free exercise of your religion?[88] What about your right to free speech?[89] How about your right to privacy?[90] What about the right to be free of unwanted medical experimentation and treatment?[91]

Prior to the start of the Gulf War, the Department of Defense was required to obtain a serviceperson's informed consent prior to administering any drug classified as investigational.[92] Motivated by concerns of a possible threat of biological and chemical warfare in the Persian Gulf, the Department of Defense sought a combat-waiver to the requirement; a waiver that would authorize the use of investigational drugs

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85. *See* Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 1995 ARMY LAW. 27, 28 (1995) (detailing restrictions placed on our citizens once military status is acquired). "In a nation that places great value on freedom of expression, freedom of association, freedom of travel, and freedom of employment, the armed forces stand as a stark exception." *Id.*

86. Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (quoting Orloff v. Willoughby, 345 U.S. 83, 92 (1953)).

87. *See Judicial Review and Soldiers' Rights*, *supra* note 33, at 491 (contending that Court's jurisprudence in military context lends credence to belief that servicemembers have lost all Bill of Rights protections).

88. *See Goldman*, 475 U.S. at 510 (denying First Amendment challenge to an Air Force regulation that deprived an Airman of the right to wear a yarmulke while on duty).

89. *See* Brown v. Glines, 444 U.S. 348, 361 (1980) (upholding Air Force regulation prohibiting circulation of petitions on base).

90. *See* Steffan v. Cheney, 780 F. Supp. 1, 16 (D.D.C. 1991) (denying Navy enlistee's equal protection challenge to military's prohibition against homosexuals).

91. *See* United States v. Stanley, 483 U.S. 669, 686 (1987) (dismissing suit by Army Sergeant who was unwittingly administered LSD as part of a military experiment); Doe v. Sullivan, 938 F.2d 1370, 1383 (D.C. Cir. 1991) (denying Fifth Amendment challenge to FDA waiver of informed consent requirement for administration of investigational drugs to service personnel). *See also* Robyn Pforr Ryan, *Should Combat Troops be Given the Option of Refusing Drug Treatment?*, 52 FOOD DRUG L.J. 377, 396 (1997). "Troops must surrender some rights in the interest of supporting their fellow troops and the military mission, but forcing them to take investigational drugs, in addition to undergoing the normal risks of the battlefield, is forcing soldiers to surrender too many rights." *Id.*

92. *See* Suzanne B. Seftel, *Justiciability: Waiving for the Flag: Should Informed Consent Rules Apply in the Context of Military Emergencies?*, 60 GEO. WASH. L. REV. 1387, 1388-89 (detailing FDA regulations regarding use of unapproved drugs and existing exceptions for treatment purposes). At the time of the Gulf War, August 1990, no exception existed for waiver of the rules for military purposes. *See id.*

when informed consent would arguably be unfeasible.[93] The FDA ultimately granted the waiver, and interim Rule 23(d) was implemented.[94]

Armed with the FDA's endorsement, the Department of Defense began an inoculation program that included two drugs whose efficacy had never been tested through actual human use.[95] John Doe, an American serviceman, sought to enjoin further implementation of interim Rule 23(d) in federal district court.[96] Doe argued, among other things, that the interim rule deprived him of his Fifth Amendment right to be free of unwanted medical treatment.[97] The district court dismissed the case on justiciability grounds, citing *Feres* and its progeny in support of its conclusion that the judicial second-guessing of the Defense Department's decision would be plainly inconsistent with existing Supreme Court precedent.[98] Doe appealed the decision to the District of Columbia Court of Appeals.[99]

Before the case reached the appellate court, the Gulf War ended.[100] Characterizing the U.S. military's risk of organized chemical attack as "overstated" and the future likelihood of chemical warfare as "diminished,"

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93. *See* Ryan, *supra* note 91, at 378 (detailing FDA's decision to acquiesce to military's request and grant waiver after six months of heated debate). *See also* Annas, *supra* note 36, at 245 (arguing that while military strategy may have demanded waiver, "the Nuremberg Code, medical ethics, and respect for the human rights and dignity of American soldiers cautioned against it"). The Nuremberg Code, established in response to the atrocities Nazi doctors perpetrated on concentration camp prisoners, outlines the boundaries for human experimentation by military personnel. *See* Annas, *supra* note 36, at 245-46 n.3 (providing detailed history of Nuremberg Code including full text of its ten provisions).

94. *See* Annas, *supra* note 36, at 247. "Rule 23(d), ... permits drug-by-drug waiver approval on the basis that consent is "not feasible" in a "specific military operation involving combat or the immediate threat of combat." *Id.*

95. *See* RICHARD A. RETTIG, MILITARY USE OF DRUGS NOT YET APPROVED BY THE FDA FOR CW/BW DEFENSE: LESSONS FROM THE GULF WAR 5-6 (1999). The drugs were pryidostigmine bromide, a pretreatment for nerve gas exposure, and the botulism vaccine. *See id.* Of the three drugs administered to Gulf War troops, the anthrax vaccine was the only one with FDA-licensing. *See id.* at 5. However, in a suit filed in the D.C. Circuit, the plaintiffs allege that the anthrax vaccine's use in AVIP is inconsistent with its licensed and approved use. *See* Gordon, *supra* note 9.

96. *See* Doe v. Sullivan, 756 F. Supp. 12, 13 (D.D.C. 1991), *aff'd on other grounds*, 938 F.2d 1370 (D.C. Cir. 1991).

97. *See id.* at 14 (detailing plaintiff's long list of challenges to Rule 23(d)'s legality).

98. *See id.* at 14-15.

99. *See* Doe v. Sullivan, 938 F.2d 1370 (D.C. Cir. 1991). Because of the constitutional implications of his claim, Doe's action was granted expedited review in both the district and the appeals court. *See id.* at 1376 n.9.

100. *See id.* at 1371. On March 15, 1991, the Department of Defense notified the FDA that military operations in the Gulf had ended, and that the informed consent waiver was no longer necessary. *See* Seftel, *supra* note 92, at 1410 n.184. Doe's appeal was argued on March 18, 1991. *See Doe*, 938 F.2d at 1370.

then-Circuit Justice Clarence Thomas argued, in his dissent, that Doe's case was moot and should therefore be dismissed.[101] Then-Circuit Justice Ruth Bader Ginsburg, writing for the *Doe* majority, disagreed, remaining cognizant of the still-existing threat of biological or chemical warfare.[102] In light of that very real threat, she reasoned, there existed a reasonable expectation that the Defense Department would, once again, employ investigational drugs to protect the troops;[103] rendering Doe's case "capable of repetition, yet evading review."[104] Having cleared the mootness hurdle, Judge Ginsburg turned her attention to the judicial review issue.[105]

Judge Ginsburg began by distinguishing the present challenge from suits involving command decisions made in the heat of battle or disputes over military strategy and discipline.[106] The *Doe* court rightly observed that where facial challenges to regulations are concerned, the level of deference is lower than that for discrete personnel challenges.[107] The interim rule

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101. *See Doe*, 938 F.2d at 1385-86 (Thomas, J., dissenting) (detailing then-President George H. Bush's commitment to Chemical Weapons Convention, the objective of which was the worldwide cessation of chemical warfare).

102. *See id.* at 1377-78. "[President Bush] recognized ... the many years it would take, even for nations ultimately persuaded to follow our lead, to destroy existing stocks [of chemical weapons]." *Id.* at 1377 n.11.

103. *See id.* at 1379 n.14. At the end of the Gulf War, the FDA and the Department of Defense were already working on a plan to make Rule 23(d) permanent. *See* Ryan, *supra* note 91, at 378. "[I]n the summer of 1998, ... the Byrd amendment was inserted into the Defense Authorization Act." RETTIG, *supra* note 95, at xiv. Under the Byrd Amendment, 10 U.S.C. § 1107(f), only the President has the power to waive the informed consent requirement for the use of investigational drugs. *See* 10 U.S.C. § 1107(f) (2000). *But see* Katz, *supra* note 4, at 1842-43 (explaining that because the anthrax vaccine's efficacy for humans has never been tested, it should be classified as an investigational drug). For a discussion of 10 U.S.C. § 1107 and efforts to change the anthrax vaccine's classification, see *supra* notes 18-20 and accompanying text.

104. *See Doe*, 938 F.2d at 1375. As an exception to the mootness doctrine, the "capable of repetition, yet evading review" standard grants a court the authority to hear those cases where the challenged action is too short in duration to be fully litigated, and there exists a reasonable expectation of reoccurrence. *See id.* at 1376.

105. *See id.* at 1379.

106. *See id.* at 1380. "Doe currently does not ask us to review military commands made in combat zones or in preparation for, or in the aftermath of, battle. His claim ... entails no judicial interference with the relationship between soldiers and their military superiors." *Id.*

107. *See id.* at 1380-81. This view is consistent with the Supreme Court's *Chappell* decision as it distinguishes between constitutional violations arising out of military action and facial constitutional challenges to military regulations. *See* Part IV.A.1, *infra* notes 139-170 and accompanying text. *See also* John Nelson Ohlweiler, *The Principle of Deference: Facial Constitutional Challenges to Military Regulations*, 10 J.L. & POL. 147, 155-58 (1993) (proposing that civilian courts vary the level of military deference according to the

challenge, unlike challenges to military decision-making, involves judicial review of legislative action, a task that the federal courts are imminently qualified to perform.[108] Having determined that review was appropriate, the court began its analysis of the constitutional challenge.[109]

Where facial constitutional challenges to military regulations are concerned, the Supreme Court has indicated that deference to the military is appropriate, but the Court has yet to clearly articulate the proper scope of that deferential treatment.[110] While the *Doe* plaintiff correctly asserted that the Fifth Amendment protects an individual's right to be free of unwanted medical treatment,[111] the applicable standard of review for his facial challenge to Rule 23(d) saddled him with a virtually insurmountable burden of proof.[112] In essence, Doe was required to show that "no possible application of Rule 23(d) [could] be squared with the Fifth Amendment."[113] As the court observed, the very fact that Rule 23(d) was implemented to meet the exigencies caused by the Gulf War indicated both the legitimacy and reasonableness of the interim rule's implementation[114]

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type of claim presented).

108. *See* Doe v. Sullivan, 938 F.2d 1370, 1380 (D.C. Cir. 1991) (describing the circumstances of Doe's case as "straightforward" with a "commonplace cast").

109. *See id.* at 1381. Even though the *Doe* court ultimately found for the military on the merits of the case, one commentator has heralded the court's initial decision to exercise review as "most exemplary." *See* Seftel, *supra* note 92, at 1434.

110. *See Judicial Review and Soldiers' Rights*, *supra* note 33, at 491 (criticizing Court's failure to provide "clear and coherent statement of the proper relationship between the political branches of government and the judiciary in defining servicemembers' constitutional rights"); Ohlweiler, *supra* note 107, at 181 (observing that Court's adoption of clear standard for the "unique subset" of facial challenges will contribute greatly to the protection of servicemembers' constitutional rights).

111. *See Doe*, 938 F.2d at 1383. *See generally* Washington v. Harper, 494 U.S. 210, 210 (1990) (challenging prison officials' right to force prisoner to submit to anti-psychotic medication); Jacobson v. Massachusetts, 197 U.S. 11, 11-12 (1905) (challenging compulsory state smallpox vaccination program).

112. *See Doe*, 938 F.2d at 1383. Fifth Amendment challenges are subject to rational relationship scrutiny, whereby the court balances the individual's interest in being free from unwanted treatment against the government's interest in administering the treatment. *See id. See also Washington*, 494 U.S. at 236 (finding that the state's interest in keeping prisoners safe outweighed individual interests); *Jacobson*, 197 U.S. at 26 (upholding state compulsory smallpox vaccination program as a reasonable restraint on personal liberty for furthering state's legitimate interest in protecting public health and safety).

113. *Doe*, 938 F.2d at 1383 (citing Nat'l Treasury Employees Union v. Yeutter, 918 F.2d 968, 975 (D.C. Cir. 1990)).

114. *See id.* The appeals court agreed with the lower court's assessment of the government interests:

> [T]wo concerns stressed by the DOD [Department of Defense] "constitute legitimate government interests that ... counterbalance an individual's interest in

As such, Doe's constitutional claim was defeated on the merits.[115]

Now that biological and chemical warfare have been waged here at home,[116] we are all acutely aware of how prophetic then-Judge Ginsburg's words were.[117] Unlike the inoculations administered in *Doe*, however, the anthrax vaccine is FDA-approved, taking it out of the investigational drug category.[118] Like Doe, it would be extremely difficult for an aggrieved service person to demonstrate that there exists no possible constitutional application of the anthrax inoculation program to Armed Forces members.[119]

Similar to Rule 23(d), the anthrax inoculation program (AVIP) was promulgated in response to the Department of Defense's concerns relative to the threat of chemical and biological warfare.[120] As the Department of Defense reiterated when it announced AVIP's resumption in June 2002, "[c]urrent intelligence assessments indicate that the anthrax threat. . .is real."[121] Although the *Doe* court applied the lowest level of judicial

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> being free from experimental treatment without giving informed consent." First, "administering the drugs uniformly prevents unnecessary danger to troops and medical personnel from injury to, or the death of, fellow military personnel in battle. [Also], the DOD ha[d] an interest in successfully accomplishing the military goals of Operation Desert Storm.

Id. (quoting Doe v. Sullivan, 756 F. Supp. 12, 17 (D.D.C. 1991)).

115. *See Doe*, 938 F.2d at 1383. *But see* Ryan, *supra* note 91, at 395-96 (arguing that military justification did not outweigh individual service person's dignity and his/her right to be free of unwanted treatment). For an in-depth analysis of Rule 23(d) and the debate over the use of investigational drugs in combat, see generally Seftel, *supra* note 92, at 1387-1435 (concluding that *Doe* court reached the proper result); RETTIG, *supra* note 95, at 13-39 (reporting events leading to Rule 23(d)'s implementation and broader policy implications of its effects).

116. *See supra*, notes 1-8 and accompanying text (discussing post-September 11, 2001 anthrax mailings).

117. *See Doe*, 938 F.2d at 1378-79. "We reach this conclusion cognizant of the still undiminished, worldwide chemical and biological weapons threat, [and] the hardly hypothetical danger chemical warfare agents pose for combat troops." *Id.*

118. *See* Ryan, *supra* note 91, at 395 (characterizing the decision to force troops to take the anthrax vaccine as "qualitatively different" from the compulsory investigational drug inoculation under Rule 23(d)). For a discussion of attempts to change the anthrax vaccine's classification to investigational, and the FDA's refusal to do so, see *supra* notes 17-21 and accompanying text.

119. *See* O'Neil v. Sec'y of the Navy, 76 F. Supp. 2d 641, 645 (W.D. PA 1999) (challenging denial of hardship discharge request after anthrax inoculation refusal). "[T]he evidence establishes that the anthrax vaccination program is a lawful response by defendants to the dangers with which the military personnel of the United States may be confronted in the future. *Id.*

120. *See supra* notes 13-21 and accompanying text (discussing AVIP's inception).

121. *Reintroduction of AVIP Memorandum*, *supra* note 15.

scrutiny in upholding Rule 23(d)'s constitutionality,[122] AVIP would arguably pass constitutional muster under an even stricter level of scrutiny due to the Defense Department's compelling interest in protecting Armed Forces personnel from the threat of weaponized anthrax.[123] At best, a contrary holding by a federal court would upset the balance between our three branches of government; at worst, a contrary holding would render our troops vulnerable to full-scale biological attack.[124]

While a constitutional challenge to the anthrax inoculation program will, in all likelihood, prove unsuccessful, there is uniform agreement amongst the circuit courts of appeals as to the justiciability of these constitutional challenges, i.e. prospective relief suits.[125] However, there is little harmony in the circuits' analyses of the justiciability issue where suits for retroactive relief are presented.[126] Unfortunately, the lack of uniformity, perpetuated by the Supreme Court's silence, has created an environment of uncertainty for potential litigants and the lower courts.[127]

What is sorely needed is an approach that recognizes that military

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122. *See* Doe v. Sullivan, 938 F.2d 1370, 1377 (D.C. Cir. 1991) (applying rational relationship level scrutiny to constitutional challenge of FDA waiver of informed consent requirement for use of investigational drugs and upholding waiver due to compelling government interests).

123. *See id.* at 1383 (assessing weight of government's interest in maintaining military inoculation programs in times of war).

124. *See* Warren, *supra* note 30, at 191-92. "[T]here are some circumstances in which the Court will, in effect, conclude that it is simply not in a position to reject descriptions by the Executive of the degree of military necessity." *Id.* at 192. *See also* Hirschhorn, *supra* note 29, at 237-39 (predicting potential costs of judicial intervention in areas of military expertise). "Not only are the consequences of judicial error uniquely serious; it is peculiarly likely to occur when the courts assess the effect of a practice on military effectiveness." *Id.* at 239.

125. *See* Wigginton v. Centracchio, 205 F.3d 504, 512-13 (1st Cir. 2000) (explaining that *United States v. Stanley* left undisturbed a military plaintiff's right to bring suit to enjoin constitutional violations); Jones v. New York State Division of Military and Naval Affairs, 166 F.3d 45, 54 (2d Cir. 1998) (recognizing exception to exhaustion requirement in cases presenting "substantial constitutional questions"); Watson v. Ark. Nat'l Guard, 886 F.2d 1004, 1010 (8th Cir. 1989) (citing a series of Supreme Court cases in support of the proposition that facial constitutional challenges are justiciable in federal courts); Crawford v. Tex. Army Nat'l Guard, 794 F.2d 1034, 1036 (5th Cir. 1986) (distinguishing facial constitutional challenge in *Goldman* from plaintiffs' racial discrimination claim); Dillard v. Brown, 652 F.2d 316, 320 (3d Cir. 1981) (recognizing that despite constitutionally-granted authority over Armed Forces, "[t]he military has not been exempted from constitutional provisions that protect the rights of individuals").

126. For a discussion and analysis of the circuit court split, see Part IV, *infra* notes 130-252 and accompanying text.

127. *See* Hawkens, *supra* note 33, at 100-01 (criticizing lack of uniformity because it results in "gross unfairness" to potential plaintiffs).

deference is an important, and often times critical, consideration, but at the same time, "the reach of [the military's] power must be carefully limited lest the delicate balance between freedom and order be upset."[128] By the same token, the judiciary must also limit the reach of its own power, lest the line between jurisprudence and legislation be blurred beyond recognition.[129]

IV. RETROACTIVE RELIEF IN THE FEDERAL COURTS

Since 1946, federal law has recognized and protected a person's right to seek judicial review of federal agency action.[130] However, where the agency in question is the United States military, the issue of to what extent, and in what circumstances, judicial review should bow to military expertise remains a topic of some debate.[131] In the circuit courts of appeals, a clear and consistent standard for judicial review of military agency action has yet to emerge.[132] As such, a serviceperson disciplined or discharged from the military, after refusing the anthrax inoculation, who seeks judicial review and retroactive relief in the federal courts, will find that his chances for success depend more on geography than advocacy.[133]

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128. Warren, *supra* note 30, at 182.

129. *See* Hirschhorn, *supra* note 29, at 182.

> [B]y exercising its own judgment on behalf of the individual, the court sets aside the conclusion reached on the same problem by either the executive authorities or Congress. This decision requires not only sufficient confidence by the court that its decision will produce an acceptable balance of individual rights and organizational needs, but also the conclusion that the court is more likely to have done so than the institutions whose decision is under review.

Id.

130. *See* 5 U.S.C. §§ 701-06 (2000). Section 702 of the Administrative Procedure Act (APA) provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." § 702. Suit under the APA is only available to parties seeking non-monetary relief. *See id.* The APA is inapplicable in circumstances where either a statute precludes judicial review, or the challenged action is committed by law to the agency's discretion. *See* § 701(a)(1)(2).

131. Although the APA expressly prohibits judicial review of military courts-martial and combat decisions, judges and commentators have continued to wrestle with the question of which military decisions are "committed to agency discretion by law" and therefore unreviewable. *See* §§ 701(a)(2) and 701(b)(1)(F)(G). *See also* Captain John B. McDaniel, *The Availability and Scope of Judicial Review of Discretionary Military Administrative Decisions*, 108 MIL. L. REV. 89, 98-99 (1985) (arguing that APA's exceptions should not be interpreted as a rule of absolute non-reviewability of military decisions).

132. This Note will outline the approaches that the circuit courts have most frequently utilized and discussed. *See infra* Part IV.A-B.

133. *See* Hawkens, *supra* note 33, at 122 (criticizing lack of uniformity in federal

A. The Nature of the Relief Requested as a Determining Factor

While the APA specifically bars court-martialed servicepersons from seeking judicial review,[134] other avenues of redress, such as reinstatement, have been made available in the federal courts.[135] When determining whether judicial review is appropriate, a court may look to the nature of the relief requested to determine (1) whether the plaintiff seeks money damages;[136] or (2) whether relief can be granted without unwarranted intrusion into matters of military expertise.[137] These approaches represent each court's attempt to follow *Feres* and its progeny while maintaining the proper balance between deference to the military and an individual serviceperson's rights.[138] However, the misapplication and misinterpretation of existing Supreme Court precedent has led to irreconcilable results.

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courts where military jurisprudence is concerned).

134. *See* 5 U.S.C. § 701(b)(1)(F) (2000). As such, the Armed Forces personnel who have been court-martialed for refusing to submit to anthrax inoculation would be unable to seek review under the APA. For a discussion of the disciplinary action taken against servicemembers as a result of AVIP, see *supra* note 24 and accompanying text. The question of whether civilian courts should review court-martial decisions has been disputed. *Compare* Schlesinger v. Councilman, 420 U.S. 738, 764-65 (1975) (Brennan, J., dissenting) (criticizing the ineptitude of courts-martial in dealing with the subtleties of constitutional law), *with* Warren, *supra* note 30, at 189 (expressing confidence in Court of Military Appeals' ability to guarantee due process rights of those subjected to trial by court-martial). Servicemembers sentenced to confinement after court-martial are free to challenge their convictions by habeas corpus motion. *See generally*, Burns v. Wilson, 346 U.S. 137, 137-46 (1953).

135. *See generally* Wigginton v. Centracchio, 205 F.3d 504 (1st Cir. 2000) (challenging, on due process grounds, forced retirement from Rhode Island National Guard unit); Jorden v. Nat'l Guard Bureau, 799 F.2d 99 (3d Cir. 1986) (alleging First Amendment violation in discharge from Pennsylvania National Guard).

136. *See infra* Part IV.A.1.

137. *See infra* Part IV.A.2.

138. *See* Warren, *supra* note 30, at 182-83.

> Not infrequently in the course of its history the Supreme Court has been called upon to decide issues that bear directly upon the relationship between action taken in the name of the military and the protected freedoms of the Bill of Rights.... From a broad perspective, it may be said that the questions raised in these cases are all variants of the same fundamental problem: Whether the disputed exercise of power is compatible with preservation of the freedoms intended to be insulated by the Bill of Rights.

Id.

1. *Chappell v. Wallace* and the Money Damages Distinction

Although *Chappell v. Wallace*[139] involved a suit for monetary damages by Navy personnel alleging constitutional violations, the Supreme Court's reasoning in dismissing the suit as non-justiciable applies with equal force to injunctive relief claims by Armed Forces members seeking to overturn military personnel decisions on constitutional grounds.[140] In fact, any attempt to distinguish the two types of claims on the basis of the relief requested would be, in the words of the Eighth Circuit, to "exalt form over substance."[141] Rather, a lower court's analysis of these types of suits should be guided by the overarching policy considerations contained within the *Chappell* decision.[142]

Characterizing the need for a special and exclusive system of military justice as "too obvious to require extensive discussion,"[143] the *Chappell* court outlined the legislative branch's activity in the military context, particularly Congress' establishment of an all-inclusive system of redress for personnel grievances.[144] Finding that this activity and the military establishment's unique disciplinary structure constituted "special factors" indicating the impropriety of judicial interference,[145] the unanimous Court refused plaintiff's request for monetary relief.[146] Missing from the Court's extensive analysis of the potential policy implications of judicial intrusion, however, is any mention of the effect judicial review would have on our

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139. 462 U.S. 296 (1983).

140. *See id.* at 297 (alleging Navy promotional practices deprived plaintiffs of right to be free from discrimination).

141. Watson v. Ark. Nat'l Guard, 886 F.2d 1004, 1009 (8th Cir. 1989). *See also* Crawford v. Tex. Army Nat'l Guard, 794 F.2d 1034, 1035-36 (5th Cir. 1986) (perceiving "no basis upon which to distinguish" claims that *Chappell* court deemed impermissible from injunctive relief suits based on similar circumstances).

142. *See Watson*, 886 F.2d at 1008. "[T]he policies upon which the *Feres* doctrine and subsequent case law in that doctrine's development are premised, weigh heavily in favor of precluding claims for equitable relief." *Id.*; Ohlweiler, *supra* note 107, at 179 (citing *Watson* as having provided a clear articulation of the *Chappell* rationale). *But see* Jorden v. Nat'l Guard Bureau, 799 F.2d 99, 109 (3d Cir. 1986). "*Chappell* itself suggests that it leaves open claims for injunctive relief against the military .... Moreover, we find that permitting injunctive relief while denying a damages remedy is supported by considerations of policy." *Id.*

143. Chappell v. Wallace, 462 U.S. 296, 300 (1982).

144. *See id.* at 302-03 (relying on existence of congressionally established system to provide relief for plaintiffs' injuries). "The special status of the military has required, the Constitution has contemplated, Congress has created, and this Court has long recognized two systems of justice, to some extent parallel: one for civilians and one for military personnel." *Id.* at 303-04.

145. *See id.* at 304.

146. *See id.* at 305.

nation's finances.[147]

Instead, the basis of the *Chappell* court's decision to deny review was the inability of a civilian court to "determine the impact upon discipline that any particular intrusion upon military authority might have."[148] Similarly, in *Schlesinger v. Councilman*,[149] the Court's refusal to intervene in an Army captain's pending court-martial was grounded in its respect for Congress' judgment that the military court system was fully capable of performing its assigned task.[150] The *Councilman* court did not foreclose the possibility of judicial review of courts-martial; rather it called upon service personnel to seek redress before the tribunal congressionally, and constitutionally, delegated to conduct the inquiry.[151] In the First Circuit, however, the absence of a monetary damages request remains the critical factor in the justiciability analysis.[152]

The First Circuit has questioned,[153] criticized,[154] and begrudgingly followed *Feres*,[155] which may explain that court's eagerness to narrowly interpret Supreme Court precedent where suits by military personnel are

147. *See generally*, Chappell v. Wallace, 462 U.S. 296 (1983) (dismissing damages suit by Navy personnel based on impropriety of judicial intervention in military matters).

148. *See id.* at 305 (quoting Earl Warren, *The Bill of Rights of the Military*, 37 N.Y.U. L. REV. 181, 187 (1962)).

149. 420 U.S. 738 (1975).

150. *See id.* at 757-58. Enactment of the Uniform Code of Military Justice, the Court reasoned, indicated Congress' attempt to ensure military duty and discipline while providing fairness for service personnel charged with military offenses. *See id.* By creating the military court system, the critical element of which being the Court of Military Appeals, Congress instituted what it believed to be the proper mechanism by which those competing interests could be adjusted. *See id.*

151. *See id.* at 759-60 (seeing "no injustice" in requiring plaintiff to submit to a military tribunal so that important factual inquiries could be undertaken prior to a civilian court's review). Judges and commentators have remained skeptical of the military courts' competence in areas of constitutional interpretation. *See id.* at 765 (Brennan, J., dissenting) (characterizing as "hornbook law" his contention that "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law") (quoting O'Callahan v. Parker, 395 U.S. 258, 265 (1969)). *See also* Mahoney, *supra* note 49, at 815-16 (questioning military justice system's capability of adjudicating claims that violate civilian standards).

152. *See, e.g.*, Day v. Mass. Air Nat'l Guard, 167 F.3d 678 (1st Cir. 1999) (finding National Guardsman's personal injury suit non-justiciable due to presence of request for monetary relief).

153. *See id.* at 683 (dismissing damages suit by National Guardsman injured in hazing incident, but observing that *Feres*' original rationale has lost its persuasiveness).

154. *See* Jones v. La Riviera Club, Inc., 655 F. Supp. 1032, 1037 (D. P.R. 1987) (expressing sympathy and reluctance to dismiss wrongful death action of serviceman's widow).

155. *See id.*

concerned. For instance, one year after the Court decided *Chappell v. Wallace*,[156] the First Circuit was faced with the choice of interpreting that case narrowly, based on its holding, or broadly, based on its reasoning.[157] It chose to interpret *Chappell* narrowly[158] by limiting its scope to cases arising out of the superior/subordinate officer relationship rather than construing *Chappell* as an extension of the *Feres* doctrine to all constitutional claims for monetary relief arising out of the military context.[159] Ultimately, the First Circuit was forced to overrule that conclusion in *Wright v. Park*.[160]

Wright involved an Air Force National Guardsman who faced termination from his unit after refusing to accept an unfavorable assignment.[161] He brought suit against his superior officers in civilian court, alleging that his status as a whistleblower precipitated his termination.[162] In dismissing the suit as non-justiciable, the court recounted the various rationales behind the *Feres* doctrine, including the *Feres* court's recognition of the potential disruption that could result "if the soldier were allowed to hale his superiors into court."[163]

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156. 462 U.S. 296 (1983).

157. *See* Penagaricano v. Llenza, 747 F.2d 55, 59-60 (1st Cir. 1984) (alleging denial of due process in discharge from Puerto Rico Air National Guard). *Chappell* involved the allegation of constitutional violations by Navy personnel. *See* 462 U.S. at 297.

158. *See Penagaricano*, 747 F.2d at 59-60.

159. *See id.* "[T]he *Chappell* reasoning does not directly control the issue before us." *Id.* at 60.

160. 5 F.3d 586, 590-91 (1st Cir. 1993). In the years between *Penagaricano* and *Wright*, the Supreme Court decided *United States v. Stanley*, which held that *Chappell* was applicable to all activities incident-to-service, regardless of the relationship between the parties. *See* United States v. Stanley, 483 U.S. 669, 680-81 (1987).

161. *See Wright*, 5 F.3d at 587.

162. *See id.* Because Major Wright belonged to a state National Guard unit, he brought suit under the federal civil rights statute, 42 U.S.C. § 1983. *See id.* at 591. The civil rights statute authorizes suits for constitutional violations committed by parties acting under color of state authority. *See* 42 U.S.C. § 1983 (2000). In contrast, military suits against federal officials, like that in *Chappell*, are brought directly under the Constitution, as *Bivens* actions. *See* Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388 (1971). For discussion of the Court's creation of a constitutional cause of action in *Bivens*, and ultimate refusal to extend that remedy to the military context in *Chappell v. Wallace*, see *supra* notes 55-62 and accompanying text. The circuit courts have long construed § 1983 suits to be analogous with *Bivens* actions. *See Wright*, 5 F.3d at 591 (finding "no principled basis for according state actors ... a different degree of immunity than would be accorded federal actors sued ... under *Bivens*"). *See also* Crawford v. Tex. Army Nat'l Guard, 794 F.2d 1034, 1035-36 (5th Cir. 1986) (detailing other circuits' acceptance of *Chappell*'s applicability to § 1983 claims by National Guard personnel).

163. *Wright*, 5 F.3d at 590-91 (quoting Chappell v. Wallace, 462 U.S. 296, 304 (1983)).

Despite the *Wright* court's acknowledgment of the "symbiotic relationship" between *Chappell* and *Feres*,[164] subsequent First Circuit courts have adopted a stringent view of the policy rationales behind those cases in order to carve out ill-reasoned distinctions.[165] While *Feres* did in fact involve a suit for monetary relief, the decision to dismiss the claim as non-justiciable was motivated by more than fiscal concerns, as the First Circuit documented in *Wright*, and as the Supreme Court has repeatedly made clear in the post-*Feres* line of cases.[166] At its core, the *Feres* doctrine recognizes that Congress' constitutionally granted power to establish inferior courts[167] and to regulate the Armed Forces,[168] while not absolute, imposes upon the judiciary a coordinate responsibility to undertake a "delicate exercise in constitutional interpretation,"[169] before exercising its power to intervene in military matters.[170] Regardless of how controversial,

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164. *See id.* at 590.

165. *Compare Wright*, 5 F.3d at 591 (following *Feres* and dismissing a monetary damages claim as non-justiciable), *with* Wigginton v. Centracchio, 205 F.3d 504, 512-13 (1st Cir. 2000) (exercising jurisdiction over a similar suit because plaintiff did not request monetary damages). The other circuits have heavily criticized this approach to injunctive relief suits by military personnel. *See* Watson v. Ark. Nat'l Guard, 886 F.2d 1004, 1009 (8th Cir. 1989). "To disallow claims for damages while agreeing to review claims for injunctive relief arising from the same facts would be to exalt form over substance." *Id. See also* Speigner v. Alexander, 248 F.3d 1292, 1297 (11th Cir. 2001) (finding unpersuasive plaintiff's argument, borrowed from First Circuit, that *Stanley* barred only monetary damages claims and not injunctive relief suits arising out of similar circumstances).

166. *See supra* notes 40-83 and accompanying text (discussing *Feres* doctrine's historical development).

167. *See* U.S. CONST. art. III, § 1 ("[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish").

168. *See* U.S. CONST. art. I, § 8 cl. 13-14 (Congress has the power "[t]o raise and support Armies;" "[t]o provide and maintain a Navy;" and "[t]o make Rules for the Government and Regulation of the land and naval Forces").

169. Baker v. Carr, 369 U.S. 186, 211 (1962). In *United States v. Richardson,* Justice Powell stressed the importance of judicial trepidation in areas constitutionally committed to the coordinate branches:

> [R]epeated and essentially head-on confrontations between the life-tenured branch and the representative branches of government will not, in the long run, be beneficial to either. The public confidence essential to the former and the vitality critical to the latter may well erode if we do not exercise self-restraint in the utilization of our power to negative the actions of the other branches.

418 U.S. 166, 188 (1974) (Powell, J., concurring).

170. *See* Hawkens, *supra* note 33, at 129 (arguing that *Feres*' "overriding goal" of protecting command relationship's integrity cannot be served by a rule that renders justiciability dependent on nature of relief requested). *See also* Watson v. Ark. Nat'l Guard, 886 F.2d 1004, 1009 (8th Cir. 1989) (denying plaintiff's request for reinstatement to

outdated, and deserving of criticism *Feres*' original holding may be, the courts of appeals should not attempt to circumvent its underpinnings by exercising jurisdiction over claims better left to the judgment of military tribunals, simply because the plaintiff removes monetary damages from his list of desired remedies.

2. *Gilligan v. Morgan* and the "Level of Intrusion" Inquiry

The Third and Seventh Circuits also examine the plaintiff's requested remedy before determining whether judicial review is appropriate. Unlike the First Circuit, however, these courts do not base the justiciability decision solely upon the plaintiff's request for money damages.[171] Instead, the Third and Seventh Circuit courts ask to what extent granting the requested remedy will involve the judiciary in matters constitutionally committed to the legislative and executive branches.[172] If granting the plaintiff's request would require the court to engage in ongoing judicial oversight of military matters, the political question doctrine is implicated, and the case is dismissed as non-justiciable.[173] Conversely, a remedy that

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National Guard even though plaintiff dropped request for monetary damages). "Based upon a searching consideration of the policies underlying *Feres* and *Chappell*, we are unable to conclude that military discipline will be any less affected by a suit for injunctive relief than by a claim for damages." *Id.*

171. For discussion and criticism of the First Circuit's approach to injunctive relief suits, see Part IV.A.1, *supra* notes 139-170 and accompanying text.

172. It is this posture of judicial deference to the co-equal branches of government that forms the foundation of the political question doctrine as a basis for non-justiciability. While a court may possess the power to exercise jurisdiction over a particular case, the political question doctrine counsels restraint in certain circumstances to prevent the type of headlong confrontations between the three branches that Justice Powell alluded to in *Richardson*. *See* United States v. Richardson, 418 U.S. 166, 188 (1974) (Powell, J., concurring). See also *supra* note 169 and accompanying text, and Baker v. Carr, 369 U.S. 186, 217 (1962), where Justice Brennan outlines the ingredients of a non-justiciable political question:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id.

173. *See* Orloff v. Willoughby, 345 U.S. 83 (1953). "[J]udges are not given the task of running the Army..... Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in

results in a minimal intrusion upon the military's province is proper where a service person's constitutional rights are affected.[174] Both circuits rely upon the Supreme Court's decision in *Gilligan v. Morgan*[175] as a basis for the distinction. However, both circuits' differing interpretation of "minimal intrusion" has led to irreconcilable results.[176]

Gilligan stemmed from a 1970 incident on the campus of Kent State University, where the Ohio National Guard was dispatched to squelch an anti-war protest.[177] The Guard members' use of force resulted in the death and injury of several students.[178] Plaintiffs, full-time students and student government officers at the time of the incident, brought suit in district court seeking, among other things, continuing judicial regulatory surveillance over Ohio National Guard activities.[179]

In dismissing the case as non-justiciable, the Court made it clear that its decision was not to be construed as immunization of the National Guard from any form of judicial review.[180] Rather, the Court explained, dismissal

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judicial matters." *Id.* at 93-94.

174. *See* Jorden v. Nat'l Guard Bureau, 799 F.2d 99, 111 (3d Cir. 1986) (exercising jurisdiction over First Amendment claim where plaintiff sought reinstatement to Pennsylvania National Guard); Dillard v. Brown, 652 F.2d 316, 316-24 (3d Cir. 1981) (declining to dismiss plaintiff's suit seeking reinstatement based on equal protection challenge to National Guard enlistment regulation); St. Clair v. Sec'y of the Navy, 970 F. Supp. 645 (C.D. Ill. 1997) (opting to review plaintiff's constitutional claim and request for reclassification of his discharge order).

175. 413 U.S. 1 (1973).

176. *Compare* Knutson v. Wis. Air Nat'l Guard, 995 F.2d 765, 771 (7th Cir. 1993) (characterizing plaintiff's request for reinstatement to National Guard unit as more than "administrative inconvenience"), *with Jorden*, 799 F.2d at 111 (characterizing reinstatement as a viable judicial remedy).

177. *See Gilligan*, 413 U.S. at 3.

178. *See id.*

179. *See generally id.* Plaintiffs requested that the court establish standards for Guard weapon training and conduct ongoing inspections to ensure compliance with those standards. *See id.* at 5-6. Plaintiffs also challenged the constitutionality of an Ohio statute that immunized law enforcement personnel from any potential legal consequences stemming from actions taken to suppress a riot. *See id.* at 3 n.2. By the time oral arguments were conducted, the plaintiffs were no longer students of the school and the Ohio legislature had promulgated a new use of force policy for the National Guard. *See id.* at 4-5. The government argued that the case was moot, but the Court dismissed the case under the political question doctrine, without reaching the question of mootness. *See* Gilligan v. Morgan, 413 U.S. 1, 5 (1973).

180. *See id.* at 11-12. The Court stated:

> In concluding that no justiciable controversy is presented, it should be clear that we neither hold nor imply that the conduct of the National Guard is always beyond judicial review or that there may not be accountability in a judicial forum for violations of law or for specific unlawful conduct by military personnel,

was appropriate in this case because granting plaintiff's request would necessitate an improper level of judicial interference in an area constitutionally committed to the elected branches, where "ultimate responsibility for these decisions is appropriately vested."[181]

In *Knutson v. Wisconsin Air National Guard*,[182] the Seventh Circuit applied *Gilligan* to a serviceman's request for reinstatement to his National Guard Unit.[183] Although the plaintiff requested injunctive relief, rather than monetary damages, the *Knutson* court envisioned the potential consequences a decision to grant the requested relief would have on Colonel Knutson's former guard unit.[184] The court reasoned that judicial interference in areas such as military promotions, demotions and detentions, would "significantly hamper [the Guard's] ability to staff properly and to fulfill its mission."[185] As a result, the *Knutson* court denied the plaintiff's reinstatement request and dismissed the suit.[186] Preclusion of judicial review, however, is less likely in cases where the plaintiff's request can be granted without potential disruption of military affairs, as was the case in *St. Clair v. Secretary of the Navy*.[187]

Michael St. Clair received a general discharge from the U.S. Navy following a series of alcohol-related incidents.[188] Rather than asking for reinstatement to the Navy, St. Clair requested that the court reclassify his discharge to 'Honorable.'[189] In determining that the case was proper for

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whether by way of damages or injunctive relief.

Id.

181. *Id.* at 10. "It is this power of oversight and control of military force by elected representatives and officials which underlies our entire constitutional system." *Id.*

182. 995 F.2d 765 (7th Cir. 1993). Colonel Knutson was released from the Wisconsin Air National Guard based on poor performance evaluations from his superior officer. *See id.* at 766-67. He challenged the termination decision as a violation of his due process rights. *See id.* at 767.

183. *See id.* at 769.

184. *See id.* "If civilian courts are regularly open to claims challenging personnel decisions of the military services, judicial review may also undermine military decision-making or impair training programs and operational readiness." *Id.*

185. Knutson v. Wis. Air Nat'l Guard, 995 F.2d 765, 771 (7th Cir. 1993). For the court, the level of interference posed by judicial review amounted to more than "administrative inconvenience." *Id.* This approach has received support from at least one commentator. *See* Commander Roger D. Scott, Article, *Kimmel, Short, McVay: Case Studies in the Executive Authority, Law and the Individual Rights of Military Commanders*, 156 MIL. L. REV. 52, 62 (1998) (forewarning the risk of "total breakdown of order and discipline" if command decisions concerning officer relief and reassignment were subject to judicial review).

186. *See Knutson*, 995 F.2d at 771.

187. 970 F. Supp. 645 (C.D. Ill. 1997), *aff'd*, 155 F.3d 848 (7th Cir. 1998).

188. *See St. Clair*, 970 F. Supp. at 647.

189. *See id.* St. Clair first petitioned the Naval Discharge Review Board for

judicial review, the court distinguished St. Clair's reclassification request from the *Knutson* plaintiff's reinstatement request.[190] Unlike reinstatement, the court held, St. Clair's request did not pose a threat to military discretion, nor was it insufficient to preclude review.[191]

The Third Circuit's approach mirrors that of the Seventh Circuit, as both courts interpret *Gilligan* as an illustration of the type of circumstance where a judicially imposed remedy is inappropriate.[192] There is one important divergence, however. Unlike the Seventh Circuit, the Third Circuit does not view judicially imposed reinstatement as implicating the kind of extreme oversight of military matters that prompted the Supreme Court to order dismissal in *Gilligan*.[193] Rather, the Third Circuit views reinstatement as both a viable judicial remedy and a minimal intrusion upon the military's province.[194]

By switching the focus of the justiciability inquiry from the nature of the relief sought to the requested remedy's potential effect on military functioning, the Third and Seventh Circuits afford more deference to the military than the First Circuit courts, but their approach is by no means an ideal standard.[195] On the contrary, the Third and Seventh Circuit approach raises several concerns.

First, the "minimal intrusion" approach directly contradicts the *Stanley* Court's policy of non-intrusion.[196] Further, the subjectivity of the "minimal

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reclassification. *See id.* Following the Board's denial of his request, St. Clair brought suit under the Administrative Procedure Act (APA) seeking judicial review of the Board's decision. *See id.* Under the APA, administrative agency actions are reversible if a court determines that the action was arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, or contrary to the plaintiff's constitutional or statutory rights. *See* 5 U.S.C. §§ 706 (2)(A)-(F) (2000).

190. *See St. Clair*, 970 F. Supp. at 648.

191. *See id.* The court ultimately upheld the Board's decision.*See* St. Clair v. Sec'y of the Navy, 155 F.3d 848, 850 (7th Cir. 1998).

192. *See* Jorden v. Nat'l Guard Bureau, 799 F.2d 99, 111 (3d Cir. 1986) (raising First Amendment challenge to discharge from Pennsylvania Air National Guard). "[S]uits against the military are non-cognizable in federal court only in the rare case where finding for plaintiff 'require[s] a court to run the military.'" *Id.* (quoting Dillard v. Brown, 652 F.2d 316, 322 (3d Cir. 1981)).

193. *See Jorden*, 799 F.2d at 111.

194. *See id.*

195. *See* Ohlweiler, *supra* note 107, at 177 (recognizing that while Third and Seventh Circuits have rightly acknowledged distinction between *Chappell* and those cases in which Supreme Court has undertaken review, courts have incorrectly identified the type of remedy sought as the crucial distinguishing factor). *See also* Hawkens, *supra* note 33, at 133 (contending that a justiciability inquiry based on the potential for disruption in military affairs is inconsistent with Supreme Court precedent).

196. *See* United States v. Stanley, 483 U.S. 669, 682 (1987) (describing level of

intrusion" standard will do little to end the preexisting inconsistency among the circuit courts of appeals, since one court's administrative inconvenience is another court's overly intrusive disruption.[197] Third, a careful reading of *Gilligan v. Morgan*[198] indicates that the Third and Seventh Circuits' reliance on that decision is misplaced.[199] Unlike the intra-military personnel decisions challenged in suits brought before the Third and Seventh Circuit courts,[200] the cases the *Gilligan* Court cites in support of its finding of non-justiciability, like *Gilligan* itself, involve military intrusion into the civilian sector.[201]

Lastly, the Third Circuit's willingness to grant remedies otherwise unavailable in the military system, such as reinstatement, raises serious separation of powers concerns.[202] While the courts arguably possess the power to grant relief without congressional authority, that power should be "exercised in the light of relevant policy determinations made by the Congress."[203] In cases involving the Armed Forces, where Congress has

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inconvenience to military officials posed by a process in which a court examines the potential degree of disruption before imposing liability). "A test for liability that depends on the extent to which particular suits would call into question military discipline and decisionmaking would itself require judicial inquiry into, and hence intrusion upon, military matters." *Id.*

197. *See supra* notes 182-195 and accompanying text (discussing Third and Seventh Circuits' conflicting approaches to reinstatement requests).

198. 413 U.S. 1 (1973).

199. *See* Knutson v. Wis. Air Nat'l Guard, 995 F.2d 765, 769 (7th Cir. 1993) (interpreting *Gilligan* as an instance where judicial review would undermine military decision-making); Jorden v. Nat'l Guard Bureau, 799 F.2d 99, 109 (3d Cir. 1986) (citing *Gilligan* as a rare instance in which the "kind of relief requested would involve the court in tasks well outside its capacity and function"); Dillard v. Brown, 652 F.2d 316, 321 (3d Cir. 1981) (describing plaintiff's equal protection challenge to a military regulation as very type of suit that "*Gilligan* excepted and did not intend to bar").

200. *See Knutson*, 995 F.2d at 767 (challenging dismissal based on poor performance evaluations); *Jorden*, 799 F.2d at 101 (challenging discharge from National Guard unit); *St. Clair*, 970 F. Supp. at 647 (challenging Navy discharge classification).

201. *See Gilligan*, 413 U.S. at 12 n.16. Following the Court's admonition against interpreting its decision as a grant of blanket immunity to the National Guard, the Court cited several cases in support of the proposition that the National Guard's conduct cannot escape judicial review in every instance. *See id.* at 11-12. These cases included *Laird v. Tatum*, 408 U.S. 1 (1972) (challenging on First Amendment grounds Army Intelligence data-gathering system) and *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (challenging criminal convictions by military tribunals).

202. *See Jorden*, 799 F.2d at 102 n.5 (citing First Jersey Securities, Inc. v. Bergen, 605 F.2d 690, 696 (3d Cir. 1979)). In *Bergen*, the court held that a military plaintiff is not required to exhaust all military avenues of redress if the administrative remedy would be inadequate. *See Bergen*, 605 F.2d at 690.

203. Bush v. Lucas, 462 U.S. 367, 373 (1983) (denying plaintiff's request for remedy

established a comprehensive system for the vindication of serviceperson's rights, this doctrine should apply with even greater force.[204] As part of this far-reaching system of redress, Congress has authorized military tribunals to grant those remedies it deemed appropriate for given circumstances.[205] Although an aggrieved serviceperson may view these proscribed remedies as "inadequate," it is for Congress, and not the civilian courts, to decide the proper form of relief.[206]

For those Armed Forces members discharged for refusing the anthrax vaccine, the list of congressionally authorized remedies could hardly be characterized as adequate.[207] However, the granting of the congressionally authorized remedy, as opposed to the plaintiff's desired remedy, is consistent with both Congress' activity in the field and with Supreme Court precedent.[208] As such, a serviceperson who refuses the anthrax vaccine

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where Congress had established an elaborate scheme of redress under the federal civil service system). The Administrative Procedure Act also prohibits the granting of relief where such remedy is expressly or impliedly forbidden by statute. *See* 5 U.S.C. § 701(a)(1) (2000).

204. *See* Chappell v. Wallace, 462 U.S. 296, 302-03 (1983) (discussing congressionally-created procedures and remedies contained within the Uniform Code of Military Justice). "Any action to provide a judicial response by way of [a damages remedy] would be plainly inconsistent with Congress' authority in this field." *Id.* at 304. *See also* United States v. Stanley, 483 U.S. 669, 683 (1987) (labeling "irrelevant," for purposes of determining whether to afford a non-statutory remedy to an aggrieved serviceperson, the question of whether existing federal remedy is "adequate").

205. *See* Guitard v. Sec'y of the Navy, 967 F.2d 737, 741-42 (2d Cir. 1992) (describing Navy's intra-service boards of review for personnel complaints).

206. *See id.* at 741 (dismissing plaintiff's request for reinstatement on grounds that he failed to exhaust his administrative remedies even though the Navy's Discharge Review Board lacked authority to order reinstatement). "[T]he inability to grant full relief does not dispose of the exhaustion requirement so long as the tribunal in question had the power to grant some pertinent relief." *Id.*

207. *See* Williams, *supra* note 15. In June 2001, when the Pentagon halted the anthrax inoculation program due to the shortage, Major General William Cugno, of the Connecticut National Guard, was unwilling to reverse his earlier decision regarding two National Guardsmen who were discharged after refusing the vaccine. *See id.*

208. *See* United States v. Stanley, 483 U.S. 669, 683 (1987).

> [I]t is irrelevant to a "special factors" analysis whether the laws currently on the books afford Stanley, or any other particular serviceman, an "adequate" federal remedy for his injuries. The "special facto[r]" that "counsel[s] hesitation" is not the fact that Congress has chosen to afford some manner of relief in the particular case, but the fact that congressionally uninvited intrusion into military affairs by the judiciary is inappropriate.

Id. The courts of the Second and Eighth Circuits have recognized that the judiciary's power is limited in those instances where the congressionally-proscribed remedy does not meet the plaintiff's expectations. *See* Chandler v. United States Air Force, 255 F.3d 919, 920-21 (8th

would have to show that the order to take the vaccine was, in and of itself, illegal or unconstitutional.[209] Because the vaccine is both FDA-approved and a congressionally authorized component of the Department of Defense's response to the threat of biological warfare, such an argument would probably fail.[210] Unlike a direct challenge of AVIP's legality or constitutionality, an aggrieved serviceperson's challenge of a command decision to discharge him from service involves a wholly distinct legal inquiry and should be adjudicated in the congressionally-delegated forum.[211] Despite Congress' "authority in the field,"[212] however, the civilian courts have expressed reluctance to acknowledge the military courts' ability to adjudicate alleged constitutional violations.[213]

The federal courts, in fulfillment of their role as guardians of the Constitution,[214] have long recognized an individual's constitutional right to

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Cir. 2001) (conceding that even though judicial review was appropriate, court had no authority to grant plaintiff a promotion in rank); Guitard v. Sec'y of the Navy, 967 F.2d 737, 741 (2d Cir. 1992) (dismissing suit as non-justiciable even though intra-military tribunal lacked authority to grant plaintiff's reinstatement request).

209. *See* 5 U.S.C. §§ 706(2)(A)-(F) (2000) (outlining scope of judicial review of agency action). Under the APA, a court can reverse an administrative agency's decision if the court finds that the agency's decision was somehow contrary to a constitutional right, power, privilege or immunity. *See* 5 U.S.C. § 706(2)(B) (2000). However, the government may have a strong argument that AVIP's implementation was a component of a combat operation exercised in the field in time of war, and therefore not amenable to review under the APA. *See* 5 U.S.C. § 701(b)(1)(G) (2000). *See also* McDaniel, *supra* note 131, at 122 (contending that combat decisions and those decisions that implicate "*readiness* for combat" are entitled to a higher level of deference than other agency decisions).

210. *See* O'Neil v. Sec'y of the Navy, 76 F. Supp. 2d 641, 645 (W.D. Pa. 1999) (dismissing plaintiff's challenge of Marine Corps' decision to deny request for hardship discharge based on unwillingness to submit to anthrax inoculation).

211. *See* Ohlweiler, *supra* note 107, at 158 (explaining distinction between judicial review of military command decisions and judicial review of constitutional challenges to military regulations).

212. Chappell v. Wallace, 462 U.S. 296, 304 (1983).

213. *See* Schlesinger v. Councilman, 420 U.S. 738, 764-65 (1975) (Brennan, J., dissenting in part). "It baffles me therefore how the Court can conclude that courts-martial or other military tribunals can be assigned on grounds of expertise, in preference to civilian federal judges, the responsibility for constitutional decisionmaking." *Id.* at 765 (Brennan, J., dissenting). In *Councilman*, the plaintiff, an Army Sergeant, challenged the military's jurisdiction over his drug possession case and sought to enjoin his impending court-martial. *See id.* at 740-41. The Court held that judicial intervention was improper and ultimately denied plaintiff's request. *See id.* at 740.

214. *See Judicial Review and Soldiers' Rights*, *supra* note 33, at 478. "Since *Marbury v. Madison*, it has been the function of the judiciary and not the political branches to delimit the bounds of permissible governmental conduct and the scope of constitutionally protected rights." *Id.*

be free of unwanted medical treatment.[215] Therefore, it stands to reason that where an Armed Forces member alleges that the Department of Defense's anthrax inoculation program (AVIP) deprives him of that treasured right, vindication of that right should take place in a federal court, where similar challenges have been adjudicated.[216] Not all constitutional deprivation claims are the same, however.[217] Some, like an action to enjoin AVIP's implementation, are deserving of expedited judicial review in a civilian court.[218] Others, such as suits challenging military personnel decisions on constitutional grounds, should be heard in federal court, but only as a last resort.[219] By differentiating between the two types of constitutional claims and applying the appropriate level of deference to each, the courts of appeals can maintain the proper balance between the coordinate branches and develop the level of consistency in approach to military injunctive relief suits that has somehow eluded them.[220]

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215. *See, e.g.*, Washington v. Harper, 494 U.S. 210, 228 (1990) (recognizing that Due Process Clause protects a prisoner's right to refuse anti-psychotic medication).

216. *See generally* Goldman v. Weinberger, 475 U.S. 503 (1986) (challenging on First Amendment grounds Air Force dress code regulation); Frontiero v. Richardson, 411 U.S. 677 (1973) (challenging on equal protection grounds constitutionality of a military benefits statute that discriminated against women).

217. *See* Wallace v. Chappell, 661 F.2d 729, 734 (9th Cir. 1981) (distinguishing between "recognized" constitutional violations and those that are invented by "clever pleader[s]"), *rev'd on other grounds*, 462 U.S. 296 (1983).

218. *See* Ohlweiler, *supra* note 107, at 158 (explaining that constitutional challenges to military regulations involves judiciary in an examination of a "deliberative legislative policy" and not the "considered judgment of individual commanders"). *See also* Part III, *supra* notes 84-129 and accompanying text (discussing and analyzing possible constitutional challenge to AVIP).

219. *See generally* Jones v. N.Y. State Div. of Military and Naval Affairs, 166 F.3d 45 (2d Cir. 1998) (denying request for judicial review in § 1983 suit where plaintiff failed to seek redress in military courts); Watson v. Ark. Nat'l Guard, 886 F.2d 1004 (8th Cir. 1989) (dismissing plaintiff's suit for reinstatement to National Guard for failure to exhaust intra-service remedies). The Seventh Circuit abandoned the exhaustion requirement after the Supreme Court's decision in *Darby v. Cisneros*. 509 U.S. 137 (1993). *See* St. Clair v. Sec'y of the Navy, 970 F. Supp. 645, 647-48 (C.D. Ill. 1997). In *Darby*, the Supreme Court held that the federal courts lack the authority to require that plaintiff's exhaust their administrative remedies prior to bringing suit under the APA. *See Darby*, 509 U.S. at 153-54. Because *Darby* arose in the civilian context, at least one commentator maintains that the exhaustion requirement remains viable for military personnel seeking judicial review in the federal courts. *See* Captain E. Roy Hawkins, *The Exhaustion Component of the Mindes Justiciability Test is not Laid to Rest by Darby v. Cisneros*, 166 MIL. L. REV. 67, 68-69 (2000).

220. *See* Ohlweiler, *supra* note 107, at 180-81.

B. The Nature of the Right Asserted as a Determining Factor

While conceding that the rights of armed forces personnel differ from those of civilians in certain circumstances, some courts vest responsibility for defining those rights with the judiciary—not the military.[221] Deference to the military and the coordinate branches, while important to a decision on the merits of a particular claim, will not affect the court's initial decision to exercise jurisdiction.[222] This open-door policy applies even where the plaintiff's claim is based on a "weak or frivolous" constitutional challenge.[223]

These weak and frivolous constitutional challenges are usually disguised as procedural due process claims, where a serviceperson alleges that an adverse personnel decision somehow infringed upon his or her constitutional rights.[224] For example, in *Wigginton v. Centracchio*,[225] a Rhode Island National Guardsman sought review of an independent military review board's decision to involuntarily retire him from service.[226] Specifically, Major Wigginton alleged that the termination of his tenure

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221. *See* Dillard v. Brown, 652 F.2d 316, 320 (3d Cir. 1981):

> These constitutional provisions [art. I, § 8 and art. II, § 2] unquestionably reveal that the operation of the military is vested in Congress and the Executive. ... Yet these sections of the Constitution do not provide or intimate that, when statutes or regulations regarding the composition of the military trench upon other constitutional guarantees, the courts are powerless to act.

Id.

222. *See id.*

223. *See id.* at 323:

> We do not dispute that military justifications must be taken into account when ruling on suits that have been brought against the military..... If the military justification outweighs the infringement of the plaintiff's individual freedom, we may hold for the military on the merits, but we will not find the claim to be non-justiciable and therefore not cognizable by a court.

Id. at 323-24.

224. *See* Knutson v. Wis. Air Nat'l Guard, 995 F.2d 765, 771 (7th Cir. 1993) (distinguishing First Amendment challenges such as that faced by Third Circuit in *Jorden v. Nat'l Guard Bureau*, 799 F.2d 99 (3d Cir. 1986), from the type of procedural due process claim asserted by plaintiff in the case at bar); Watson v. Ark. Nat'l Guard, 886 F.2d 1004, 1010 n.15 (8th Cir. 1989). The plaintiff "makes no constitutional attack on any statute or regulation. Rather, he challenges the constitutionality of a discrete personnel action taken pursuant to unassailably valid statutory authority." *Id.*

225. 205 F.3d 504 (1st Cir. 2000).

226. *See id.* at 506-07. The National Guard convened Selection Retention Boards to determine whether guardsmen with more than 20 years of service should be retained or honorably discharged. *See id.* at 506 (describing procedures contained in National Guard Regulation 635-102 § 3(a)).

constituted an abridgment of a vested property right without due process of law.[227] In determining that judicial review was appropriate, the *Wigginton* court surmised that its decision was consistent with the Supreme Court's decision in *Stanley*,[228] which left undisturbed a military plaintiff's entitlement to pursue an equitable action to bring constitutional violations to an end.[229] However, the *Wigginton* court's decision to grant retroactive relief, while well intentioned, cannot be reconciled with *Stanley*.

In *Stanley*, the plaintiff alleged that Army officials violated his constitutional rights by exposing him to mind-altering hallucinogens during a chemical warfare testing program.[230] Despite the egregious circumstances[231] and accusations of judicial abdication from the dissenting Justices,[232] the Court held that the *Feres* doctrine barred the plaintiff's monetary damages claim.[233] The *Stanley* Court distinguished the type of cases where a plaintiff seeks to thwart an ongoing constitutional violation from the case at hand, where the plaintiff sought redress for a past injury.[234] As Justice Brennan further explained, "experimentation with unconsenting soldiers, like any constitutional violation, may be enjoined *if* and when discovered."[235]

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227. *See id.* at 508. The question was ultimately certified to the Rhode Island State Supreme Court for determination of whether existing state employment law recognized a vested property interest in a National Guard commission. *See id.* at 515, 519. In response to the certification, the Rhode Island Supreme Court held that because the statute purporting to protect plaintiff's right contained obsolete language inadvertently carried over to the present statute, litigation of the issue in federal court would lead to an "absurd" result. *See* Wigginton v. Centracchio, 787 A. 2d 1151, 1158 (R. I. 2001). *But see* Scott, *supra* note 185, at 65 (contending that "[a]ppointment to flag or general rank, and service in important positions of command, are fragile privileges, not rights").

228. United States v. Stanley, 483 U.S. 669 (1987).

229. *See Wigginton*, 205 F.3d at 512.

230. *See Stanley*, 483 U.S. at 671. James Stanley was unwittingly administered lysergic acid diethylamide (LSD) as part of an Army-sponsored experiment to test the drug's effect on human subjects. *See id.* As a result, he suffered severe personality changes that ultimately led to his discharge from the Army and the dissolution of his marriage. *See id.*

231. *See id.* at 709 (O'Connor, J., dissenting) (arguing that *Feres* and its progeny were inapplicable to case at bar because the military's conduct could not be characterized as "incident to service"). "In my view, conduct of the type alleged in this case is so far beyond the bounds of human decency that as a matter of law it simply cannot be considered a part of the military mission." *Id.* at 709 (O'Connor, J., dissenting).

232. *See id.* at 686 (Brennan, J., dissenting). For in-depth discussion and criticism of the *Stanley* decision, see Mahoney, *supra* note 49 (characterizing *Stanley* as an example of judicial deference to the military gone awry); Kellman, *supra* note 37 (criticizing the *Stanley* Court's abdication of their constitutional role).

233. *See Stanley*, 483 U.S. at 683-84.

234. *See id.* at 683.

235. *Id.* at 690 (Brennan, J., dissenting). Justice Brennan bemoaned the lack of

The *Wigginton* court seized upon that language to create a judicial forum for the plaintiff's procedural due process claim.[236] The two cases are not analogous, however. In *Stanley*, Justice Brennan was clearly troubled by an injunction's inability to satisfy a party who has already suffered injury.[237] Had Sergeant Stanley sought to enjoin the LSD experiment's implementation prior to his injury, the Court may have granted prospective relief and a grave injustice might have been averted.[238]

The *Stanley* Court's analysis, while harsh and seemingly unjust as applied to the facts of that case, is especially appropriate in cases like *Wigginton*, where the military's decision involves personnel matters.[239] Major Wigginton's injury[240] is wholly distinct from the type of harm Sergeant Stanley suffered.[241] The decision to grant judicial review *and* the

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available redress for plaintiffs like James Stanley who had already suffered wrongs at the hands of their military superiors. *See id.* at 690-91 (Brennan, J., dissenting). "An injunction, however, comes too late for those already injured; for these victims, 'it is damages or nothing.'" *Id.* at 690 (quoting Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1971) (Harlan, J., concurring)).

236. *See* Wigginton v. Centracchio, 205 F.3d 504, 513 (1st Cir. 2000).

237. *See Stanley*, 483 U.S. at 690-91 (Brennan, J., dissenting). "The practical result of this decision is absolute immunity from liability for money damages for all federal officials who intentionally violate the constitutional rights of those serving in the military." *Id.* at 691.

238. In the civilian context, government-ordered medical treatment must bear a rational relationship to a legitimate state interest in order to survive a Fifth Amendment challenge. *See* Washington v. Harper, 494 U.S. 210, 236 (1990) (upholding forced medication of state prisoner after balancing prisoner's right to be free from unwanted anti-psychotic medication with state's interest in keeping prisoners safe); Jacobson v. Massachusetts, 197 U.S. 11, 26 (1905) (upholding state compulsory smallpox vaccination program as a reasonable restraint on personal liberty for protection of state's legitimate interest in protecting public health and safety). It is doubtful that the military's interest in administering LSD to Sergeant Stanley, "for no other reason than to gather information," could survive a similar analysis. *See Stanley*, 483 U.S. at 709 (O'Connor, J., dissenting). Unlike the LSD experiment in *Stanley*, the anthrax inoculation program was implemented for a far greater purpose than information gathering and would arguably survive rational relationship level scrutiny. *See* Part III, *supra* notes 84-129 and accompanying text.

239. The Seventh Circuit has declined jurisdiction over procedural due process claims, recognizing that the potential for unwarranted judicial intrusion into a "province committed to the military's discretion" is heightened when a serviceperson challenges the nature of a military procedure. *See* Knutson v. Wis. Air Nat'l Guard, 995 F.2d 765, 771 (7th Cir. 1993). The Seventh Circuit's over-reliance on the Supreme Court's *Gilligan* decision, however, leads to inconsistent outcomes. See *supra* Part IV.A.2 for criticism of the Seventh Circuit's approach to non-monetary relief actions by military personnel.

240. An *honorable* discharge based upon the objective and unbiased determination of an independent review board. *See Wigginton*, 205 F.3d at 506-07.

241. In addition to hallucinations, violent outbursts, and the alienation of his family's affections, Sergeant Stanley suffered the indignity of having been made the subject of

possibility of relief to Major Wigginton for his alleged past constitutional violation can not be reconciled logically with a decision to deny Sergeant Stanley both a forum and *any* relief for his alleged past constitutional violations. Further, this does not appear to be the result the Court intended.[242]

Because artful pleading enables most plaintiffs to transform an adverse personnel decision into a constitutional claim, the First, Third, and Seventh Circuit approaches would allow a serviceperson, dishonorably discharged or punished for refusing the anthrax inoculation, to bring suit in civilian court.[243] However, the justiciability determination should not rest solely upon a plaintiff's ability to hitch his grievance to the procedural due process wagon to ride his way into federal court.[244] While civilian courts arguably possess the power to intervene, it is improper for the courts to exercise this power in every instance, particularly where military tribunals have been established for the protection of servicepersons' constitutional rights.[245] It is not inconsistent with the judiciary's role as the Constitution's guardian to require that the federal courts distinguish claims like Major Wigginton's from prospective challenges to ongoing constitutional

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human experimentation without his consent. *See Stanley*, 483 U.S. at 708 (Brennan, J., dissenting).

242. *See id.* at 682-83 (criticizing circuit court's erroneous application of that part of *Chappell* decision declaring that Court had "never held, nor do we now hold, that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service") (quoting Chappell v. Wallace, 462 U.S. 296, 304 (1983)). As the *Stanley* Court pointed out, the language in *Chappell*, "referred to redress designed to halt or prevent the constitutional violation rather than the award of money damages." *See Stanley*, 483 U.S. at 683. Since *Stanley* would, in all likelihood, bar those adversely affected by the anthrax vaccine from any monetary relief, a lower court's decision to grant any other form of relief would be plainly inconsistent with the policy rationale behind the Supreme Court's decision. However, a constitutional challenge to the AVIP program would clearly fall within the parameters outlined by Justice Brennan for enjoinment of ongoing constitutional violations. *See supra* Part III.

243. *See supra* Part IV.B. *See, e.g.*, Dillard v. Brown, 652 F.2d 316, 322 (3d Cir. 1981). "[A] constitutional challenge brought against the military, which does not require a court to run the military, is justiciable." *Id.* Even under this relaxed standard of review, however, the federal court should decline jurisdiction over requests for review of disciplinary decisions stemming from anthrax inoculation refusals, as a contrary decision would have a deleterious effect on military effectiveness and discipline. *See generally Stanley*, 483 U.S. 669.

244. "[A]n allegation of wrongdoing does not assume constitutional dimensions simply because the plaintiff states that it does." Wallace v. Chappell, 661 F.2d 729, 734 (9th Cir. 1983), *rev'd on other grounds*, 462 U.S. 296, 305 (1983).

245. *See* Chappell v. Wallace, 462 U.S. 296, 303-04 (1983) (outlining "parallel" systems of justice that military's "special status" requires).

violations,[246] and then apply a level of deference proper for the type of claim presented.[247]

In his critique of the Court's *Stanley* decision,[248] one commentator finds "most chilling" the majority's unwillingness to express any sympathy for Sergeant Stanley's plight, or repugnance towards the military for subjecting Sergeant Stanley to harmful mind-altering hallucinogens solely for the purpose of gathering information.[249] Legislators, not judges, are tasked with weighing the moral and ethical ramifications of government action, however.[250] Consistent with the judiciary's role as the Constitution's interpreter is the realization that not all grievances, particularly those stemming from the U.S. military's response to the very real threat of chemical and biological warfare, can—or should be—redressed in federal court.[251]

V. CONCLUSION

For an Armed Forces member disciplined or discharged for refusing the anthrax vaccine, a federal court's unwillingness to review the military's

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246. *See Chappell*, 462 U.S. at 304-05 (distinguishing constitutional challenges of military regulations in *Brown v. Glines* and *Frontiero v. Richardson* from personnel dispute in case at bar). "[T]he special relationships that define military life have 'supported the military establishment's broad power to deal with its own personnel.'" *Id.* at 305 (quoting Earl Warren, *The Bill of Rights of the Military*, 37 N.Y.U. L. REV. 181, 187 (1962)).

247. *See* Ohlweiler, *supra* note 107 at 155 (proposing that the level of deference vary with the type of suit brought against the military). Ohlweiler stated that:

> concerns about command and authority are not threatened by challenges to established military regulations. The judiciary examines the constitutionality of deliberative legislative policy, not the considered judgment of individual commanders. The former is not a necessary component of effective command integrity; it does not deserve the same broad deference which must be granted individual command decisions.

Id. at 158.

248. 483 U.S. 669 (1987).

249. *See* Kellman, *supra* note 37, at 1624. "Justice Scalia's denial of the central reality of the case suggests a tolerance for [the] conduct." *Id.*

250. *See* BORK, *supra* note 29, at 6. "[W]e administer justice according to law. Justice in a larger sense, justice according to morality, is for Congress and the President to administer, if they see fit, through the creation of new law." *Id.* (quoting Hohri v. United States, 793 F.2d 304, 313 (D.C. Cir. 1986) (Bork, J., dissenting), *rev'd*, 482 U.S. 64 (1987)).

251. *See* Webster v. Doe, 486 U.S. 592, 613-14 (1988) (Scalia, J., dissenting):

> In sum, it is simply untenable that there must be a judicial remedy for every constitutional violation. Members of Congress and the supervising officers of the Executive Branch take the same oath to uphold the Constitution as we do, and sometimes they are left to perform that oath unreviewed, as we always are.

Id. at 613.

decision will appear unjust.[252] Because of the existing circuit court split, an aggrieved serviceperson could find success in courts where the mere allegation of a constitutional violation, in any form, was enough to convince the court to exercise jurisdiction.[253] Similarly, judicial review can be found in those circuits where the courts conduct fact-specific inquiries into the nature of either the remedy requested[254] or the claim presented[255] to determine whether judicial intervention is proper. While these approaches may appeal to potential litigants, they not only raise serious concerns about the proper role of the judiciary in our country's tripartite system of government, but they are also based on misguided interpretations of existing Supreme Court precedent.[256]

So, what is the answer? The Supreme Court could reexamine *Feres v. United States*,[257] and subsequent cases, in a manner more consistent with the Federal Tort Claims Act.[258] However, even if the Court interpreted the FTCA as written, service members who sustained injury as a result of a combat decision, like the anthrax inoculation program, would arguably be barred from recovery.[259] The Department of Defense could make the anthrax inoculation voluntary, as the United Kingdom has done.[260] In the

252. The Eleventh Circuit has adopted a blanket rule of non-justiciability for injunctive relief suits stemming from military personnel grievances. *See* Speigner v. Alexander, 248 F.3d 1292, 1298 (11th Cir. 2001). "[W]e now hold that cases brought by enlisted personnel against the military for injuries incident to service are nonjusticiable, whether the claims request monetary damages or injunctive relief. Consistent with Supreme Court precedent, this holding in no way bars facial challenges to military regulations." *Id.*

253. *See supra* Part IV.A.1.

254. *See supra* Part IV.A.2.

255. *See supra* Part IV.B.

256. *See supra* Parts IV.A.1-2, IV.B.

257. 340 U.S. 135 (1950). For discussion of the *Feres* doctrine's historical development, see Parts II.A, II.B, II.C.

258. *See* United States v. Johnson, 481 U.S. 681, 693 (1987) (Scalia, J., dissenting) (contending that *Feres* Court's conclusion that Congress did not intend to permit tort recovery by military personnel for injuries sustained incident to service is contrary to FTCA's plain language). *See* Dalton, *supra* note 10, at 210 (criticizing decisions like *Boyle v. United Technologies, Corp.*, 487 U.S. 500 (1988), where Court extended *Feres*-type immunity to government contractors who manufacture defective products if those products were made for military purposes).

259. *See* 28 U.S.C. § 2680(j) (2000). The FTCA precludes "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." *Id.* Similarly, the Administrative Procedure Act (APA) prohibits judicial review of combat decisions. *See* 5 U.S.C. § 701(a)-(b)(1)(G) (1994). *See also* McDaniel, *supra* note 131, at 122 (proposing that combat decisions and those decisions that implicate "*readiness* for combat" are entitled to a higher level of deference than other agency decisions).

260. *See* Katz, *supra* note 4, at 1864 n.178. *But see* Nunn, *supra* note 85, at 28. "Once military status is acquired, military service loses its voluntary character. Once an individual

event of a full-scale anthrax attack, however, the depletion of our forces, caused by a decrease in inoculated personnel, could prove catastrophic.[261] More promising, however, is the hope that the Executive and Legislative Branches will finally take action to restore our Armed Forces personnel's trust in the government they serve everyday.[262]

As the Supreme Court has observed, the military and civilian courts were created as parallel systems.[263] The AVIP controversy, and each system's apparent inability to remedy it, does not stem from either system's incompetence to protect the rights of military personnel.[264] Rather, responsibility for improvement rests with the Executive and Legislative Branches, and ultimately falls squarely in the hands of each individual voter.[265] I remain sympathetic to those adversely affected by the anthrax inoculation program, but my sympathies will manifest themselves each November, when I enter a voting booth and make an informed choice. It is there, and not in our nation's courtrooms, that these appeals are properly heard.[266]

Natashia Tidwell

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has changed his or her status from civilian to military, that person's duties, assignments, living conditions, privacy, and grooming standards are all governed by military necessity, not personal choice." *Id.*

261. *See* News Release, *supra* note 13. When announcing AVIP's implementation, then-Secretary of Defense Cohen characterized immunization as "a prudent action" designed "to protect highly mobile U.S. military forces against a potential threat that is 99 percent lethal to unprotected individuals." *Id.*

262. *See* Katz, *supra* note 4, at 1865 (arguing that vaccine program should be curtailed so that Department of Defense can regain service members' trust). For a discussion of Congress' response to the AVIP controversy, see *supra* notes 5-21 and accompanying text.

263. *See* Chappell v. Wallace, 462 U.S. 296, 303-04 (1983).

264. *Compare* Mahoney, *supra* note 49, at 815-16 (criticizing "inadequacies" of military justice system where constitutional issues are concerned), *with* Major Richard D. Rosen, Article, *Civilian Courts and the Military Justice System: Collateral Review of Courts-Martial*, 108 MIL. L. REV. 5, 75 (1985). "Indeed, there is no basis for believing that a lawyer, whose only knowledge of the military comes from the entertainment or news media, should suddenly become on his or her ascension to the federal bench, a fount of wisdom on the application of constitutional principles to peculiar military problems." *Id.*

265. *See* Nunn, *supra* note 85, at 32 (noting that most recent advancements in enhancement of service persons' rights have come through congressional action, rather than litigation).

266. *See* Warren *supra* note 30, at 183. "[T]hese decisions [in the Supreme Court's military cases] reveal, I believe, that while the judiciary plays an important role in this area, it is subject to certain significant limitations, with the result that other organs of government *and the people themselves* must bear a most heavy responsibility." *Id.* (emphasis added).

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SYMPOSIUM

The Role of Jurisdiction in the Quest for Sovereignty

INTRODUCTION

In his opinion in *Worcester v. Georgia* (1832), U.S. Supreme Court Chief Justice John Marshall described American Indian nations as "distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States." Although this acknowledgment of tribal sovereignty has served as a foundational principle of Indian law since its pronouncement in 1832, the precise contours of tribal sovereignty have varied over time, as tribes have been confronted with vacillations in federal Indian affairs policy and in federal court judges' attitudes toward exercises of tribal governmental authority.

The New England Law Review's 2002 Symposium entitled "The Role of Jurisdiction in the Quest for Sovereignty" explored the current dimensions of tribal sovereignty, with a particular focus on the role that jurisdictional issues play in key areas of Indian law today. Specific areas addressed included the process for federal recognition of tribal existence; economic development on tribal lands; property-related issues, including tribal land claims, the trust status of tribal lands, tribal environmental regulation, and religious freedom claims implicating federal lands; and the role and status of tribal courts. The featured speakers were tribal attorneys, government attorneys, attorneys in private practice, academics, and other recognized experts in the field of Native American law, who brought a diversity of experiences and viewpoints to their discussion of these issues, which have become so prominent in the Northeast, as well as throughout the United States, in the last decade.

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KEYNOTE ADDRESS:

A Constitutional Confession: The Permanent if Malleable Status of Indigenous Nations

David E. Wilkins*

I appreciate the opportunity to address such an august group of students and faculty. When Amy invited me to join you, and she certainly is a very persuasive person, I debated long and hard on what kind of talk to give since I study politics comparatively. Although much of my work is infused with law and history, and a smidgen of culture, economics, and geography, I work largely at the intersection of politics, history and law, and have coined the awkward, though accurate, term, "Polegalorian," to describe what I do. My research is concerned broadly with how indigenous peoples generate, participate, and are subject to these and other important forces. My research also deals with how and why the American constituent states, international bodies, and the federal government, act in the manner they do towards aboriginal peoples.

I would like to begin with three epigraphs that I have posted on my office door, because you occasionally find snippets that really sort of capture certain ideas and themes that you have in mind. These three epigraphs, I think, typify the deep level of anger and frustration felt about the topics we will be discussing today. The first one is from Ted Moses, who is the ambassador for the Cree nation in Canada. He said, "This is a most peculiar situation. How is it that I, a Cree, whose ancestors lived in the Cree territory of James Bay for at least 5,000 years, find myself and my people suddenly subject to the laws of states that were only established a

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few hundred years ago?"[1] The second one is from Francis Abraham, an Ojibwa. Abraham said, "Where did the MNR [Ministry of Natural Resources] get the right to tell us what we can do and what we can't do on our own land? How come we have to do a land claim while the others who came and took our land never have to prove anything?"[2] Finally, there is the comment from Corn Tassel, a Cherokee, from a speech he made to U.S. Treaty Commissioners in 1785. He said, "Again, were we to inquire by what law or authority you set up a claim [to our land], I answer none! Your laws extend not into our country, nor ever did. You talk of the law of nature and the law of nations and they are both against you."[3]

These are provocative and gut wrenching statements and represent some of the genuine and legitimate moral, emotional, and yes, jurisdictional concerns of aboriginal people. My comments today represent an effort to try and get a handle on the convoluted, and in some respects irreconcilable, nature of the political, legal, and cultural status of indigenous nations as they operate outside, within, and under United States policy and law, and increasingly under state law as well. Before doing this though, it is important from a comparative context to understand that what happens to aboriginal peoples in the United States is not unique to this country.

I would like to share a little from my experience as a Fulbright Fellow last fall. My family and I had the opportunity to spend the fall semester at the University of Calgary, "The Texas of Canada" as I was told going in, and I discovered that characterization to be fairly accurate. It was quite an experience for many reasons, but the primary reason I sought the fellowship was to learn something of what conditions are like for First Nations, Inuit, and Métis peoples in Canada. One hears about how strong the democratic State of Canada is, and how it has a fairly tolerant attitude towards non-white Canadians, but my prior reading of Canadian aboriginal law and politics had shown me a different side, a darker side, a less tolerant side, and I wanted to see firsthand what was happening. Of course, Canada is a massive geopolitical entity, home to over 600 aboriginal communities with a convoluted treaty history and a budding treaty present. It also is home to the Métis, a mixed blood people with their own unique history and legal status, and also is most recently home to a new territorial government, Nunavut, a Provincial-like entity governed by the Inuit of the far north. I knew I would only be getting a taste of what there was to learn, but I was

1. Ted Moses, *Seeking Justice at the International Level*, *in* ABORIGINAL PEOPLES: TOWARD SELF-GOVERNMENT 25 (Marie Leger ed., 1994).

2. SIDNEY L. HARRING, WHITE MAN'S LAW: NATIVE PEOPLE IN NINETEENTH-CENTURY CANADIAN JURISPRUDENCE 273–74 (1998).

3. DAVID E. WILKINS & TSIANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW 19 (2001) (quoting Corn Tassel).

excited to begin the process.

One can read about such affairs, but book learning is not like actual visitation or, better yet, residency in a new land. As my principal teacher and good friend Vine Deloria once put it: "We may misunderstand something we hear or read, but we cannot misexperience a lived moment or set of moments."[4] To put it another way, slightly different from what Descartes said when he made the statement, "I think; therefore I am[,]"[5] aboriginal peoples might respond by saying, "I experience; therefore I am." So even though we had only four months to enjoy that breathtaking country and the diverse peoples of that land, we experienced a great deal during our time there.

Since the United States and Canada share some common territorial landmarks, colonial ancestors, and are home to a number of indigenous nations who, historically and today, lived and traveled across the constructed border dividing the two, it has long been one of my avowed goals to continue to expand my research on the similarities and dissimilarities in the historical trajectories, political relations, and legal standings of native peoples towards one another, and in relation to the provinces, states, the national government, and increasingly, vis-à-vis their relations with the international community. Some of the questions that gelled in my mind as a result of my short stay in Canada include the following:

- Why was the treaty process continued, and in fact, recently revived in Canada, while it problematically ended in the United States in 1871 with no clear sign that it will ever be restarted?
- Why do some aboriginal people in Canada now believe that the present treaty process is actually a cooptive ploy by the Canadian State to solidify their already powerful position vis-à-vis First Nations' peoples?
- Why, despite the professed liberal democratic nature of the Canadian State, has indigenous self government largely been denied to First Nations in Canada while in the United States it is, at least theoretically, a reality enshrined in the Constitution, treaty relationships, statutory law, and federal policy?
- How were aboriginal peoples in Canada able to have their treaty rights constitutionally entrenched in 1982, while tribes in the United States who, in theory, enjoy far more self-governance, have not been able to garner a similar constitutional safeguard for our treaty or sovereign rights, notwithstanding that treaties are considered the supreme law of the land?

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4. Personal Communication with Vine Deloria (April 17, 2000).

5. RENE DESCARTES, DISCOURSE ON METHOD (1637).

- Why have both countries been unwilling to jettison the factually inaccurate and morally indefensible "doctrine of discovery" and the theory of federal and, increasingly, state provincial plenary power, despite the fact that these concepts are rooted in pre-colonial notions of European racism and ethnocentrism that essentially deny the humanity and legal standing of aboriginal peoples?
- Finally, how is it that both countries emphasize that they have a fiduciary, or trust relationship, with native nations—a relationship in which the national government promises to protect and support aboriginal peoples and which should protect and shield the First Nations from forces aimed at their destruction or diminution of their treaty resources or civil rights—yet despite this acknowledged trust relationship, aboriginal peoples in both states continue to experience astronomical levels of poverty (except for a few gaming tribes), gross health conditions, poor education attainment levels, and have treaty and constitutional rights that can be wiped out quite easily by the very trust agent charged with protecting aboriginal rights and powers?

In fact, while I was there, a reporter for the *Toronto Globe and Mail*, a leading national newspaper, wrote a fourteen-part series entitled "Canada's Apartheid,"[6] which began just about the time we arrived and concluded just as we were leaving. In the article the reporter graphically depicted the ongoing horrendous conditions that aboriginal nations face in Canada, despite the Canadian government's perception of itself and its projection to the outside world of it being the most just society around. Unfortunately, the reporter concluded his otherwise solid series by asserting that the solution to aboriginal problems was the assimilation of aboriginal peoples. Even George Bush and Gail Norton, as conservative as they are, are not so naïve as to make such a simplistic ethnocentric statement—at least not publicly. These were just some of the comparative questions that came to mind during my stay in Calgary. Other questions are still forming.

While it is premature for me to speak comparatively across these two countries, I would like to take the remainder of my time to provide you with a brief, but I think fairly comprehensive, overview of some of the complex dimensions of aboriginal status in the United States that make for a perpetually insecure world for native peoples.

The multiple overlapping and often contradictory manifestations of indigenous status have arisen from the American public's curiously

6. John Stackhouse, *Canada's Apartheid*, THE GLOBE AND MAIL, Nov. 3–Dec. 15, 2001, *available at* http://www.globeandmail.com/series/apartheid (last visited Mar. 31, 2003).

ambivalent views of aboriginal peoples, historically contradictory Supreme Court precedents—I say "historically" because the Rehnquist Court has been remarkably consistent in its successful attempts to diminish tribal authority and jurisdictional authority—vacillating congressional statutes, the long and complicated treaty and agreement record, and thousands of Byzantine administrative regulations. In fact, in keeping with the Bush administration's war-like tenor of the day, we could term the contemporary indigenous situation an "Axis of Insecurity." This is a protean mix of the Bush administration's policies regarding natural resources, trust funds, gaming, and state governments that are forcing themselves deeper and deeper into Indian country despite the constitutional and treaty safeguards set up long ago that have still not been dislodged. This is all held together by the Supreme Court's ideological and practical orientation masked by the alleged neutrality of the rule of law, which is emphatically aimed at the drastic reduction, if not the formal termination, of tribal sovereignty as we once experienced it.

Unlike Bush's problematic characterization of the "Axis of Evil," this "Axis of Insecurity" for tribal nations is real and fluid and has meant a perpetual destabilized set of statuses for indigenous nations. Over time, and in an entirely unpredictable and ad hoc way, the statuses have expanded and multiplied, but their lineage traces to the earliest moments of the United States—although one could easily push the variations back to sixteenth century theological debates in Spain about whether or not indigenous peoples were free persons or slaves. Thus, tribes, as collective bodies, have an inherent racial, cultural, and national status. United States law and policy also has accorded them a dependent ward-like status and later, a corporate status. Tribes have been alternately treated as discrete and insular minority groups and as local governments or sub-units of governments. They also have been viewed as social service agencies, as a result of their poverty, and United States law and policy has regarded tribes as delegated bodies for purposes of carrying out federal mandates. In addition, tribes have been statutorily treated as states for some problematic purposes. These are descriptions of tribes in a collective sense.

Indians and Alaskan natives, as individuals, have a recognized status as tribal, cultural, and political citizens, eligible for distinctive property rights and tax exemptions. Although not initially granted state and federal citizenship due to their pre-existing national status, individual Indians and Alaskan natives now hold that status and are legally entitled to the services and benefits open to every American. Due to their indigenous status, however, native citizens may still be treated as subjects under federal law. The United States can abrogate or diminish their treaties and collectively-held property rights, notwithstanding their sovereign or citizenship status. This subject status is largely due to congressional plenary power, defined

here as unlimited and absolute, which was unilaterally and extra-constitutionally generated in the late 1800s via the *Kagama*[7] decision, and a number of succeeding cases after that aimed at the forcible assimilation of individual Indians and the dispossession of indigenous collective property and other rights. This status continues to affect Indians and tribes through criminal penalties, religious rights, aboriginal title, and treaty enforcement—or more accurately, lack of enforcement—which are some of the issues we will be talking about in the panels today.

As a result of these multiple, inherent, assumed, and imposed statuses, indigenous peoples, as collective bodies and as individuals, are left with an inconclusive and ambivalent understanding of their political, legal, and cultural rights, and their actual status vis-à-vis states and the federal government. In short, the federal government has an indeterminate relationship with tribal nations and their members, sometimes recognizing and supporting tribal sovereignty, and sometimes acting to deny, diminish, or even terminate that status. However, the federal government is always acting as if it were the superior sovereign in the awkward minuet of sovereigns.

On the one hand, such indeterminacy accords to imaginative tribal leaders, American presidents and their agents, federal judges, congressional lawmakers, and state officials a degree of political and legal flexibility. Involved parties may successfully navigate otherwise difficult political terrain by choosing the appropriate indigenous statuses that can benefit tribal nations and individual Indians. On the other hand, and of greater import, such ambivalence deprives aboriginal peoples, collectively and individually, of a clear and consistent understanding regarding the powers and rights they may exercise, thereby contributing to the ongoing tension that frequently clouds the relationship between First Nations and other political or corporate entities.

In the essay that this talk is drawn from, I examined the origin, rationale, and consequences of several of these collective and individual statuses using a simple chronological format starting with the grandfather of all American policy equivocators, Chief Justice John Marshall, and continuing to the present. The three Indian law cases that Marshall is most noted for, *Johnson v. McIntosh*,[8] *Cherokee Nation v. Georgia*,[9] and *Worcester v. Georgia*,[10] were all written in the early 1800s. In these cases, Chief Justice Marshall openly and deftly manipulated indigenous status by trying to provide some measure of recognition of Indian rights vis-à-vis the states,

7. United States v. Kagama, 118 U.S. 375 (1886).
8. 21 U.S. (8 Wheat.) 543 (1823).
9. 30 U.S. (5 Pet.) 1 (1831).
10. 31 U.S. (6 Pet.) 515 (1832).

while simultaneously elevating the federal government to a superior position in relation to tribes. Even though tribes were *de facto* and *de jure* sovereigns, Marshall spoke of indigenous people not only as national and state-like entities but also as Indians in the conglomerate or cumulative sense, as a race of people, as individuals, and of course, as domestic dependant nations. While the last two cases focused only on one tribal nation, the Cherokee, the principles enunciated have been used to diminish, and sometimes enhance, the rights of all aboriginal peoples.

From a democratic theory and constitutional perspective this is most problematic, since each indigenous nation has its own diplomatic arrangement with the United States—what the President and Congresses of recent years like to refer to as a government-to-government relationship. So why should a judicial ruling involving only a single tribal nation be extrapolated to infringe, or in some cases, affirm the rights of other First Nations? Tribal nations, after all, are not citizens in a constitutional sense, as their relationship with the United States is based on a sovereign recognition of one another's political independence, and individual Supreme Court rulings should have a bearing only on those tribal parties directly involved in the litigation. The various statuses constructed by Marshall—tribes as nations, state-like entities, focusing on individuals, or as Indians in a collective racial sense—are all distinctly different under the law. Marshall and subsequent Courts, lawmakers, and bureaucrats have ventured back and forth, sometimes intentionally, sometimes unwittingly, between these statuses. In a sense, the Court was only amplifying the conflicting statuses of aboriginal peoples specified in the United States Constitution. The Commerce Clause, as we all know, affirms a separate political status of tribes, while the Fourteenth Amendment and Article I make reference to Indians not taxed, which identifies the individual status of Indians who remained out of the political jurisdiction of the United States.

In the essay, I then moved to discuss Justice Taney's Indian law cases, such as *United States v. Rogers*,[11] which strikingly emphasized the racial dimension of Indian law that is still with us today. I talked about the important congressional and judicial actions of the 1860s and 1870s that redefined Indian status and treaty-making and forced assimilation, which became a dominant federal policy and legal paradigm. Next, I examined the notion of American citizenship as it was applied to certain tribal nations and their citizens and discussed how this has affected their status from the allotment policy to the 1924 Indian Citizenship Act.[12]

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11. 45 U.S. 567 (1846).

12. Indian Citizenship Act, ch. 233, 43 Stat. 253 (1924) (codified as 8 U.S.C. § 1401(b) (2000)).

In fact, the layering of federal citizenship onto individual Indian citizenship, later supplemented by various state laws that accorded Indians the right to vote, has proven most troubling for First Nations members. On the one hand, individual Indians are now entitled to exercise a franchise in state elections and in federal elections under the Fifteenth Amendment; on the other hand, individual Indians are not guaranteed Fourteenth Amendment protection from their own tribal governments if the tribal government is acting within its sovereign capacity, as was held in the case *Groundhog v. Keeler*.[13] So what is our status as American citizens, and more broadly, did the United States Congress have the power to unilaterally enfranchise Indians absent our consent?

The 1930s signaled another dramatic shift in indigenous status with the passage of the Johnson-O'Malley Act[14] (JOM) and the Indian Reorganization Act[15] (IRA) in 1934. JOM brought the states into a more prominent role in Indian affairs, while the IRA, the most important piece of legislation dealing with the indigenous status in the past century, was much more comprehensive in its focus. While designed to counteract the ravages of allotment era policies and to encourage, some say to insist, that the tribes establish constitutional-type governments, it also served to dichotomize tribes into federally recognized and non-recognized entities. A vital question for such federally incorporated tribes is this: Does such incorporation make the indigenous polity an instrumentality of the federal government? Not surprisingly, there is conflicting evidence on this important question. In some cases it has been held that tribes, in relationship to states and municipal governments, are to be treated as federal instrumentalities; but in other cases, tribes have been held not to have such status under the meaning of the federal statutes.

Finally, I looked at the chain of events inspired by the federal government's termination policy, which began in the 1950s, and the stunning political, social, and cultural indigenous activism that termination inspired in the 1960s and 1970s. The rash of events resulting from that era's activism, especially the Civil Rights Movement, revived old indigenous statuses and created new ones that have continuing effect today. These include (i) tribes as discrete and insular minorities that require special protection from discrimination, (ii) tribes as dependant and geographically incorporated communities with reduced governing powers because of their alleged dependency status, (iii) tribes as states (TAS), (iv)

13. 442 F.2d 674 (10th Cir. 1971).

14. Johnson-O'Malley Act, ch 147, 48 Stat. 596 (1934) (codified as amended at 25 U.S.C. §§ 452-57 (2000)).

15. Indian Reorganization Act, ch 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461-79 (2000)).

the TAS treatment as states for purposes of environmental and taxation legislation in the shifting arrangement of federalism, and (v) tribes and their members as poverty stricken groups deserving federal assistance, not because of their distinctive treaty or political status, but because of their American citizenship and weakened socio-economic standing. Importantly, these statuses did not supplant the pre-existing ones. They simply were added on, making an already convoluted situation even more confusing. One of the important dimensions that resurfaced powerfully in the 1970s was the question of whether tribes were political or racial entities, although why this was pitched as a zero-sum situation has always eluded me.

In *Morton v. Mancari*,[16] the Supreme Court reaffirmed the political status of tribes by throwing out a challenge to the preference policy operating in the Bureau of Indian Affairs. Despite the anti-affirmative action position of the Rehnquist Court, the *Mancari* decision was reaffirmed in *Rice v. Cayetano*.[17] Ironically, this was a case involving the political and racial status of Hawaiian natives. Kennedy and the majority went to great lengths to distinguish the status of Hawaiian natives from American Indians to the detriment of Hawaiian natives, and, at least in this narrow instance, to the advantage of federally recognized tribes. One of the most important elements of the *Mancari* ruling, cited positively by both Kennedy for the majority and Stevens in dissent, was the notion that federal legislation singling out American Indians, though not Hawaiians, would be upheld as long as the special treatment could be tied rationally to the fulfillment of Congress' unique obligations to Indians—the old "tied rationality doctrine." Here we see the generic word "Indians" figuring prominently into the Court's calculus, not as specific tribes, and certainly not as Hawaiian natives. Of course, the so-called "tied rationality doctrine" hinges entirely upon whether or not the United States acknowledges its trust relationship with tribes. It also assumes that there is some rationality to what Congress or the Court does, although trust and rationality have been the exception, rather than the norm, in federal policy and law.

In conclusion, I suggest that Congress, working closely with tribal governments, should act under its plenary exclusive power to clarify what rights indigenous nations and their members possess and may exercise under treaties, trust, and statutory law based on their sovereign national status. This would include jurisdictional authority over peoples and places in their territories, tax exemptions, rights to hunt and fish, sovereign immunity protections, racial preferences, et cetera. Congress should also clarify, in partnership with tribes, what rights indigenous nations and their members possess and may exercise under their status as federal and state

16. 417 U.S. 535 (1974).

17. 528 U.S. 495 (2000).

citizens, or as sub-units, and as governments, when they are using funds for highways, providing certain social services, such as unemployment compensation, and so on. They should then educate the American public about how these two broad statuses, tribes as sovereign nations whose citizens are also citizens of the United States and the states, are not irreconcilable.

Finally, Congress should clarify its own responsibilities in the field of Indian affairs. When tribes are statutorily accorded a status of corporation, or are treated as states for purposes of environmental and tax laws, are these political statuses that trace back to their aboriginal standing as preexisting sovereigns, or are they devolutions of federal power to the tribes, which, for purposes of the specific statute, act as federal instrumentalities or as arms of the federal government? That is a fundamental question to which we still do not have an answer.

This highlights one of the most important questions that tribal, federal, and state policymakers must address: Are tribes inherent sovereigns acting as policy partners with the United States and the states—which is generally the indigenous view—or are they units of government entitled to exercise only those powers expressly delegated to them by Congress? This is increasingly the view of a small but powerful group of United States policymakers and Supreme Court Justices. Until this fundamental question is resolved and formally incorporated at all governmental levels, the multitude of statuses indigenous peoples have, both collectively and individually, and the verifiable indigenous axis of insecurity will continue to proliferate, leading to even greater political, cultural, and inter-governmental confusion and tension.

Reflections on a Flawed System

Henry Sockbeson*

What is an Indian tribe? That is a question the federal government, and even tribes themselves have been struggling with for a long time. It doesn't seem like it's that hard of a question, really. You've all seen television and movies where the cowboys ride into a village where there has been an Indian attack. There is mayhem everywhere and arrows sticking out of prone bodies. One cowboy goes over and picks an arrow out of a body, looks at it, and wisely says, "Ah, Comanche!" or whoever. How did he know that? It seems pretty easy, as the cowboy knew where the Indian villages were located. He knew certain tribes had certain ways of marking or making arrows. He knew tribes dressed differently, spoke different languages, and had different religious beliefs. He knew and recognized that there were cultural differences between tribes. An uneducated cowpoke could figure all this out and could do so without the aid of anthropologists, historians, ethnographers, and mounds of documentation. So why is identifying a tribe as a tribe today that tough?

Well, life is a lot more complex today. We are no longer faced with tribes who necessarily speak their own distinct language. Often, particularly in the east where contact with outside cultures is as much as six hundred years old, the language is often dead or dormant. Tribes have intermarried with non-Indians and the objective differences between tribal members and the general public are not so easy to detect. Indeed, Donald Trump in his testimony to Congress once noted that the members of a certain federally recognized Indian tribe did not look like Indians to him. Tribes no longer depend exclusively upon hunting and fishing to sustain themselves and their distinctive characteristics to an outside observer, like our cowboy, are no longer so clear or easy to detect.

The issue is particularly complex here in the east. In our area, when you identify a tribe, you are often faced with a group of people that often had colonial ties. These ties were continued when the United States was formed. For literally hundreds of years the eastern tribes had official dealings with the various eastern states. The tribes sent delegates and

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petitions to states, and states often dealt exclusively with those tribes that they recognized within their borders. When a state has historically dealt with a particular group, often with land acknowledged by a state to be an "Indian reservation," it seems easier to determine whether a tribe exists or not. Presumably, at some point, the state will recognize that the tribe has died off or otherwise disappeared. One of the more difficult issues that is faced by the federal government today is when a historically recognized state tribe asks for recognition by the federal government. This has created immense problems for the federal government because, as a separate sovereign, the federal government has refused to accept state judgments as to who is and who is not a tribe for federal purposes.

The federal government is now faced with the task of determining when a group of people, who do not necessarily possess all of the attributes that our cowboy relied upon, is or is not a tribe for federal purposes. It's not as easy of a question for an outsider as it is for an insider, since, as an insider, you've lived the experience. Whereas, if you're looking at it from the outside, it is not as simple a question as you may think.

Traditionally, from the colonial era up until about the civil war period, the federal government dealt with the Indian tribes primarily through treaties. The federal government would enter an area they wanted to take over and would sign treaties with the various tribes. Such action was considered fairly conclusive for the federal government. It was clear that the federal government, at least at one point in time, said, "This group is an Indian tribe because we've dealt with them."

You would think a federal treaty would provide a good basis to say that whatever the process the federal government went through to recognize this group as an Indian group, it must make them a tribe, and, therefore, you can recognize a federal tribe by treaty today. Well, that is not so. In 1871, Congress, in its wisdom (and its jealousy of the exclusive prerogative of the executive branch to enter into treaties), passed legislation providing that the executive branch could no longer form treaties with the Indian tribes.[1] As a result, the treaty-making approach now fails.

Actually, even during the treaty era, federal efforts at recognition pretty much failed. Even when the United States entered into treaties with Indian tribes it did not do a very good job. The United States signed treaties with what they recognized as tribes, but many times they actually were splinter groups of larger tribes. Plus, the federal government did not form treaties at all, for the most part, on the east coast where many Indian tribes existed, and of which everybody was aware.

You have to remember that a treaty was not conducted by ethnologists or

1. *See* Act of Mar. 3, 1871, ch. 120, § 1, 16 Stat. 566 (codified as amended at 25 U.S.C. § 71 (2000)).

historians or any other type of professional that one would bring to the table today. Generally, the treaty process was conducted by a military officer who was sent out into the field with an objective that was in direct conflict with the establishment of government-to-government relationships with the various tribes. Rather, the primary driving purpose behind the treaty-making process was to take Indian land. Legal niceties about which group was this group, which tribe was here, which tribe was there, and what territory constituted what, was secondary to their goal. Even during the treaty-making era, the ability of the federal government to determine tribal recognition was not above question.

Subsequent to the treaty period, which ended in 1871, and until the adoption of federal recognition regulations, the federal government made recognition decisions through legislation, basically on an ad hoc basis. As problems arose, they were resolved through legislation, or the President issued executive orders.

In California, a particularly shameful episode took place when treaty commissioners were sent to negotiate treaties with the tribes in that state. I think, overall, more than a hundred treaties were eventually signed. However, all of the treaties were subject to ratification by the Senate, yet none of them were actually ever ratified—something about the discovery of gold occurring around the same time that the treaties were scheduled to be ratified. It was very convenient to forget about the treaties and, in fact, that is exactly what occurred. The Senate simply ignored the treaties and sealed the records. In fact, with respect to those treaties, Congress never recognized nor ratified them.

Instead, the President created what were called "executive order reservations," which was another means by which an Indian group could achieve federal recognition as a tribe. Again, the President did less than a stellar job in that regard. For example, with the Yurok and Hoopa reservation in California, it was not made clear just exactly to which tribe the reservation belonged.[2] More than two tribes resided on the reservation that was created, and the executive order did not clarify exactly who was entitled to share in what resources within the two geographically distinct portions of the reservation. This discrepancy lead to thirty years of litigation in an attempt to resolve the issue of how, once the President had established the reservation, the assets of that reservation were to be shared among those tribes who were residents. Thus, the executive branch did not do a particularly good job in establishing reservations or recognizing Indian tribes, as well. Even subsequent to 1871, after tribes were recognized

[2] *See generally* Amy C. Brann, Karuk Tribe of California v. United States: *The Courts Need a History Lesson*, 37 NEW ENG. L. REV. 743 (2003) (analyzing the dispute that arose out of the creation of the executive order reservation).

primarily by a treaty or an executive order, nobody thought very much about the need to establish a list of Indian tribes that would cover the entire United States.

The first time the question of federal recognition truly became articulated by the federal government occurred in 1934, under what is called the Indian Reorganization Act.[3] Under the Indian Reorganization Act, only Indians who were recognized as eligible to vote could organize under this Act. There was, for the first time, a list of 258 Indian tribes, and the federal government said, "These are the tribes that can go through this process to be organized under the Act." Up until 1934, as I said, tribal recognition was pretty much an ad hoc process. After the Indian Reorganization Act, a federal qualifications process developed, and a group could not receive federal services unless they were on the list. Of course, many tribes wanted to be on the list. They discovered, "Hey, we're not on the list! We're here. We've always been here. We should be on the list! How do we get on the list?"

Felix Cohen, the Solicitor at the time, was the first to attempt his hand at a resolution. Cohen thought about what the criteria should be in order for a tribe to be recognized as an Indian tribe, and he outlined five criteria to be met. Predictably enough, the first thing on the list was that the group had to have a treaty. (Now the reason this does not help much is pretty self-evident, I think.) Cohen then went on to say that the group must have been denominated a tribe by an act of Congress or by an executive order. So, if a group had a prior problem that had been solved by Congress, then they were in good shape. However, if the group did not have a prior problem that had been solved by Congress, then matters did not look so good. The same dilemma existed with the executive order issue. The third criteria Cohen identified was that the group must have been treated as possessing "collective rights" in tribal lands or funds even though they were not expressly designated a tribe. In other words, if the federal government held tribal land in trust for the tribe, even if the tribe was not technically recognized as a tribe, they were in good shape. The fourth criteria was that other Indian tribes must have treated the group as a tribe. This criteria was particularly helpful and seemed to be the most reliable way of recognizing an Indian tribe. If other Indians recognize a group as an Indian tribe that seems to be fairly strong evidence that the group should be federally recognized. The final and fifth criteria was that the group must exercise political authority over its members through a tribal council or other governmental form.

So that, in a nutshell, was the Cohen criteria. Many tribes actually went

3. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–79 (2000)).

through a recognition process, if you will, via the solicitor's office and the Bureau of Indian Affairs (BIA). The tribe would apply to the BIA saying, "We have this issue, and we want to become eligible for services." The Office of the Solicitor, who represents the BIA as its "in house" advisor, would conduct an investigation, and, through application of the Cohen criteria, they would issue a ruling that the tribe was or was not entitled to services. During the 1930s and 1940s, a number of Indian tribes were recognized through that process via the solicitor's office.

Now, with all due respect to my co-panelists, those conducting the investigations were attorneys and not historians. They received advice, of course, but the process was not much more formalized than that. There was an attorney, an investigation (not on the record), perhaps a hearing with evidence, and then a ruling was issued. I am not aware of any administrative appeals of this process, so recognition was pretty much an administrative process without Congressional approval.

Now something happened in the 1970s that greatly impacted the process. In 1975, the Passamaquoddys, along with the Penobscots, filed suit in Maine and claimed ownership to about two thirds of the State of Maine. The reason they made this claim was because they held a 1794 treaty with Maine, which was actually Massachusetts at the time, under which the State extinguished the Passamaquoddy and Penobscot land and reduced it to its then current land base. Through the treaty, the State took a great deal of land.

However, in 1790, four years prior to the treaty, Congress passed the Non-Intercourse Act,[4] which stated that "[n]o purchase, grant, lease, or other conveyance of lands ... from any Indian nation ... shall be of any validity in law or equity, unless the same be made by treaty ... entered into pursuant to the Constitution."[5] Basically, Congress established a means of extinguishing Indian title and reserved it solely to itself. To extinguish Indian title there had to be a federal treaty. A state treaty was insufficient. As the Passamaquoddys and the Penobscots had given up their land via a state treaty, that conveyance, under the federal Non-Intercourse Act, was invalid. The tribes sued to require the United States to pursue the claim for them.[6]

In determining the case, the Court looked at the Non-Intercourse Act and saw that it said "from any Indian nation."[7] The State of Maine accepted that

4. Indian Non-Intercourse Act, ch. 161, § 12, 4 Stat. 730 (1790) (codified as amended at 25 U.S.C. § 177 (2000)).

5. *Id.*

6. *See* Joint Tribal Council of Passamaquoddy Tribe v. Morton, 388 F. Supp. 649 (D. Me. 1975).

7. *Id.* at 652.

the Passamaquoddys and the Penobscots were actually tribes. In fact, I believe the State admitted to that as one of a series of admissions during the litigation. In reaching its decision, the Court simply read the statute and saw that in fact there was an Indian tribe. Neither the Passamaquoddys nor the Penobscots held a treaty with the United States government, nor was an executive order issued with respect to them. Yet, there they were. So the Court said, and the State of Maine admitted, "Yes, you are a tribe, and the Non-Intercourse Act is applicable to you."

The decision was very interesting, as it basically threw everything in the garbage, as far as the federal government was concerned, on how tribes were recognized. It was no longer only executive orders, legislation, or treaties that recognized tribes. Rather, there was this other means. If there is a tribe "in fact," then they are entitled to federal protections; and, once that door is opened, there is a whole plethora of other things they are entitled to as a federal tribe.

Another case was decided, around the same time, but on the other side of the country. In *United States v. Washington*,[8] the tribes in Washington State asserted a right to fish for salmon, as they had for thousands of years—the exception being that they wanted to now sell the salmon commercially. The Ninth Circuit held, in that case, that Indian tribes in the Pacific Northwest that exercised treaty fishing rights were entitled to one-half of the commercial catch from the State of Washington. The holding, however, limited this entitlement to tribes that possessed signed treaties and to other tribes that were federally acknowledged.[9] Such a limitation placed a lot of pressure on west coast tribes, who, although they had been there for thousands of years, were ineligible to share in the good fortune of the case simply because they were not federally recognized.

Returning back to the east side of the country where the Passamaquoddys and the Penobscots were saying, "We are here. We have proved it, and we are able to go forward," the BIA was presented with a bit of a problem. All of a sudden there were Indian tribes on the west coast who found it essential to become recognized, and there were Indians on the east coast who were successful in achieving recognition through their court case by proving that they were tribes "in fact." This whole situation was brought to a head in *Stillaguamish Tribe v. Kleppe*,[10] in which the court ordered the BIA to issue a decision on the tribe's application for recognition within thirty days. This case forced the BIA to act on a request for "recognition" and placed a lot of administrative pressures on the BIA to

8. 520 F.2d. 676 (9th Cir. 1975).

9. *See id.* at 692-93.

10. No. 75-1718 (D.D.C. 1976), *cited in* DAVID GETCHES, ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 356 (4th ed. 1998).

establish a coherent means of processing tribal claims for recognition.

Partly, as a result of these cases, a large number of tribes previously unrecognized by the United States, stepped forward to say, "Please recognize me," and the BIA was under pressure from the courts saying, "Do something. Recognize them or not." It was in the context of these pressures that the BIA attempted to establish a means of developing regulations that, for the first time, attempted to set out in a relatively organized fashion, a means of extending federal recognition to tribes.

The federal regulations established basically set forth the criteria a tribe must meet in order to obtain federal recognition.[11] There are seven that I consider to be "major criteria." First, the group must be identified as being an American Indian entity since 1900. Second, the group must have been a distinct community from historic times to the present. Third, the group must have maintained political influence over members of the tribe from historic times to the present. Fourth, the group must have a governing document of some sort that addresses issues such as membership and governing procedures. Fifth, the group must show that its members are descendents of an historic Indian tribe. Sixth, the group must show that its members are not members of another tribe. Seventh, the tribe must not have been previously terminated by the federal government. These are the major criteria the BIA applies. One must look at the full, detailed regulations to see all of the additional things a group may use to prove these major criteria.

Dr. Jack Campisi will have a good deal to say, I'm sure, about the process he and I both went through with the Wampanoag Tribe of Gay Head. Jack was primarily responsible for the recognition aspects for the Wampanoag Tribe, while I handled the settlement aspects. The process itself was extremely convoluted. The process took approximately five years to complete, which nowadays is considered record time. Today, tribes are faced with a fifteen-year waiting period, if not longer. For example, I worked on the Mashpee tribe's application when I was in law school back in the 1970s, and they still are not recognized. It is an incredibly time-consuming process. I won't go through the administrative steps, but I urge you to look at the regulations and see for yourselves. A good deal is wrong with the process, but Jack is far more qualified to discuss it than I. However, I will say that Indian tribes today are faced with a bureaucratic morass. The United States, even when recognition was cognitive as with our cowboy example, never did a particularly stellar job in recognizing tribes, and now, when the decision is more difficult, they are doing a fairly miserable job.

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11. *See* Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 25 C.F.R. § 83.7 (2003).

These days, gaming has reared its head and injected itself into the process, raising the stakes much higher than they were before. When Jack and I were dealing with the Wampanoag Tribe, it was just an issue of, "Are they going to be a federal tribe? Are they going to have recognition?" The tribe in that case had actually said they were not interested in having Bingo on Gay Head, so gaming was never a factor. Even under those circumstances, it took us five years and an incredible amount of money, time, and expertise. Now, the issue is even more complicated. Local communities do not want gaming in their community so, very often, they're organized to fight. They have lawyers, and we have lawyers, and it all just spirals out of control. That is the background of the situation we are in and how we got there. It has never been a clean process. It has never been a good process. I think now it has become an impossible process.

Thank you for your attention.

Tribal Status Decision Making: A Federal Perspective on Acknowledgment

Barbara N. Coen*

Historically, the federal government and the U.S. Department of the Interior made determinations as to which Indian groups were tribes when negotiating treaties and determining which groups could reorganize under the Indian Reorganization Act.[1] This prior ad hoc decision-making was made uniform with the adoption of the federal acknowledgment regulations in 1978.[2] These regulations delineate the criteria, standard of evidence, burden of proof, and administrative procedures for federal acknowledgment utilized in determining whether a particular group is an Indian tribe. The essential regulatory requirement for administrative acknowledgment as an Indian tribe is that the group has existed continuously as a tribe with retained political powers.

THE LEGAL SIGNIFICANCE OF TRIBAL RECOGNITION

An administrative determination that a group is a tribe (i.e., that it merits federal acknowledgment, or recognition) establishes a government-to-government relationship between it and the United States. A positive determination under the regulations means that the group has inherent

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1. 25 U.S.C. §§ 461–479 (1934).

2. The federal acknowledgment regulations became effective in October 1978 and were originally codified at 25 C.F.R. Part 54. *See* 43 Fed. Reg. 39,361 (Sept. 5, 1978). In 1982, they were renumbered 25 C.F.R. Part 83 without other changes. *See* 25 C.F.R. §§ 83.1–83.13 (1982). In 1994, the regulations were amended, but "[n]one of the changes made ... [would] result in the acknowledgment of petitioners which would not have been acknowledged under the previously effective acknowledgment regulations. Neither [would] the changes result in the denial of petitioners which would have been acknowledged under the previous regulations." 59 Fed. Reg. 9280 (Feb. 25, 1994).

sovereign authority independent of the state in which it is located and independent of the United States, although it remains a domestic dependent nation.[3] A group acknowledged under the regulations has continuously existed throughout history. A tribe, consequently, has sovereign immunity and may exercise jurisdiction over its territory and establish tribal courts, administer funds under the Indian Self-Determination and Education Assistance Act,[4] establish gaming facilities under the Indian Gaming Regulatory Act,[5] bring a land claim under the Indian Trade and Non-Intercourse Act,[6] exercise treaty hunting and fishing rights, and obtain other federal benefits and exercise their own sovereign authority, except as limited by federal law.[7] General prohibitions or limitations also apply to federally recognized tribes. For example, possession of liquor is prohibited in Indian country absent publication of a certified liquor ordinance,[8] and the sale of land is limited.[9] Thus, a determination that a group is or is not a tribe is a decision with significant impacts on the group itself, federal and state governments, other Indian tribes, and non-Indians.[10]

THE ADMINISTRATIVE PROCESS, 25 C.F.R. PART 83

The primary impetus for formalizing the decision-making process concerning tribal status was the increase in the number of petitions from groups throughout the United States requesting that the Secretary of the Interior officially acknowledge them as Indian tribes.[11] Treaty rights

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3. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

4. Pub. L. No. 93-638, §§ 2–110, 88 Stat. 2203 (1975) (codified as amended at 25 U.S.C. §§ 450–450n (2000)).

5. Pub. L. No. 100-497, §§ 1–22, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701–2721 (2000)).

6. Act of June 30, 1834, ch. 161, § 12, 4 Stat. 730 (codified as amended at 25 U.S.C. § 177 (2000)).

7. Acknowledgment does not create immediate access to existing programs, but places the newly acknowledged tribe in the budgetary cycle. *See* 25 C.F.R. § 83.12(c)-(d) (2003).

8. *See* 18 U.S.C. §§ 1156, 1161 (2000).

9. *See* 25 C.F.R. §§ 83.2, 83.11 (2003).

10. The list of federally recognized tribes is published in 67 Fed. Reg. 46,328–33 (July 12, 2002) and includes 562 tribes.

11. *See* 43 Fed. Reg. 39,361 (Sept. 5, 1978). When the regulations were adopted in 1978, over forty requests for recognition of tribal status were pending, and the Department was aware of an additional 130 potential petitioners. *See* Memorandum from Dennis L. Petersen, Chief, Division of Tribal Government Services, to the Director of the Office of Indian Services 3 (Oct. 31, 1977) (on file with author). *See also Oversight of the Federal Acknowledgement Process and the Federal Acknowledgement Project of the Bureau of Indian Affairs: Hearings Before the Senate Select Comm. on Indian Affairs*, 96th Cong. 44 (1980).

litigation on the West coast, such as *United States v. Washington*,[12] and land claims litigation on the East coast, such as *Joint Tribal Council of Passamaquoddy v. Morton*,[13] highlighted the importance of these tribal status decisions. The underlying premise in both cases is that the plaintiff had to be a tribe in order to have standing to assert treaty rights or claims to aboriginal title.[14] The conclusion in both cases was that Indian tribes, even if not presently recognized by the federal government, could possess treaty rights or be within the purview of federal statutes. In the wake of these decisions, the Department reexamined how it implemented congressional intent extending federal protection to "Indian tribes." The resulting federal acknowledgment process reflects the Department's position that it has obligations to all Indian tribes encompassed by federal statute, whether listed on the Federal Register list of recognized tribes or not.

The United States Constitution, Article 1, Section 8, provides Congress with the power to regulate commerce with Indian tribes, and Congress has delegated implementation of its statutes dealing with Indian affairs to the Department of the Interior.[15] Pursuant to this statutory authority, the regulations governing the process were issued following notice and comment rulemaking under the Administrative Procedure Act (APA).[16]

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12. 384 F. Supp. 312, 379 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

13. 528 F.2d 370 (1st Cir. 1975).

14. *United States v. Washington* determined which Indian groups were "tribes," i.e., successors in interest to treaty tribes, and therefore entitled to exercise treaty fishing rights even though they were not "recognized" as tribes by the federal government. *See Washington*, 384 F. Supp. at 379, 406 (holding that the Stillaguamish Tribe was a successor to a treaty tribe and entitled to exercise treaty fishing rights even though it was not recognized as an Indian governmental entity by the federal government). In *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, the Department stipulated that the Passamaquoddy and the Penobscot were tribes, but argued that the Indian Trade and Non-Intercourse Act, 25 U.S.C. § 177, applied only to tribes with whom the United States had dealings in the past, and thus, the Act was not applicable to tribes in the original colonies, which historically were treated as tribes solely by the colonies and subsequently by the States. *See* 528 F.2d at 373, 376. The court disagreed and held the Act applicable to any Indian tribe, whether or not it had been "recognized" by the federal government through past dealings. *Id.* at 377. Thus, the Department was required to consider whether to bring a land claim against the State of Maine on behalf of the Passamaquoddy and Penobscot tribes, which the Department stipulated were tribes but were not considered federally "recognized." *Id.* 380–81.

15. *See* 43 U.S.C. § 1457 (2000). *See also* 25 U.S.C. §§ 2, 9 (2000).

16. 5 U.S.C. § 553 (2000). The Secretary of the Interior's authority to promulgate the regulations was upheld in *James v. U.S. Department of Health and Human Services*, 824 F.2d 1132, 1137 (D.C. Cir. 1987) (finding that Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and Indian relations). *See also* Miami Nation of Indians of Indiana, Inc. v. Babbitt, 887 F. Supp. 1158, 1165 (N.D.

The preamble to the regulations provides an overview of the extensive public input into the regulations—by recognized tribes, petitioners, states, legal representatives of petitioning groups, and the general public—in formulating the criteria for acknowledgment, the burden of proof, and the procedures themselves.[17]

The administrative process starts when a group petitions for acknowledgment as an Indian tribe and submits its documented petition to demonstrate its continuous existence. The minimum time for the decision-making process, from the start of active consideration of a petitioner's documented petition, is twenty-five months.[18] This time period includes: the evaluation of the petition; issuance of the proposed finding or preliminary decision; comment periods on the proposed finding by the petitioner, interested parties, and the general public; and issuance of the final determination.[19] The regulations permit extensions of time, commonly requested by petitioners and to a lesser extent interested parties, which extend the time period from the start of active consideration to the issuance

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Ind. 1995) (finding that acknowledgment regulations were promulgated under Congress' delegation of authority to the President and to the Secretary to prescribe regulations concerning Indian affairs and relations), *aff'd*, 255 F.3d 342, 346 (7th Cir. 2001), *cert. denied*, 534 U.S. 1129 (2002); United Tribe of Shawnee Indians v. United States, 253 F.3d 543, 549 (10th Cir. 2001) (finding that the Bureau of Indian Affairs has been delegated the authority to determine whether recognized status should be accorded to previously unrecognized tribes); Kahawaiolaa v. Norton, 222 F. Supp. 2d 1213, 1215 (D. Haw. 2002) (pending appeal) (finding that, pursuant to the Department's authority to adopt regulations to administer Indian affairs, the Department adopted comprehensive regulations that govern its decisions concerning tribal status); *and* Burt Lake Band of Ottawa and Chippewa Indians v. Norton, 217 F. Supp. 2d 76, 77 (D.D.C. 2002) (stating that "[p]ursuant to this delegation of authority to [the Department], BIA promulgated regulations establishing procedures for federal recognition of Indian groups as Indian tribes").

17. *See* Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 39,361 (Sept. 5, 1978) (presently codified at 25 C.F.R. Part 83 (2003)). As stated in the preamble to the 1978 regulations, when the final comment period on the proposed acknowledgment regulations closed, the amount of consultation and discussion was unprecedented, comprising:

> [A] total of 400 meetings, discussions and conversations about Federal acknowledgment with other Federal agencies, State government officials, tribal representatives, petitioners, congressional staff members, and legal representatives of petitioning groups; 60 written comments on the initial proposed regulations of June 16, 1977; a national conference on Federal acknowledgment attended by approximately 350 representatives of Indian tribes and organizations; and 34 comments on the revised proposed regulations, published on June 1, 1978.

43 Fed. Reg. 39,361 (July 3, 1978).

18. There is no prescribed time period in which a group must submit its documentation.

19. *See* 25 C.F.R. Part 83 (2003).

of the final determination.[20] In addition, the process takes longer to complete if a request for reconsideration is filed before the Interior Board of Indian Appeals.[21]

Critical to the decision-making process is the evaluation of the petition materials by the Department's professional staff, the Branch of Acknowledgment and Research (BAR) in the Bureau of Indian Affairs (BIA).[22] This review is conducted by a professional research team—usually composed of a cultural anthropologist, an historian, and a genealogist—who evaluate the evidence according to the methods and standards of their professions.[23] This professional staff—with specialized knowledge and experience in acknowledgment, uniformly applying the regulations, and resolving complex factual issues within its realm—is key to the deference accorded the administrative decision.[24] The result of the process is a decision based on an extensive factual analysis, with administrative records currently ranging in excess of 30,000 pages to over 100,000 pages.[25]

The regulatory process is a public and open process. It includes informal technical assistance, where the petitioner and its researchers, or interested parties and their researchers, consult directly with the BAR researchers about the petition materials and suggested research.[26] It includes an extensive public comment period on the proposed finding.[27] The regulations provide also for a formal "on the record" technical assistance meeting, during which the petitioner and interested parties may question the Department's researchers about the proposed finding and the evidence, following an agenda prepared in the first instance by the party requesting the meeting.[28] Finally, there is independent review by the Interior Board of Indian Appeals (IBIA) through which the petitioner or interested party can challenge the final determination on four enumerated grounds before it is effective.[29] During this IBIA administrative review, the Assistant Secretary–Indian Affairs and the BIA are neutral and do not defend the

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20. *See id.*

21. *See* 25 C.F.R. § 83.11(a)(1) (2003).

22. *See* United States v. 43.47 Acres of Land, 45 F. Supp. 2d 187, 193 (D. Conn. 1999) (citing James v. U.S. Dep't. of Health and Human Services, 824 F.2d 1132, 1138 (D.C. Cir. 1987)).

23. *See id.*

24. *See id.*

25. *See Work of the Dep't of the Interior's Branch of Acknowledgment and Research within the Bureau of Indian Affairs: Hearing Before the Sen. Comm. on Indian Affairs*, 107th Cong., 2d Sess. 2, 19–20 (2002) [hereinafter *Hearing*].

26. *See* 25 C.F.R. § 83.10(j)(1) (2003).

27. *See id.* at § 83.10(i).

28. *See id.* at § 83.10(j)(2).

29. *See id.* at § 83.11(d).

final determination.[30] The IBIA review may result in vacating the final determination, affirming it, or referring issues to the Secretary as possible grounds for reconsideration of the final determination.[31] As a result of this open process, conclusions in proposed findings and in final determinations can be clarified, modified, or reversed.[32] Ultimately, the final and effective final determination is subject to judicial review under the APA.[33]

CONTINUOUS EXISTENCE OF A COMMUNITY EXERCISING POLITICAL INFLUENCE OR AUTHORITY IS THE CORE REQUIREMENT UNDER THE REGULATIONS

The essential requirement for acknowledgment as an Indian tribe by the Secretary of the Interior is that the group has existed continuously as a community with retained political powers.[34] It is those groups that the Department considers to be "Indian tribes" for purposes of implementing federal statutes.[35] The mandatory criteria in the regulations all focus on establishing this continuous existence—the continuation of the political

30. *See* 59 Fed. Reg. 9280, 9292 (Feb. 25, 1994).

31. *See* 25 C.F.R. § 83.11(e)(9)–(11) (2003).

32. For instance, negative proposed findings have become positive final determinations based on new evidence. *Compare* Proposed Finding Against Federal Acknowledgment of the Mohegan Tribe of Indians of the State of Connecticut, 54 Fed. Reg. 47,136 (Nov. 9, 1989), *and* Proposed Finding Against Federal Acknowledgment of the Wampanoag Tribal Council of Gay Head, Inc., 51 Fed. Reg. 23,604 (1986), *with* Final Determination that the Mohegan Indian Tribe of Connecticut, Inc., Does Exist as an Indian Tribe, 59 Fed. Reg. 12,140 (Mar. 15, 1994), *and* Final Determination for Federal Acknowledgment of the Wampanoag Tribal Council of Gay Head, Inc., 52 Fed. Reg. 4193 (1987). Even a positive final determination is not immune from reversal in the administrative process before it becomes effective. *Compare* Final Determination to Acknowledge the Chinook Indian Tribe/Chinook Nation (Formerly: Chinook Indian Tribe, Inc.), 66 Fed. Reg. 1690 (Jan. 9, 2001), *with* Reconsidered Final Determination to Decline to Acknowledge the Chinook Indian Tribe/Chinook Nation, 67 Fed. Reg. 46,204 (July 12, 2002).

33. 5 U.S.C. § 706 (2000).

34. *See* 25 C.F.R. § 83.7 (2003).

35. The regulations were upheld in *Miami Nation of Indians of Indiana, Inc. v. Babbitt*, 887 F. Supp. 1158 (N.D. Ind. 1995), *aff'd, Miami Nation of Indians of Indiana, Inc. v. U.S. Department of the Interior*, 255 F.3d 342 (7th Cir. 2001), *cert. denied*, 534 U.S. 1129 (2002), and in *United Houma Nation v. Babbitt*, 1997 WL 403425 (D.D.C. 1997). Also, the regulations withstood a challenge brought by Native Hawaiians claiming that the regulations were unconstitutional because they excluded from their purview indigenous peoples of Hawaii. *See* Kahawaiolaa v. Norton, 222 F. Supp. 2d 1213, 1220–22 (2002) (holding that the regulations "effectuate congressional policy with respect to Native Hawaiians in the sense that Congress has not, as of yet, decided to enter into a government-to-government relationship" with Native Hawaiian groups, and supplanting Congress' decision presents a non-justiciable political question).

entity. Descent from the same tribe is required, but alone is not sufficient.[36]

The underlying premise of this requirement—to demonstrate continuous tribal existence of the group—is that a tribe is a political, not a racial, classification.[37] Thus, under the acknowledgment regulations, a tribe is *not* a collection of persons of Indian ancestry, *unless* they and their ancestors are part of a continuously existing political entity.[38] As stated in the preamble to the 1978 regulations: "Although petitioners must be American Indians, groups of descendants will not be acknowledged solely on a racial basis. Maintenance of tribal relations—a political relationship—is indispensable."[39] Historically, the Department implemented this standard of continuous existence as well.[40]

This requirement of continuous existence is stated in *United States v. Washington*:

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36. *See* 25 C.F.R. § 83.7 (2003).

37. *See* Morton v. Mancari, 417 U.S. 535, 553, n.24, 554 (1974), *cited with approval in* Rice v. Cayetano, 528 U.S. 495, 518–20 (2000).

38. *See* 25 C.F.R. § 83.3(a), (c) (2003). According to the court in *United Houma Nation v. Babbitt*, Civ. No. 96-2095 (JHG):

> [C]ase law is persuasive and clearly outlines the fundamental distinction between the political classification of groups as Indian tribes and the racial classification of persons as Indians.... This [distinction] is the premise underlying the defendants' succinct statement that "miscellaneous Indians do not make a tribe."

1997 WL 403425 at *7 (D.D.C. July 8, 1997).

39. 43 Fed. Reg. 39,361–62 (Sept. 5, 1978); *see also* Masayesva v. Zah, 702 F. Supp. 1178, 1187 (D. Ariz. 1992) (upholding the agency's interpretation of its regulations that a "tribal roll" must reflect the maintenance of a bilateral political relationship). The community criterion and political authority criterion each provide a list of evidence that is sufficient in itself to demonstrate the criterion at a particular point in time. *See* 25 C.F.R. § 83.7(b)(2), (c)(2) (2003). Also, the regulations provide examples of evidence that in combination is sufficient to demonstrate criteria (b) and (c). *See* 25 C.F.R. § 83.7(b)(1), (c)(1) (2003).

40. As stated in a 1938 Solicitor's Opinion concerning whether the Miami and Peoria Indians are recognized tribes for purposes of organization under the Oklahoma Indian Welfare Act:

> It is not enough that the ethnographic history of the two groups shows them in the past to have been distinct and well-recognized tribes or bands. A particular tribe or band may well pass out of existence as such in the course of time. The word "recognized" as used in the Oklahoma Indian Welfare Act involves more than past existence as a tribe and its historical recognition as such. There must be a currently existing group distinct and functioning as a group in certain respects and recognition of such activity must have been shown by specific actions of the Indian Office, the Department, or by Congress.

Nahan R. Margold, Memorandum to the Commissioner of Indian Affairs, 1938 WL 6850 (Sol.) (1938).

> We have defined a single necessary and sufficient condition for the exercise of treaty rights by a group of Indians descended from a treaty signatory: the group must have maintained an organized tribal structure .... For this purpose, tribal status is preserved if some defining characteristic of the original tribe persists in an evolving tribal community.[41]

The Seventh, Ninth, and Tenth Circuits all reject the notion that there is a presumption of continuous tribal existence. As stated by the Ninth Circuit in *United States v. Washington*: "We reject their argument that, because their ancestors belonged to treaty tribes, the[y] ... benefited from a presumption of continuing existence."[42] Along the same lines, the Tenth Circuit rejected the argument that because the Shawnee tribe was recognized as a tribe in an 1854 treaty, that the United Tribe of Shawnee Indians (UTSI), alleged descendants from it, must therefore be included on the Federal Register list of recognized tribes:

> UTSI's argument assumes the very factual issue at the heart of this litigation.... While this fact [of descent] may establish that [plaintiff's] ancestor was a member of the Shawnee tribe and that [plaintiff] is therefore a descendant of a tribal member, it says nothing about whether UTSI has maintained its identity with the Shawnee tribe and has continued to exercise that tribe's sovereign authority up to the present day. While the 1854 Treaty and *The Kansas Indians* recognized the sovereignty of the Shawnee Tribe in the nineteenth century, those events without more do not speak to the status of UTSI today.[43]

Finally, the Seventh Circuit rejected the argument that it was the Department's burden to show that the group voluntarily abandoned its tribal relations, rather than the burden of the petitioning group to document its political continuity: "And what sense would that make? Few nations dissolve or disband voluntarily.... If a nation doesn't exist, it can't be recognized, whether or not it ceased to be a nation voluntarily."[44]

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41. 641 F.2d 1368, 1372–73 (9th Cir. 1981), *cert. denied* 454 U.S. 1143 (1982). *See also* United States v. State of Oregon v. Confederated Tribes of Colville Reservation, 29 F.3d 481, 484, *amended by*, 43 F.3d 1284 (9th Cir. 1994), *cert. denied*, 515 U.S. 1102 (1995) (in determining whether a tribe can assert a treaty claim, look to whether the "group has preserved its tribal status" and whether "tribal continuity has been maintained").

42. 641 F.2d at 1374.

43. United Tribe of Shawnee Indians v. United States, 253 F.3d 543, 548 (10th Cir. 2001).

44. Miami Nation of Indians of Indiana, Inc. v. U.S. Dept. of the Interior, 255 F.3d 342, 350 (7th Cir. 2001). The district court in *Miami Nation of Indians of Indiana* was even more express. It found that Congress has not exhibited a plain intent to recognize "all Indian tribes," much less "that all groups claiming to be Indian tribes be recognized as such." Miami Nation of Indians of Indiana, Inc. v. Babbit, 887 F. Supp. 1158, 1168–69 (N.D. Ind.

Similarly, district courts have followed suit. As stated succinctly in *Burt Lake Band v. Norton*, "historical recognition by the Executive Branch does not allow a [group] to bypass BIA, even if the recognition occurred in a treaty.... Accordingly, neither the Treaty of Washington nor the Treaty of Detroit excuses plaintiff from exhausting its administrative remedies."[45]

This requirement of continuous existence is an inherent limitation on the administrative authority to acknowledge a tribe. The significance of this requirement is that the administrative decision to acknowledge a tribe acknowledges that an inherent sovereign still exists. The Department is not "granting" sovereign status or powers to the group, nor is it creating a tribe made up of its Indian descendants, when it determines that a group is an Indian tribe. Rather, the Department is acknowledging that the sovereign has existed continuously since historic times, retaining its inherent powers.[46]

ISSUES TODAY

The primary mission of the BAR is to evaluate the evidence presented to determine if petitioning groups are Indian tribes, prepare recommended decisions for the Assistant Secretary–Indian Affairs, and assist in the defense of those decisions.[47] The professional staff, however, spends an

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1995). Furthermore, assuming that the tribal abandonment standard could result in a presumption of continued existence, the court noted that:

> [a]ny difference between "tribal abandonment" or "continuous existence" is merely a matter of semantics: if the regulations establish a permissible method for determining that a group continues to exist as an Indian tribe, then the regulations must also implicitly establish a method for determining whether the tribe has been abandoned.

Id. at 1169.

45. 217 F. Supp. 2d 76, 79 (D.D.C. 2002).

46. Issues arising from retained inherent sovereignty continue to be important issues before the Supreme Court. *See* C&L Enterprises v. Citizen Band Potawatomi Indian Tribe, 532 U.S. 411 (2001) (issues of sovereign immunity); Nevada v. Hicks, 533 U.S. 353 (2001) (issues regarding jurisdiction over persons and land); Bishop Paiute Tribe v. Inyo County, 275 F.3d 893 (9th Cir. 2002), *cert. granted*, 123 S. Ct. 618 (2002) (No. 02-281) (issues of sovereign immunity); Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001). There is also an impact on tribes, as newly acknowledged tribes seek to gain treaty fishing rights, see *Samish Indian Tribe, United States v. Washington*, Civ. No. C70-9213, Sub-proceeding No. 01-2 (W.D. Wash. Feb. 7, 2003), or raise issues of possible control over existing reservations. *See* 65 Fed. Reg. 8436, 8438 (Feb. 18, 2000) (regarding the Cowlitz Indian Tribe and the Quinault Indian Reservation).

47. Only two acknowledgment decisions have been reviewed on the merits by the courts under the APA. Both decisions were upheld by the district courts, affirmed on appeal, and denied certiorari by the Supreme Court. *See* Miami Nation of Indians of Indiana, Inc. v. Babbitt, 112 F. Supp. 2d 742 (2000), *aff'd*, 255 F.3d 342 (7th Cir. 2001), *cert. denied*, 534

estimated forty percent of its time on administrative matters, diverting them from the evaluation of the petitions. The most time-consuming administrative task is responding to requests for copies of documents under the Freedom of Information Act (FOIA).[48] Specifically, under the FOIA and the Privacy Act,[49] certain privacy material must be redacted from documents before they are released to the public. In documented petitions, this privacy material is found throughout the extensive administrative record. The documents must be reviewed and redacted line by line, based on a balancing of the individual's privacy interests with the public's right to know.

The General Accounting Office (GAO) recently reviewed the acknowledgment process and made two recommendations.[50] First, the Department is to provide a clearer understanding of the bases of the acknowledgment decision by developing and using transparent guidelines to interpret key aspects of the criteria.[51] Second, the Department needs to make the decision-making process more timely.[52]

The Department's initial response to the GAO report is included as Appendix IV of the report.[53] The Department's *Strategic Plan* dated September 12, 2002, which is a more detailed response to the recommendations in the GAO report, includes a plan to make acknowledgment precedents more accessible and to provide clearer guidelines to the regulations in order to ensure consistency in the decisions and to improve public understanding of, and public confidence in, the acknowledgment decisions.[54] It also includes an analysis of the workload and needs assessment for the BAR.[55]

As part of the Department's response to the GAO, and as a result of negotiations in litigation, the BAR initiated, and has expanded use of, a pilot project called Federal Acknowledgment Information Resource

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U.S. 1129 (2002); Ramapough Mountain Indians, Inc. v. Norton, No. 98-2136, 2000 U.S. Dist. LEXIS 14479 (D.D.C. Sept. 30, 2000), *aff'd per curiam*, No. 00-5464, 2001 U.S. App. LEXIS 27805 (D.C. Cir. Dec. 11, 2001), *cert. denied*, No. 01-1730, 2002 U.S. LEXIS 5546 (Oct. 7, 2002).

48. *See* 5 U.S.C. § 552 (2000).

49. *See id.* at 552(a).

50. *See* INDIAN ISSUES, IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS, GAO-02-49 (Nov. 2001).

51. *See id.* at 20.

52. *See id.*

53. *See id.* at 39.

54. *See* DEP'T OF INTERIOR, STRATEGIC PLAN: RESPONSE TO THE NOVEMBER 2001 GENERAL ACCOUNTING OFFICE REPORT 2–3 (2002) [hereinafter STRATEGIC PLAN].

55. *See id.* at 7–17.

(FAIR), a database system for use in the evaluation of the petition.[56] The FAIR system provides on-screen access to all of the documents in the record, which are linked to entries of information extracted from them. It includes data extracts and a chronology of events from the documents submitted, and allows the tracking of persons involved in the group and their activities.[57] Qualified research assistants enter the initial set of data, which is supplemented by the professional researchers during their evaluation.[58] The system responds to both GAO recommendations. The basis of the decision is more apparent and more readily reviewable, and the use of research assistants for data entry frees the professional researchers to focus on evaluating and analyzing the evidence in the record.[59] The FAIR system itself allows faster access to and evaluation of the data, permitting more timely decisions.[60]

Another issue facing the administrative process is litigation under the APA challenging the time it takes for the Department to assign a team to review the documented petition and issue a decision.[61] The BAR is funded

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56. *See id.* at 13. *See also* BUREAU OF INDIAN AFFAIRS, SUMMARY UNDER THE CRITERIA AND EVIDENCE FOR PROPOSED FINDING, SCHAGHTICOKE TRIBAL NATION 4–5 (2002) [hereinafter SUMMARY] (prepared in response to a petition for federal acknowledgment submitted by a group).

57. *See* SUMMARY, *supra* note 56, at 4.

58. *See* STRATEGIC PLAN, *supra* note 54, at 13–14. *See also See* SUMMARY, *supra* note 56, at 4-5.

59. *See Hearing*, *supra* note 25, at 20–21.

60. *See id.* In addition, a federal court order prohibits the privacy material in the record from being released by the parties in the litigation. This order allows the Department to release the record to those parties without redaction while simultaneously preventing an unwarranted invasion of individual privacy. *See* United States v. 43.47 Acres of Land, No. H-85-1078 (PCD) (D. Conn. Feb. 2, 2001) (an example of one such order that was issued).

61. Since the Bush Administration took office in January 2001, it has issued proposed findings and final determinations in many cases. *See* Final Determination Against Federal Acknowledgment of the Duwamish Tribal Organization, 66 Fed. Reg. 49,966 (Oct. 1, 2001); Proposed Finding Against Federal Acknowledgment of the Nipmuc Nation, 66 Fed. Reg. 49,967 (Oct. 1, 2001); Proposed Finding Against Federal Acknowledgment of the Webster/Dudley Band of Chaubunagungamaug Nipmuck Indians, 66 Fed. Reg. 49,970 (Oct. 1, 2001); Reconsidered Decision for Federal Acknowledgment of the Cowlitz Indian Tribe, 67 Fed. Reg. 607 (Jan. 4, 2002); Reconsidered Final Determination to Decline to Acknowledge the Chinook Indian Tribe/Chinook Nation, 67 Fed. Reg. 46,204 (July 12, 2002); Proposed Finding Against Federal Acknowledgment of the Ohlone/Costanoan Muwekma Tribe, 66 Fed. Reg. 40,712 (Aug. 3, 2001); Final Determination to Decline to Acknowledge the Muwekma Ohlone Tribe, 67 Fed. Reg. 58,631 (Sept. 17, 2002); Final Determination to Acknowledge the Historical Eastern Pequot Tribe, 67 Fed. Reg. 44,234 (July 1, 2002) (made up of the Eastern Pequot and the Paucatuck Eastern Pequot petitioners) (request for reconsideration pending before IBIA); Proposed Finding Against Federal Acknowledgment of the Schaghticoke Tribal Nation, 67 Fed. Reg. 76,184 (Dec. 11, 2002);

through a lump-sum appropriation to the BIA's Office of Tribal Services (OTS). Established case law recognizes that the Executive has discretion in allocating lump-sum appropriations.[62]

As of mid-2002, the professional researcher staff included three cultural anthropologists, three historians, and three genealogists, permitting three interdisciplinary teams. Assuming that researchers can focus on the evaluation of petitions, it is estimated that each interdisciplinary BAR researcher team can produce one proposed finding and either one final determination or reconsidered determination per year.[63]

Before the BAR could commence a full review of their petition, the Muwekma and Mashpee petitioners separately challenged in court the anticipated delay.[64] Even though there is limited staffing in the BAR, and the BAR researchers followed the priorities established in the regulations and worked on petitions that were ready for consideration before the Muwekma and Mashpee were ready, the Muwekma and Mashpee argued that there was unreasonable delay in violation of the APA.[65] The litigation resulted in these particular petitioners receiving priority over other groups in contravention of the priority provisions in 25 C.F.R. § 83.10(d), as well as over other groups in active consideration.[66] The court orders also shortened the regulatory time period for the public to comment on the proposed findings.[67] The D.C. Circuit subsequently stayed the district court order in *Mashpee*,[68] whereas the Muwekma petition proceeded to a final determination.[69]

Simultaneously, litigation arose over attempts by the Department to speed the administrative process. For instance, the State of Connecticut and various Connecticut towns challenged changes made in certain internal administrative procedures designed to speed the administrative process.[70]

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and Proposed Finding Against Federal Acknowledgment of the Golden Hill Paugussett Tribe, 68 Fed. Reg. 4507 (Jan. 29, 2003).

62. *See generally* Lincoln v. Vigil, 508 U.S. 182 (1993).

63. *See* STRATEGIC PLAN, *supra* note 54, at 6.

64. *See* Muwekma Tribe v. Babbitt, 133 F. Supp. 2d 42 (D.D.C. 2000). *See also* Mashpee Wampanoag Tribal Council, Inc. v. Norton, 180 F. Supp. 2d 130 (D.D.C. 2001) (stay pending appeal).

65. *See Muwekma Tribe*, 133 F. Supp. 2d at 45–46. *See also Mashpee Wampanoag*, 180 F. Supp. 2d at 133–34.

66. *See Hearing*, *supra* note 25, at 21.

67. *See id.*

68. *See* Mashpee Wampanoag Tribal Council, Inc. v. Norton, No. 02-5139, 2002 U.S. App. LEXIS 11203 (D.C. Cir. July 10, 2002).

69. *See* Final Determination to Decline to Acknowledge the Muwekma Ohlone Tribe, 67 Fed. Reg. 58,631 (Sept. 17, 2002).

70. *See* Connecticut v. Dept. of the Interior, No. 3:01-CV-88-AVC (D. Conn. Jan. 18,

In one case, the Department and the other parties negotiated a time schedule for processing the petition.[71] The court-approved agreement included a time period for the submission of materials to the Department before the BAR would commence review of the petition. It also included time schedules for issuing the proposed finding, for release of the documents used for the proposed finding, for comment, for formal technical assistance, and for issuance of the final determination.[72] Extensions of time were permitted only through the court. This procedure addressed interested parties' concerns that the BAR not commence its review before they submitted their documents. It also addressed the BAR's concern that the record be set during their review, and addressed the petitioner's concern that it be evaluated under a set time schedule. Thus far, the negotiated schedule has minimized the extensions requested by petitioners and interested parties, and has provided for a more orderly processing of the petition.[73]

In recent hearings on the acknowledgment process, Congress acknowledged its responsibility for the limited funding available to the BAR and asked extensive questions concerning the recent judicial branch decisions that impacted the priorities and time periods established in the regulations.[74] "The Congress is primarily responsible for the inadequate resources, both financial and personnel resources, that are provided for the Branch of Acknowledgment to carryout [sic] its work."[75] Simultaneously, the Senate voted on whether to impose a moratorium on acknowledgment decisions as requested by some members of Congress.[76]

CONCLUSION

The significant impact of federal acknowledgment decisions has brought to the forefront the respective and potentially conflicting roles of the three branches of the federal government. The Executive Branch's role is reflected in the process established in the regulations, its expertise in a fact-based decision making process, and the amount of resources it allocates to the BAR from within the OTS budget. The Legislative Branch's role is reflected in the lump-sum funding provided to the OTS, its votes on

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2001) (challenging Changes in the Internal Processing of Federal Acknowledgment Petitions, 65 Fed. Reg. 7052 (Feb. 11, 2000)).

71. *See* United States v. 43.47 Acres of Land, No. H-85-1078 (PCD) (D. Conn. May 8, 2001).

72. *See id.* at 2–7.

73. *See* Proposed Finding Against Federal Acknowledgment of the Schaghticoke Tribal Nation, 67 Fed. Reg. 76,184 (Dec. 11, 2002).

74. *See Hearing*, *supra* note 25, at 12–13.

75. *Id.*

76. *See* 148 CONG. REC. S8411 (daily ed. Sept. 10, 2002).

moratoriums, its request for a GAO investigation into the process, and its willingness to defer to the criteria, standards, and administrative process delineated in the regulations, following extensive hearings over the years on the acknowledgment process. The Judicial Branch's role is reflected in its decisions sustaining the regulatory criteria, its APA review of the final decisions, and, most recently, in its decisions concerning alleged unreasonable delay in the administrative process despite the priority provisions of the regulations and the lump-sum funding mechanism for the BAR.

Reflections on the Last Quarter Century of Tribal Recognition

Jack Campisi, Ph. D.*

Nearly twenty-five years ago, the Department of the Interior promulgated a set of regulations that established specific criteria and a process to acknowledge the existence of a government-to-government relationship between the United States and the Indian tribes.[1] Since that time, there has been an ongoing controversy over the criteria and process, specifically directed at the interpretation of the criteria and their content and wording. Arguments against the criteria describe them as too vague and too difficult to meet. Furthermore, it is argued that the timeframe is unrealistic, the standards for determining sufficiency are not fixed, the decisions are idiosyncratic, and the regulations do not reflect the reality of the conditions under which nonrecognized tribes have had to exist.

The Department of the Interior revised the regulations in 1994,[2] but for many, these changes fell far short of the needed reforms. Among the changes made were an attempt to provide quantification under criteria b (community) and c (political continuity), and a shortened time depth under criterion a (external identification).[3] However, the cure merely created new maladies without resolving the standing ones. With the added dimension of municipalities and states raising their own objections to the acknowledgment of specific tribes, the din of protest has become deafening.

According to John A. Shapard, Jr., the first chief of the Branch of Acknowledgment and Research (BAR), when the regulations were drafted, the expectation was that a petitioner could write the petition with little or no help from outsiders. He stated that he envisioned a simple,

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1. *See* Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 39,361–64 (Sept. 5, 1978).

2. *See* Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. 9280–300 (Feb. 25, 1994).

3. *See id.*

straightforward process requiring minimal effort,[4] and certainly the first petitions submitted appeared to be short and rather general in scope. For example, the Poarch Band petition, dated 10 January 1980, is ninety-seven pages long; criterion b (community) is covered in 4 1/3 pages and criterion c (political continuity) is but 12 1/4 pages.[5] A supplement containing seventy-three pages was added in 1981.[6] From this petition, the Poarch Band received a favorable proposed finding and final determination.[7]

Compare the Poarch Band petition with the United Houma Nation petition, which was submitted in 1986 and totaled 176 pages.[8] After a negative proposed finding was issued in 1994, which was itself 402 pages single-spaced, the United Houma Nation submitted its rebuttal in 1996. The rebuttal contained 526 pages of narrative plus several thousand pages of exhibits.[9] In all, the United Houma Nation file contains 106,800 pages.[10] Another example of the increase in size of the petitions is the Little Shell Tribe of Montana, which received a favorable proposed finding after submitting 93,600 pages.[11]

One may ask: why has the volume of documentation increased over the years? The answer begins with the Bureau of Indian Affairs (BIA), which employs anthropologists, historians, and genealogists that work in teams of three to review petitions. In order to meet the requirements of the regulations and the BAR staff, petitioners are forced to hire their own anthropologists, historians, and genealogists. With the exception of genealogy, these are well established academic disciplines, with multiple and varied theoretical and methodological approaches. It is unrealistic to believe that the anthropological theories and historical models would somehow disappear when the reviewers passed through the doors of the

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4. *See* John A. Shapard, Jr., *Factors Affecting The Development Of The Regulations For The Acknowledgment Of American Indian Tribes, from* CONFERENCE ON THE CRISIS IN AMERICAN INDIAN POLICY (Wellesley College, Wellesley, MA 1990).

5. *See* Petition for Federal Recognition Submitted by the Poarch Band of Creeks to the U.S. Dept. of the Interior 69–73 (Jan. 10, 1980) (on file with author).

6. *See* Supplement to Petition for Federal Recognition Submitted by the Poarch Band of Creeks to the U.S. Dep't of the Interior (Jan. 23, 1981) (on file with author).

7. *See* Federal Acknowledgment of the Poarch Band of Creeks, 49 Fed. Reg. 1141 (proposed Dec. 30, 1983). *See* BUREAU OF INDIAN AFFAIRS, SUMMARY STATUS OF ACKNOWLEDGMENT CASES (Apr. 4, 2000) (on file with author).

8. *See* Petition for Federal Acknowledgment Submitted by the United Houma Nation, Inc. to the U.S. Dep't of the Interior (1988) (on file with author).

9. *See* United Houma Nation Rebuttal to Bureau of Indian Affairs Proposed Findings Against Acknowledgment (1996) (on file with author).

10. *See* Declaration of R. Lee Fleming at 7, Golden Hill Paugussett Tribe v. Gale A. Norton, Secretary of the Interior, No. 3:01CV1448 (D. Conn. 2001).

11. *See id.* at 8.

Department of the Interior building.

Each set of exchanges between the petitioner and the BIA, each round of technical assistance letters, each technical meeting, and each proposed finding and rebuttal have all increased the paper flow. Petitioners feel obliged to fill the record with every possible scrap of documentation. For their part, the BAR researchers encourage the amassing of data, and in fact, urge the petitioners to engage in some of the most esoteric searches for evidence—no matter how trivial and inconsequential the results. This exercise has all the appearances of, in Arlinda Locklear's words, "an evidentiary bidding war."[12]

The process also has resulted in a succession of litigation that, by the BAR's own admission, has tied up the staff and slowed the overall process.[13] The BIA is proud that it has won the majority of cases, but that hardly offsets the costs expended in time and productivity. Parenthetically, one must wonder: would this record be the same if the standard was other than "arbitrary and capricious?" It is not just the filing of lawsuits that has negatively impacted the process; it is the staff's efforts—no doubt upon the advice of counsel—to protect the department, which has led to a pre-occupation with detail. It is as though the staff is not preparing a response to the petition, but rather is developing a defense for an anticipated lawsuit.

With an increase in the complexity of preparing a petition comes, inevitably, an increase in cost. The main sources for financing petitions come from the Administration for Native Americans, grants from the Department of Health and Human Services, non-profit law firms, such as the Native American Rights Funds, and tribal funds. The only additional sources of funds to meet the growing cost come from venture capitalists seeking contracts to finance gaming, should a tribe receive federal recognition. Despite the tendency of politicians, newspaper reporters, and editors to see gaming as the cause for tribal attempts to achieve federal recognition, the truth is actually the opposite of that assumption. A cursory examination of the list of petitioners illustrates that the vast majority submitted letters of intent to petition well before both the *Cabazon* case[14] and the passage of the Indian Gaming Regulatory Act,[15] as well as the American Indian Policy Review Commission report that was published in

12. Personal communication with Arlinda F. Locklear (2002).

13. *See* GENERAL ACCOUNTING OFFICE, INDIAN ISSUES: IMPROVEMENTS NEEDED IN TRIBAL RECOGNITION PROCESS 16 (Nov. 2001), *available at* http://www.gao.gov/new.items/d0249.pdf (last visited Mar. 27, 2003) [hereinafter GAO REPORT].

14. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (finding that tribes had a right to conduct gaming on Indian land, if they resided in a state that otherwise allowed gaming).

15. Indian Gaming Regulatory Act, Pub. L. No. 100-497, §§ 2–22, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701–21 (2000)).

1976.[16]

This is not to say that the flow of money has not affected the process. Rather, the process has benefited from the financial involvement of lawyers and lobbyists, who too often think that influence-peddling is the path to a swift and favorable decision. The late Russell Peters, formerly the president of the Mashpee Wampanoag Tribe and its staunchest advocate, described the legal feeding frenzy in the following terms: "The closer we get to federal recognition, the more the sharks swarm around us, trying to work us and our people and get into the inner circle."[17] On the other side of the issue, with the NIMBY (Not In My Back Yard) mania in full voice, one could hardly expect politicians—local, state, or national—to refrain from jumping into the fray and beginning their own lobbying and lawsuits, adding to the list of newly-minted experts the voices of village and town officials, attorneys general, members of Congress, and senators. All involved seem to have connections in the White House who can guarantee the results they seek.

The effect is apparent to all but the most myopic. The amount of documentation has increased. The amount of time to prepare a petition and to review a petition has increased exponentially, as has the cost to the petitioners and government. Requiring more detail will increase both the opportunities for obfuscation and, without any clear standard of sufficiency, a greater accumulation of minutiae and inconsequential information; and with this, efficiency has declined.

In 2001, the General Accounting Office (GAO) conducted a study of the problems endemic in the process. Entitled *Indian Issues: Improvements Needed in Tribal Recognition Process*,[18] the study evaluated the process from its inception and reviewed the development of Indian gaming. The GAO issued a second report in 2002 entitled *Indian Issues: More Consistent and Timely Tribal Recognition Process Needed.* Here the GAO summarized its two main findings:

> First, the basis for BIA's tribal recognition decisions is not always clear. While there are set criteria that petitioning tribes must meet to be granted recognition, there is no guidance that clearly explains how to interpret key aspects of the criteria. For example, it is not always clear what level of evidence is sufficient to demonstrate that a tribe has continued to exist over a period of time—a key aspect of the criteria.

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16. *See* AMERICAN INDIAN POLICY REVIEW COMMISSION, REPORT ON TERMINATED AND NONFEDERALLY RECOGNIZED INDIANS: TASK FORCE TEN: TERMINATED AND NONFEDERALLY RECOGNIZED INDIANS (1976).

17. Jeff Barker, *A Reawakening of Tribes: Indians Toiling to be Recognized*, THE ARIZONA REPUBLIC, July 9, 1995, at A13.

18. GAO REPORT, *supra* note 13.

> The lack of guidance in this area creates controversy and uncertainty for all parties about the basis for decisions reached. To correct this, we recommend that the BIA develop and use transparent guidelines for interpreting key aspects of its recognition decisions.
>
> Second, the recognition process is hampered by limited resources, a lack of time frames, and ineffective procedures for providing information to interested parties, such as local municipalities and other Indian tribes. As a result, there is a growing number of completed petitions waiting to be considered. BIA officials estimate that it may take up to 15 years before all currently completed petitions are resolved; BIA's regulations outline a process for evaluating a petition that was designed to take about 2 years. To correct these problems, we recommend that the BIA develop a strategy for improving the responsiveness of the recognition process, including an assessment of needed resources.[19]

I suggest that the root of the problem, the cause of the excess, rests squarely on the vagueness and imprecision of the language of the regulations. The lack of clear definitions and evidentiary standards places impossible burdens on the petitioners and the BAR. For example, how does the staff conceptualize "community," "political activity," "leadership," and the word that appears most often in the regulations, "significant?" Equally important, how are these terms and concepts operationalized?

One might argue that the meanings of these, and other key terms, can be understood by reviewing past decisions. However, I defy anyone to do that. In fact, until a few years ago, I and others were told by BAR staff members that one could not base one petition on the findings of other petitions, because each case was unique. In the last few years, the BAR has curiously changed its approach, possibly demonstrating its wariness of being sued. Now, instead of preparing detailed reports to support its findings, the BAR uses a spreadsheet-approach borrowed from law that identifies what the BAR considers to be precedents. The value of this approach, in my opinion, is negligible, even if one has the documents cited by the BAR.

In September 2002, Assistant Secretary of the Interior for Indian Affairs, Neal McCaleb sent to Congress the BIA's *Strategic Plan*, in which the BIA outlined a schedule for meeting the deficiencies identified by the GAO. It is worth pausing to take a closer look at Secretary McCaleb's plan for improving the process. He proposed that by January 1, 2003 the BIA would

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19. *Indian Issues: More Consistent and Timely Recognition Process Needed: Hearing Before the House Subcomm. on Energy Policy, Natural Resources and Regulatory Affairs of the House Comm. on Government Reform*, 107th Cong. 2 (2002) [hereinafter *Hearings*] (statement of Barry T. Hill, Director of Natural Resources and Environment), *available at* http://www.gao.gov/new.items/d02415t.pdf (last visited Mar. 27, 2003).

have completed the following tasks:

(1) "Compile[d] pertinent technical assistance/guidance materials: technical assistance letters, letters with advice, policy statements, and interpretations of the regulations, and any other guidance;"[20]

(2) "Compile[d] all published and unpublished court decisions involving acknowledgment issues;"[21]

(3) "Compile[d] all Interior Board of Indian Appeals (IBIA) acknowledgment decisions and accompanying documents such as Departmental responses to and from [the] Secretary;"[22]

(4) "Complete[d] and update[d] the *Acknowledgment Precedent Manual*;"[23]

(5) "Assign[ed] a web-page manager to maintain and upload key documents to the BAR web-page in a timely manner;"[24]

(6) "Update[d] and expand[ed] the 1997 *Official Guidelines to the Federal Acknowledgment Regulations*, and complete[d] research guidelines for petitioners, third parties, researchers, and the general public."[25]

The BIA's solution to the delays relies on the hiring of more people to process petitions. McCaleb informs us that by doubling the BAR staff the present backlog could be reduced from six years to three or four years. This presumes that no other completed petitions or lawsuits are filed. Each team of three would produce "(a) one proposed finding and (b) one final determination, one reconsidered final determination, or, provide litigation support."[26] The cost, the report states, would be $3.1 million a year.[27] McCaleb also proposed to reorganize the BAR, elevate it to a division level, and use outside contractors "to develop a database system and to perform data entry ... to speed the analysis and evaluation of acknowledgement."[28]

Even if the BIA accomplishes all that the *Strategic Plan* outlined—which is extremely doubtful—the process will remain mired in controversy, delay, and litigation, as the proposals do not address the fundamental weaknesses inherent in the regulations. The solution is not to

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20. DEP'T OF INTERIOR, STRATEGIC PLAN: RESPONSE TO THE NOVEMBER 2001 GENERAL ACCOUNTING OFFICE REPORT 3 (2002), *available at* http://www.doi.gov/news/barstrategicplan23.pdf (last visited Feb. 6, 2003).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 6.

27. *See id.* at 13.

28. *Id.*

increase the staff or to implement elaborate websites or cosmetic changes within the existing structure. The solution lies with Congress, which needs to take control of the recognition process and change both the criteria and the system for evaluating petitions.

This is not a new problem for Congress. Over the past quarter century the House and Senate repeatedly have held hearings, but with no resolution. In 1989, both Senators Daniel Inouye and John McCain proposed alternative bills to remedy the problems.[29] The McCain bill merely adopted the regulations and added more money for the processing of petitions, whereas the Inouye bill altered the process and modified the regulations.[30] While neither bill survived, during the hearings, Reid Chambers, who was an associate solicitor at the Department of the Interior when the regulations were being developed, put his finger on the built-in inequity of the criteria. He testified:

> I have always had trouble with one of the criteria that is in the current regulation; that is the requirement that a tribe continuously assert political authority and social cohesion. I thought when I was in the Department that was an unrealistic criterion and I urged against it. Ultimately the regulations that were adopted after I left included that.
>
> I think given the history of outright discrimination against Indian tribes, given the forcible repression on Indian culture that went on for long periods of our history, it is perfectly understandable that a lot of tribes would have simply have gone underground basically and wouldn't have documents and wouldn't have openly functioned as an Indian tribe. So I think that criterion needs to be given careful reconsideration.[31]

Despite Chambers's criticism, there have been repeated efforts to embed the present regulations in law, which in Shapard's view would "lock this stuff into legislative concrete."[32]

Shapard goes further and provides an important insight into the construction of the regulations that bears directly on their inutility as a measuring device. According to Shapard, the reason the criteria were

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29. *See generally Federal Acknowledgment Administrative Procedures Act of 1989: Hearing on S. 611 Before the Senate Select Comm. on Indian Affairs*, 101st Cong. Part 1 (Apr. 28, 1989).

30. *See generally Federal Acknowledgment Administrative Procedures Act of 1989: Hearing on S. 611 Before the Senate Select Comm. on Indian Affairs*, 101st Cong. Part 2 (May 5, 1989).

31. *To Establish Administrative Procedures To Determine The Status Of Certain Indian Groups: Hearing Before The Select Comm. on Indian* Affairs, 101st Cong. 48–53 (1989) (statement of Reid Chambers, Esq., Attorney, Sonosky, Chambers, Sachse & Miller, Washington D.C.).

32. Barker, *supra* note 17.

written as they are had very little to do with former procedures for recognition or an understanding of the problems faced by nonrecognized tribes in maintaining their identities. The criteria were made "too rigorous because [BIA] overestimated the number of bogus Indian groups trying to get acknowledged."[33] He told Barker: "We were just too cautious ... We started out to build a racehorse and ended up with a kind of camel."[34] Clearly, the BIA had the wrong agenda in mind, and, based on its misdirected motives, it has compounded the problems.

Unless Congress addresses the problems of the criteria, there will be no equitable remedy. Unless Congress takes into account the loss and destruction of records held by the states, counties, and municipalities, and the impact of racist and assimilationist policies in any re-draft of the criteria, it will have the effect of rewarding those policies that Congress and most citizens find abhorrent.

My suggestion is that a commission be formed by Congress to act as a special court to hear testimony, review reports and documents, and make recommendations to Congress. The present BAR would act as the research arm of the BIA, playing a central role in determining whether or not the executive will choose to support a petitioner. In either case it would provide expert testimony. Petitioners, states, and other interested parties would have the opportunity to present testimony and to perform cross-examination. Then the commission would provide its report to Congress for action.

I stress the need for all parties to have access to the experts, as to do otherwise is to deny fairness. The present situation allows the determinations of the BAR to be immune from review as long as they are not arbitrary and capricious. Mistakes should not be tolerated and perpetuated simply because they were made honestly. The present system has the perception of being a star-chamber proceeding that can only be cured in an open court where all parties have equal access.

The need for some judicial process, to insure fair and equal treatment by the BAR staff, was made eminently clear in a recent letter sent to Senator Ben Nighthorse Campbell from Interior Department Solicitor William G. Myers III. He points out that in the 1994 regulations the Department rejected the suggestion that the standard be a "preponderance of the evidence." He writes:

> The preamble to the final revised acknowledgment regulations in 1994 contains a discussion of the comments received concerning the standards for evidence. In rejecting the suggestion that the standard be a "preponderance of the evidence," the preamble notes that such a

33. *Id.*

34. *Id.*

> standard suggests that the question will be decided by which ever side has the most evidence when the real issue is whether the level of evidence is high enough even in the absence of negative evidence. *See 59 Fed. Reg. 9280.* The discussion in the preamble is important because it reflects a subtle but essential facet of the process in evaluating petitions for acknowledgment. That facet is consideration not only of what is presented by the petitioner but also of what is not presented in light of what should otherwise be available for an Indian tribe. In a number of instances unsuccessful petitioners have claimed that the BAR's standards were too exacting because documents simply were not available. While such claims may sound reasonable at first, given the requirements in the regulations for historical documentation since first contact, BAR's expertise and knowledge of other Indian records are indispensable for putting such claims in proper perspective.[35]

Myers further states, in support of his argument, that

> [t]he regulations establish a decision-making process based on anthropological, historical and genealogical analysis using the standards of the respective disciplines. The role of BAR's professional researchers in the process is woven through the regulations and directives. The existence and functioning of this professional expertise is important to the judicial deference owed to the administrative agency. In considering BAR's recommendations on acknowledgment, the Assistant Secretary should be mindful of the unique expertise of BAR's professional researchers and that fairness to the petitioners and interested parties requires consistency with established precedent, or an adequate explanation for the change.[36]

Myers would have us believe that the expertise of the BAR staff is an acceptable and preferable substitute for the well established legal standard of "preponderance of the evidence," and that there are agreed upon standards of analysis in the social science disciplines, neither of which propositions makes sense. The Solicitor accurately paraphrases the short discussion of "preponderance of the evidence" in the 1994 revised regulations, but he leaves out a very important change made in the body of the regulations pertaining to adequacy of evidence under section 83.6 (d):

> A petitioner may be denied acknowledgment if the evidence available demonstrates that it does not meet one or more criteria. A petitioner may also be denied if there is insufficient evidence that it meets one or more criteria. *A criterion shall be considered met if the available*

35. Letter from William G. Myers, III, to Honorable Ben Nighthorse Campbell, Vice Chairman, Comm. on Indian Affairs, U.S. Senate 3 (June 20, 2002) [hereinafter Myers Letter] (on file with author).

36. *Id.* at 4.

> *evidence establishes a reasonable likelihood of the validity of the facts relating to that criterion. Conclusive proof of the facts relating to a criterion shall not be required in order for the criterion to be considered met.*[37]

Furthermore, the regulations require only that a "documented petition ... be [of] any readable form that contains detailed, specific evidence in support of a request to the Secretary to acknowledge tribal existence."[38] Since a petitioner is required only to present data that supports his or her argument, the task of producing any additional data falls upon the BAR. However, in 2000, the Department of the Interior modified the acknowledgment regulations and prohibited the BAR from conducting independent research. Now, the BAR is required to base its findings only on the record before it.[39]

In lieu of tangible evidence, Myers asserted that it is sufficient to find against a petitioner based on "what is not presented in light of what should be available for an Indian tribe."[40] I find nothing in the regulations that speaks to the right of the BAR to determine a case based upon the staff's alleged universal knowledge of other sources "for putting such claims in proper perspective."[41] Myers, in his attempt to justify the existing process, provided the most damaging arguments for its elimination. At the very least, should not petitioners and other parties have the right to determine for themselves the expertise of those who are making the decisions for and against federal recognition? The process described by Myers has the unmistakable taint of a star-chamber proceeding.

A cynic might argue that the slow process has protected many more tribes than it has hurt, as a quicker process based on the present regulations would have resulted in many more tribes being denied. That may be true, but for all of the millions of dollars spent by the federal government and the tribes, there is precious little to the claim. A review of the numbers points to this conclusion: of the 561 recognized tribes, as of November 2001, all but forty-seven were recognized before 1960. Of the remaining forty-seven tribes recognized between 1960 and 2001, sixteen were recognized by Congress. Of the remaining thirty-one, only fourteen were recognized through the process. During the same period, fifteen tribes were

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37. Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 59 Fed. Reg. 9280 (Feb. 25, 1994) (to be codified at 25 C.F.R. pt. 83) (emphasis added).

38. *Id.* at 9294.

39. *See* Changes in the Internal Processing of Federal Acknowledgment Petitions, 65 Fed. Reg. 7052, 7052–53 (Feb. 11, 2000) (to be codified at 25 C.F.R. pt. 83).

40. Myers Letter, *supra* note 35.

41. *Id.*

denied. During the period from 1978 to 2001, there have been as many tribes recognized by Congress as those recognized through the acknowledgment process. Thus, over the course of twenty-three years, the BAR has completed action upon twenty-nine cases out of a possible 175.[42]

I recognize there are problems and risks inherent in the approach I suggest, but the present system cannot and will not work, no matter how many are employed and how much money is thrown its way. The process is intellectually and conceptually fatally flawed.

42. *See* BUREAU OF INDIAN AFFAIRS, SUMMARY STATUS OF ACKNOWLEDGMENT CASES (Feb. 6, 2001) (on file with author). *See also* GAO REPORT, *supra* note 13, at 5; *Hearings*, *supra* note 19, at 1.

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Current Trends in Tribal Economic Development

Robert L. Gips*

Thank you, to the New England School of Law and to the organizers of this symposium, for bringing together all of these wonderful speakers.

Many people in attendance here are law students, and being here leads me to think back to 1983, when I first began practicing Indian law. Having finished law school and a clerkship, I joined two lawyers who had just completed the Maine Indian Settlement Act,[1] which awarded to the Penobscot Nation and the Passamaquoddy Tribe $80 million. These attorneys also had just completed the Mashantucket Pequot Indian Land Claims Settlement Act,[2] which awarded the much smaller sum of $900 thousand to the Mashantucket Pequot Tribe. Being the new lawyer at the firm, I was assigned to represent the Mashantucket Pequot Tribe, and I have continued to do so since 1983. It has been an interesting vantage point from which to participate in and watch the course of tribal economic development.

Starting from 1983 and looking forward to the present, what has happened in Indian economic development is quite remarkable. What little development was occurring on reservations in the early 1980s primarily involved mining or energy production on reservations with natural resources, like coal, gas, or uranium. Aside from a few scattered businesses designed to take advantage of minority preference provisions, there was little other significant economic development occurring anywhere in Indian country.

One reason for this lack of economic development was access to capital, which was a major problem. Each time tribes attempted to borrow money, they faced numerous problems, as multiple legal issues needed to be resolved. These legal issues included questions about the ability of tribes to waive sovereign immunity, the validity of tribal consent to state court

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1. 25 U.S.C. § 1721–1735 (1980).
2. 25 U.S.C. § 1751–1760 (1983).

jurisdiction, questions about the exhaustion of tribal court remedies, and uncertainty concerning the enforceability of security agreements involving cash and personal property collateral. Further compounding these problems was a third-party lack of understanding of tribal governments, tribal decision-making, and tribal courts. In addition, a lack of tribal experience and sophistication in dealing with capital markets and businesses also impacted a tribe's ability to borrow the needed funds. As a result, almost no lending occurred in Indian country.

Loans, when they did occur, generally took one of two forms—they were either guaranteed by the federal government or fully cash collateralized by the tribe itself. A cash collateralized loan, however, was not really a loan. Rather, it was a mechanism whereby banks re-loaned to tribes the tribes' own money. Further, the loan guarantee program for Indian tribes was, and remains today, woefully inadequate in scope. The entire Bureau of Indian Affairs (BIA) loan guarantee program for Indian tribes in the mid-eighties was only about $60 million, and the program's funding is not, I believe, much greater than that today. With over 500 tribes, this amount obviously is not going to leverage significant capital or catalyze significant economic development in Indian country.

When we first attempted to finance the Mashantucket Pequot Tribe's bingo hall in 1985, we needed a little over $4 million. Jim Sappier, who you will hear from at lunch today, was the Governor of the Penobscot Nation, which had agreed to manage the facility for the Mashantucket Pequots. The Penobscots were able to put approximately $700 thousand toward the venture, and we were able to win a federal economic development grant for $300 thousand. However, even with a million dollars of equity, not a single bank would loan the tribe the remainder of the money. Fortunately, the firm I worked with, Tribal Assets Management, eventually located one bank that was willing to finance the bingo hall with a federal loan guarantee. I believe this transaction was the first bank-financed Indian gaming facility in the country. Due to this financing, the bingo hall was built and, since then, has performed extremely well.

Despite this success, in the early 1990s, when we decided to create and open Foxwoods and Tribal Assets Management approached approximately thirty-five lenders in this country and around the world, not a single bank or institutional investor would finance the project. For that reason we ended up turning to private lenders from Malaysia, who believed in what we were trying to do and were willing to take risks that others perceived to be insurmountable. The initial Foxwoods financing was about $60 million—an amount that would have subsumed almost the entire Indian loan guarantee budget for the year, had it been guaranteed—and this loan was the largest Indian gaming financing that had occurred up until that point.

Fortunately, Foxwoods was an immediate success and became the most profitable gaming facility—Indian or non-Indian—in the world. The facility's success helped to pave the way for the dramatic change in the way lenders and developers perceived Indian country gaming projects. The Mashantucket Pequot Tribal Nation now issues investment-grade bonds and has raised over one billion dollars through multiple financings. More importantly, the Tribe's success has been duplicated by other tribes around the country, and the revenues created by successful tribal gaming facilities are fueling the potential for a renaissance in tribal economic development.

The capital access problems faced by Indian country in the 1980s have been solved and good projects in Indian country generally—though not always—can be financed today. Yet putting together good projects and promoting successful tribal economic development continues to be challenging. The vexing problems all new businesses face are only amplified on Indian reservations. Not only is capital needed, but experienced entrepreneurs and managers, trained laborers, and sound business plans are essential as well. Having access to debt markets does not mean that one has equity to put into projects, and many tribes, particularly those without gaming revenues, lack equity capital. Experienced tribal entrepreneurs and managers are still in short supply and often have more attractive job opportunities outside of Indian country.

In addition, tribes, as discussed today, are governments, and governments generally have problems running businesses. Similar to other governments that run businesses, tribes must address political interference with business decision-making and micromanagement by tribal governing bodies. The governmental need for funds often means that the surplus created by a profitable tribal business is stripped off for distribution to members or governmental programs rather than reinvested, as would happen in other businesses. Additionally, governmental employee work and incentive structures are often not the same as those required in a competitive business. Finally, governmental decision-making timetables are often much slower and more protracted than the business world tolerates.

However, these are solvable problems. Tribes are learning to separate their business entities from their political entities and are becoming more successful at doing so. Lack of capital and experienced management also may be solved through joint ventures and management agreements. Yet, in such arrangements, tribes must overcome their suspicion that they will not be treated fairly—though this is a well-grounded suspicion stemming from Indian country's unfortunate historical experience with hustlers and shills promoting self-serving and flawed projects.

One very positive trend is an increase in tribal focus on areas of tribal strategic advantage, and the focus of today's symposium on sovereignty

and tribal jurisdiction is precisely an area in which tribes have been focusing in order to create successful businesses. Gaming is a prime example of this; tribes have a strategic advantage in gaming due to the preemption of state regulatory laws in that field. This often leads to a relative tribal monopoly; that is, at least for as long as states do not legalize gaming generally. Given the ability of states to legalize commercial gaming, tribes are coming to realize this is not a perpetual monopoly and are becoming more willing to negotiate payments to states that help obviate the pressure on a state to legalize gaming.

The preemption of state laws is one area tribes have been focusing on for strategic advantage in economic development. This occurs in the two areas touched on before: preemption of state regulatory laws and preemption of state taxes. Both can provide tribes with advantages to overcome the disadvantages that they otherwise face.

One example of this is a resurgence of energy deals on tribal lands. Companies are interested in working with tribes because while federal regulatory laws are still applicable, cumbersome and time-consuming state regulatory laws and permitting schemes are preempted, and tribes are adopting streamlined tribal permitting systems. Tribes also are negotiating for more active roles in the development process. Partly this derives from their experience with gaming, and partly it derives from a past experience where tribes have learned that passivity left too much value on the table. Tribes are not simply leasing out their land; tribes are acting as developers or joint venturers.

Similarly, in real estate development, where local zoning laws are inapplicable, tribes can set up their own zoning laws, and, since local property taxes are preempted, this gives tribes a competitive advantage. There is an increasing interest in tribal real estate and commercial development, often ancillary to casino facilities. If you go into Mohegan Sun, for example, you will see leased space, just like in a mall. If you go into Foxwoods, you will see the same thing; although at Foxwoods the stores generally operate on a proprietary basis.

There also have been some instances of tribes creating successful telecommunications businesses. In some cases the tribes have been driven by the need to increase access on remote reservations, while other situations were catalyzed by a tribal competitive advantage. For example, not being subject to certain state or local restrictions on cell tower heights has given tribes an exploitable competitive edge.

Situations where state taxes are preempted are another area where tribes have a potential advantage. Tribes have proven to be successful at selling products that normally carry high state taxes; for example, the sale of cigarettes or gasoline by tribes to nonmembers has been a common type of tribal business. Lorie Graham touched on the major issue in these tribal-

state tax matters: Where is the legal incidence of the tax? If the legal incidence is on the tribe, then the state tax is preempted.[3] If the incidence is not on the tribe, a balancing of federal, tribal, and state interests is undertaken to determine whether such taxes are preempted. The major part of the analysis then becomes: how much value is the tribe adding to the product that is being sold? If a tribe is simply marketing a tax exemption, a state tax is unlikely to be preempted.[4] However, when tribes add value, a good argument can be made that sales taxes and excise taxes are preempted, even when a non-Indian is buying the good or service.[5] Yet, there also are a number of cases where courts have held that tribes have not done enough to maximize reservation-based value and, as a result, have not been able to establish a state tax preemption.[6]

Another area touching on sovereignty and jurisdiction where tribes are making tremendous strides is through the adoption of tribal laws relating to commercial and economic development activity. For example, the Mashantucket Pequot Tribal Nation has adopted its own workers' compensation system, which has saved the Tribe money and has preempted the state workers' compensation system.[7] Tribes also are adopting their own health, safety, and environmental laws, and we are seeing numerous tribes adopting uniform commercial codes and secured transaction codes.[8] Tribes are dealing with issues that concern lenders, such as the fact that absent a provision in a tribal constitution, the Fifth Amendment impairment of contracts clause will not apply to tribes. Some tribes are addressing this problem through constitutional reforms.

Similarly, tribes are moving to create their own business and corporation laws. Tribes face complicated questions when considering whether to operate a business under a corporate structure, as an arm of the tribal

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3. *See* Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 459 (1995).

4. *See generally* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980); Dep't of Taxation and Finance of N.Y. v. Milhelm Attea & Bros., Inc., 512 U.S. 61 (1994).

5. *See generally* Hoopa Valley Tribe v. Nevins, 881 F.2d 657 (9th Cir. 1989); Cabazon Band of Mission Indians v. Wilson, 37 F.3d 430 (9th Cir. 1994).

6. *See* Yavapai-Prescott Indian Tribe v. Scott, 117 F.3d 1107, 1112 (9th Cir. 1997) (stating that the Tribe must play "an active role in the creation of the value taxed in order to establish preemption"). *See also* Gila River Indian Cmty. v. Waddell, 91 F.3d 1232, 1236 (9th Cir. 1996) (holding that the sale of non-Indian goods to non-Indians were subject to state taxes, where the tribe did not demonstrate a contribution to the value of the goods sold); Salt River Pima-Maricopa Indian Cmty. v. Arizona, 50 F.3d 734, 736 (9th Cir. 1995) (describing the factors to be considered when determining whether a state tax is preempted).

7. *See* Mashantucket Pequot Tribal Workers' Compensation Code, Title XIII (2002), *available at* http://www.mptnlaw.com/law_library.htm.

8. *See* Mashantucket Pequot Tribal Commercial Code, Title IX (2002), *available at* http://www.mptnlaw.com/law_library.htm.

government, or as a tribal authority; but increasingly tribes are developing the infrastructure to create corporate structures under tribal regulatory regimes. For example, outside of Indian country, limited liability companies are probably the most common structure for business formation today. The key advantages offered by limited liability companies—limited liability along with an absence of corporate level taxation—are equally attractive to tribally-owned businesses, and in certain instances it is advantageous for a tribe to create a limited liability company formed under tribal law rather than state law. As a result, we are working with tribes that are creating their own limited liability company codes. Similarly, tribes are instituting their own taxes, which can be an important factor in balancing test cases concerning the preemption of state taxes.[9]

Another encouraging trend involves inter-tribal agreements to promote economic development. One of the projects that I have been involved with, through representation of the Mashantucket Pequot Tribal Nation, has been the creation over the past several years of the Native American National Bank. The formation of this bank involves twelve tribes from around the country, each putting up a million dollars in capital to create a bank designed to serve Indian country.

Finally, the last area of economic development worth noting involves efforts by tribes to utilize small and disadvantaged business programs, in particular, the Small Business Administration program.[10] While contracts under this program can be frustratingly difficult to come by, some tribes have been successful in this area, and it remains an area of potential opportunity.

In conclusion, problems remain, and successful economic development remains difficult to achieve; but a tremendous amount of exciting activity is occurring, and I believe we are on the cusp of a renaissance in economic activity in Indian country.

9. *But see* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989) (holding that the State could validly impose a tax on non-Indian businesses involved in the on-reservation production of oil and gas even though those businesses were simultaneously subject to tax by the Tribe).

10. *See* 8(a) Business Development Program, 13 C.F.R. pt. 124 (2003).

Securing Economic Sovereignty Through Agreement

Lorie Graham*

I. INTRODUCTION

Economic development is one of the most important issues facing Indian nations today. Politically, it speaks to a tribe's fundamental right to development, which is closely linked to its right of self-determination.[1] Socio-economically, it is the means by which a tribe seeks to confront the enduring consequences of poverty.[2] Culturally, it offers a pathway to preserving and enhancing indigenous worldviews.[3]

Indigenous land-based economies sustained millions of Native Americans for thousands of years before the arrival of the Europeans.[4] Contact with the Europeans altered the form of some of these economies, but also led to new avenues of trade and commerce.[5] Over time colonial

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1. In relation to the rights of indigenous peoples to freely pursue their economic development, see *Draft United Declaration on the Rights of Indigenous Peoples*, U.N. ESCOR, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 46th Sess., U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56 (1994) (specifically art. 38). *See also* S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW 97–112 (1996).

2. *See, e.g.*, U.S. Census Bureau, *at* http://www.census.gov/pubinfo/www/amin hot1.html (1990 and 2000 statistics) (last visited Jan. 22, 2003).

3. *Cf.* Stephen Cornell & Joseph P. Kalt, *Culture and Institutions as Public Goods: American Indian Economic Development as a Problem of Collective Action*, *in* PROPERTY RIGHTS AND INDIAN ECONOMIES 245–46 (Terry L. Anderson ed., 1992).

4. *See, e.g.*, WILLIAM CRONON, CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND (1983); R. DOUGLAS HURT, INDIAN AGRICULTURE IN AMERICA (1987); RICHARD WHITE, THE ROOTS OF DEPENDENCY (1983).

5. *See, e.g.*, CRONON, *supra* note 4. *See also* Neal Salisbury, *The Indians' Old World: Native Americans and the Coming of Europeans*, 53 WM. & MARY Q. 435 (July 1996). *See generally* RENNARD STRICKLAND, FIRE AND THE SPIRITS: CHEROKEE LAW FROM CLAN TO COURT (1975).

disease, warfare, and the plundering of Indian lands and resources took their toll on indigenous economies. Next came two and a half centuries of U.S. Indian policies that sought to destroy the customs, laws, and institutions that supported these economies.[6]

The latter part of the twentieth century ushered in a new era of federal-tribal relations with the emergence of the policy of self-determination.[7] With a new emphasis on tribal control of resources, land, and government, sustained economic development for Indian nations was once again possible. Today, tribes are engaging in a range of domestic and international initiatives as a means of rebuilding their economic base. The scope and breadth of Indian economic development is as varied as the tribes themselves: recreation, manufacturing, retail, eco-tourism, timber, grazing, agriculture, banking, construction, energy, gaming, and telecommunications, to name a few.[8] While the long-term effects of this development are yet to be fully realized, short-term indicators suggest socio-economic gains for tribes, as well as off-reservation local, state, and federal economies.[9]

Yet even with these advances, there exist variations in the rates and levels of economic recovery among tribes. A number of non-legal factors affect long-term economic growth, such as institution-building, strategic

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6. *See generally* THE AGGRESSIONS OF CIVILIZATION: FEDERAL INDIAN POLICY SINCE THE 1880S (Sandra L. Cadwalader & Vine Deloria, Jr. eds., 1984). Some scholars have referred to this as a "command-control economic system," in which the federal government sought to place control of tribal economies in the hands of federal agencies and individuals. *See, e.g.*, Stephen Cornell & Joseph P. Kalt, *Reloading Dice: Improving the Chances for Economic Development on American Indian Reservations*, *in* WHAT CAN TRIBES DO?: STRATEGIES AND INSTITUTIONS IN AMERICAN INDIAN ECONOMIC DEVELOPMENT 3, 35–36 (Stephen Cornell & Joseph P. Kalt eds., 1993). For an analysis of the historical origins of the policies advanced by the colonists and later the U.S. government, see ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990).

7. On the initial U.S. policy of self-determination see generally Message from the President of the United States Transmitting Recommendations for Indian Policy, H.R. Doc. No. 91-363 (July 8, 1970). The Indian Reorganization Act of 1934 was an earlier attempt at reviving tribal economies, but was limited by the federal government's continued control over tribal affairs. On the international law of self-determination for indigenous peoples, see generally ANAYA, *supra* note 1.

8. *See generally Economic Development*, *in* FELIX COHEN'S HANDBOOK ON FEDERAL INDIAN LAW ch. 18 (forthcoming 2004).

9. *See, e.g.*, *Hearing on Economic Development Before the Sen. Comm. on Indian Affairs*, 105th Cong. (1998) [hereinafter *Hearing*] (testimony of Phillip Martin, Chief of the Mississippi Band of Choctaw Indians) (noting a precipitous drop in unemployment due to economic development efforts). *See also infra* notes 76–79 and accompanying text (discussing off-reservation impact of tribal development).

planning, and access to capital.[10] Additionally, the unique legal status of tribes has resulted in a set of complex rules that impact development efforts.[11] While these legal rules can result in development advantages for tribes, this is not always the case. In keeping with the theme of the symposium, this paper analyzes an important legal hurdle to sustained development: U.S. Supreme Court cases that create jurisdictional uncertainties regarding the scope of tribal sovereign powers. This paper also explores how Indian nations might minimize the development impact of these decisions.

Sovereigns seeking to provide for their constituencies exercise several key prerogatives, such as the power to tax, the authority to regulate, the right to be immune from suit without consent, and the ability to provide a forum for the adjudication of disputes.[12] Tribes retain significant powers in each of these areas, but the last twenty-five years of Supreme Court jurisprudence has resulted in a morass of legal rules that make it difficult to predict just how far those powers extend.[13] Section II of this paper discusses some of these cases and how they affect tribal economic development. Section III discusses ways in which tribes can contract or negotiate around these jurisdictional issues. Section IV offers some thoughts on how resolution by agreement enhances tribal sovereignty and development.

II. TRIBES AS SOVEREIGNS

During the early years of self-determination, the Supreme Court advanced a rather robust definition of tribal sovereignty.[14] As self-

10. *See Economic Development*, *supra* note 8. *See also* Cornell & Kalt, *supra* note 6.

11. *See Economic Development*, *supra* note 8.

12. Although this latter issue of adjudication will not be covered in this paper, recent Supreme Court decisions, such as *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), similarly affect tribal development by limiting a tribe's sovereign power to provide a meaningful forum for the resolution of disputes arising within its territory. *Cf. Hearing*, *supra* note 9 (statements of Donald R. Wharton, Attorney, Native American Rights Fund, and Hon. Jill E. Shibles, President, National American Indian Court Judges Association) (noting that "[e]ffective and efficient resolution of disputes arising from commercial dealings is an essential component of the [tribal] governance infrastructure ...").

13. *See infra* notes 23–65 and accompanying text. For a discussion of Supreme Court jurisprudence during the last fifteen years, see David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996); Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177 (2001); Joseph William Singer, *The Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641 (2003).

14. Since the early 1970s, the legislative and executive branches have recognized and supported a policy of self-determination for Indian nations, which includes, among other

governing political entities, tribes retained all the attributes of sovereignty that had not been limited by treaty or federal law. Generally speaking, this included the power to raise revenue, to enact and enforce their laws, to remedy disputes, and to conduct government-to-government relations with the United States and other domestic governmental bodies. The powers of states to exercise jurisdiction in Indian country were generally limited by the primacy of federal law and principles of tribal sovereignty.[15]

However, beginning in 1978 with the decision in *Oliphant v. Suquamish Indian Tribe*, the U.S. Supreme Court introduced a new set of rules limiting the scope of tribal jurisdiction within Indian country.[16] In *Oliphant*, tribal authorities arrested two non-Indian residents of the Port Madison Reservation for crimes committed on the reservation. The Suquamish Indian Tribe sought to prosecute the two individuals under tribal law. The Supreme Court ruled that the Suquamish Indian Tribe had been implicitly divested of criminal jurisdiction over non-Indians as a result of its "incorporation into the United States."[17] While the case was limited to criminal jurisdiction, it marked a fundamental shift in the Court's

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things, the right of tribes to shape their own socio-economic futures. A similar trend toward the recognition and fulfillment of this right can be found in U.S. Supreme Court jurisprudence prior to *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). *See, e.g.*, United States v. Wheeler, 435 U.S. 313 (1978) (reaffirming principles of tribal sovereignty, but discussing new limits imposed by *Oliphant*); Morton v. Mancari, 417 U.S. 535 (1974); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 (1973); Williams v. Lee, 358 U.S. 217 (1959). The contours of tribal sovereignty discussed in these later cases were based on earlier foundational decisions, such as *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831) and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). While these cases are based on flawed doctrinal tenets, see, for example, WILLIAMS, *supra* note 6 and Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219, 258–65, the concept of tribal sovereignty can be separated from these historically tainted roots. International law on the rights of self-determination provides a more appropriate framework for considering the scope and substance of tribal sovereignty today. *See, e.g.*, ANAYA, *supra* note 1; Lorie M. Graham, *Self-determination for Indigenous Peoples After Kosovo: Translating Self-determination "Into Practice" and "Into Peace,"* 6 ILSA J. INT'L & COMP. L. 455 (2000). *See generally* Mabo v. Queensland, 107 A.L.R. 1 (1992) (Australian High Court).

15. *See, e.g.*, Williams v. Lee, 358 U.S. 217 (1959); McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164 (1973); Fisher v. Dist. Ct. of Rosebud County, 424 U.S. 382 (1976).

16. *See* 435 U.S. 191 (1978). For a critical discussion of this case, see N. Bruce Duthu, *Implicit Divesture of Tribal Powers: Locating Legitimate Sources of Authority in Indian Country*, 19 AM. INDIAN L. REV. 353, 366–81 (1994); Williams, *supra* note 14, at 273–74; Russel Lawrence Barsh & James Youngblood Henderson, *The Betrayal:* Oliphant v. Suquamish Indian Tribe *and the Hunting of the Snark*, 63 MINN. L. REV. 609 (1979).

17. *Oliphant*, 435 U.S. at 209.

interpretation of the rights of tribes as sovereigns.[18] Following *Oliphant*, tribes were proscribed from exercising powers that were expressly limited by Congress and those that were implicitly "inconsistent with their status."[19] During the 1980s and 1990s, the Supreme Court decided a series of civil cases that further muddied the jurisdictional waters, imposing new standards for determining when a tribe could exercise regulatory or adjudicative power over nonmembers located within its territory.[20] A number of cases addressing the regulatory powers of states within Indian country added to the level of confusion.[21] Taken as a whole, these cases raise serious questions regarding the role of the judiciary in the continued subjugation of Indian people in a manner inconsistent with human rights precepts.[22] They also create legal barriers to tribal economic development. A critique of some of the civil jurisdiction cases will help to illustrate this latter point.

A. Regulation, Taxation & Sovereign Immunity

The United States Supreme Court stated in *Merrion v. Jicarilla Apache Tribe* that "the power to tax is [an] essential attribute of Indian sovereignty because it is a necessary instrument of self-government and territorial management."[23] This statement holds true for a host of other tribal regulatory powers, such as land use, zoning, and environmental protection. Yet the Supreme Court has failed to adopt clear rules regarding the rights of tribes to control activities within their territories. For instance, while tribes retain broad authority to regulate tribal lands,[24] reservation lands held by nonmembers invoke a different set of jurisdictional rules. Ostensibly, a tribe has the power to regulate the activities of nonmembers when they have entered into a "consensual relationship" with the tribe or when they undertake activities that affect the "political integrity, the economic

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18. *See, e.g.*, Barsh & Henderson, *supra* note 16; Duthu, *supra* note 16; Williams, *supra* note 14 at 273.

19. *Oliphant*, 435 U.S. at 208.

20. *See, e.g.*, Nevada v. Hicks, 533 U.S. 353 (2001); Strate v. A-1 Contractors, 520 U.S. 438 (1997); Montana v. United States, 450 U.S. 544 (1981).

21. *Compare* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134 (1980) *with* Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995) *and* Dep't of Taxation and Finance of N.Y. v. Mihelm Attea & Bros., Inc., 512 U.S. 61 (1994). *Cf.* A-1 Contractors, 520 U.S. 438 (1997); Nevada v. Hicks, 533 U.S. 353 (2001).

22. *See, e.g.*, Williams, *supra* note 14. *Cf.* ANAYA, *supra* note 1 (exploring the rights of indigenous peoples under international law).

23. 455 U.S. 130, 137 (1982).

24. *See* Montana v. United States, 450 U.S. 544 (1981). *But see* Nevada v. Hicks, 533 U.S. 353 (2001).

security, or the health or welfare of the tribe."[25] This test arises from *Montana v. United States*, in which the Court held that a tribe lacked regulatory authority over reservation lands held in fee by non-Indians unless one of the two criteria articulated above was met.[26] The *Montana* standard law has resulted in an "unstable jurisdictional crazy quilt"[27] of the Supreme Court's own making.

This point is well demonstrated in the recent case of *Atkinson Trading Co. v. Shirley*,[28] in which the Supreme Court held that the Navajo Nation lacked the power to impose a hotel occupancy tax on a non-Indian business located on fee simple land within the borders of the reservation.[29] The Court maintained that the Nation's authority to tax did not extend beyond tribal lands unless it could prove one of the two exceptions found in *Montana v. United States*.[30] The Court ultimately concluded that the hotel tax was not "related to any consensual relationship" with the owner and was not "necessary to vindicate the Navajo Nation's political integrity."[31] In my view, the opinion was terribly flawed in its analysis, most strikingly for what it failed to do—connect the delivery of governmental services by a sovereign power with its power to tax individuals located within its borders

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25. *Montana*, 450 U.S. at 566.

26. *See id.* The situation in *Montana* arose out of the "checkerboard" nature of the land holdings on the Crow reservation, which included lands held in trust by the United States and nonmember fee lands held by individuals, the State of Montana, and the United States. Much of this non-tribal ownership arose out of the policy of allotment, articulated in the General Allotment Act of 1887. Like *Oliphant*, the *Montana* Court relied on the principle of implied divestiture to conclude that the Crow Tribe lacked inherent powers to regulate hunting and fishing activities on non-Indian fee land within the reservation. *See id.* at 564–66. See generally Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1 (1993) for a critique of the Court's approach.

27. *Hicks*, 533 U.S. at 383. In *Hicks*, Justice Souter proclaimed his support for a general rule that prohibits the exercise of tribal civil jurisdiction over nonmembers as a way of preventing an "unstable jurisdictional crazy quilt." *Id.* What Justice Souter and other members of the Court fail to acknowledge is the original origins of this "crazy quilt," namely *Montana v. United States*, 450 U.S. 544 (1981). A more appropriate means of undoing this "crazy quilt" is to reaffirm a tribe's sovereign power over its territory. As Professor Tatum points out, this "result would be much more consistent with current federal policy." Melissa L. Tatum, *A Jurisdictional Quandary: Challenges Facing Tribal Governments in Implementing the Full Faith and Credit Provisions of the Violence Against Women Acts*, 90 KY. L.J. 123, 160–61 (2001/2002). It also would be more consistent with international principles of the rights of indigenous peoples regarding control over their lands and resources. *See* ANAYA, *supra* note 1, at 104–07.

28. 532 U.S. 645 (2001).

29. *See id.* at 659.

30. 450 U.S. 544 (1981).

31. *See Atkinson Trading Co.*, 532 U.S. at 654–59.

and benefiting from those services. Looking at the larger jurisdictional picture, the uneven application of *Montana* makes it difficult to predict how far a tribe's regulatory power extends. The facts of a case do not suggest a particular result. Thus, in a case where a tribe enters into a contract with a nonmember and an agent of that nonmember injures someone within the borders of a reservation one would expect that the tribe would have jurisdiction under the consensual relationship test. However, the Court held to the contrary in *Strate v. A-1 Contractors.* [32] Additionally, when a nonmember business relies on fire, police, and other governmental services, as well as employing a number of tribal members within the borders of a reservation, presumably the tribe would have jurisdiction over this nonmember's activity because it affects the political integrity, economic security, and health and welfare of the tribe. Yet *Atkinson* supports a different reading of the *Montana* test. [33] While courts do apply *Montana* in favor of tribes, such as in the case of *Montana v. EPA*, [34] it is difficult to know in advance how far a tribe's power will extend.

Another related example is in the area of zoning, which is an important governmental power in terms of land use planning. In *Brendale v. Confederated Tribes & Bands of Yakima,*[35] the Yakima Nation sought to exercise regulatory authority through its zoning ordinance over two parcels of reservation land held in fee by nonmembers. Both parcels were significant tracts of land that bordered reservation trust lands. Given these facts, one might have expected the Court to apply the principles of *Montana* discussed earlier and readily conclude, as the Ninth Circuit and Justice Blackmun did, that [i]t would be difficult to conceive of a power more central to the "'economic security, or the health or welfare of the tribe' ... than the power to zone."[36] Instead, a divided court essentially split "tribal zoning authority over non-Indian fee lands between the so-called 'open' and 'closed' areas of the Yakima Indian Reservation."[37] In doing so, the Court failed once again to articulate any coherent factors to guide tribes, states, or lower courts in the exercise of tribal regulatory powers over land use. Moreover, the opinion suggests hostility on the part of the Court toward contemporary tribal economic development efforts. The various opinions led to a result that recognized tribal authority to zone in

32. 520 U.S. 438 (1997).

33. *See Atkinson Trading Co.*, 532 U.S. at 645.

34. 137 F.3d 1135 (9th Cir. 1998) (tribe able to exercise authority over all water resources within the borders of the reservation, including non-tribal land), *cert. denied*, 521 U.S. 921 (1998).

35. 492 U.S. 408 (1989).

36. *Id.* at 458 (Blackmun, J. dissenting) (quoting *Montana*, 450 U.S. at 566).

37. *Brendale*, 492 U.S. at 449.

"closed areas" that were, in the words of one Justice, still "pristine."[38] In those areas that had significant nonmember "residential and commercial development" the tribe lacked certain zoning powers over non-Indian fee land.[39] Thus, a number of Justices seem open to the idea that a change in the fundamental economic character of a reservation can affect the scope of a tribe's regulatory power.[40]

Other aspects of Indian regulatory law are equally muddled, such as the rules on when a state may tax nonmembers doing business within Indian country (which in turn affects the amount of tax a tribe can charge and still remain competitive). The Supreme Court in *White Mountain Apache Tribe v. Bracker*[41] articulated two independent but related barriers to the assertion of state taxation authority in Indian country.[42] According to *Bracker,* state regulatory authority may be preempted by federal law or unlawfully infringe on the rights of tribes "to make their own laws and be ruled by them."[43] The *Bracker* Court held that the State of Arizona lacked authority to impose motor carrier license and use fuel taxes on a nonmember logging company doing business on the Fort Apache Reservation. The Court emphasized both the comprehensive nature of the federal timber regulatory scheme and the potential impact of the state tax on revenues derived from tribal timber sales.[44] The preemption analysis utilized in *Bracker* was first articulated in *McClanahan v. Arizona State Tax Commission,*[45] where the Court held that Arizona exceeded its regulatory authority by attempting to impose its income tax on an enrolled member of the Navajo Tribe who lived and worked on the reservation. While *McClanahan* was a win for the tribal member challenging the state tax, the Court's primary focus on

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38. *See id.* at 439–40.

39. *See id.*

40. *See id.* at 465 (Blackmun, J., dissenting):

> In my view, even under Justice Stevens' analysis, it must not be the case that tribes can retain the 'essential character' of their reservations (necessary to the exercise of zoning authority) ... only if they forgo economic development and maintain those reservations according to a single, perhaps quaint, view of what is characteristically "Indian" today.

Id. Cf. South Dakota v. Bourland, 508 U.S. 679 (1993); Kiowa Tribe of Okla. v. Mfg. Technologies, Inc. v. United States, 523 U.S. 751 (1998) (discussed *infra* notes 62–65 and accompanying text). *See generally* Kristen Carpenter & Ray Halbritter, *Beyond the Ethnic Umbrella and the Buffalo: Some Thoughts on American Indian Tribes and Gaming*, 5 GAMING L. REV. 311 (2001).

41. 448 U.S. 136 (1980).

42. *See id.* at 143.

43. *Id.* (quoting Williams v. Lee, 358 U.S. 217, 220 (1959)).

44. *See id.* at 145–46.

45. 411 U.S. 164 (1973).

preemption was a retreat from earlier decisions.[46] The Court stated that "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption."[47] As one federal judge put it: "By reducing sovereignty to a backdrop and relying on the preemptive effect of federal treaties and statutes, it reversed the fundamental presumption of inherent tribal power applicable to disputes between tribes and states."[48] Moreover, the "extremely fact-specific" nature of the preemption inquiry creates unpredictable results.[49]

Nor has the Court been consistent in its application of the Indian preemption test—regarding different factors as determinative in different cases. In *Cotton Petroleum Corp. v. New Mexico*,[50] the Court recognized a state's power to tax in situations where the state offers services to a nonmember doing business on the reservation.[51] In doing so, the Court appeared to balance the State's interest in taxing the nonmember business against the asserted federal and tribal interests in an attempt to determine whose interests were more substantial.[52] However, such balancing is not a part of the Court's original preemption analysis; the role of the court is to consider whether Congress intended to preempt state law as it applies to non-Indians. Moreover, tribal sovereignty is intended to serve as an important "backdrop" to this analysis.[53] Under *McClanahan*, "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply"[54] and "[i]f faced with two reasonable constructions of Congress's

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46. *See, e.g.*, Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832); Williams v. Lee, 358 U.S. 217 (1959).

47. *McClanahan*, 411 U.S. at 172.

48. Honorable William C. Canby, Jr., *The Status of Indian Tribes in American Law Today*, 62 WASH. L. REV. 1, 7 (1987).

49. *See id.*

50. 490 U.S. 163 (1989).

51. It is worth noting that the Court did not feel the same compulsion to recognize a tribe's power to tax under similar circumstances. *See Atkinson Trading Co. v. Shirley*, 532 U.S. 645 (2001). *But see* Flat Ctr. Farms v. Montana Dep't of Revenue, 49 P.3d 578 (Mont. 2002), *cert. denied*, 2002 U.S. LEXIS 8710 (2002):

> If a tribal sovereign may not tax a state corporation owned by non-Indians doing business on fee land within the reservation, I cannot by analogy see how the State can claim any greater authority to tax a state corporation owned 100% by Indians doing business on non-fee land entirely within the reservation.

Flat Ctr. Farms, 49 P.3d at 584.

52. *See Cotton Petroleum*, 490 U.S. at 185–86.

53. *See* McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172 (1973).

54. *Id.* at 170–71.

intent, [a] [c]ourt resolves the matter in favor of the Indians."[55]

Yet the Court took a different approach in *Washington v. Confederated Tribes of the Colville Indian Reservation*,[56] weighing the State's interest in collecting a tax on the sale of cigarettes to non-Indians against the Tribe's economic interest in selling those cigarettes at a reduced price. In fact, the case appears to articulate yet another test for determining when a state may exercise its regulatory power in Indian country where nonmembers are concerned. The Court noted that the Tribe was attempting to market "an exemption from state taxation" with no "value being generated on the reservation."[57] Later decisions rely, at least in part, on this "value added" test in determining the breadth of state regulatory authority. For instance, in *California v. Cabazon Band of Mission Indians*[58] the Supreme Court found that the Tribes were "not merely importing a product onto the reservation for immediate resale to non-Indians. They have built modern facilities which provide recreational opportunities and ancillary services to their patrons...."[59] Thus, the Tribes were "generating value on the reservations through activities in which they have a substantial interest."[60] However, much like the *Montana* test discussed earlier, this "valued added" test has proven difficult to apply, as evidenced in a number of recent conflicting Ninth Circuit opinions.[61]

One final example is in the area of sovereign immunity—in a case in which the Court appeared to be openly hostile toward contemporary tribal economic development. In *Kiowa Tribe of Okla. v. Mfg. Technologies*,[62] the Court held that the Kiowa Tribe of Oklahoma was immune from suit

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55. Gobin v. Snohomish County, 304 F.3d 909, 914 (9th Cir. 2002) (holding that the county lacked zoning authority over reservation land owned in fee simple by tribal members).

56. 447 U.S. 134 (1980).

57. *Id.* at 155–59. *But see* Oklahoma Tax Comm'n v. Chickasaw Nation, 515 U.S. 450, 453 (1995) ("State's excise tax is unenforceable if its legal incidence falls on a Tribe or its members for sales made within Indian country). Sovereign immunity also precludes the state from collecting such a tax directly from a tribe. *See Oklahoma Tax Comm'n*, 498 U.S. at 514.

58. 480 U.S. 202 (1987).

59. *Id.* at 219–20.

60. *Id.*

61. *See generally* Richard J. Ansson, Jr., *State Taxation of Non-Indians Whom Do Business With Indian Tribes: Why Several Recent Ninth Circuit Holdings Reemphasize the Need for Tribes to Enter Into Compacts with Their Respective States*, 78 OR. L. REV. 501 (1999) (analyzing a series of conflicting Ninth Circuit opinions on whether a state could tax nonmembers doing business in Indian country on the grounds that the tribe did or did not play an active role in generating value on the reservation).

62. 523 U.S. 751, 758 (1998). *See also* Carpenter & Halbritter, *supra* note 40, at 314–16.

for an alleged breach of contract involving an off-reservation commercial activity.[63] While the case was decided in the Tribe's favor, the *Kiowa* majority articulated an apprehension regarding the exercise of this important right beyond what the Court labeled "traditional tribal customs and activities."[64] The Court took the liberty to advise Congress on how it might proceed in the future, stating, "There are reasons to doubt the wisdom of perpetuating the doctrine ... when tribes take part in the Nation's commerce."[65]

Each of the above cases represents a change, or potential change, in Supreme Court jurisprudence regarding tribal jurisdiction. Tribes no longer retain the full panoply of sovereign powers over their territory, but rather are subject to a set of complex jurisdictional rules that create a host of legal, economic, and political problems. The next section considers how these decisions might impact tribal economic development.

B. Impact on Tribal Economic Development

Sovereign immunity is justified, in part, on the theory that protection of the public treasury from unlimited exposure to liability helps to ensure a well-functioning government. Forcing broad-based waivers of immunity any time a tribe "take[s] part in the Nation's commerce"[66] would have the opposite effect, subjecting it to potentially crippling liability. The *Kiowa* Court, and others who support such a change in the law, fail to understand the important connection between tribal self-governance and tribal enterprises. Tribal governments are responsible for providing services to their constituencies, such as health, education, law enforcement, and housing, to name a few. Most sovereigns levy taxes to pay for these essential governmental functions. Yet the broad array of taxes available to state and local governments are not as readily available to tribes.[67] Indeed,

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63. Tribes are generally immune from suit regardless of the type of activity involved (e.g., commercial versus governmental) or where the tribal activity occurs (e.g., on-reservation versus off-reservation). *See generally Kiowa Tribe*, 523 U.S. at 751.

64. *Kiowa Tribe*, 523 U.S. at 756–59.

65. *Id.* at 758. Perhaps in partial response to the decision, Congress inserted in the Indian Tribal Economic Development and Contracts Encouragement Act of 2000 a provision on tribal sovereign immunity. The Act, among other things, revises 25 U.S.C § 81 regarding secretarial approval of contracts with Indian tribes. While the Act limits the type of contracts subject to Secretarial approval, one stated pre-condition to that approval is an express statement by the tribe disclosing or waiving tribal immunity from suit. *See* 25 U.S.C. § 81(d)(2)(C) (2000); Anna-Emily C. Gaupp, *The Indian Tribal Economic Development and Contracts Encouragement Act of 2000: Smoke Signals of a New Era in Federal Indian Policy?*, 33 CONN. L. REV. 667 (2001).

66. *Kiowa Tribe*, 523 U.S. at 758.

67. For instance, tribal lands that are held in trust for tribes do not generate property

cases such as *Atkinson*, which limit a tribe's ability to tax nonmember commercial enterprises located within the reservation, severely restrict a tribe's ability to raise governmental revenue through taxation.[68] Thus, tribes have had to rely on other revenue streams to meet their governmental responsibilities, most notably commercial enterprises.

The existence of the right of immunity, however, does not foreclose the possibility of waiver. Indeed, as we will see in a moment, the trend has been toward limited waivers of tribal immunity as a means of stimulating economic development. The key factor here is that tribes—and not the federal government or courts—are determining the appropriate scope of the waiver based on individual tribal circumstances. As one attorney put it "[s]overeign immunity is best understood as the power of a government to define the forum, procedure, and limits to be placed upon suits against itself."[69]

The cases dealing with regulation and taxation raise another important challenge for tribes: how to develop a comprehensive development strategy that allows the tribe to plan for the future. Land use and zoning are two good examples of how the scope of tribal powers may have a direct impact on a tribe's ability to manage its resources effectively. For instance, if a tribe is found to lack zoning authority over certain portions of the reservation, as was the case in *Brendale*,[70] the integrity of its trust lands may be compromised. Moreover, since tribes cannot predict with any certainty how a court might apply the *Montana* test, comprehensive land use planning is very difficult to undertake. Similar problems arise in the area of taxation. For example, a tribe will be hampered in its ability to establish a comprehensive tax code if it is uncertain to what extent a state can tax the same subject matter. Additionally, uncertainty with respect to tax liability can create economic disincentives for businesses wishing to pursue development with tribes.[71]

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tax, except perhaps in the form of licensing fees, business activity fees, lease income, or excise and severance tax. Economic considerations—both in terms of individual tribal income levels and a desire to attract business to the reservation—may further limit the practical value of relying on taxes to pay for governmental services.

68. *See* Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001).

69. Thomas P. Schlosser, *Sovereign Immunity: Should the Sovereign Control the Purse?*, 24 AM. INDIAN L. REV. 309, 317 (1999–2000).

70. Brendale v. Confederated Tribes & Bands of Yakima, 492 U.S. 408 (1989).

71. In the past, courts have often ignored the economic impact of their decisions, contrary to federal policies designed to promote tribal economic sovereignty. *See, e.g.*, Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 154–59 (1980). *Cf.* Sac & Fox Nation of Mo. v. Pierce, 213 F.3d 566, 583–86 (2000).

III. TRIBAL DEVELOPMENT BY AGREEMENT

Thus far, this paper has explored jurisdictional changes in Supreme Court jurisprudence and how those changes might impact tribal economic development. One means of addressing the uncertainties created by those decisions is through cooperative agreements. While the idea of cooperative agreements is not new,[72] it is worth revisiting in light of increasing development activity and increasing legal complexity.

In the area of taxation, cooperative agreements with states can reduce the level of uncertainty, both in terms of the tribe's power to tax and the level of taxation sought by the state. There are a number of models to draw upon. As recently as 2001 there were some 200 voluntary tribal-state agreements addressing a range of taxation issues.[73] These agreements have been structured differently depending on the type of tax at issue and the concerns raised by the two sovereigns regarding the tax. Not surprisingly, most of the agreements address nonmember taxation in such areas as sales, use, cigarette, tobacco, liquor, and motor fuel taxes. The agreements fall into three general categories, with some variations: (1) a tribe agrees to tax at the same level as the state and then retains the proceeds; (2) a tribe agrees to tax at the same level as the state and then divides the tax between the state and tribe (based on an estimated percentage of sales to non-Indians v. Indians); or (3) the tribe agrees to collect some percentage of tax on non-Indians for the state.

However, tribal-state compacting may not be a panacea for all types of tax disputes. For instance, these types of agreements do not address the *Atkinson* scenario discussed earlier.[74] Contracts with businesses that benefit from tribal services will be needed to close this loophole in the law. Possible competition from tribal or member businesses may also create incentives for such businesses to enter into agreements with the tribe.

Additionally, tribal-state compacts presume a willingness on the part of states to work with tribes in resolving taxation disputes. There are two

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72. *See, e.g.*, David H. Getches, *Negotiated Sovereignty: Intergovernmental Agreements with American Indian Tribes as Models for Expanding Self-Government*, 1 REV. CONST. STUD. 120 (1993); Gover, Stetson & Williams, P.C., *Tribal-State Dispute Resolution: Recent Attempts*, 36 S.D. L. REV. 277 (1991). *See generally* Philip P. Frickey, *Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754 (1997); Frank Pommersheim, *Tribal-State Relations: Hope for the Future?*, 36 S.D. L. REV. 239 (1991).

73. *See* KIM SHEANE, ARIZONA LEGISLATIVE COUNCIL, STARTED: STATE TRIBAL APPROACHES REGARDING TAXATION & ECONOMIC DEVELOPMENT 81–105 (1995) (on file with the author). *See also Tax Fairness and Tax Base Protection: Hearing on H.R. 1168 Before the House Comm. on Resources*, 105th Cong. (1998) (testimony of W. Ron Allen, President, National Congress of American Indians).

74. *See supra* notes 28–34 and accompanying text.

reasons why states should want to proceed in this manner. First, there is enough uncertainty in the law regarding the scope of state powers in this area to support negotiation over litigation.[75] Second, it makes good economic sense. Reservation businesses are generating significant tax and other types of revenue for state and local governments.[76] Moreover, surrounding communities benefit from cooperation with tribes in other ways. For example, a 1998 study demonstrated "that tribal governments account[ed] for $1.2 billion in off-reservation spending for goods and services and that reservation businesses account[ed] for $4.4 billion in off-reservation spending."[77] This spending generated "$246 million in tax revenue for state and local governments and $4.1 billion in annual tax revenue for the federal government."[78] Additional benefits include improved infrastructure; access to and creation of additional fire, police, and health care services; and expanded social services, to name a few.[79] To the extent tribes are able to undertake these initiatives through an expanded tax base, the burden on federal, state, or local agencies that might otherwise fill the void is decreased.

Tribes also may want to consider cooperative agreements as a means of addressing uncertainty in the areas of land use and zoning. The Swinomish Indian Tribal Community land use agreement with Skagit County, Washington is one such example. The agreement establishes a comprehensive land use plan (which articulates land use goals, policies for protecting resources, and an implementation strategy); a coordinated framework for conducting permitting activities; an agreed upon mechanism for resolving disputes; and a planning board consisting of tribal appointees, county appointees, and a neutral facilitator.[80] Another model is the Grand

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75. *See supra* notes 16–65 and accompanying text.

76. For instance, a 1999 study showed the State of Connecticut receiving some $200 million in fees and taxes from the Mashantucket Pequot Nation. These taxes were in the form of sales and use taxes, regulatory fees, real and personal property taxes, slot contributions, tax withholdings, and unemployment insurance. *See* Kenneth E. Robbins, *State Support for Health Reservation Economies: A Win-Win Strategy for All*, AMERICAN INDIAN REPORT, June 1999, at 18.

77. The Harvard Project on American Indian Economic Development, *Native America at the New Millennium* 107 (Final Working Draft July 11, 2001) (citing a study conducted by Buffy Naake, for the Center for Applied Research Inc., titled *The Economic and Fiscal Importance of Indian Reservations in the US Economy*), *at* http://www.ksg.harvard.edu/hpaied/docs-CIP%20%20NANM%20Final%20Working%20Draft%20July%2011%202001.pdf (last visited Apr. 17, 2003).

78. *Id.*

79. *See* Robbins, *supra* note 76.

80. *See Tribal Legal Code Project*, *at* http://www.tribal-institute.org/codes/part_five.htm (last visited Apr. 17, 2003).

Traverse Band of Ottawa and Chippewa Indians' planning and development department, which has forged a strong relationship with local chambers of commerce and town planning departments to coordinate future planning efforts.[81]

Beyond the obvious benefit of creating an atmosphere of cooperation, these types of agreements can enhance a tribe's ability to pursue a more cohesive economic strategy, particularly for those with "checkerboard" reservations. Such coordinated land use planning also increases predictability for the tribe in terms of long-term land use goals and protection of important resources. However, there are obvious limitations to this approach. Surrounding communities must be willing to cooperate with tribes in this regard and to respect and accommodate tribal norms and practices, such as creating special zoning areas to protect important cultural and natural resources.

Another related area of potential cooperation is in the commercial law context. Commercial transactions within Indian Country should fall squarely within the regulatory and adjudicative jurisdiction of tribes under the "consensual relationship" test of *Montana v. United States*.[82] However, issues of uniformity and certainty may arise over transactions involving nonmember parties.[83] Tribes must then face the question of whether to adopt certain types of uniform codes, such as the Uniform Commercial Code (UCC), as a means of facilitating economic development and decreasing legal uncertainty.[84] There are several different approaches that a tribe might pursue. It might adopt the UCC (or other uniform code) as part of the tribal code, making such non-uniform provisions as it chooses. Alternatively, it may ratify or incorporate by reference the UCC as enacted by a relevant state's UCC (which may include case law interpreting the UCC), again with appropriate amendments. A third approach is to enter

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81. *See* The Harvard Project on American Indian Economic Development, *Honoring Nations: 2000 Honorees: Grand Traverse Band Planning & Development*, *at* http://www.ksg.harvard.edu/hpaied/hn/hn_2000_plan.htm (last visited Apr. 17, 2003).

82. *See* 450 U.S. 544, 565 (1981). *But see supra* notes 24–34 and accompanying text.

83. Even if the initial transaction occurs outside of Indian Country, nonmember parties to the transaction may still be subject to tribal law or face sovereign immunity issues. *See, e.g.*, *In re* Blue Lake Forest Products, Inc., 30 F.3d 1138, 1141 (9th Cir. 1994); Babbitt Ford, Inc. v. Navajo Indian Tribe, 710 F.2d 587, 597 (9th Cir. 1983); Kiowa Tribe of Okla. v. Mfg. Technologies, Inc., 523 U.S. 751, 760 (1998).

84. Commercial activity aids economic development by permitting exchange. If two parties enter into a voluntary, informed exchange then, in theory, both are better off in their estimation. Thus, voluntary exchange is the basic way that a market economy allocates resources to uses. The UCC provides a legal infrastructure for these basic types of commercial exchange. See *Tribal Legal Code Project*, *at* http://www.tribal-institute.org/codes/part_seven.htm (last visited Apr. 17, 2003) for helpful information regarding the adoption of a tribal UCC.

into a cooperative agreement with a relevant state.[85] This approach has the benefit of uniformity and also allows tribes to address any potential conflicts in government-to-government agreements. While the adoption of the UCC makes it easier for parties to plan their transactions and allocate their risks via fairly straightforward rules, it may include rules and norms that a tribe would not have otherwise chosen. For instance, some tribes are reluctant to adopt the UCC rules permitting self-help repossession by creditors, a practice with a sorry history in Indian country.[86] The hazard of adopting rules, or even case law that are inconsistent with tribal norms, can be addressed with limiting provisions in the agreement or by granting tribal courts the power to interpret provisions appropriately. Other advantages to adopting the UCC through agreement include reducing the costs of drafting a new law and reducing negotiation and contract costs for parties doing business with tribes. Other types of commercial codes, such as a corporation code, may similarly facilitate economic development by aiding in the creation of institutions and enterprises familiar to investors and others interested in doing business in Indian country.[87]

One final area where tribes may consider using agreements to address legal uncertainty is sovereign immunity. Partial waivers of immunity can be helpful to tribes as a means of attracting new development.[88] However, whether and to what extent a tribe has waived its immunity will depend on

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85. The Cheyenne River Sioux Tribe recently entered into such a compact with the State of South Dakota adopting portions of South Dakota's UCC with provisions addressing various concerns of the Tribe. *See* Kay Humphrey, *New Code Bodes Well for Cheyenne River Development*, INDIAN COUNTRY TODAY, Jan. 24, 2001, *available at* http://www.indiancountry.com/?1899 (last visited Apr. 17, 2003).

86. *See Tribal Legal Code Project*, *at* http://www.tribal-institute.org/codes/part_seven.htm (last visited Apr. 17, 2003). *Cf. Babbitt Ford*, 710 F.2d at 594 (discussing the Navajo Nation's repossession statute).

87. *See generally*, *Economic Development*, *supra* note 8.

88. Another approach for tribes is to create separate business entities that are not immune from suit. This may be a particularly useful tool for tribes running off-reservation businesses, as a means of avoiding potential clashes with the states in which these corporations operate. Yet it need not be limited to such circumstances. Several studies suggest that this kind of organizational restructuring can yield positive results both in terms of profitability and access to capital. *See, e.g.*, Miriam R. Jorgensen & Jonathan Taylor, *Patterns of Indian Enterprise Success: A Statistical Analysis of Tribal and Individual Indian Enterprise Performance, A Report to the National Congress of American Indians*, The Harvard Project on American Indian Economic Development, Harvard University (2000) (on file with the author). *See also* Cornell & Kalt, *supra* note 6, at 29–34. Any judgments against one of these entities would be appropriately limited to assets held by that entity. Of course, the more tribes separate their businesses from government operations, the more susceptible they are to judicial criticism regarding their status as sovereigns. *See, e.g.*, *supra* notes 62–65 and accompanying text.

the terms of the agreement.[89] Further, while waivers need to be "clear and unequivocal" to be enforceable, the Supreme Court recently concluded that an arbitration clause providing for "disputes ... arising out of or relating to the Contract ... [to] be decided by arbitration in accordance with the Construction [I]ndustry Arbitration Rules of the American Arbitration Association currently in effect," along with a choice-of-law clause, was sufficient to constitute a clear waiver of immunity.[90] Thus, it is important for tribes to state clearly both the existence and extent of any waiver.[91] Limited waivers of immunity address Justice Kennedy's concern in *Kiowa* that "[i]n this economic context, immunity can harm those who are unaware that they are dealing with a tribe ... [or] do not know of tribal immunity...."[92] Yet a waiver by sovereign agreement is very different from one that is mandated by Congress or the courts. A tribe determines when the waiver is appropriate and to what extent. For reasons noted earlier, this is an important sovereign attribute.[93]

Of course, each of the approaches discussed above should only be pursued to the extent they are consistent with tribal norms concerning interpersonal dealings. Adopting a code or regulatory scheme that is contrary to those norms or practices could result in a disregard of the law. This would increase uncertainty, not reduce it. Research in other fields of study has aptly demonstrated the hazards of pursuing culturally mismatched economic strategies: "[U]nless there is a fit between the culture of the community and the structure and powers of its governing institutions, those institutions may be seen as illegitimate, their ability to regulate and organize the development process will be undermined, and

89. *See, e.g.*, C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411 (2001); Kiowa Tribe of Okla. v. Mfg. Technologies, Inc., 532 U.S. 751 (1998).

90. *C & L Enterprises*, 532 U.S. at 415.

91. One practitioner of Indian law suggests a number of issues that tribes should consider when drafting such waivers, including whether to limit: (1) who can bring a claim; (2) the types of claims allowed; (3) the types of relief that can be sought; (4) the forum the claim can be heard in; (5) the law to be applied, the amount, and source of the judgment; and (6) the duration of the waiver. *See* Schlosser, *supra* note 69, at 325–28. Businesses seeking limited waivers of immunity in order to protect their investment will have similar concerns, such as: (1) what recourse does it have in the event of a default; (2) what assets are relevant to a potential claim and who has control over those assets; (3) what steps need to be taken to reach those assets in the event of a dispute; and (4) to what extent have those assets been set aside to secure other tribal obligations? *See generally* Mark A. Jarboe, *Doing Business in Indian Country*, *in* FEDERAL RESERVE BANK OF MINNEAPOLIS, LENDING IN INDIAN COUNTRY: CULTURAL AND LEGAL ISSUES 66 (1997) (seminar materials on file at the University of Minnesota Law Library).

92. *Kiowa Tribe*, 523 U.S. at 758.

93. *See supra* notes 66–69 and accompanying text.

development will be blocked."[94]

IV. ENHANCING TRIBAL SOVEREIGNTY

Agreements of the type mentioned above, that waive a tribe's immunity against suit or require it to share power or revenue with another sovereign, may at first blush be perceived as a diminishment of sovereignty. However, these steps actually can enhance a tribe's sovereignty in two key ways.

A. Avoiding Uncertainty

An important benefit of conflict resolution by agreement is that it allows tribes to commence with the business of providing for their constituency, rather than become mired in protracted litigation. Moreover, for reasons previously discussed, both tribes and states may prefer the predictability created by agreement to the uncertainty created by U.S. Supreme Court decisions. These points are well illustrated in the pending dispute between the Winnebago Tribe of Nebraska and the State of Kansas and an earlier dispute between the State of Nebraska and the Winnebago Tribe.

The current dispute between the Winnebago Tribe and the State of Kansas began when the Kansas Department of Revenue and the State Attorney General confiscated two motor fuel transport trucks owned by the Tribe's business corporation.[95] The State brought civil and criminal charges against tribal officials for their alleged failure to pay $1.25 million in motor fuel taxes. The motor fuel at issue is manufactured and sold on the Winnebago reservation by HCI, a wholly-owned tribal corporation. The fuel is then transported to several tribes located within the exterior borders of Kansas. The proceeds from the sale are used for tribal services, including police, fire, health care, and education. The Winnebago Tribe claims it does not owe the motor fuel tax because, among other things, such a tax would interfere with the rights of tribes as sovereigns to do business with each other. The Tribe, through HCI, pays a road tax to the State of Kansas when it transports the fuel, but maintains no other tax is due.

Since the facts have not been fully developed at this juncture, it is difficult to provide a complete analysis of the case. However, both the facts

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94. Cornell & Kalt, *supra* note 6, at 10.

95. The facts are drawn primarily from the following sources: Winnebago Tribe of Neb. v. Stovall, No. 02-4070-JTM (D. Kansas Aug. 5, 2002); David Melmer, *Ho-Chunk Inc. Wins Again*, INDIAN COUNTRY TODAY, July 12, 2002, *available at* http://www.indiancountry.com/article/1026487637 (last visited Apr. 17, 2003); David Melmer, *Winnebagos v. Kansas*, INDIAN COUNTRY TODAY, May 4, 2002, *available at* http://www.indiancountry.com/article/1020452229 (last visited Apr. 17, 2003); Henry J. Cordes, *Winnebago Tribe's Gasoline Tankers Impounded in Tax Dispute With Kansas*, THE OMAHA WORLD-HERALD, April 12, 2002.

and the law appear to be on the Tribe's side. If the Court was to view this as a "value added" issue, it seems clear that the Tribe is "not merely importing a product onto the reservation for immediate resale to non-Indians" or "marketing" an exemption from state taxation.[96] The Tribe manufactures the fuel on the reservation using it own unique blending process and then sells it to other tribal governments and entities. In this way, the case is much more analogous to *Cabazon*, in which the Court held that the tribes were "generating value on the reservations through activities in which they have a substantial interest."[97] Nor is this a situation in which the State can claim the ability to tax a wholesaler selling goods to tribes that are later resold to nonmembers, as in *Dep't of Taxation & Finance of N.Y. v. Milhelm Attea & Bros.*[98] *Milhelm Attea* did not involve goods that were manufactured and sold by a tribe on its own reservation to another tribe. Rather the case is more analogous to *Oklahoma Tax Commission v. Chickasaw Nation*,[99] where the Supreme Court held that a "State's excise tax is unenforceable if its legal incidence falls on a Tribe or its members for sales made within Indian country."[100] Since the Tribe owns the entity being taxed and uses the profits from that entity to fund essential governmental services, the legal incidence of the tax falls on both the Tribe and its members. Two other possible arguments support the Tribe's claim. First, principles of sovereign immunity should shield the Tribe and its officials from any action by the State of Kansas.[101] Second, there is nothing more antithetical to principles of tribal sovereignty than to find in favor of a state seeking to tax a transaction between two sovereign tribal entities.[102] A U.S. District Court has temporarily enjoined the State from taking further action against the Tribe pending adjudication of the Tribe's claims against the State.[103]

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96. *Cf.* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 155–57 (1980).

97. California v. Cabazon Band of Mission Indians, 480 U.S. 202, 219–20 (1987).

98. 512 U.S. 61 (1994).

99. 515 U.S. 450 (1995).

100. *Id.* at 453.

101. *See, e.g.*, Kiowa Tribe of Okla. v. Mfg. Technologies, Inc., 523 U.S. 751 (1998). *See also* Fletcher v. United States, 116 F.3d 1315, 1324 (10th Cir. 1997) (extending immunity to tribal officials acting in their official capacity).

102. *Cf.* White Mountain Apache v. Bracker, 448 U.S. 136, 143 (1980) (noting that tribal sovereignty may serve as an independent barrier to the assertion of state jurisdiction).

103. The court granted the Tribe's motion for a preliminary injunction, barring the State from imposing a tax, pursing criminal or civil charges against tribal officials, or confiscating any property. The State also was ordered to return the fuel delivery trucks and to not interfere with the Tribe's sales to other tribes. *See* Winnebago Tribe of Neb. v. Stovall, No. 02-4070-JTM (D. Kansas Aug. 5, 2002).

Yet the State is holding steadfast to its position, most probably for reasons earlier discussed: the cases on taxation are not models of clarity.[104] One state official remarked "we don't see this as a jurisdictional issue.... We see them as a private company that owes the tax just like any other distributor."[105] This statement misses the mark in that HCI is in fact a tribally-owned and chartered corporation that uses its revenue to provide essential governmental services to its members. In this way, it performs much the same function as any state-run agency that raises revenue through the sale of goods or services, such as lotteries, transportation facilities, toll roads, universities, and convention centers. To its credit, the Tribe offered to sit down with the Kansas officials and discuss taxation issues, but the State has so far refused.

This is the opposite of what the State of Nebraska chose to do when faced with a tax dilemma involving the same motor fuel. Nebraska negotiated a cooperative agreement with the Winnebago Tribe. While the Tribe could have argued against the imposition of any state tax under the "value added" test discussed earlier,[106] it instead opted to enter into an agreement with the State and to address the State's concerns. The Tribe agreed to charge a gas tax equal to the State's rate from all reservation customers and to remit one-quarter of that tax to the State based on estimates of sales to non-Indians.[107] In the end, the agreement benefits both the Tribe and the State. The Tribe is ensured a stable revenue stream for important governmental services, and the State is able to address concerns over possible differences in tribal and state tax rates.

Of course this type of an agreement is possible only if states are willing to recognize tribes as sovereign partners with a common goal of providing for their constituencies. In other words, Kansas should not view the dispute with the Tribe as a dispute between a "private company" and a state, but rather between two sovereigns, each with an interest in capturing a share of the tax revenue. For tribes, it means recognizing that compromise along the lines of the Winnebago-Nebraska agreement may actually enhance tribal sovereignty by providing a stable source of revenue and opening the door to further government-to-government relations.

B. Exercising "De Facto" Sovereignty

This latter point on the link between the exercise of sovereignty and tribal economic development is an important one. Research suggests that the exercise of tribal authority over lands and resources, coupled with the

104. *See supra* notes 28–61 and accompanying text.

105. Cordes, *supra* note 95 (quoting Gayle Martin of the Kansas Revenue Department).

106. *See supra* note 77.

107. *See id.*

policy of self-determination, greatly improve a tribe's chances for sustained economic development.[108] This exercise of authority has been referred to as "de facto sovereignty,"[109] as opposed to "de jure sovereignty," which is subject to the changing tides of the Supreme Court.

The experiences of individual tribes during the last thirty years support this conclusion. Chief Phillip Martin, of the Mississippi Band of Choctaw Indians, notes that "[t]he Choctaws' ability to exercise our sovereignty, to operate our own tribal government and to work in conjunction with the local, county, state, and federal governments on a government-to-government basis" were crucial factors in the Tribe's economic revitalization.[110] Tribal Representative Ray Halbritter of the Oneida Indian Nation makes a similar point in his discussion of the "practical value" of Native American sovereignty in rebuilding Oneida society and culture:

> We have empowered ourselves in a way that cannot be denied, and in a way that allows us to do things for our people that we have been unable to do for centuries.... I believe that such empowerment is more than just a statement of sovereignty, it is sovereignty, and we have established that sovereignty without waiting or depending on other people to define what that term means. Whatever ... the pronouncements of the Supreme Court, sovereignty to us is the power to act ... for ourselves.[111]

Cooperative agreements with other sovereigns are an expression of de facto tribal sovereignty. These types of agreements send a clear message to those who fail to understand that when tribes engage in economic development or, in the words of Justice Kennedy, "take part in the Nation's commerce,"[112] they do so as sovereigns. Moreover, cooperative agreements are an expression of the right of tribes to shape their own socio-economic future, which is an essential attribute of the right of self-determination.[113]

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108. *See, e.g.*, SHARON O'BRIEN, AMERICAN INDIAN TRIBAL GOVERNMENTS (1989); *Economic Development*, supra note 8; Cornell & Kalt, *supra* note 6, at 14–16; John C. Mohawk, *Indian Economic Development: An Evolving Concept of Sovereignty*, 39 BUFF. L. REV. 495 (1990–1991).

109. Cornell & Kalt, *supra* note 6, at 14 (the term "de facto sovereignty" is used to describe what practical sovereign steps tribes have taken to improve their chances for sustainable economic development).

110. *Hearing*, *supra* note 9 (testimony of Phillip Martin, Chief of the Mississippi Band of Choctaw Indians).

111. Ray Halbritter & Steven Paul McSloy, *Empowerment or Dependence? The Practical Value and Meaning of Native American Sovereignty*, 26 N.Y.U. J. INT'L L. & POL. 531, 570–71 (1994).

112. Kiowa Tribe of Okla. v. Mfg. Technologies, Inc., 523 U.S. 751, 758 (1998).

113. *See supra* note 7 and accompanying text.

V. CONCLUSION

Supreme Court decisions during the last twenty-five years have created jurisdictional uncertainties for Indian nations. These uncertainties have developmental consequences: most notably they create economic disincentives and interfere with tribal planning. Cooperative agreements may be one way to minimize these uncertainties and increase economic opportunity. Additionally, such agreements represent an exercise of "de facto sovereignty," which is an important step in the development process.

The Role of the National Indian Gaming Commission in the Regulation of Tribal Gaming

Sandra J. Ashton*

Good morning ladies and gentlemen. Thank you for the opportunity to describe the role of the National Indian Gaming Commission (NIGC) in the regulation of gaming by Indian tribes. As a federal employee, I must state that these are my views and do not necessarily represent the views of the NIGC.

I currently am an attorney in the Office of General Counsel of the NIGC, after having worked for several years in the Solicitor's Office, Division of Indian Affairs. Today I will present a brief overview of the industry, describe the specifics of the NIGC's regulatory responsibilities, and discuss some of the challenges facing the NIGC. Before I begin, however, it is important to distinguish between the NIGC and the National Indian Gaming Association (NIGA). The NIGC is the regulator, whereas NIGA is an organization composed of gaming tribes.

I. OVERVIEW OF THE INDUSTRY AND ITS REGULATION

Indian gaming generated $12.7 billion in 2001 and accounts for about a quarter of the gaming market in the United States.[1] As recently as 1997, the annual revenues were $7.4 billion, only slightly more than half of the 2001 revenues.[2]

Many tribes have used their gaming profits to fund education, improve health and elder care, enhance police and fire departments, build housing and roads, develop environmental programs, launch commercial ventures, and buy back reservation lands. Tribal casinos also contribute to local economic development by creating jobs for non-Indians in the surrounding

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1. NIGC, TRIBAL GAMING REVENUES, *at* http://www.nigc.gov (last visited Jan. 27, 2003).

2. *See id.*

communities, by increasing tourism, and by giving a share of their profits to local authorities to pay for roads, schools, and law enforcement. However, not all tribes benefit equally from gaming: some tribes choose not to undertake gaming operations, while others are not so geographically situated as to make gaming profitable. For the fiscal year ending in 2000, 62% of all tribal gaming revenues were generated by only 12% of the gaming operations.[3]

The NIGC operates on a fixed annual budget of $8 million that is funded by fees paid by gaming tribes. The NIGC tracks nearly 300 tribal gaming operations run by over 200 tribes in twenty-seven states. The NIGC is the primary federal regulator of tribal gaming. Under the Indian Gaming Regulatory Act enacted in 1988,[4] the Secretary of the Interior has certain responsibilities, such as approving Tribal-State compacts, authorizing procedures for Class III gaming when a state refuses to compact with a tribe, taking land into trust for gaming, and approving tribal plans for the distribution of gaming revenue to individual members. The Department of Justice also has involvement in Indian gaming through its authority to enforce civil and criminal prohibitions on illegal gaming activities.

II. HISTORY

The NIGC came into existence after Congress passed the Indian Gaming Regulatory Act (IGRA) in 1988.[5] Congress had contemplated an act to regulate Indian gaming for several years and attempted to balance the competing interests of the Indian tribes and the states. In IGRA, Congress set up the jurisdictional framework that presently governs Indian gaming. An impetus for enactment of IGRA was the 1987 Supreme Court decision *California v. Cabazon Band of Mission Indians*.[6] The Supreme Court found that Indian tribes located in states that otherwise allow gaming have a right to conduct gaming on Indian lands unhindered by state regulation.[7]

III. GOALS OF THE INDIAN GAMING REGULATORY ACT

IGRA has three main purposes:

(1) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences;

(2) to ensure that the Indian tribe is the primary beneficiary of the

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3. *See id.*

4. 25 U.S.C. §§ 2701–2721 (1988). For an overview of the Act see http://www.nigc.gov (last visited Jan. 27, 2003).

5. *See* 25 U.S.C. § 2704 (1988).

6. 480 U.S. 202 (1987).

7. *See id.*

gaming operation; and

(3) to assure that gaming is conducted fairly and honestly by both operators and players.[8]

As you can see, the NIGC is charged with both protecting tribal gaming revenues as well as ensuring the integrity of the industry. Most often, depending on with whom you talk, the NIGC can be both a friend and an enemy.

At its core, Indian gaming is a function of sovereignty exercised by tribal governments; as tribes, consistent with IGRA, play a front-line role in the regulation of Indian gaming. In addition, the federal government maintains a government-to-government relationship with the Indian nations. Thus, while the NIGC is committed to strong regulation of Indian gaming, it also is our philosophy to be user friendly. By this, we mean that the NIGC should be responsive, efficient, and committed to education and training, when it comes to compliance with the law. Additionally, we make certain that the NIGC consults with tribes on matters of mutual concern, such as the development of regulations.

IV. OVERVIEW OF REGULATION

Indian gaming consists of three layers of regulation: tribal, state, and federal. Tribes provide the first level of regulation for their gaming operations, while state involvement occurs when Tribal-State compacts provide for some level of state regulation. The third level of regulation is provided by the NIGC.

Tribal governments often delegate gaming regulatory authority to tribal gaming commissions under the tribal gaming ordinances that are submitted and approved by the NIGC. Tribal gaming commissions also may be established or delegated authority under Tribal-State compacts entered into to govern Class III gaming. The NIGC encourages tribes to establish independent tribal gaming commissions and works closely with tribes to advise them on the responsibilities of those commissions.

V. GAME CLASSIFICATION AND REGULATION

IGRA classifies Indian gaming into three categories and designates the governmental entity or entities with regulatory authority for each category:

CLASS I: Class I gaming is gaming conducted on Indian lands at traditional ceremonial celebrations.[9] Regulatory jurisdiction for Class I gaming is retained solely by the Indian tribe.

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8. NIGC, MISSION AND RESPONSIBILITIES, *at* http://www.nigc.gov (last visited Jan. 27, 2003).

9. *See* 25 U.S.C. § 2703 (1988).

CLASS II: Class II gaming includes bingo, instant bingo, and other games similar to bingo, such as pull-tabs, lotto, punch-boards, tip jars, and certain card games.[10]

CLASS III: Class III gaming is everything else—all forms of gaming that are not Class I or Class II gaming.[11]

The Tribal-State compacting process set out in IGRA primarily governs the regulation of Class III gaming. The provisions subject to compact negotiation include criminal and civil jurisdiction, state assessments to cover the costs of any state regulation, standards of operation, licensing, and any other subjects that are directly related to Indian gaming activities.[12]

Sometimes tribes that cannot obtain compacts with states will push the limits of Class II gaming or even engage in Class III gaming, which is a violation of IGRA. Distinguishing between Class II and Class III gaming involves complex factual and legal issues. While the NIGC has no formal process to identify Class II games, we do issue advisory opinions when resources permit. Such determinations are difficult, as a variety of software-based games can proliferate overnight. Disputes over game classification issues frequently become matters for federal courts to decide.

In general, the NIGC has the authority to monitor gaming activities, inspect and examine gaming premises, examine and photocopy gaming books and records, receive annual audit reports of gaming operations, approve tribal gaming ordinances, approve gaming management contracts between tribes and third-party managers, conduct background investigations as necessary, issue closure orders, impose and collect civil fines, and issue regulations that are needed to carry out its responsibilities.

VI. SPECIFICS OF THE NIGC'S REGULATORY ROLE

The NIGC works to establish a cooperative relationship with tribes and, as part of this effort, the NIGC engages in several activities.

A. Monitors all tribal gaming operations on a continuing basis and, when required, investigates

The eyes and ears of any regulatory agency are primarily those staff members who go on-site to observe the regulated operations. To fulfill its role, the NIGC relies on its field investigators, which are located in five regional offices, to maintain close contact with the regulated community. Through these field investigators the NIGC is able to observe tribal gaming activities and to render technical assistance to tribal gaming regulators and

10. *See id.*

11. *See id.*

12. *See* 25 U.S.C. § 2710 (1988).

operators in the areas of (1) auditing and accounting, (2) security and investigations, (3) gaming operations and internal controls, and (4) environment, health, and public safety.

B. Reviews and approves tribal gaming ordinances

Under IGRA, the Commission has the responsibility to approve tribal gaming ordinances and amendments to the ordinances. In fulfilling these obligations, the Commission has approved nearly 300 gaming ordinances.

C. Reviews and approves management contracts

If a tribe chooses to engage the services of a third party to manage its gaming operations, the NIGC must first approve a written agreement setting forth the terms of that relationship. The Chairman has the authority to find a management contractor unsuitable if the NIGC has information before it that would support such a determination.[13]

The NIGC is frequently asked to review other contracts affecting the operation of Class II and Class III gaming. These contracts range from straight financing agreements to lease agreements, employment agreements, and consulting agreements. All are reviewed to see if they constitute a "management contract" requiring Commission approval. In addition, those agreements found not to be "management contracts" are forwarded to the Bureau of Indian Affairs for review as to the applicability of 25 U.S.C. § 81.[14]

D. Conduct background investigations on employees

Essential to a background investigation is the submission of fingerprint cards for employees of tribal gaming operations. The NIGC has entered into memoranda of understanding for the purpose of processing fingerprint cards with 169 Indian tribes, and the NIGC processes approximately 3,000 fingerprint cards each month. Since 1992, the NIGC has processed more than 165,000 fingerprint cards, and it currently maintains records on nearly 95,000 individuals.

E. Initiate enforcement actions to ensure the integrity of Indian gaming operations

The NIGC is a very small agency that must enforce the provisions of IGRA and the regulations primarily by working with tribal gaming commissions in order to achieve compliance with the law. Only as a last resort will the NIGC turn to its assortment of enforcement tools.

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13. *See* 25 U.S.C. § 2711(e) (1988).

14. *See* 25 U.S.C. § 2711 (1988).

Among matters for which the NIGC may seek enforcement are those relating to the operation of gaming facilities without a tribal license, failure of gaming operations to perform background investigations on key employees and primary management officials, failure to submit audit reports, operating on land which has not been approved for gaming, offering Class III gaming without a Tribal-State compact, management by contractors whose agreements have not been approved by the NIGC, and inadequate maintenance of gaming operations that could threaten the health and safety of the public.

There are difficulties that can be encountered in an enforcement action. As most enforcement actions are appealed, they affect the limited resources of the NIGC by triggering the administrative hearing process. The final agency decision after the hearing is likely to result in a challenge in federal court, which virtually assures protracted litigation.

VII. ISSUANCE OF REGULATIONS

IGRA specifically authorizes the NIGC to issue regulations that are required to fulfill its role.[15] Under this authority, the NIGC has undertaken several major regulatory initiatives.

A. Minimum Internal Control Standards

On July 29, 2002, revisions to the regulations concerning the Minimum Internal Control Standards (MICS) became final.[16] The MICS are intended to protect and preserve the integrity of Indian gaming by preventing the potential risk of loss at tribal casinos due to customer or employee access to cash and cash equivalents within the casino. The MICS reduce the risk of loss to tribal gaming operations because they contain, among other things, standards and procedures that govern cash handling and counting, documentation, game integrity, auditing, and surveillance. The MICS also establish minimum standards and procedures for Class II and Class III games such as bingo, pull tabs, card games, manual and computerized Keno, pari-mutuel wagering, table games, and gaming machines. In short, the MICS provide strict rules which track money from the time it enters the casino until the time it leaves.

Under the MICS, the annual independent audit of a tribal gaming operation provided to the NIGC will include comments on that tribal gaming operation's compliance with the tribe's MICS program. Many tribes' internal controls already meet or exceed the NIGC's MICS, and many have state-of-the-art surveillance and machinery to conduct the

15. *See* 25 U.S.C. § 2706(b)(10) (1988).

16. *See* 25 C.F.R. § 542.3 (2002). *See also* NIGC, MINIMUM INTERNAL CONTROL STANDARDS, FINAL RULE, *at* http://www.nigc.gov (last visited Jan. 27, 2003).

counting of money.

B. Self-Regulation

The NIGC promulgated rules regarding Tribal Self-Regulation for Class II operations.[17] These voluntary procedures permit a tribe to obtain a Class II self-regulation certificate if it meets certain criteria, such as: (1) documentation of how tribal net gaming revenues were used; (2) adequate systems for accounting; (3) adequate systems for investigation, enforcement, and prosecution of violations; (4) adequate minimum internal control standards; and (5) an independent tribal regulatory body.

The issuance of a self-regulation certificate will allow a tribe a reduction in the fees it pays to the NIGC. However, notwithstanding the regulatory role of tribal gaming commissions, the NIGC will maintain oversight authority and continue to be responsible for enforcing compliance with IGRA, its implementing regulations, and tribal gaming ordinances.

C. Health and Safety

IGRA also requires that tribes include provisions within their tribal gaming ordinances relating to the adequate protection of the environment, public health, and safety. The NIGC plays an oversight role in assuring the safety of the public in tribal gaming facilities, and the threat of imminent harm justifies the issuance of an interpretive rule. The NIGC developed this rule with the assistance of a tribal advisory committee, and the rule became effective on August 12, 2002.[18]

These are just a few of the regulations that the NIGC has promulgated since its inception. Among its additional regulations, the NIGC also maintains regulations for debt collection[19] and for responding under the Freedom of Information Act.[20]

17. *See* 25 C.F.R. pt. 518 (1998). *See also* NIGC, SELF REGULATION OF CLASS II GAMING, *at* http://www.nigc.gov (last visited Jan. 27, 2003).

18. *See* 25 C.F.R. pt. 580 (2002). *See also* NIGC, ENVIRONMENT, PUBLIC HEALTH AND SAFETY, *at* http://www.nigc.gov (last visited Jan. 27, 2003).

19. *See* 25 C.F.R. pt. 513 (2001).

20. *See* 25 C.F.R. pt. 517 (1993). *See also* NIGC, FREEDOM OF INFORMATION ACT PROCEDURES, *at* http://www.nigc.gov (last visited Jan. 27, 2003).

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Municipal and State Impact of Gaming

Kevin Ryan*

Good morning. I think I am here this morning because of the fact that I represent the Town of Montville, Connecticut. Montville includes the Village of Uncasville, and in that village is the Mohegan reservation. On the Mohegan reservation is Mohegan Sun Casino and Hotel, one of the largest gaming facilities in the world. Moreover, just ten miles away in the Town of Ledyard is another large tribal gaming facility, which is the Foxwoods gaming facility. I am here basically to talk about how these two facilities affected the towns surrounding them, as well the State of Connecticut. At the National Conference of Legislators from Gaming States recently held in New Orleans, we had a mayor of one town and a selectmen from another town who were in place when these facilities came into operation. These two gentlemen had very different perspectives on how these gaming facilities affected their towns, and I think I will hit a little bit on that as I am speaking this morning.

Ten years ago, the Mashantucket Pequots expanded their bingo hall and opened up the first portion of the Foxwoods Casino. At the time, southeastern Connecticut was anticipating very heavy unemployment at a possible rate of around twenty to twenty-five percent, due to defense cutbacks. Electric Boat, a division of General Dynamics, was one of the largest employers, and, as the federal government just was not buying submarines, they were cutting back on their employees. The casino initially opened, I think, with the intention of having limited operating hours. Yet, the day it opened its doors was the last time it had its doors shut. Since then, it has operated continuously over the last ten years.

The casino initially began with only table games, as allowed under Connecticut's Las Vegas Nights Statutes.[1] Under an agreement with then-Governor Weicker, the Tribe signed a compact with the State permitting the casino to have slot machines; furthermore, the agreement provided that the State would receive twenty-five percent of the profits. The State then shared a portion of this money with towns throughout the state according to

* State Representative, 139th Assembly District, Connecticut.

1. *See* CONN. GEN. STAT. §§ 7-186a to 7-186p (2001).

a pilot formula, which is a payment in lieu of taxes formula. Using this formula, the State collects around $350 million from the two casinos and distributes about $135 million to the towns from a fund called the Mohegan Pequot Fund.

The original compact was reopened under an agreement between the State and the Mashantucket Pequot Tribe, and, in 1994, the Mohegan Tribe built a casino on what had been United Nuclear, an industrial property in the Town of Montville. As a result, Mohegan Sun also was allowed to have slot machines in addition to the table games, with the same agreement that the State would receive about twenty-five percent of the profits from the casino slot machines. We anticipate that this money, which I earlier said is about $350 million, will probably increase to about $400 million next year.

Now, for the Town of Montville, United Nuclear had been a private entity that paid the Town of Montville about one million dollars a year in real estate and personal property taxes. When the land went into trust with the United States government for the Mohegans, the Town lost this tax revenue. Since it was sovereign land held in trust, the land was not taxable by the local town. During Governor Weicker's discussions with the Mohegans concerning their compact with the State, it had been recommended that the Tribe pay the Town of Montville about a half of a million dollars a year.

At this point in time, we had some feeling for what the impact on the Town would be from our experience in Ledyard, Preston, and North Stonington, where the Foxwoods Casinos were located, or approximately located. With this knowledge, the State Senator, at the time, and I made the following recommendation: while we could see that having a casino is great for jobs, the casino may cause other problems, and thus, the Tribe should help out with some of the consequences of having a large facility in a small town. For the most part, everyone involved was in agreement. Unfortunately, the Governor's office determined that negotiation between the State and the Tribe on behalf of the Town was not allowable, and a separate agreement between the Tribe and the Town was negotiated. Fortunately, this agreement carried through, and the Town of Montville now receives a half of a million dollars yearly directly from the Tribe.

Since the casinos opened, the Foxwoods Resort Casino has created almost 13,000 jobs, and the Mohegan Casino and Tribe employ over 10,000 men and women. These jobs help our region to maintain about a two percent unemployment rate. I think earlier this morning, we heard reference to a study by the Connecticut Center for Economic Analysis at the University of Connecticut,[2] which was conducted in 2000. In that study,

2. FRED CARSTENSEN ET AL., UNIVERSITY OF CONNECTICUT, THE ECONOMIC IMPACT OF THE MASHANTUCKET PEQUOT TRIBAL NATION OPERATIONS ON CONNECTICUT (2000).

commissioned by the Mashantucket Pequot Tribe, a claim was made, or a finding was shown, that nearly 41,363 jobs have been created directly, indirectly, or induced by the gaming operations and their respective tribes.

As I mentioned earlier, there was a difference in how the tribes and their gaming facilities were envisioned by the surrounding communities. The Mashantucket Pequot Tribe, during this period, wanted to annex more land to their reservation, which was located in Ledyard, North Stonington, and Preston. Those three towns were concerned about the loss of property taxes and the loss of local control, such as zoning, and opposed the annexation. Since that time, they have spent large amounts of money on attorneys and their associated costs. During that period, there were discussions between the Mashantucket Pequot Tribe and the towns—with the Tribe making various offers—but no agreement was reached. Since then, the Tribe has dropped its request for annexation.

The report completed by the Connecticut Center on Economic Analysis concluded that one of the benefits brought to the region by the Mashantucket Pequot Tribe included the raise in the real gross state product by $1.2 billion, [3] which also represents a yearly average percentage increase of about eight and a half percent for the New London region,[4] an eight and a half percent increase for New London's gross regional product, and a one percent increase for the overall state gross state product.

The Mashantucket Pequot Tribe also has sustained positive residential property values in Ledyard, North Stonington, and Preston relative to the Hartford labor market. Keep in mind that ten years ago we were looking at property values possibly going down with a twenty percent unemployment rate. Obviously, if people left the region, there would have been too many homes for sale and, thus, the price of homes would have gone down. The Tribe changed that and helped to maintain residential property values.

Furthermore, the Mashantucket Pequot Tribe provided millions of dollars in property tax money to the City of Norwich and the towns of Preston, North Stonington, and Ledyard. This money has come about from other development projects in the region that are off the reservation, including a boatyard and a high-speed ferry service. One project currently being developed by the Mohegans is an aquaculture project in the Long Island Sound, where they are seeding shellfish beds. The Mashantuckets' projects include hotels and restaurants in the region. Overall, the Mashantucket enterprises bring in roughly 41,000 people a day on average to the area, with about seventy-three percent of the people coming from out-of-state. The Tribe brings in people who use their money to purchase gas, souvenirs, meals, and lodging in the region.

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3. *See id.* at 13.

4. This region is home to the two casinos.

Now, these are some of the good things we have seen from having the facilities in our area. However, as mentioned, these facilities bring in about 41,000 people a day to the region. This has resulted in a lot of traffic congestion on our local roads, as well as the state highways, and this isn't just the visitors they bring in. This includes the employees that we also talked about coming through the area. Local officials have been very concerned with public safety issues because of the large amount of traffic occurring on the roads outside the reservation. Police calls have increased, as have ambulance calls involving traffic accidents. However, the Town of Montville does benefit from a mutual aid agreement with the Mohegan Tribe for ambulance and fire coverage, when needed, in Montville.

The study from the Connecticut Center on Economic Analysis also shows an increase in crime in two of the three towns in the Foxwoods area.[5] In one town, however, the crime rate actually decreased by a significant amount. Due to the public safety concerns, the towns that I've talked about have long lobbied the Connecticut General Assembly for impact aid to the region to help compensate the towns for these additional costs. Increased traffic has required more police patrols and an increase in the cost of road maintenance. For example, in Montville, the town in which I live, at one time you could have one patrolman on duty from 11:00 pm until 7:00 am. Now, because of the twenty-four hour operation of the casino, we require a full patrol on all police shifts.

We also are seeing some effects where we didn't expect to see effects. Due to the low unemployment rate, the casinos have been forced to bring in people from out of the area to work in the facilities. Many of them are non-English speaking individuals, prompting the City of Norwich, and the Town of Montville, to develop or expand their ESL programs within their school system. However, the State has assisted the City of Norwich and the Town of Montville with this developing problem. Out of the Mohegan Pequot Fund, the State has increased the impact aid to the Town over the years, and now, each of the impacted communities receives about a half of a million dollars from the State, in addition to their allotment of the Mohegan Pequot Fund. For Montville, this now means that the Town will get about a million dollars in addition to our Pequot Fund money from the State. However, if you remember back to what I said earlier, this just breaks even for the Town of Montville—making up for the property taxes they lost when the industrial property went off the tax rolls.

The Mohegan Tribe has worked hard to be a good neighbor to the Town of Montville. The Town of Montville was the host community and did support the Tribe's bid for recognition. The Tribe has given generously to the community by donating such items as a senior citizens' bus and by

5. *See* CARSTENSEN, *supra* note 2, at 19–20.

furnishing the new town hall. Additionally, both tribes have given very generously to charities and community activities. For example, the local New London/Groton fireworks for the Fourth of July are sponsored by the Mashantucket Pequots. Moreover, the Mohegan Tribe has entered into an agreement with the surrounding towns to develop a new water project to help handle the water situation in the towns.

One of the other difficulties we've seen arise, as a result of the influx of new people, is affordable housing. As a result of supply and demand, the rental industry has suffered, leading to increased rents for tenants. This has led to some people taking single family homes and essentially converting them into boarding homes. The State is concerned because there could be up to ten more tribes becoming recognized, and people are concerned about how this is going to affect their communities, but I guess we'll talk about that at another time.

Thank you.

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Economic Self-Determination: Federal Policies Promoting Development of Reservation Economies

John Tahsuda*

It is a pleasure to be here with you this morning. My name is John Tahsuda and I work for Senator Ben Nighthorse Campbell, the Ranking Member on the Senate Committee on Indian Affairs. Senator Campbell represents the State of Colorado and is the only Native American in the United States Senate. I would like to emphasize that my remarks today are my own and should not be attributed to either Senator Campbell or to the committee itself. Hopefully, I will not be presenting anything new to you.

Economic issues have driven a great deal of federal Indian policy from the earliest days. The early treaties dealt not only with war and peace, but also with commerce and the economic relationships between the United States and the Indian tribes. Early economic agreements that were spelled out in those treaties demonstrated that the United States recognized how important these developing business relationships were to the growing nation.

Among the earliest laws passed by the first Congress were statutes dealing with Indian affairs. In particular, one of the first statutory and regulatory schemes adopted by Congress was the Trade and Intercourse Act.[1] This regulatory scheme established federal monopolies over trade with Indian tribes, required traders to be licensed by the federal government, and required all land transactions to be approved by the federal government. Now, of course, we know that these early policies were not intended to benefit Indians. Rather, they were intended to facilitate commerce between Indian tribes and the newly created United States. Unfortunately, the next phase of federal economic policy directed toward Indians was even more self-interested. That phase being the "civilization" of Indians.

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* Minority Senior Counsel, Senate Committee on Indian Affairs.

1. Indian Trade and Non-Intercourse Act of 1790, ch. 33, 1 Stat. 137 (codified as amended at 25 U.S.C. § 177 (2000)).

This drive to civilize Indians conveniently served to transfer a great deal of wealth from Indian people to the United States. The goal of making farmers out of Indians went hand-in-hand with the allotment policies and the sale of "surplus" land. Most of us are probably aware of how damaging those policies were to tribal communities, but what we sometimes do not think about is the long-term economic implications of those policies—the heavy hand of which we still deal with today. Simply put, Indians no longer directed their own economic fortunes. Instead, the federal government controlled every aspect of reservation economics in a stranglehold that continued unbroken from the middle 1800s through 1934.

The Indian Reorganization Act (IRA),[2] enacted in 1934, was the first thoughtful policy aimed at lessening federal control over Indians. Many of the IRA provisions were aimed at improving the economic plight of Indians by encouraging tribes to organize like business corporations, providing a system of financial credit to tribes, preventing the further loss of tribal land by ending allotment, and even allowing for the acquisition of new land or the reclamation of old land previously lost. Yet Indian programs remained firmly under the federal thumb, and the economic fortunes of Indian tribes did not significantly improve. Unfortunately, the IRA did not have a chance to bear fruit before its policies were repudiated by House Concurrent Resolution 108,[3] also known as the federal termination policy.

The only economic policy of note during this short-lived period was urban relocation, where thousands of Indians were encouraged to leave their reservation communities and to take jobs in urban centers.[4] However, jobs were not guaranteed and vocational training was almost nonexistent. Thus, many Indian people who left the reservation in those days found themselves stranded in alien communities with little means to support themselves or their families. Once again, we saw that the federal dictation of the economic policy for Indians was an absolute failure. Fortunately, at least in some sense, the termination policy was so disastrous that it didn't even last a decade.

While both Presidents Kennedy and Johnson began to include Indian tribes in some of the social programs they implemented, it was really with President Nixon that we saw the next seismic shift in Indian policy. This policy began where the Indian Reorganization Act had been aborted earlier, and it went even further. President Nixon's concept was that Indians were the people best able to determine for themselves how to solve the social

2. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–479 (2000)).

3. H.R. Con. Res. 108, 83d Cong., 1st Sess., 67 Stat. B132 (1953).

4. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 169–170 (1982 ed.) (briefly describing the Relocation Policy).

and economic ills plaguing their communities. Thus, the policy of self-determination was born.

President Nixon enunciated the blueprint for the self-determination policy in his special message to Congress on July 8, 1970.[5] In that message, he urged Congress to expressly repudiate termination and to pass legislation that would turn control of federal Indian programs over to Indian tribes. In addition, he urged Congress to pass legislation fostering economic development for Indian tribes. For once, a President's actions matched his rhetoric. By 1975, Congress had passed the Indian Self-Determination Education and Assistance Act of 1975[6] and the Indian Financing Act of 1974.[7] For the first time, the federal government was loosening its grip over the social and economic lives of Indian people. The Indian Self-Determination Act[8] allows, or acknowledges, two important principles: (1) that the United States owes a legal and moral obligation to Indian tribes and Indian people; and (2) that Indian tribes and Indian people are the ones best able to determine the most effective and efficient provision of government programs, services, and economic development for Indian people. Through this scheme, Indian tribes are able to take over federal programs and funding.

Also significant was the Indian Financing Act.[9] It was extremely important because, rather than dictating business decisions, as had been the prior practice of the federal government, it opened up credit and private capital sources for Indian tribes and allowed the tribes to determine for themselves what economic ventures they would pursue. That is sort of a brief review of the federal economic policy up until about fifteen years ago.

In the last fifteen years, what we have really seen is a refinement of the self-determination policies. A refinement into what we now call self-government or self-governance. First, we have seen the further growth of the creative and entrepreneurial spirit of Indian tribes, which began with gas stations and smoke shops and has now evolved into world-class casinos and destination resorts. None of these successful economic initiatives are the product of federal programs. Instead, they are the product of the creative spirit and the entrepreneurial ideas of Indian people. Second, we've seen a further relinquishment of federal control over Indian tribal

5. President Nixon's Special Message to the Congress on Indian Affairs, PUB. PAPERS 564 (July 8, 1970).

6. Indian Self-Determination Education and Assistance Act of 1975, Pub. L. No. 93-638, 88 Stat. 2203 (codified as amended at 25 U.S.C. §§ 450–458 (2000)).

7. Indian Financing Act of 1974, Pub. L. No. 93-262, 88 Stat. 77 (codified as amended at 25 U.S.C. §§ 1451–1453, 1461–1469, 1481–1499, 1511, 1512, 1521–1524, 1541–1544 (2000)).

8. Indian Self-Determination Education and Assistance Act, *supra* note 6.

9. Indian Financing Act, *supra* note 7.

decision-making. Beginning simply with reforms to Indian agricultural and forestry programs, the federal government's trust responsibility has slowly changed from that of a dictator to more like a business partner. These programs now allow tribes to establish their own management plans, and the federal agencies are now required to assist them in the implementation of these plans—not dictate how the plans are created. Accordingly, these reforms are now providing significant and broad-based value. Self-determination has become self-governance, giving tribes nearly complete control over federal programs.

In economic matters, the results have been just as striking. For example, not too long ago the Indian Affairs Committee passed the Indian Land Consolidation Act.[10] Although constitutional concerns have been raised,[11] and the Committee has been required to address these concerns in several subsequent amendments, this Act is significant in that it simplifies the use and acquisition of land by Indian tribes. Land is obviously one of the few remaining significant assets that tribes have, and it is often complicated by the history of allotment policies that created individual allotments and single parcels of land, which oftentimes have resulted in multiple ownership interests. Today, decisions affecting these plots of land can now be made by a majority of owners through the Indian Land Consolidation Act Amendments of 2000;[12] whereas before, unanimous consent by all the owners was required, which made productive use of this land difficult at best, if not impossible.

Another significant reform of federal policy occurred during the 106th Congress. Senator Campbell introduced and passed a reform of section 81 of the United States Code,[13] which was part of the generic federal approval statutes in which Indian tribes were prevented from making any decisions on their own without the approval of the federal government. Prior to this amendment, all agreements affecting Indian land or trust assets required federal approval. Even the hiring of attorneys had to be approved by a federal bureaucrat. Now, with these amendments, only agreements that are seven years or longer and affect Indian land and trust assets require federal approval. Moreover, for those of you in law school, you can breathe a sigh of relief since the amendments now allow tribes to hire lawyers without

10. Indian Land Consolidation Act of 1983, Pub. L. No. 97-459, 96 Stat. 2517 (codified at 25 U.S.C. §§ 2201–2219 (2000)).

11. *See* Babbit v. Youpee, 519 U.S. 234 (1997) (arguing that the Indian Land Consolidation Act violated the Just Compensation Clause of the Fifth Amendment).

12. *See* Indian Land Consolidation Act Amendments of 2000, Pub. L. No. 106-462 (enacted November 7, 2000) (amending 25 U.S.C. § 2206).

13. *See* Indian Tribal Economic Development and Contract Encouragement Act of 2000, Pub. L. No. 106-179, § 1, 114 Stat. 46 (codified as amended at 25 U.S.C. § 81 (2000)).

federal approval.

As I said, a lot of these recent reforms have come under the direction of Senator Ben Nighthorse Campbell, and I think if you consider these reforms carefully, you'll see a common thread, which is something we jokingly refer to as the "Campbell Doctrine." The common thread that you will see is the idea that federal approval should only be required in those instances where federal action provides a demonstrable value to the transaction or to the decision-making.

Looking forward, I think Senator Campbell's latest proposals on economic development are consistent with that common theme. He has proposed significant changes to federal energy policy, specifically policies affecting Indian tribes. If these proposals go through, they will enable Indian tribes to control all aspects of their energy development decisions. He also plans to propose amendments to the Indian Financing Act,[14] which will create greater entrée for tribes to access private capital and which will allow banks to rollover loans, as done by Fannie Mae and federal housing programs. This amendment will hopefully double, or even triple, the amount of private capital that is available for tribes to access. Furthermore, this amendment will permit Indians to make their own business decisions and to enter into businesses they think are appropriate for their own communities. In addition, Senator Campbell plans to propose a number of other bills that will allow tribes to slice through federal red tape, waive federal regulations where unnecessary, and authorize tribes to even waive regulations where there is no real value added to the decision-making process.[15]

In conclusion, I want to end with a note of hope and caution. I think the continuation of the flow of control from the federal government to tribes will further the rejuvenation of Indian sovereignty, but Indian people must be prepared to take over the reins and take responsibility for their own future.

Thank you.

14. *See* S. 2017, 107th Cong., 2d Sess., 116 Stat. 2834 (2002).

15. *See, e.g.*, S. 210, 107th Cong., 1st Sess. (2001).

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LUNCHEON ADDRESS

Tribes and Tribal Governments

James Sappier*

I had five drafts of what I wanted to present here today, but none of them seemed complete; so, I will be combining the last two. It has been difficult to determine what you already know, what you would like to hear, and what you should hear about tribes and tribal governments.

Today, I speak to you from experience, for my family has always been involved in tribal government, tribal politics, tribal culture, and traditional ceremonies. We ate them, drank them, slept them, talked them, and sang them.

Before I begin, I highly recommend that whenever you begin an event, such as the one that brings us together today, you should begin with an invocation, as do tribes before undertaking important tribal matters. An invocation serves two very important functions. First, an invocation brings each and everyone in the room together physically, mentally, and spiritually. Second, it excises the room as to decree, "Let no evil enter." An invocation will ease your mind of the many personal distractions that you bear, such as the stress from the journey here today, and will bring all to be as one person and one body.

You and I are here today because our ancestors and ancient ones made it possible. Their suffering and pain brought us here, and therefore, we should be most grateful. I would like to have a moment of silence for the deceased members of all our tribes and of all our relations. If you would please join me.

[Moment of silence.]

Thank you.

You and your ancestors came from tribes and recognize the same rites of passage as do my ancestors and I. These rites of passage are birth, adolescence to adulthood, marriage or vocation, and death. Since time

* Penobscot Elder.

immemorial, these rites have been associated with ceremonies, which continue with us today. As a tribal leader, I have seen many people work for our tribe. Some have used their time with the tribe to learn as much as they can with the intent to move ahead in their careers. However, many become engrossed with tribalism after being introduced to tribal ceremonies, with a few even becoming better "Indians" than some tribal members. I believe these individuals, who make the effort to understand our traditions, inherently have a deep yearning for that human spiritual tribal experience. These individuals draw from inside, within their total being, calling on their own ancient tribalism. Eventually, they become our finest employees—our tribal employee.

So let's begin. First, let us understand that Penobscot people never migrated from Mongolia. Penobscot people were created here on the land GheChe'Nawais gave to them. To an Indian tribe, the Symposium's title, "Sovereignty and Jurisdiction," does not quite fit the practice of a tribe; that is, the daily activities of a tribe or tribal government. As a tribal Governor, and a Chief, I have never made a decision as a jurisdictional decision; nor have I made a decision as a sovereignty decision. A tribal decision is based on what is known culturally, traditionally, and spiritually. This difference is what separates the concept of sovereignty and jurisdiction from traditionalism.

Tribes and tribal governments, and the subject matter of this Symposium, need clarification. The term "sovereignty" is foreign and leans heavily toward the theories of a monarchy and ownership. Likewise, the term "jurisdiction" relates to the boundaries of ownership. Tribal beliefs do not reflect words of ownership. For instance, who can own Mother Earth, water, or air?

Another important word is "quest," meaning to find or search. I equate that word to our tribal tradition of vision quests. If you are unfamiliar with what a vision quest is, you will never forget its meaning once you have experienced one for yourself. A vision quest is the physical, mental, and spiritual ritual associated with the second rite of passage. It involves a sweat lodge, an intense prayer lodge, no food or water for four days, and another sweat lodge. You will experience a vision after the third night ... known as the night the men scream. On this vision quest, we seek GheChe'Nawais, all creation, and all our relations.

Let us look further at our decision-making and applied beliefs. All tribes have an "In The Beginning" story. I call it an ITB theology. GheChe'Nawais created all that is: darkness, light, planets, stars, the universe, fire, air, water, rock, Mother Earth, plants, insects, fish, birds, animals, and creatures. The moon went to bed, and the sun got up this morning and began doing its job. Thank God. All of creation received a job description, is in balance, and has a purpose. GheChe'Nawais then created

people: man and woman. People, who make decisions, think logically and have free will to do what people do. Remember, animals and all of creation do not have free will. They know what they are to do; whereas, people were given the understanding of the spirit of creation, including respect and feeling. Indian tribes have retained to some degree those tenets of creation. The tribe and its members believe, basically, that one God created all things. As each was created, they received a "spirit," as did you and I and the smallest insect. The GheChe'Nawais that resides in you and I is the same GheChe'Nawais that resides in the littlest plant and animal.

English is so blatant, as it is in the word God. I prefer the Penobscot word, GheChe'Nawais. GheChe'Nawais—God—is when a little seed opens up and life begins. It is the light of life. This brilliant light of life is the very essence of life. Take you, for example. Your father and mother got together many times, perhaps hundreds. If that were all it took, you would have hundreds of brothers and sisters. However, there was that one time when GheChe'Nawais said, "I want you." There was a most brilliant light, and you were created.

The tribal relationship to the animal is spiritual, as it is to the air, fire, water, and plants. Spirituality cannot be conveyed or transmitted in writing. It is actually my spirit speaking to your spirit. The Bible is a very good book with many good stories. Spiritualness is transferred from the writer's spirit to the reader's spirit to you and your spirit. Their spirit is to you, as is the animal's spirit to you, as well as the wind, the rain, and the sun.

A few years ago, I invited monks from the Weston Priory to visit Penobscot. After about five years of deliberation, they agreed to come and stay with us for a week. After a visit to Passamaquoddy and having received a language lesson, three of them began talking. They asked, "In Passamaquoddy language, if the apple is animate, why is not the banana animate?" After a while I had to tell them, "The Passamaquoddy knew the apple and its creation of the apple. The banana, however, was foreign. All they knew was, it is about this long, it is yellow, and it tastes good." The language of the tribe reflects the spiritualness of creation, as the language is animate and alive. This basic tribal foundation is the sole difference in our philosophies and in our thinking.

Sovereignty, a term that evolved from Moses, Jesus, Constantine, and King Richard III, came to us at about the same time the Europeans began arriving. So who receives credit for this idea? Abraham. It is Abraham who is acknowledged to be the patriarch of Christianity, Islam, and Judaism. He and his sons, Ishmael and Issac, are key players in regard to this topic of sovereignty. Yet the time of Abraham and his sons was 3,800 years ago. Whereas, more than 10,000 years ago, our tribes, basically, were where they are today, doing what they and other tribes normally do: speaking their language and performing the same traditional, ancient

practices and songs. A Penobscot Elder speaking in Council said, "I love this island, all our islands, and our river. There is no other place for us to go."

Then discovery occurred. In the Northeast, the first to arrive between 800 A.D. and 1492 A.D. were an Irish monk, Brendon, Erik the Red, and Columbus. However, it was not until 1537 that sovereignty of tribes in America was first recognized. This recognition was by the Vatican and took form in the Sic Dilexit. Later, in 1610, the Vatican entered into another agreement, known as the Concordant, with the Mi'kmaq Grand Chief Membertuo. The Sic Dilexit and the Concordant were the first North American government-to-government agreements, and they represent the respect held for the sovereignty of the Mi'kmaq. These agreements described both the missionaries' work in North America and their respect for the tribes and their tribal governments. Our tribes honored and upheld these early Mi'kmaq-Vatican agreements as nations, lest we would end up going to war. Then came the English.

On a personal note, my father is Maliseet and from the Woodstock Reserve. As a boy, he recalls the St. John River boiling with fish as they migrated up river, an event that took place every spring. Tribal members would take canoes into the river, drive spears into the schools of fish, release the spear, grab another spear, and then another. After the school had passed, they would find their spears and their fish and then take them to the shore for the women and children to gut, cut, and dry.

One Thursday night, a Mountie, a provincial game warden, and a constable arrived at the house. Upon searching the house, they found fish and dried and smoked deer and moose meat. They stated that the fish and animals belonged to the Crown, and they arrested my grandfather and took him to the Woodstock jail. On the following Sunday night, a priest came to see my grandmother. He told her that she had to go to Woodstock to identify the body. We were told that the officers had beaten my grandfather to death, while he was in jail. Is this a form of sovereignty? A form that we do not quite understand, but to which we are subjected?

Penobscot has exercised sovereignty as a tribal right of tribal government since time immemorial, as a gift from GheChe'Nawais. Tribes and tribal governments are human, and in their decision-making they call on all attributes of their past—historical and ancient—including the spiritualness of creation. It truly is a miracle that we are here today, especially as you become more familiar with each tribe's history. Today, even with outside influences from all over the world, tribes have retained their beliefs. Decisions of tribes and tribal governments include the ancient tenets of creation.

Spirituality cannot be read. It is an experience—your spirit talking with mine. This contrast of what is learned and what is known can affect your

purpose. If you represent a tribe, you must know yourself and your client. A Mohawk once told me, "I don't understand. You would think the United States would declare a holiday when a tribe is recognized; a tribe that is thousands and thousands of years older than the United States." If your intent is to represent a sovereign tribe, you must know your tribe. Remember all of this, as you have become the translator—the interpreter. Plus, if you ever have a chance to participate in a tribe's ceremony, do it.

Thank you for putting up with me. Woliwoni, GheChe'Nawais.

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Turf Struggles: Land, Sovereignty, and Sovereign Immunity

Catherine T. Struve*

As the discussion today illustrates, land is central to tribal sovereignty. For a tribe that lost possession of some or all of its lands in prior years, land claims can form a key part of the strategy to reassert that sovereignty. For many of those tribes, claims against state governmental entities play a central role in obtaining effective redress. My remarks will focus on the ways in which the Supreme Court's recently developed doctrines of state sovereign immunity will shape a tribe's ability to assert land claims against a state government.[1] Those sovereign immunity doctrines often will operate to bar at least some of the claims a tribe might assert against a state in land claims litigation—if the tribe asserts those claims as sole plaintiff. However, if the United States sues the state on the tribe's behalf, state sovereign immunity will pose no bar, and, under *Arizona v. California*,[2] the tribe can intervene in that litigation to assert its claims on its own behalf.[3]

A land claim suit against state government entities[4] might seek several

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* Assistant Professor, University of Pennsylvania Law School. I am indebted to Frank Goodman and Steven Paul McSloy for very helpful comments on the issues discussed in this essay, and to participants in the New England Law Review's Symposium for instructive discussions of related questions. I previously worked as an associate at Cravath, Swaine & Moore, where I was part of the team that represented the Oneida Indian Nation of New York in land claims litigation (*see* Oneida Indian Nation v. County of Oneida, Nos. 70-CV-35 and 74-CV-187 (N.D.N.Y.)). Obviously, my views do not necessarily reflect the position of the Oneida Indian Nation of New York or of Cravath, Swaine & Moore or any of its other clients.

1. The title of this paper echoes that of an essay by Steven Paul McSloy. *See* Steven Paul McSloy, *Border Wars: Haudenosaunee Lands and Federalism*, 46 BUFF. L. REV. 1041 (1998).

2. 460 U.S. 605 (1983).

3. *See id.* at 614.

4. Obviously, many land claims cases will include claims against other defendants as well. The sovereign immunity protections that the present Court has derived from the Constitution do not protect local government defendants unless those entities are deemed arms of the state. *See* Alden v. Maine, 527 U.S. 706, 756 (1999) (noting that state sovereign im-

types of relief. Concerning tribal land currently held by the state, the tribe might seek damages arising from the state's previous unlawful possession of the land, as well as prospective relief enforcing the tribe's right to possess the land in the future. As an alternative to that prospective relief, the tribe might seek damages representing the present value of the state's future possession of the land. Often, however, the tribe will wish to recover the land itself. Moreover, in connection with the tribe's future possession of the land, the tribe might also seek declaratory and/or injunctive relief affirming the tribe's regulatory authority, and a corresponding absence of state regulatory authority, with respect to the land in question. Relatedly, the tribe may seek to reacquire tribal land currently held by non-state entities; and the tribe might seek prospective relief against the state concerning regulatory authority over that land as well. Moreover, in cases where tribal land was initially acquired from the tribe by the state and then was transferred by the state to third parties, the tribe may also seek to hold the state liable for damages for the tribe's loss of possession of the land on the theory that the state is jointly liable for the trespasses of the subsequent landholders.

Current sovereign immunity doctrine poses problems for each of these types of relief. Under *Blatchford v. Native Village of Noatak*,[5] state sovereign immunity bars tribal claims to the same extent that it bars claims by private litigants;[6] and, in the view of a majority of the current Supreme Court, that is a very large extent indeed. State sovereign immunity bars claims for damages against states, unless the state consents to suit[7] or Con-

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munity "does not extend to suits prosecuted against a municipal corporation or other governmental entity which is not an arm of the State"). Likewise, sovereign immunity obviously provides no defense for nongovernmental defendants. To simplify the analysis, I focus here on claims against state government entities.

5. 501 U.S. 775 (1991).

6. *See id.* at 782.

7. A state could consent to suit in a number of ways. Sovereign immunity is a waivable defense, so that if the state fails to raise the defense at all, it will pose no bar to the tribe's claims; but that, of course, is highly unlikely. It appears that, pursuant to the Spending Power, Congress can elicit state consent to suit in connection with the state's acceptance of federal funds. It seems unlikely, however, that any such state consent would have been elicited with respect to Native American land claims. Finally, if the state removes a case from state to federal court, it thereby waives its immunity from suit. *See* Lapides v. Board of Regents, 535 U.S. 613, 623–24 (2002) (unanimous decision). Although the *Lapides* Court purported to limit its holding "to the context of state-law claims, in respect to which the State has explicitly waived immunity from state-court proceedings," *id.* at 617, its reasoning appears to extend to all instances in which a state defendant removes a case from state to federal court. *See id.* at 619 (stating that "[i]t would seem anomalous or inconsistent for a State both (1) to invoke federal jurisdiction, thereby contending that the 'Judicial power of the United States' extends to the case at hand, and (2) to claim Eleventh Amendment immu-

gress abrogates that immunity by means of a valid exercise of its authority to enforce the provisions of the Reconstruction Amendments.[8] The typical Native American land claim will not satisfy the requirements for a finding of such abrogation.[9] Admittedly, the Fifth Amendment's Just Compensa-

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nity, thereby denying that the 'Judicial power of the United States' extends to the case at hand"). *Lapides* seems unlikely to provide much assistance to tribal land claims plaintiffs for two reasons. First, land claims plaintiffs suing states are likely to prefer a federal forum to a state forum, and thus will be unlikely to sue in state court as an initial matter, unless the state has waived sovereign immunity from suit in state court but not in federal court. Second, even if the plaintiff does sue in state court, a state defendant sued in state court is unlikely, in light of the *Lapides* holding, to join in a notice of removal to federal court.

8. Article I does not authorize Congress to abrogate state sovereign immunity. *See* Seminole Tribe of Florida v. Florida, 517 U.S. 44, 72–73 (1996). Congress may abrogate state sovereign immunity in the exercise of its enforcement authority under Section Five of the Fourteenth Amendment. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). Moreover, it appears that Congress also may abrogate state sovereign immunity pursuant to its power to enforce the provisions of the Thirteenth and Fifteenth Amendments. *See* City of Rome v. United States, 446 U.S. 156, 179–80 (1980) (upholding Voting Rights Act as a proper exercise of Fifteenth Amendment power and explaining that "*Fitzpatrick* stands for the proposition that principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments 'by appropriate legislation'"); Lawson v. Shelby County, 211 F.3d 331, 335 (6th Cir. 2000) (reading *City of Rome* as "suggest[ing] that Congress may also abrogate state sovereign immunity under the Fifteenth Amendment"); Mixon v. Ohio, 193 F.3d 389, 399 (6th Cir. 1999) (holding that the Voting Rights Act validly abrogated state sovereign immunity pursuant to Congress' power to enforce the Fifteenth Amendment); U.S. v. Nelson, 277 F.3d 164, 181 n.17 (2d Cir. 2002) (reasoning that "Congress's enforcement powers under Section Two of the Thirteenth Amendment would seem not to be limited by *Seminole Tribe* and its progeny"). However, Congress must clearly express its intent to abrogate. *See* Raygor v. Regents of the Univ. of Minnesota, 534 U.S. 533, 541–42 (2002); Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985). Also, the abrogation must be a valid exercise of Congress' authority to enforce the relevant Amendment. *See, e.g.*, Bd. of Trustees v. Garrett, 531 U.S. 356, 374 (2001) ("[I]n order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation."). *See generally* Frank Goodman, *Preface* to *The Supreme Court's Federalism: Real or Imagined?*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 9, 18 (2001) (critiquing the Court's use of the congruence and proportionality test).

9. Take for example a claim under the Nonintercourse Act. That Act was first enacted in 1790, and was reenacted in 1793, 1796, 1799, 1802, 1834 and 1874. *See* Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137, 138; Act of March 1, 1793, ch. 19, § 8, 1 Stat. 329, 330–31; Act of May 19, 1796, ch. 30, § 12, 1 Stat. 469, 472; Act of March 3, 1799, ch. 46, § 12, 1 Stat. 743, 746; Act of March 30, 1802, ch. 13, § 12, 2 Stat. 139, 143; Act of June 30, 1834, ch. 161, § 12, 4 Stat. 729, 730–31; Rev. Stat. § 2116. The first six versions of the Act clearly were not exercises of Congress' power to enforce the Fourteenth Amendment, since that Amendment was not adopted until 1868. In 1874, Congress revised and reenacted the federal statutes that were in force as of December 1, 1873, and included the Nonintercourse Act

tion Clause also appears to furnish an exception to the prohibition on damages relief.[10] That Clause has been incorporated against the states via the Due Process Clause of the Fourteenth Amendment,[11] and the Supreme Court implied in *First English Evangelical Lutheran Church v. Los Angeles*[12] that the Constitution requires the state to provide the remedy of just compensation for a governmental taking of property.[13] For several reasons, however, tribal litigants may prefer not to attempt to shoehorn their claims into the takings framework,[14] and thus this exception—to the extent that it is available—often will not provide an appealing route for the assertion of tribal damages claims against states.

Prior to 1997, it appeared that a tribe's prospects for obtaining injunctive and declaratory relief were brighter than the prospects for securing damages relief. The *Ex parte Young* doctrine provides that state officials can be sued for injunctive relief to require their future compliance with federal

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as Section 2116 of those Revised Statutes. *See* Act of June 20, 1874, ch. 333, § 2, 18 Stat. 113 (providing for publication of "the revised statutes of the United States enacted at this present session of Congress"); Ralph H. Dwan & Ernest R. Feidler, *The Federal Statutes—Their History and Use*, 22 MINN. L. REV. 1008, 1012–15 (1938) (discussing the enactment of the Revised Statutes). Even if Congress could be viewed as acting pursuant to its Fourteenth Amendment enforcement power when it reenacted the Nonintercourse Act as part of this general revision—which seems unlikely—the reenacted statute fails to meet the clear statement requirement that the Court now requires for abrogation of state sovereign immunity. *See* Katharine F. Nelson, *Resolving Native American Land Claims and the Eleventh Amendment: Changing the Balance of Power*, 39 VILL. L. REV. 525, 614 (1994) ("[N]either the current version of the Nonintercourse Act nor any of its previous versions contains 'unmistakably clear language' showing Congress' intent to abrogate the states' Eleventh Amendment immunity.").

10. *See* U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

11. *See* Chicago, Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 236 (1897).

12. 482 U.S. 304 (1987).

13. *See id.* at 316 ("[I]n the event of a taking, the compensation remedy is required by the Constitution."). *But see* Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 WASH. L. REV. 1067, 1074–75 (2001) (arguing that the Court in *First English* held merely that there is a cause of action for compensation for a taking, and that the Court did not address the further question whether sovereign immunity would bar a plaintiff from recovering that remedy against a state).

14. Among other reasons, a takings claim will be strategically unappealing because the tribal plaintiff frequently will be obliged to seek compensation through state procedures before suing in federal court. *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 194–95 (1985) (holding a takings claim in federal court was not ripe because "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation").

law.[15] Under the theory of *Young*, when a state official violates federal law, that violation strips the official of her character as a state officer, and thus of her ability to assert the state's sovereign immunity.[16] In past years, the Court has set an important (though criticized) limitation on *Young* relief: the relief must be prospective, rather than retrospective.[17] Accordingly, damages for past violations of federal law are not available under *Young*, but injunctive and declaratory relief with respect to future conduct are permissible.[18] One of the primary justifications for the doctrine is that, because state sovereign immunity impairs individual litigants' ability to seek damages relief against states, *Young* relief is necessary in order to enforce the supremacy of federal law.[19]

In 1997, in *Idaho v. Coeur d'Alene Tribe of Idaho*,[20] seven members of the current Court reaffirmed their general commitment to the *Young* doctrine.[21] Three of those seven, however, joined with the two remaining Jus-

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15. *See Ex parte* Young, 209 U.S. 123, 159–60 (1908).

16. As the Court explained in *Young*:

> If the act which the state Attorney General seeks to enforce be a violation of the Federal Constitution, the officer in proceeding under such enactment comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

Id. (citing *In re* Ayers, 123 U.S. 443, 507 (1887)).

17. *See generally* Carlos Manuel Vázquez, *Night and Day:* Coeur d'Alene, Breard, *and the Unraveling of the Prospective-Retrospective Distinction in Eleventh Amendment Doctrine*, 87 GEO. L.J. 1 (1998).

18. Another recently imposed limit on *Ex parte Young* relief is that "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." Seminole Tribe v. Florida, 517 U.S. 44, 74 (1996). This limit is unlikely to apply to tribal land claims; the primary statutory source for such claims is the Nonintercourse Act, and that statute does not specify the sort of "detailed remedial scheme" referred to in *Seminole Tribe*.

19. *See, e.g.*, Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 105 (1984) ("Our decisions repeatedly have emphasized that the *Young* doctrine rests on the need to promote the vindication of federal rights.").

20. 521 U.S. 261 (1997).

21. *See id.* at 288 (O'Connor, J., joined by Scalia & Thomas, JJ., concurring in part and in the judgment) (stating that "[w]here a plaintiff seeks prospective relief to end a state officer's ongoing violation of federal law, such a claim can ordinarily proceed in federal court."); *id.* at 296 ("I do not subscribe to the principal opinion's reformulation of the appropriate jurisdictional inquiry for all cases in which a plaintiff invokes the *Young* doctrine."); *id.* at 297 (Souter, J., joined by Stevens, Ginsburg & Breyer, JJ., dissenting) ("The Tribe's suit falls squarely within the *Young* doctrine, and the District Court had an obliga-

tices to set what appears to be a unique limitation on *Young*: in *Coeur d'Alene Tribe*, those five Justices held that the *Young* theory was unavailable to support the Tribe's request for declaratory and injunctive relief with respect to submerged lands held by the state and claimed by the Tribe.[22] Although Justice Kennedy wrote the principal opinion in *Coeur d'Alene Tribe*, only certain portions of that opinion gained a majority of votes; accordingly, my discussion will focus on the parts to which the majority subscribed.[23] In those parts, the Court justified its rejection of *Young* relief for the Tribe by dwelling on three aspects of the relief sought. First, the Court stressed that the relief would be equivalent to a quiet title action, and would thus have the effect of depriving the state of all ownership rights to the relevant territory.[24] Second, the Court emphasized that the relief sought would erase the state's regulatory authority over that territory.[25] Third, the Court indicated that the first two concerns were magnified in the *Coeur d'Alene* case because the lands in question were submerged beneath Lake Coeur d'Alene, and states have especially strong sovereign interests in navigable waters.[26]

As many have noted, the Court's holding in *Coeur d'Alene Tribe* is hard to justify. To the extent that the Court relied on the fact that the Tribe was seeking prospective relief to effectuate its right to possess the land, the holding contravenes prior case law that held government officials subject to suits seeking ejectment.[27] On the other hand, to the extent that the Court relied in *Coeur d'Alene Tribe* on the fact that the Tribe was challenging state regulatory authority over the land, that reliance seems contrary to the

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tion to hear it.").

22. *See id.* at 287 (Kennedy, J., joined by Rehnquist, C.J., and O'Connor, Scalia & Thomas, JJ.).

23. In the parts of his opinion that were joined only by Chief Justice Rehnquist, Justice Kennedy advocated a much more dramatic narrowing of the *Young* doctrine. *See id.* at 270–80.

24. *See id.* at 282.

25. *See id.*

26. *See Coeur d'Alene Tribe of Idaho*, 521 U.S. at 283–84.

27. *See* Tindal v. Wesley, 167 U.S. 204, 212, 223 (1897) (holding that state's Eleventh Amendment immunity did not bar judgment awarding possession of land to a private plaintiff in a suit against state officials who claimed to hold the land for public purposes in their capacity as state agents); United States v. Lee, 106 U.S. 196, 215–17, 223 (1882) (holding that the federal government's sovereign immunity did not preclude a private plaintiff's suit to recover possession of land held by federal officials for public purposes); *The Supreme Court, 1996 Term: Leading Cases*, 111 HARV. L. REV. 269, 277–78 (1997) [hereinafter *Leading Cases*] ("Ultimately, the Coeur d'Alene Tribe's claim can be factually distinguished from those brought in *Lee* and *Tindal* only because the disputed property involved submerged lands and the tribe's suit threatened the general regulatory authority of the state. This distinction, however, lacks a principled basis.").

very notion of *Young*.[28] Although the *Young* doctrine evolved in the second half of the twentieth century into a vehicle for civil rights suits against states, *Young* itself involved a challenge to state regulation,[29] and businesses continue to this day to use the *Young* doctrine to assert challenges to state regulatory schemes. Admittedly, the plaintiff in *Coeur d'Alene Tribe* was seeking to end *all* state regulation with respect to the disputed lands, rather than seeking simply to enjoin enforcement of a particular regulation with respect to a particular entity. Viewed from a different angle, however, this provided all the more reason for permitting the claim to proceed: to the extent that the state's assertion of regulatory authority over that land violated federal law, the extensiveness of that violation *strengthened* the case for permitting *Young* relief. Finally, one need not dispute the Court's view that navigable waters are important to the sovereign in whose territory they lie in order to question the relevance of that view to the issue of sovereign immunity. To conclude that the importance of navigable waters strengthens the state's claim to immunity is to assume the state's entitlement to the disputed territory; viewed from the Tribe's perspective, the importance of navigable waters merely underscores the gravity of the state's ongoing violation of federal law.[30]

However, though one may criticize the result in *Coeur d'Alene Tribe*, land claim litigants nonetheless must deal with its implications.[31] Where a

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28. *Cf. Leading Cases*, *supra* note 27, at 278 ("It is difficult to understand how submerged lands implicate state sovereign power any more than the economic regulatory authority that was at issue in *Young* ....").

29. *See Young*, 209 U.S. at 127–29 (statement by Justice Peckham).

30. *See* Lauren E. Rosenblatt, *Removing the Eleventh Amendment Barrier: Defending Indian Land Title Against State Encroachment After* Idaho v. Coeur d'Alene Tribe, 78 TEX. L. REV. 719, 737 (2000) ("[I]f the Court assumes without investigation that all sovereign interests are state interests, it has assumed without valid examination that the Indians have no sovereign rights."). The *Coeur d'Alene* Court acknowledged that "[a]s the Tribe views the case, the lands are just as necessary, perhaps even more so, to its own dignity and ancient right"—but the Court concluded that "[t]he question before us is not the merit of either party's claim ... but the relation between the sovereign lands at issue and the immunity the State asserts." *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 287.

31. By contrast, *Coeur d'Alene Tribe* should not pose a similar impediment in other kinds of cases. Admittedly, some lower federal courts have read *Coeur d'Alene Tribe* as creating an exception with potentially broader application. For example, the Tenth Circuit articulated a two-part test to determine whether *Coeur d'Alene Tribe* bars *Young* relief:

> In light of *Coeur d'Alene Tribe*, federal courts must examine whether the relief being sought against a state official "implicates special sovereignty interests." If so, we must then determine whether that requested relief is the "functional equivalent" to a form of legal relief against the state that would otherwise be barred by the Eleventh Amendment. In the end, we must not extend the *Ex parte Young* doctrine to allow a suit for prospective equitable relief when that relief would be just as intrusive, if not more so, into core aspects of a state's sovereignty.

tribe seeks possession of state-held lands submerged under navigable waters and seeks relief excluding the state from regulating those lands, *Coeur d'Alene Tribe* will bar the application of the *Young* doctrine. Even if the disputed territories are merely dry land—with no navigable waters—it seems possible that the same result would occur, so long as the relief sought would bar both state possession and state regulation of the land.[32] However, where the relief involves one of the latter aspects but not the other, the case will be distinguishable from *Coeur d'Alene Tribe*.[33] Thus,

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ANR Pipeline Co. v. Lafaver, 150 F.3d 1178, 1190 (10th Cir. 1998). Similarly, the Fourth Circuit reasoned that *Coeur d'Alene Tribe* "reflects a considered evaluation of the degree to which a State's sovereign interest would be adversely affected by a federal suit seeking injunctive relief against State officials." Bell Atlantic Md., Inc. v. MCI WorldCom, Inc., 240 F.3d 279, 295 (4th Cir. 2001), *vacated*, Verizon Md. Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635 (2002). The Fourth Circuit viewed *Coeur d'Alene Tribe* as instituting a "case-by-case approach" under which the court "must evaluate the federal interests served by permitting a federal suit" for injunctive relief against state officials, and "must determine whether the federal suit would unduly sacrifice the important value of [the state's] sovereign immunity." *Id.* at 295.

The Supreme Court, however, vacated the Fourth Circuit's judgment in the *Bell Atlantic Maryland* case, and in doing so the Court rejected the Fourth Circuit's case-by-case balancing approach. *See* Verizon Md. Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635 (2002). As the Court explained, "[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Id.* at 645. (quoting *Coeur d'Alene Tribe*, 521 U.S. at 296 (O'Connor, J., joined by Scalia & Thomas, JJ., concurring in part and in the judgment)). Justice Kennedy wrote separately in *Verizon Maryland* to reiterate his view that "our *Ex parte Young* jurisprudence requires careful consideration of the sovereign interests of the State as well as the obligations of state officials to respect the supremacy of federal law." *Id.* at 649 (Kennedy, J., concurring). However, *Verizon Maryland*'s reaffirmation of the "straightforward inquiry" that should govern the availability of *Ex parte Young* relief strongly suggests that at least seven of the Justices view *Coeur d'Alene Tribe*'s exception as *sui generis*. (Although Justice O'Connor took no part in the consideration or decision of the *Verizon Maryland* case, the majority's language in *Verizon Maryland* concerning the "straightforward" application of *Ex parte Young* was taken from Justice O'Connor's partial concurrence in *Coeur d'Alene Tribe*.)

32. *But see* Vázquez, *supra* note 17, at 49 ("[T]he Court's disquisition on the special nature of submerged lands suggests that the exception extends only to disputes over sovereignty over such lands.").

33. As Vicki Jackson has observed:

> [w]hether what was crucial was that the claims to real property were asserted by a tribe (with the ensuing loss of sovereign regulatory authority for the state resulting from the unique status of "Indian Tribes" under federal law), or that the real property in question was submerged land under a riverbed (with their unique associations with state sovereignty and interstate equality under the equal footing doctrine), or the conjunction of these factors, cannot clearly be discerned from the

where a tribe seeks only possession, without seeking relief concerning regulatory authority, *Coeur d'Alene Tribe* should not bar *Young* relief.[34] Conversely, if a tribe seeks declaratory and/or injunctive relief against state officials concerning the state's authority to regulate tribal land that the state does not currently possess, the relief sought is not as extensive as that sought in *Coeur d'Alene Tribe* and thus the latter's holding is distinguishable.[35] Moreover, with respect to land not currently held by the state, an alternative strategy might sometimes prove useful. Instead of a suit by a tribe against state officials to enjoin all state regulation of the tribal lands, persons who live or work on the land might sue those officials to enjoin the enforcement of state regulations with respect to them in particular. This sort of suit would more closely parallel the strategy approved in *Young*, and thus seems likely to avoid the bar set by *Coeur d'Alene Tribe*. *Coeur d'Alene Tribe*, then, should not preclude all litigation challenging a state's possession or regulation of tribal land. It will, however, impose some limitations on the scope of the relief sought in such litigation.

In sum, most land claim suits against states will face significant sovereign immunity issues if the tribe sues alone. By contrast, state sovereign immunity is no bar to suits by the United States,[36] and because the United States has a trust responsibility to protect tribal interests against state encroachment, the United States can sue to enforce tribal rights against

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Court's opinion. One might fairly conclude from the *Coeur d'Alene* opinions, however, that some or all of these factors together constituted the circumstance that make the case so "particular and special."

Vicki C. Jackson, Coeur d'Alene, *Federal Courts and the Supremacy of Federal Law: The Competing Paradigms of Chief Justices Marshall and Rehnquist*, 15 CONST. COMM. 301, 313 (1998) (quoting *Coeur d'Alene Tribe of Idaho*, 521 U.S. at 287).

34. *See* Vázquez, *supra* note 17, at 49 (arguing that the *Coeur d'Alene* exception to the *Young* doctrine "would thus appear to embrace only disputes over sovereignty between states and Indian tribes, and possibly also between states and foreign states"); Rosenblatt, *supra* note 30, at 758 (arguing that tribes might avoid "the obstacle posed by the new *Young* analysis" by "request[ing] relief that stops short of divesting the state of any sovereign power").

35. *See, e.g.*, Timpanogos Tribe v. Conway, 286 F.3d 1195, 1205 (10th Cir. 2002) (noting that where a tribe's claim sought "no more than an injunction barring ... state officials from prosecuting [tribe] members ... for hunting, fishing, and gathering with Tribe-issued licenses on Indian lands within the ... Reservation," the claim was "squarely within the exception set out by *Ex parte Young* and its progeny"); Agua Caliente Band of Cahuilla Indians v. Hardin, 223 F.3d 1041, 1043 (9th Cir. 2000) (holding that a tribal claim for a declaratory judgment that federal law bars California from taxing non-tribe members' on-reservation food and beverage purchases "fall[s] within the *Ex Parte Young* exception to the Eleventh Amendment bar").

36. *See, e.g.*, United States v. Texas, 143 U.S. 621, 646 (1892).

states.[37] Moreover, the *Arizona* case demonstrates that when the federal government asserts claims against a state on a tribe's behalf, the tribe can intervene in that suit to press its claims on its own behalf. The *Arizona* doctrine, of course, predates the recent rash of state sovereign immunity decisions. However, as I have argued elsewhere, *Arizona* intervention meets the concerns that underlie the Court's current expansive view of state sovereign immunity, because in relevant respects an *Arizona* suit resembles a suit by the United States (which is still permitted) rather than a suit by a private party or a tribe alone (which is now barred).[38] In particular, the fact

37. *See* Rosenblatt, *supra* note 30, at 741–49 (discussing United States' trust responsibility to sue on tribes' behalf); Vázquez, *supra* note 17, at 50 ("Disputes between states and Indian tribes concerning sovereignty over submerged lands can be resolved in the federal courts if the federal government brings suit.").

38. *See* Catherine T. Struve, *Raising* Arizona: *Reflections on Sovereignty and the Nature of the Plaintiff in Federal Suits Against States*, 61 MONT. L. REV. 105, 141 (2000). In that article, I noted that the Court's current approach to state sovereign immunity appeared to undermine the rationale for another mechanism for suits against states—the use of a *qui tam* suit by a private individual to assert claims against a state on behalf of the United States. *See id.* at 132–33 ("[*Q*]*ui tam* suits against states in which the United States chooses not to intervene fall close to the line sketched by the *Alden* Court around state sovereign immunity."). *But see* Evan H. Caminker, *State Immunity Waivers for Suits by the United States*, 98 MICH. L. REV. 92, 95 (1999) (arguing that although "[t]he Court hinted in *Alden* that" the states' waiver (in the constitutional plan) of immunity from suit by the United States "might exclude suits brought on behalf of the United States by private plaintiffs rather than by public officials," such a view "rests in tension with the Court's professed commitment, throughout its immunity jurisprudence generally and its waiver jurisprudence specifically, to an originalist methodology; one that focuses on the nature of the legal interest asserted rather than on the structural form of the litigation"). *Vermont Agency of Natural Resources v. United States ex rel Stevens*, 529 U.S. 765 (2000), presented the Court with a potential opportunity to address the question of state sovereign immunity with respect to *qui tam* suits under the False Claims Act, 31 U.S.C. §§ 3729–3733. *See Stevens*, 529 U.S. at 768. Ultimately, the Court decided *Stevens* as a matter of statutory interpretation, holding that states were not "persons" subject to suit by private individuals under the Act. *See id.* at 787–88. The Court thus "express[ed] no view on the question whether an action in federal court by a *qui tam* relator against a State would run afoul of the Eleventh Amendment"—but it "note[d] that there is 'a serious doubt' on that score." *Id.* at 787 (quoting excerpt from Justice Brandeis's statement in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936), that "[w]hen the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided," *Ashwander*, 297 U.S. at 348 (Brandeis, J., concurring) (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932))). Even if state sovereign immunity bars *qui tam* suits against states, however, such a bar would not call into question the legitimacy of tribal intervention in United States suits against states under the *Arizona* doctrine. *See* Struve, *supra* note 38, at 141–64 (discussing reasons why state sovereign immunity would not bar *Arizona* intervention even if it did bar *qui tam* suits).

that the United States is a plaintiff satisfies the Court's requirements "that the National Government must itself deem the case of sufficient importance to take action against the State"[39] and that the federal government must be politically accountable for the maintenance of the suit.[40]

The Court's recent decision in *Idaho v. United States*[41]—the sequel to the *Coeur d'Alene Tribe* litigation—underscored the continuing validity of the *Arizona* doctrine. In a separate lawsuit, the United States sued the state, seeking relief with respect to roughly one-third of the land that the Tribe had sought in its suit.[42] The district court permitted the Tribe to intervene,[43] and, after a bench trial, found for the plaintiffs.[44] Accordingly, the district court quieted title in favor of the United States and the Tribe (as trustee and beneficiary, respectively), and it permanently enjoined the state from asserting any interest in the relevant land.[45] The Ninth Circuit affirmed, as did the Supreme Court.[46] In affirming, the Supreme Court expressly rejected the contention that sovereign immunity barred the claims against the state. As the Court explained, "[b]ecause this action was brought by the United States, it does not implicate the Eleventh Amendment bar raised when the Tribe pressed its own claim to the submerged lands in *Idaho v. Coeur d'Alene Tribe of Idaho*."[47] Although the *Idaho* Court's discussion of state sovereign immunity did not refer explicitly to the Tribe's intervention, the Court cited the portion of the *Arizona* opinion which had addressed that issue.[48]

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39. Alden v. Maine, 527 U.S. 706, 759–60 (1999).

40. *See id.* at 756 ("Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States.").

41. 533 U.S. 262 (2001).

42. *See* Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 266 (1997) (noting that the United States' suit against Idaho concerned "approximately a third of the land covered by this suit").

43. *See* United States v. Idaho, 95 F. Supp. 2d 1094, 1095 (D. Idaho 1998).

44. *See id.* at 1117.

45. *See id.* The court also declared that the United States and the tribe were "entitled to the exclusive use, occupancy and right to the quiet enjoyment of" the relevant lands. *Id.*

46. *See* United States v. Idaho, 210 F.3d 1067, 1069 (9th Cir. 2000), *aff'd*, 533 U.S. 262, 281 (2001).

47. Idaho v. United States, 533 U.S. 262, 271 n.4 (2001).

48. *See id.* (citing Arizona v. California, 460 U.S. 605, 614 (1983)). In the cited passage, the Court had explained, concerning the *Arizona* litigation, that:

> [t]he Tribes do not seek to bring new claims or issues against the states, but only ask leave to participate in an adjudication of their vital water rights that was commenced by the United States. Therefore, our judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised.

Thus, although some questions remain concerning the details of its application,[49] *Arizona* intervention remains viable under the current sovereign immunity precedents. The availability of *Arizona* intervention, however, is an imperfect solution to the problems posed by current sovereign immunity doctrine, for it makes the tribe's access to justice dependent on the federal government's willingness to sue on the tribe's behalf.[50] The recent devel-

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Arizona v. California, 460 U.S. 605, 614 (1983).

49. The Supreme Court has not yet explicitly resolved the extent to which the tribal intervener can seek relief and make arguments that differ from the positions taken by the United States. In *Arizona* itself, the special master's grant of intervention rested in part on the recognition that the tribal interveners sought relief not requested by the United States. *See* Struve, *supra* note 38, at 137 ("The Special Master's Preliminary Report made clear that the Tribes sought greater relief than did the United States—indeed, that conclusion was among the primary reasons the Special Master permitted the Tribes to intervene."). Building on this notion, I have argued that tribal interveners should have considerable latitude to take positions that differ from those asserted by the United States. *See id.* at 157, 166–69, 172. In the Cayuga land claims litigation, the district court has held that a tribal plaintiff may raise "new claims or issues" not put forward by the United States plaintiff, "so long as those issues or claims encompass the same subject matter as the original claims or issues." Cayuga Indian Nation v. Cuomo, 1999 WL 509442, at *13 (N.D.N.Y. July 1, 1999); *see also* Canadian St. Regis Band of Mohawk Indians v. New York, 146 F.Supp.2d 170, 181 (N.D.N.Y. 2001) ("[T]he tribal plaintiffs' and the United States' claims here flow from the same subject matter and, thus at least for now, the court holds that the complaints are 'virtually identical' for Eleventh Amendment purposes.").

Some courts, however, have suggested that the tribal plaintiff should not assert claims or seek relief beyond that sought by the United States. Thus, in land claims litigation brought by the Seneca Nation of Indians, in which both another tribal plaintiff and the United States had intervened, the Second Circuit Court of Appeals affirmed the district court's rejection of the state's sovereign immunity defense, but stated in dictum that "the State of New York retains its Eleventh Amendment immunity to the extent that the [tribal plaintiffs] raise claims or issues that are not identical to those made by the United States." Seneca Nation of Indians v. New York, 178 F.3d 95, 97 (2d Cir. 1999) (per curiam). Likewise, in the Idaho litigation, the United States was unwilling to assert claims concerning all the lands that the Tribe wished to put at issue. *See* United States v. Idaho, 210 F.3d 1067, 1080 (9th Cir. 2000). The district court refused to permit the Tribe to assert claims as to the additional lands, see United States v. Idaho, 95 F.Supp.2d 1094, 1097 n.3 (D. Idaho 1998), and the Court of Appeals affirmed on the ground that both the United States and the state defendant had "disavowed" any wish to place the additional lands at issue in the suit. *See Idaho*, 120 F.3d at 1080.

Of course, with respect to claims against non-state defendants, the tribe clearly should be able to assert claims not pressed by the United States, because the constraints discussed here apply only when the United States' presence as a co-plaintiff is what permits the tribe to press its claim at all.

50. *Cf.* John P. LaVelle, *Sanctioning a Tyranny: The Diminishment of* Ex parte Young, *Expansion of* Hans *Immunity, and Denial of Indian Rights in* Coeur d'Alene Tribe, 31 ARIZ. ST. L.J. 787, 941–42 (1999) ("At a time in American history when federal Indian policy ostensibly is one of supporting tribal self-determination and autonomy, it is ironic, to

opments in sovereign immunity doctrine make it all the more essential that the federal government fulfill its trust obligations to Native American tribes—including its obligation to seek redress when states have violated tribal rights.

say the least, that the Supreme Court is forcing Tribes into a position of dependency on the United States for protecting the lifeblood of tribal homelands—the lakes, rivers and other bodies of water located on Indian reservations.").

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The Landowner Defendants in Indian Land Claims: Hostages to History

Gus P. Coldebella and Mark S. Puzella*

On June 21, 2002, the 17,000 or so residents of Grand Island, New York breathed a collective sigh of relief, because the Indian land claim that had clouded the title to their property for over a decade was finally dismissed. U.S. District Judge Richard Arcara issued a comprehensive, lengthy, and well-reasoned decision granting summary judgment to all the defendants, including Grand Island's landowners.[1] In this most unusual lawsuit, the plaintiffs—two Indian tribes and the United States of America—sought a judgment that, based on the supposed invalidity of an 1815 treaty between the historic Seneca Indians and the State of New York, might effect the extreme result of turning over 18,000-acre Grand Island (and other islands located in the Strait of Niagara) to the Indian tribes, and awarding them damages for the alleged wrongful dispossession of the land from the time of the treaty until the present.[2]

As a result of the emergence of this and other similar tribal land claims, literally hundreds of thousands of landowners in New York State and elsewhere—landowners who are indisputably innocent of any wrongdoing—have been forced to live under the shadow of ejectment from homes and communities they have built over generations, as well as the spectre of financial ruin. While the *Seneca* decision gives comfort to the harried residents of Grand Island, there are several other Indian land claims—naming thousands of other innocent landowners as defendants—

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1. Seneca Nation of Indians v. New York, 206 F. Supp. 2d 448 (W.D.N.Y. 2002).
2. *See id.* at 454–55.

where the uncertainty persists. This article argues that, because they are innocent and because tribal plaintiffs can receive a full recovery without them as parties, landowners should be dismissed as a matter of course from Indian land claims.

How could a lawsuit, based on documents signed by people many generations dead, place the fortunes of these innocent landowners in jeopardy? The answer lies in a very old statute—the Indian Trade and Intercourse Act of 1790[3] (the "Act")—and the courts' interpretations of it. In general, the Act prohibits the alienation of Indian land without the approval of the federal government, though the specific requirements of the Act were uncertain at the time of its enactment and are arguably just as uncertain now. Indian tribes claim that if conveyances of Indian land, no matter how ancient, were accomplished in violation of the Act, then such conveyances are void, and the Indian tribe retains a continuing interest in the land sold long ago. Courts have by and large agreed with them.

How, then, did the defendants win summary judgment in the *Seneca* lawsuit? In order to prevail on a claim under the Act, the plaintiffs have the burden to prove, among other things, that the land claimed was tribal land at the time of the alleged violation of the Act.[4] In other words, they must show that, at that time, the land belonged to the Indians in some legally cognizable way. In *Seneca*, the plaintiffs could not do so. As the defendants demonstrated, plaintiffs' alleged forebears had a homeland far east of the land at issue, and they sold or otherwise alienated their interest in the subject land (if they had any interest at all) several times before 1815.[5] Moreover, plaintiffs failed to show that their alleged ancestors ever set foot on the Niagara islands. Based upon facts not in dispute, the *Seneca* court held that the land at issue was not tribal land at the time of the 1815 treaty and granted summary judgment to the defendants.[6]

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3. The Indian Trade and Intercourse Act is codified at 25 U.S.C. § 177. It is frequently called "the Nonintercourse Act." This appellation obscures the fact that the Act is not designed to *prohibit* dealings with Indian tribes, but to *regulate* them. Felix Cohen, the acknowledged dean of federal Indian law, wrote "[i]t should be noted that [the Trade and Intercourse Act] was not intended to prevent the alienation of Indian lands and in fact many Indian treaties thereafter concluded provided for the alienation of Indian lands to parties other than the United States[.]" FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 322–23 (1988, reprint of 1942 ed.).

4. *See Seneca*, 206 F. Supp. 2d at 502 (emphasis added). *See also* Oneida Indian Nation of N.Y. v. County of Oneida, 434 F. Supp. 527, 537–38 (N.D.N.Y. 1977).

5. *See Seneca*, 206 F. Supp. 2d at 537–40.

6. *See id.* at 542. Indian tribes can hold land in two legally cognizable ways: through aboriginal title, and through recognized title. *See id.* at 503-05. In *Seneca*, plaintiffs argued that they had both aboriginal title and recognized title to the land at issue in 1815. The court disagreed. It found that, even if the Senecas at one point had aboriginal title to the land at issue—and the court expressed serious doubt that the Senecas ever had such title—such title

In *Seneca*, innocent landowners won a rare victory because, under the undisputed facts, the plaintiffs had no claim under the Act for the land at issue—it was simply a claim that the plaintiffs never should have brought. While the *Seneca* court decided summary judgment on grounds applicable to all defendants, the landowners made an additional argument, which the court was not required to reach: that even in a land claim case in which a plaintiff may be able to make out a claim under the Act, the innocent landowners—who indisputably did not violate the Act—should not be subject to monetary judgments, should not be threatened with ejectment from their lands, and, in short, should not be defendants at all.[7] This is so not only because the landowners did not violate the Act (and were not even born at the time of the Act's alleged violation), but because courts have held that the tribal plaintiffs can receive full, fair, and complete recovery without the landowners as parties.

It is important to understand that present-day landowners stand apart from other defendants in cases under the Act. The landowners are innocent third parties, and their undisputed innocence makes them unique among land claim litigants. In the *Oneida*,[8] *Cayuga*,[9] and *Seneca*[10] land claims, for example, the central defendant is the State of New York.[11] Unlike the state, which is typically alleged to have entered into a land transaction that violated the Act, the present-day landowner defendants are not alleged to have done anything wrong. Their only "crime" is owning land that, hundreds of years ago, the state may have purchased in contravention of federal law. Their land title, and the title of their predecessors-in-interest,

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was extinguished in a 1764 treaty between the Senecas and the British Crown, and a 1784 treaty between the Senecas and the United States. *See id.* at 542. Plaintiffs claimed that, even if there was no aboriginal title in 1815, the 1794 Treaty of Canandaigua (hereinafter "Canandaigua") between the Senecas (among other tribes) and the United States gave them recognized title. *See id.* at 502. The Court again disagreed. At the close of the Revolutionary War, pursuant to the Treaty of Paris of 1783, lands belonging to the British Crown within a state became the property of that state, and so the islands in the Niagara became New York's property. *See id.* at 515. The court found that, even if Canandaigua's "boundary call" included the islands (an issue which the court did not reach), Canandaigua could not have divested New York of its title consistent with the Constitution. *See id.* at 530–33. Therefore, the Senecas had no title of any sort to the islands in 1815, and the 1815 treaty was not prohibited by the Act.

7. *See id.* at 542.

8. Oneida Indian Nation of N.Y. v. County of Oneida, 199 F.R.D. 61 (N.D.N.Y. 2000).

9. Cayuga Indian Nation of N.Y. v. Pataki, 79 F. Supp. 2d 66 (N.D.N.Y. 1999).

10. Seneca Nation of Indians v. New York, 206 F. Supp. 2d 448 (W.D.N.Y. 2002).

11. Sometimes political subdivisions, such as the counties in which the claimed land is located, are also named as defendants. *See, e.g.*, Cayuga Indian Nation v. Carey, 89 F.R.D. 627 (N.D.N.Y. 1981).

traces back to the sovereign—the State of New York. Courts routinely acknowledge this distinction among defendants. The *Seneca* court said, "[i]f there was a party who acted unfairly toward the Senecas, it was the United States, not New York, and certainly not the present-day non-State defendant-property owners, *who are unquestionably innocent of any wrongdoing*."[12] The *Oneida* and *Cayuga* courts similarly have characterized the landowners as "innocent."[13]

Moreover, when it is convenient to their purposes, tribal land claim plaintiffs concede that the defendant landowners are innocent of any wrongdoing. For example, as confirmed by the *Oneida* court:

> [I]n 1968, in a Complaint and Petition to the President of the United States ... in language which could not be more definite, the [Oneida] Nation declared: "Be it clearly understood that the Oneida Nation has *no purpose or wish to eject* from such lands *the innocent people* who now have record title to them and reside thereon.... The Oneida Nation wishes *to secure from the State ... only fair and just compensation* for the lands unlawfully taken from them without due process of law."[14]

Unfortunately, but not surprisingly, the tribal plaintiffs'' position has changed. This is likely so because a continued threat against landowners in this high-stakes game—where "victory" may not only include a judgment in the Indians' favor, but a deal to open a profitable casino—is the tribal plaintiffs' most potent bargaining chip. Plaintiffs have gone to extreme lengths to keep the threat of litigation against innocent landowners alive. In the *Oneida* case, even after the plaintiffs' request for leave to amend its complaint to add a defendant class of landowners was denied, one group of Oneidas, the "Wisconsin Oneidas," sought to circumvent the order by suing scores of landowners in *individual* actions. The court dismissed the complaints and the Wisconsin Oneidas were enjoined from filing any further actions against landowners in the claim area.[15] In sharply-worded language, the court chastised the Wisconsin Oneidas, stating:

> The time has come to put an end to the tactics long employed by the Oneida Plaintiffs in these land claim actions that are meant only to scare

12. *Seneca*, 206 F. Supp. 2d at 540 (emphasis added).

13. *See Oneida*, 199 F.R.D. at 92 (stating that "[i]f the court takes a 'wait and see' approach, then because this litigation could span another decade, approximately 20,000 innocent landowners would needlessly be kept in a state of legal limbo. The court cannot countenance such a result."); Cayuga Indian Nation of N.Y. v. Cuomo, 1999 WL 509442, at *30 (N.D.N.Y. July 1, 1999) ("conceivably ejectment would render homeless thousands upon thousands of innocent landowners").

14. *Oneida*, 199 F.R.D. at 81.

15. *See Oneida Tribe of Indians of Wis.* v. *AGB Properties, Inc.*, No. 02-CV-233, 2002 U.S. Dist. LEXIS 16538 (N.D.N.Y. Sept. 5, 2002).

> the local population and delay resolution of the ultimate issues. Judge McCurn has ruled conclusively in this action on the issue of what remedies are available to the Oneida Plaintiffs, including the Tribe, against private landowners. The Tribe's attempt to circumvent the September 2002 Order by bringing these actions is disingenuous at best.[16]

The Wisconsin Oneidas' "tactics" were "disingenuous at best" because, given the current complexion of the major New York Indian land claims, there is no legal reason—though, as mentioned above, there may be a political or bargaining-leverage reason—for the tribal plaintiffs to continue to press their claims against the landowners; nor is there any legal reason for courts to allow cases against landowners to proceed. This is so because, where the relevant political entity is a party defendant, as it is in *Seneca*, *Oneida*, and *Cayuga*, for example, the tribal plaintiff may be awarded a complete remedy without the presence of the innocent landowners. As the Second Circuit noted, "if the ejectment of current occupants and the repossession by the Indians of a wrongfully taken land is deemed an 'impossible' remedy, the court has authority to award *monetary relief* for the wrongful deprivation."[17] A remedy becomes impossible when, among other things, as in most every Indian land claim, the subject lands "have been opened to settlement and large portions of them are now in the possession of innumerable purchasers."[18] In such a situation, "the Indians [are] 'entitled to just compensation as for a taking under the power of eminent domain.'"[19] And this "just compensation" must be awarded against the alleged wrongdoer and *not* the innocent members of the defendant class.[20] Other courts dealing with New York Indian land claims have arrived at this result, based on *Oneida* and *Yankton Sioux*, among other cases.[21] After all, as Judge Murnaghan stated, "[i]t is not particularly earthshaking for a court to tailor the remedy to the problem at hand. Monetary relief representing fair value is 'just compensation' and

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16. *Id.* at *25.

17. Oneida Indian Nation v. New York, 691 F.2d 1070, 1083 (2d Cir. 1982) (emphasis added) (citing Yankton Sioux Tribe v. United States, 272 U.S. 351, 357–59 (1926)).

18. *Yankton Sioux*, 272 U.S. at 357.

19. Catawba Indian Tribe v. South Carolina, 740 F.2d 305, 307 (1984) (citing *Yankton Sioux*, 272 U.S. at 359 n.2).

20. *Catawba*, 740 F.2d at 307 ("one or both of the sovereigns [the United States or the relevant State] may indeed owe to the Tribe just compensation. On that basis, the titles of the ... landowners would be held to be paramount and they, without surrender of the land or payment in cash, *would be entitled to judgment*.") (emphasis added).

21. *See, e.g.*, Cayuga Indian Nation of N.Y. v. Cuomo, 1999 WL 509442, at *30 (N.D.N.Y. July 1, 1999) (precluding ejectment as a remedy against landowners).

constitutionally the equivalent of tangible or real property."[22]

Such a result is even more appropriate where the sovereigns "have done nothing to warn [the landowners] off the land."[23] To use the *Seneca* case as an example, Grand Island (as well as the other inhabited Niagara River island, Cayuga Island) has been open for settlement for close to 200 years. Publicly-funded projects, such as the construction of the Grand Island bridges, have encouraged generations of citizens to settle on the subject lands. The tribal plaintiffs, and especially the United States—a party plaintiff in *Seneca*—never warned the landowners that title to their lands was allegedly clouded and that a 170 year-old land claim seeking their ejectment could be brought against them. It goes without saying that "the sovereigns have actively encouraged [the landowners'] settlement or the settlement of their predecessors, and ... have actively benefited through real property and income taxes assessed against the land in their hands or against profits generated by its use."[24] In such circumstances, judgment for the innocent landowners is fair to them, fair to the plaintiff Indians—who will still have a full and fair remedy available to them—and fair to the State.

Tribal plaintiffs acknowledge, as they must, that courts may eventually bar them from ejecting, dispossessing, or recovering money from the landowners, even if liability is found.[25] Yet, tribal plaintiffs invariably seek to hold the innocent landowners hostage during the liability phase of Indian land claim litigation. If courts will *eventually* determine that tribal plaintiffs are barred from recovering land or money from the innocent landowners, there is simply no reason why courts should not act to dismiss the landowners from the case *as soon as practicable*. There is no reason to delay such a ruling, and there is ample reason to act early to protect the interests of the innocent landowners, whose lands and fortunes are unjustly placed in jeopardy by the pendency of suit against them.

These principles were put into action by the court in *Oneida Indian Nation of N.Y. v. County of Oneida*.[26] There, the court rejected the Indian plaintiffs' motion to amend their complaint to join as defendants all of the landowners in the claim area. The *Oneida* court determined that it would be "futile" for plaintiffs in that case to amend their complaints to seek ejectment or monetary damages from the landowners.[27]

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22. *Catawba*, 740 F.2d at 307 n.2 (emphasis added).

23. *Id.* at 308.

24. *Id.*

25. *See Cayuga*, 1999 WL 509422, at *30 (precluding ejectment as a remedy against landowners).

26. 199 F.R.D. 61 (N.D.N.Y. 2000).

27. *See id.* at 71.

Tribal plaintiffs are understandably afraid of this decision. Judge McCurn's compelling reasoning is applicable at any stage of any Trade and Intercourse Act claim brought against individual landowners. Wisely, Judge McCurn noted that, "the time has come to transcend the theoretical" and declared that a "pragmatic" approach was required.[28] That Judge McCurn would apply his reasoning at any time in the case is apparent. He wrote:

> The court will *not* wait for years to decide that ejectment is not a viable remedy here because, as *Cayuga* demonstrates too well, holding resolution of that issue in abeyance only prolongs what the court perceives as inevitable here: no private landowners will be evicted from property upon which they are currently residing.[29]

Here the court chose its words carefully: "what the court perceives as inevitable." This phrase sums up McCurn's decision and contradicts the argument often heard from tribal plaintiffs. Whatever the posture, tribal plaintiffs cannot and will not recover from the individual landowners, and accordingly, the individual landowners must be dismissed from the case.[30] To prevent any doubt on this point the court concludes that "there are absolutely no circumstances under which ejectment of the private landowners will be a viable remedy in this case."[31]

Tribal plaintiffs should have no remedy against the individual landowners. In *Oneida*, Judge McCurn took a practical approach to a complex issue and held that the presence of the State gave the tribal plaintiffs the required potential for a complete remedy.[32] Relying on the impossibility doctrine, as expressed in *Yankton Sioux Tribe v. United States*[33] and *Felix v. Patrick*,[34] the court concluded, "[t]hese practical concerns as to the impossibility of restoring Indians to lands formerly occupied by them resonate deeply with this court. Such concerns are magnified exponentially here, where development of every type imaginable has been on going for more than two centuries ...."[35] The court continued,

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28. *Id.* at 92.

29. *Id.* at 93.

30. Indeed, Judge McCurn even advises that an "evidentiary hearing on the issue of the availability of ejectment" will provide "little if any insight—factually or legally ...." *Id.* at 92. To the *Oneida* court "the same would be true even for a court whose docket has not included almost 20 years of presiding over land claim litigation." *Id.* at 93 n.27.

31. *Id.* at 94.

32. *Id.* at 93–94 ("the U.S. presence in this case 'now *guarantees* that the [Oneidas] can ... recover the full measure of appropriate damages from the State.'").

33. 272 U.S. 351, 357 (1926).

34. 145 U.S. 317, 334–34 (1892).

35. Oneida Indian Nation of N.Y. v. County of Oneida, 199 F.R.D. 61, 92 (N.D.N.Y.

"it is unfathomable to this court that the remedy for such harms, if proven, should be eviction of numerous private landowners more than 200 years after the challenged conveyances."[36]

Moreover, the *Oneida* court squarely rejected the approach of waiting until liability is decided to dismiss landowners from Indian land claims.[37] The court reasoned that, unlike ordinary litigation, "[i]f the court takes a 'wait and see' approach, then because this litigation could span another decade, approximately 20,000 innocent landowners would needlessly be kept in a state of legal limbo."[38] On that compelling basis, the court concluded that it could not "countenance such a result."[39]

The weight of federal case law is clear: where a complete remedy is assured by the presence of the state, individual landowners should be dismissed—and dismissed as quickly as practicable—as any recovery against them is unjust and impossible. Courts confronted with land claims naming individuals as defendants should determine, following the *Oneida* court and the Supreme Court in *Yankton Sioux*, that innocent landowners cannot be held responsible for another's alleged violation of the Trade and Intercourse Act, that no remedy may be assessed against them, and that the claims against them should be dismissed.

2000).

36. *Id.*

37. *See id.* at 94–95.

38. *Id.* at 92.

39. *Id.*

Morality and Justice 200 Years After the Fact

Arlinda Locklear*

Good afternoon. I appreciate the opportunity to give the counterpoint to Mr. Coldebella's remarks here.[1] We look forward to doing this, and I'm grateful that the law school has given us this opportunity.

Before I begin though, I would like to take this opportunity to make a personal comment, if I may. We very seldom get a chance to say thank you, publicly, to friends of Indian people. I have an opportunity today to do that, and I would like to take that opportunity. As you may have read, I am a member of the Lumbee Tribe of North Carolina, which is the largest nonfederally recognized tribe in the United States. Today, we have two very good friends with us, and I'd like to say thank you to both of them. First, thank you to Dr. Jack Campisi, who has given hours and hours of his time and long years of service, most often without pay. He is a dear friend, not only to the Lumbee Tribe, but also to other nonfederally recognized tribes. Second, thank you to Jim Sappier, who, as governor of the Penobscot Tribe, has been a great friend to the Lumbee people and has actively supported their recognition. Oftentimes the dynamic in Indian country is such that when you cross the divide and become federally recognized, you no longer know the brothers you left behind. Jim didn't do that, and, for that, I say thank you.

Now, land claims. Let me start by stating, in the interest of full disclosure, which tribes I represent and in which cases. Currently, I represent the Oneida Tribe of Indians of Wisconsin in the Oneida land claims cases. I am proud to say that I have represented them since 1978. Presently, we have two sets of litigation pending. One is what we call the "reservation case," which is a claim to title of 250 thousand acres of the Oneida reservation located in Madison and Oneida counties of upstate New

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1. Gus P. Coldebella & Mark S. Puzella, *The Landowner Defendants in Indian Land Claims: Hostages to History*, 37 NEW ENG. L. REV. 585 (2003) (another presenter at the symposium who argued the land claim issue from the landowners' perspective).

York.[2] We also have a claim pending against fifty-seven individual private property owners.[3] Although Justice Kahn, in the Northern District of New York, recently dismissed this claim, it is now on appeal to the Second Circuit Court of Appeals.

I also have the privilege of having represented the Seneca Nation since 1996. For the Seneca Nation, we have been pursuing the Grand Island suit[4] that Mr. Coldebella described to you, and we'll discuss it in a bit more detail. There also is a second claim in which I represent the Seneca Nation, along with Jeanne Whiteing, from Boulder, Colorado. This claim, generally referred to as the Cuba Lake case, is against New York State only. It is a small claim whereby New York purported to take land in the Oil Spring reservation for purposes of canal construction in 1858. This case was the subject of a motion for summary judgment in which Judge Curtin did indeed rule that there had been a violation of the Indian Trade and Intercourse Act.[5] Seneca Nation, we believe, remains the owner of that land. We are now involved in a mediation process in an attempt to settle that case.

I am going to take a step back for a moment, both in terms of history and in time, in this litigation to give you all sort of a general (very general) and brief overview of why land claims exist and the underpinning doctrine for those claims. I am sure that a lot of you have had the opportunity to take a course in federal Indian law, so this may be familiar to you, but for some of you, it may not be. So, very briefly, let me explain that this really began as a principle of international law. As those of you who have studied federal Indian law know, federal Indian law does not refer to the law of the Indians. Rather, it refers to law of the United States government.

The original tenet for these land claims cases began as a principle, as I said, of international law known as the "doctrine of discovery." Very generally, this doctrine states that upon discovery of the North American continent by the European powers, those discovering nations acquired what is referred to as the "underlying fee" or the "right of preemption" to Indian land. The Indians, at the same time, were acknowledged to be the sole occupants with the right to continue to permanently occupy that land, subject only to defeasance or extinguishment by the sovereign itself. The discovery doctrine was recognized by all of the European powers not, I might add, out of their great kindness toward Indian people, but rather as a

2. *See* Oneida Indian Nation of N.Y. v. New York, 201 F.R.D. 64 (N.D.N.Y. 2001).

3. *See* Oneida Tribe of Indians of Wis. v. AGB Properties, Inc., No. 02-CV-233, 2002 U.S. Dist. LEXIS 16538 (N.D.N.Y. Sep. 5, 2002).

4. *See* Seneca Nation of Indians v. New York, 206 F. Supp. 2d 448 (W.D.N.Y. 2002).

5. *See* Seneca Nation of Indians v. New York, 26 F. Supp. 2d 555 (W.D.N.Y. 1998).

way to eliminate competition amongst themselves for the very valuable right to extinguish and take from the Indians their land. This was convenient for them, avoided wars, and did leave the Indian people with some modicum of rights under law that was recognized by the European sovereigns. By 1789, this doctrine had become established in American law, and it was adopted by the United States.[6]

In 1790, this doctrine became the basis for Section 4 of the 1790 Indian Trade and Intercourse Act.[7] The Indian Trade and Intercourse Act, as you heard earlier today, was the first and most comprehensive enactment by Congress, at that time, to exercise its broad power over Indian affairs. It codified the principle, among other things, that only the United States can extinguish title to Indian lands.[8]

Now, what had happened as a matter of history up to this point was that a number of states, principally the original colonies of the time, had by long practice been accustomed to dealing with the tribes within their borders. By that point in time, most states, including New York and the New England states, had entered into a number of treaties with Indian tribes. Even though they were aware of the passage of the Indian Trade and Intercourse Act, they believed it did not apply to them. Rather, they believed the Act did not limit their authority to continue to trade with Indians, particularly in land. It was not until the Supreme Court's unanimous decision in 1974, in what we refer to as *Oneida I*,[9] where the Supreme Court plainly stated that only the United States can extinguish Indian title, and that the principle remains with all of the states, including the original thirteen, notwithstanding the fact that the original thirteen states may hold the underlying fee to Indian land. Clearly then, the State of New York understood by that point, that as a matter of federal law, it was bound by the Indian Trade and Intercourse Act.

Historically though, the State of New York knew long before the Supreme Court decision in 1974 that the Indian Trade and Intercourse Act did indeed apply to its actions. As early as 1795, the Secretary of War, under whose jurisdiction Indian affairs fell, became alarmed at the State of New York's very open and aggressive land acquisition policy. The Secretary of War wrote to the Attorney General of the United States and inquired as to whether, in his view, the recently enacted Indian Trade and

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6. *See* Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667 (1974); Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 574 (1823).

7. Indian Non-Intercourse Act, ch. 33, 1 Stat. 137 (1790) (codified as amended at 25 U.S.C. § 177 (2000)).

8. *See generally* FRANCIS PAUL PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790-1834 (1970).

9. *Oneida*, 414 U.S. at 667.

Intercourse Act limited the State's ability to extinguish Indian title.[10] The Attorney General, in 1795, wrote a very clear and plain opinion in which he concluded that indeed the statute did apply and limit the State's authority, including the State of New York's authority to extinguish Indian title.[11] New York cannot claim ignorance of this opinion either. In fact, immediately upon its receipt, the Secretary of War forwarded the opinion to then Governor Clinton of New York. As such, New York has been on notice, very plain and simple, since 1795, at the earliest, that the Indian Trade and Intercourse Act applied to its terms and to its actions. Notwithstanding that fact, and notwithstanding that clear knowledge, New York proceeded to dispossess most of the Indian people within its borders of most of their lands.

There is one other point I'd like to make here as an aside, as it comes up often, in terms of how these issues are presented. If you listen to the language carefully, the land acquisitions are presented as "arms length transactions," for which the tribes bargained and obtained valuable consideration. The argument made is that it is bad faith for the tribes to come back 150 years later and complain about these actions. Again, that is not an accurate reflection of history. If you examine what happened in these circumstances—and these facts are known to New York and to all of the other parties in this litigation—you will find that these transactions were, by and large, concluded as a result of duplicity and coercion on the part of the governor at the time. This is exemplified when in 1785 the transactions first began with Oneida, and running until 1788, and following the largest such transaction with respect to Oneida land, which involved about four and a half million acres, Good Peter, who had been a leader of the Oneidas at the time, actually went to Governor Clinton and said, "We thank you. The Oneida people thank you for restoring our land to us because until you came and did this the bad white people among us attempted to take it away." The Oneidas actually believed that the Governor had said to them: "We will protect your land, and we will not allow non-Indians to take it from you." That is what they believed. The very next year the Governor said, "No, you misunderstood. We purchased your land. It is now ours. It belongs to the State."[12] That statement is emblematic of the history that actually gave rise to these cases. The land acquisitions were not arms length transactions. They were produced as a result of similar coercion in virtually every circumstance.

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10. *See* Oneida Indian Nation v. County of Oneida, 434 F. Supp. 527, 534 (N.D.N.Y. 1977), *aff'd*, 470 U.S. 226 (1985).

11. *See id.*

12. *See generally* HELEN UPTON, THE EVERETT REPORT IN HISTORICAL PERSPECTIVE: THE INDIANS OF NEW YORK (1980).

It happened not only with Oneida. It happened with Cayuga. It happened with Mohawk. It happened with Seneca. So right now, based on these historic circumstances, and based on the Indian Trade and Intercourse Act, which was a codification of a principle of international law annunciated by the so-called discovering sovereigns themselves, there are now these following cases pending in court.

There is a claim by the Cayugas for 64,000 acres of land, as Mr. Coldebella described.[13] It is now on appeal to the Second Circuit Court of Appeals. The case involves illegal transactions between the Cayuga Nation and the State of New York that roughly followed the same pattern I described for Oneida. It includes a defendant class action that consists of all of those who now occupy the land. Again, language here is important. We do not refer to the defendants as landowners. They assert that they own the land, but we deny that. We believe they are trespassing on Iroquois land. That claim is currently pending.

There also is a claim by the Mohawks for 17,000 acres of land, which is pending in the district court[14] and also involves a defendant class action. There is the Oneida case pending which involves 250,000 acres of land.[15] Finally, there also is the 18,000 acre Grand Island case[16] and the fifty-five acre Cuba Lake case on behalf of Seneca Nation.[17]

Now, even though most of the claims that are pending are in New York, we must remember that there are claims pending outside New York, as well, with similar circumstances based on the same law. There are cases pending, or otherwise still outstanding, in Connecticut[18] and Massachusetts.[19] One case was settled a few years ago in South Carolina,[20] and there are still outstanding claims in Louisiana.[21] This is largely an east

13. *See* Cayuga Indian Nation of N.Y. v. Pataki, 188 F. Supp. 2d 223 (N.D.N.Y. 2002).

14. Canadian St. Regis Band of Mohawk Indians v. New York, 146 F. Supp. 2d 170 (N.D.N.Y. 2001).

15. *See* Oneida Indian Nation of N.Y. v. New York, 201 F.R.D. 64, 66–67 (N.D.N.Y. 2001).

16. *See* Seneca Nation of Indians v. New York, 206 F. Supp. 2d 448, 456–57 (W.D.N.Y. 2002).

17. *See* Seneca Nation of Indians v. New York, 26 F. Supp. 2d 555, 560–61 (W.D.N.Y. 1998).

18. *See* Schaghticoke Tribe of Indians v. Kent School Corp., 423 F. Supp. 780 (D. Conn. 1976).

19. *See* Mashpee Tribe v. New Seabury Corporation, 592 F.2d 575 (1st Cir. 1979), *cert. denied*, 444 U.S. 866 (1979).

20. *See* Catawba Indian Tribe of South Carolina Land Claims Settlement Act of 1993, Pub. L. No. 103-116, 107 Stat. 1118 (codified at 25 U.S.C. § 941 (2000)).

21. *See generally* Statute of Limitations Claims List, 48 Fed. Reg. 13,698 (March 31,

coast phenomenon, with most of the cases pending in the State of New York, due to that state's aggressive land policy of the time.

Now, I'm going to do something that a lot of you think lawyers probably have no particular expertise in, and that is, discuss morality. The topic of my talk is morality and justice 200 years after the fact. I think it's important to pay some attention to this concept of fundamental fairness and morality because, after all, that is why we are still litigating these cases.

We litigate these cases not only against the state involved, although we acknowledge that the state in most of these transactions was the original wrongdoer. We also are quick to point out and agree that the United States stood on the sidelines. The United States, as trustee for the tribes, was well aware that these transactions were taking place at the time and did nothing to stop them. So, in a sense, the original sin was committed by the states involved *and* the United States. However, we are not at all embarrassed to include those who now occupy the land as defendants as well. First of all, they are not innocent in any sense of the word. They are trespassers. They have been sued because they are sitting on, taking advantage of, and enjoying the benefit of land that belongs to the Iroquois people. Second, even had they not been aware of that fact 100 years ago, if I had to venture a guess, I would say that a good 75% of them had personal knowledge of that fact when they acquired the land.

The average length of ownership in most of these claim areas is ten to twelve years. As I indicated earlier, since at least 1974, the state of New York and most of its residents have been on notice of the fact that those transactions violated state law. Now, if they acquired that land after 1974, it seems to me that it is a stretch of the facts to claim innocence on their part.

Second of all, let's take a perspective on the damage they suffer. Exactly what is that damage? They don't have any obligation to defend the cases, as the State of New York pays for their defense. If the State of New York did not pay, the title insurance companies would themselves pay. I dare say that not a single private defendant has had to bare a single dollar of defense costs in these cases. Certainly not in New York, and I suspect not elsewhere either.

Third, should they be here? Do they have a stake in the outcome of this? Absolutely they have a stake in this, and here's what it is. We agree that there should be a legislative solution to these cases, but what happens in a legislative solution? There is a clearing on the cloud of title that now hangs over every one of these trespassers who are claiming title. They, as a result, obtain a substantial benefit from the settlement of these claims. This benefit provides them with a stake in the claim as well as an obligation to be at the table that's going to produce the settlement from which they stand so much

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1983) (listing outstanding land and other damage related claims).

to benefit.

Finally, and I think this may be the most important point with respect to the claimed innocence of these property owners, let us remind ourselves that the property owners and the United States, in general, exist in a representative form of government. These claims have been known about for generations, and, because they are constituents of a representative government, they have the obligation to convince their government to settle these claims. What have they done in that regard? Very little. In fact, if anything at all, they have taken steps in the opposite direction. They denigrate the claims. They claim that the Iroquois plaintiffs themselves are somehow immoral for even pursuing these claims. There's been only one attempt at settlement that actually was considered by Congress in one of the Iroquois claims from New York, and that was in the Cayuga case in 1982.[22] The congressman at the time introduced a potential settlement for the Cayuga land claim, but the settlement failed. Do you know why that settlement failed? It failed because the so-called landowners objected. They are the very people who can make the State of New York and the congressional delegation respond to their problems as they see it, and they are the ones who have a moral responsibility to help produce the settlement that they say they want to see happen. If that is the case, then they are the ones who are in the position to produce it. The Indian plaintiffs are not.

Let me give you a couple of examples of the "landowners" power in that regard, which are very unsettling examples for those of us on the other side because it suggests there is something inappropriate occurring within the system. In the Grand Island case,[23] one detail Mr. Coldebella did not tell you is that originally when the United States intervened, it intervened to assert a claim against both the State of New York and the private defendant class. However, under great pressure by the State of New York and its congressional delegation, the United States later amended its complaint to drop the claims it had been asserting against the private defendant class and to assert claims only against the State of New York.[24] Senator Schumer and Governor Pataki publicly expressed satisfaction with the United States' decision and took credit for having influenced the United States' decision-making process.[25] In short, the trustee dropped the claims against the private property owners in response to political pressure. Now, in the

22. *See Ancient Indian Land Claims: Hearing on S. 2084 Before the Senate Comm. on Indian Affairs*, 97th Cong., 2d Sess. 19–26 (1982).

23. *See* Seneca Nation of Indians v. New York, 206 F. Supp. 2d 448, 454 (W.D.N.Y. 2002).

24. *See id.* at 542 n.71.

25. *See* Press Release, June 21, 2002, Schumer: Grand Island Landowners Score Major Victory in Land Claim Fight, *available at* http://www.senate.gov/~schumer/Schumer Website/pressroom/press_release/PR01051.html (last visited Feb. 1, 2003).

Grand Island case, the United States is pursuing claims only against the State of New York.

In the Oneida case, we see another example of political pressure. Mr. Coldebella correctly observed that Judge McCurn entered a significant procedural decision in September of 2000 when he held that the Oneidas would be barred from amending their complaint to add a defendant class to that lawsuit.[26] Up until that point, the Oneidas had not sued private property owners. In his decision, Judge McCurn noted that he had received considerable expressions of concern in the form of letters, as well as phone calls, from Congressman Sherwood Boehlert, who sits on the other side of the aisle.[27] He is a Republican member of the House of Representatives, who represents the district where the Oneida land claim resides. This obviously figured in Judge McCurn's decision to deny the Oneidas the opportunity to present their claims against the private property owners in the claim area.

It is very clear that the political process is influencing how these claims proceed, and it is very clear that the private defendants, through their members of Congress, have the means to influence. It seems that if this is the case, the appropriate step to take is to use that influence *not* to limit the rights of the tribes in litigation, which after all does suggest an inappropriate interference with the independence of the judiciary, but rather to use that influence to convince those same members of Congress to settle the cases.

Now, in conclusion, I would like to say a few words about the morality on the other side. That is, the Indians' point of view on why they believe they have done the right thing in these cases. I think it is important to say, at the beginning of this consideration, that these are not somehow just technical violations of federal law that some clever lawyer found 150 years after the fact, dusted off, and then presented in federal court. That is not how it happened. It happened because the Indian people at the time these wrongs occurred, 150 years ago, knew that they had been mistreated. They knew their land had been effectively stolen by the states involved, and they began a series of complaints that lasted from that time until the lawsuits were filed. In virtually every one of these cases there is a continuous history of petitions to the President and complaints to the governor, to the point where the State of New York's own records document the existence of the continuous complaints by the Iroquois people.

I present one brief example on that regard. In the 1920s, the state legislature authorized a commission to collect evidence related to the

26. *See* Oneida Indian Nation of N.Y. v. County of Oneida, 199 F.R.D. 61, 95 (N.D.N.Y. 2000).

27. *See id.* at 85.

complaints of Iroquois people in the state. The Everett Commission, as it was called, traveled around the state and held hearings at all Iroquois communities. At every single stop they were told, "New York illegally took our lands. Something must be done!" In his report to the state legislature, Everett concluded that indeed the Indians were correct in saying they had been illegally deprived of millions of acres in the state and that something should be done. The state legislature was so offended by Everett's report that it refused to publish his findings. It was not until the early 1970s that the findings of the Everett Commission became public, and this was only because Everett's secretary had kept her own personal records, which later were published in the form of a book.[28]

New York State knew it had violated the law. New York State knew that it had covered this up for generations. New York State knew that the Iroquois people had complained consistently. The fact that the lawsuits were filed 150 years later is not a function of the fact that the Indian people slept on their rights, it is a function of the State's own duplicity in, first of all, taking the land illegally, and secondly, doing everything in its power over the last 150 years to refuse to address and set right those wrongs. When you balance those moralities, it seems to us that the balance weighs heavily in favor of the Iroquois plaintiffs.

We agree that this is a difficult issue. It is an issue that is best resolved by the parties negotiating amongst themselves in good faith. It is not the kind of issue where there should be an absolute victory for either side. However, it is in court because the State has, up to this point, refused to do just that. Until that happens, in all likelihood, it will stay in court.

Thank you.

28. *See generally* UPTON, *supra* note 12.

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Acquiring Land Into Trust for Indian Tribes

Larry E. Scrivner*

Thank you. I do not know how to follow that very passionate presentation that we just heard, so if you want to go to sleep I will understand. First of all, I want to say thank you to the New England School of Law for asking the Bureau of Indian Affairs (BIA) to participate in this Symposium. The BIA always welcomes the opportunity to explain its role in acquiring land into trust for Indian tribes and, since I am with Indian Affairs, I ask that you hold the boos until after I am finished.

I want to make a couple of opening remarks. First, because I am in a room full of attorneys, or would-be attorneys, although I am not an attorney I think by osmosis I may be one, as I have worked with attorneys all of my life. I suppose I may be an attorney because, in part, I like hearing the sound of my own voice. So if I run too long, that is the reason. Second, I do not have an accent. I come from Oklahoma where the King's English is spoken properly and at the correct tempo. The rest of you are the ones with the accent.

Anyway, moving on to address the process of acquiring land into trust for Indian tribes.

I left a handout here, and many of you probably saw it out on the table (see attached).[1] This handout addresses the high level approach to acquiring land by trust. While it appears to be a very simplified process based on the outline that you were given, there are a lot of things that go into the process. I will attempt to address the major events that occur at this high level.

The Secretary of the Interior has the authority, through various statutes, to take land into trust for Indian tribes and Indian individuals. The Secretary's authority is discretionary, meaning that he or she may solely decide the fate of an application to acquire land into trust. There are

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* Acting Director, Office of Trust Responsibilities, Bureau of Indian Affairs.

1. BUREAU OF INDIAN AFFAIRS, U.S. DEP'T OF THE INTERIOR, ACQUISITION OF TITLE TO LANDS IN TRUST BY THE SECRETARY OF THE INTERIOR (2002).

acquisitions that are nondiscretionary however, and those generally come about in three ways: (1) legislative action by Congress placing land into trust or directing the Secretary to place land into trust; (2) settlements to put land into trust; and finally, (3) court decisions. I am here today only to talk about the discretionary decisions, as that is where the Secretary exercises her discretionary authority to approve an application.

The only place where we do not acquire land into trust is Alaska. The Annette Island Reserve is the only place in Alaska where land has been taken into trust. In 1999, we went through a regulation development procedure to amend our current regulation. In it, we were going to explore the authority for acquiring land into trust for Alaskan Natives. This process is ongoing.

Prior to the allotment period, Indian tribes owned all of the lands. When Congress passed the Allotment Act in 1887,[2] it gave the tribes the ability to allot (give) a parcel of the land to their individual members. It was through this allotment process that Indians lost the majority of their land. Since the Allotment Act of 1887, approximately ninety million acres of land were removed from Indian hands. Currently, we are in the process, under the regulations, of reacquiring some of this land. However, it is important to be aware that Indians are still losing land today. Indians today lose land through condemnation, by eminent domain, and by other Indians who, like myself, decide that they do not need the federal government's supervision of their lands, so they ask that the restrictions be removed. Land also is lost by the foreclosure of mortgages. For example, if I mortgaged my land and went into default, they would foreclose on me and take the land. Another way land is lost is through probate. Due to the intermarriage of an Indian and a non-Indian, if the Indian dies and the non-Indian inherits the Indian's interest, the land is moved out of trust. Presently, the BIA has about fifty-six million acres of trust land,[3] of which Indian tribes own forty-six million acres,[4] and individuals own approximately ten million acres.[5]

Recently, Congress asked the BIA to collect data. This data collection covered a six-year period, during which time the BIA acquired approximately 290 thousand acres into trust. However, at the same time, Indians lost about 120 thousand acres. The two are sort of balancing themselves out.

The regulations governing the acquisition of land into trust were first

2. The Indian General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331–34, 339, 341–42, 348–49, 354, 381 (2000) (repealed 1934)).

3. *See generally* BIA ANN. REP. OF INDIAN LANDS (1997).

4. *See id.*

5. *See id.*

published in 1980.[6] Prior to 1980, no real standard existed for taking land into trust; nor was there a great need to take land into trust, since Indian tribes did not have any money to acquire land. The advent of Indian gaming has somewhat changed the entire look of what is going on in Indian country. Not all Indian tribes have the resources with which to buy land and place it into trust, however, the perception among both the casual observer and those who work with Indians is that every acquisition done by an Indian tribe is for gaming. Yet not all Indian tribes want to engage in gaming activities. Most Indian tribes have a greater necessity to meet the needs of their memberships through housing, health facilities, governmental facilities, and so on.

As I said, we, in 1999, were trying to amend the acquisition rule. It was about that time that we also changed administrations. When President George W. Bush was elected, we started looking at the regulations again, and the decision was made to withhold publishing them in a final rule. However, we are still actively looking at some areas that may need further examination, largely because of public concern.

Some of those issues involve housing for home site purposes. What is the process? Can we make it simpler? Should it be less difficult? What should be the standards of review? How is the BIA deciding whether or not to approve an application? What is the availability of the applications for review? One of the things we get asked when we notify the public that we have an application is, "May we, the public, see the application?" They tell me stories about how they heard on the radio that morning that such and such was happening. However, to some extent, as the BIA is governed by the Freedom of Information Act[7] and the Privacy Act,[8] we cannot release all of the information. Instead, we have to redact the information. Well, as you know, anytime you redact something people think you're hiding something. As a result, we are trying to figure out a way to meet the public's need to view what is in the applications, while protecting the privacy of the applicant tribes.

The other effort we are considering is the use of computer technology. We are looking at the possibility of putting up a reading room of all of our applications, so anyone throughout the nation may go in and look and see where the applications are nationwide. Like I said, these are all going to be discussed in the near future, and not one of these initiatives has been finalized.

Who has the authority to approve these acquisitions? The statutes give that authority to the Secretary, and the Secretary has redelegated that

6. *See* 25 C.F.R. pt. 151 (2003).
7. 5 U.S.C. § 552 (1966).
8. *Id.* at § 552(a).

authority down through the various levels. The Secretary delegated to the Assistant Secretary for Indian Affairs; the Assistant Secretary redelegated to the Deputy Commissioner of Indian Affairs; and the Deputy Commissioner redelegated to the Regional Directors of the BIA. The only exception to these redelegations is gaming acquisitions.

All gaming, and gaming-related acquisitions, must be approved by the Assistant Secretary. Any time a tribe makes one of these applications, the local BIA Regional Office must submit it to the BIA Central Office for review and a decision.

For what purpose may land be taken into trust? There are three primary reasons for which Indian tribes take land into trust: (1) to facilitate tribal self-determination through governmental offices, healthcare, and public services; (2) for economic development, such as gaming, and maybe an industrial park or a shopping mall; and (3) for Indian housing. Like I said, gaming falls into the section of economic development, but the process of using land for gaming is not part of the acquisition process. Gaming is how the land is used and is not a part of the process of acquiring land. Sometimes, these two things come together in one application because the tribe wants the land in trust and, as soon as they succeed in obtaining trust status for the land, they develop it for gaming purposes. These two actions are often processed simultaneously, even though the land must first be placed into trust before it can be developed. Gaming is a whole different process from acquiring land into trust.

I want to go through how we take land into trust. First, we need an application, which the tribes can submit in any form. Generally, it is by a tribal resolution. In the application, the tribe must address (i) the existence of the statutory authority to acquire the land, (ii) the need for the land, (iii) the purpose for which the land is going to be used, (iv) the impact on the state and local political subdivisions, (v) any jurisdictional problems, (vi) the ability of the BIA to discharge additional responsibility, and (vii) compliance with NEPA.[9] Of course, the factors that really matter in these applications are the impact on the state and political subdivisions and the jurisdictional problems.

We heard this morning about the joint agreements between tribes, states, and local governments to address these concerns. The BIA encourages tribes to address these concerns in the sense that we encourage them to work with the local and state governments to arrive at these cooperative agreements. Why do we do that? Because it just makes the whole process easier. Any time you have an application where all the parties are in agreement, the whole process is just simpler. As soon as someone starts

9. National Environmental Policy Act of 1969, Pub. L. No. 91-190, § 1, 83 Stat. 852 (codified as amended at 42 U.S.C. § 4321 (2000)).

raising a flag, politics come into the mix, making it more difficult to process the applications. Difficulty arises when we have to explain why we may approve an application when we have public concerns.

Now, back to the process. As soon as we receive the application, we notify the state and local governments that we have it. The state and local governments must then respond with why they think we should not be putting the land into trust. It has to be more than, "We don't want it. We think it's gaming. Don't do it." We need evidentiary documentation to support why the local government feels it is impacting their jurisdiction or their tax base. The BIA must thoroughly review every application. There is no set format for these applications, as every one is unique. We cannot apply what is done with one application to another application. They are not all the same and there are different considerations for each application. If a tribe acquires land off the reservation, we require additional information from the tribe telling us how, for example, by going fifty miles off the reservation the reservation will benefit. What benefits are going to come from it?

Once we have completed our review and our analysis, we issue a decision. This decision requires a thorough analysis of all the facts and documentation, environmental clearances, archeological studies, and all of the things that weigh into the action. Once a decision is issued, we have to give everybody the right to appeal our decision. We refer to this as our administrative appeals process, and it is for anyone who disagrees. After the administrative appeals period is exhausted, and if our decision is sustained, we must publish a notice in a local newspaper saying, in effect: we are going to take title to this land thirty days from the date we file the notice of intent to accept title to land into trust. We then go into what we call our judicial review, which means anyone can file an action in federal court in an attempt to overturn our decision.

If we disapprove an application, we notify the applicant tribe, who can then appeal the decision. If we are sustained in the appeals process for the disapproval, then the tribe can take us to federal court and say the administrative process was in error. The only exception to this process is a decision made by the Assistant Secretary. Such a decision is deemed final for the Department. The only appeal from a decision by the Assistant Secretary is that which takes place in federal court.

If we have gone through the whole process, and the BIA has been sustained through the administrative appeal and the judicial appeal, then we notify the applicant to complete the title requirements. We then approve the deed and have it recorded in the county where the land is located. We then put it in our title offices, and the land is in trust.

Now, granted this is a very high level, quick rundown of the process. Like I said, it is more complex and generates a lot of documentation.

Everyone is required to supply evidence for what they want to accomplish. Indian tribes sometimes think that they are entitled to the land because it is a trust responsibility of the government. We do not argue or debate that contention. Rather, we look only at the merits of the application.



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Washington, D.C. 20240

IN REPLY REFER TO:

ACQUISITION OF TITLE TO LANDS IN TRUST BY THE SECRETARY OF THE INTERIOR

October 2002

BRIEF HISTORY:

The Secretary of the Interior is authorized under various statutory authorities to accept title to land on behalf of Indian tribes and individuals, thereby placing the title to land "in trust." There are several statutory authorities for the acquisition of title to land in trust (see Authorities, 25 CFR 151) as well as legislative, mandated and settlement act acquisitions. However, the primary statutory authority used for the acquisition of trust title is Section 5 of the Indian Reorganization Act (IRA) of 1934, 25 U.S.C. 465. The main goal of Section 5 is to reverse the precipitous decline in the economic, cultural, governmental and social well-being of Indians caused by the disastrous late nineteenth century federal policy which facilitated the breakup of reservations though "allotment" and eventual disposal (sale) of reservation lands. Until the passage of Public Law 97-459 (96 Stat. 2517) on January 12, 1983, Section 5 of the IRA was not available to all Indian tribes. However, Section 2202 extended the provisions of Section 5 to all Indian tribes provided that nothing superseded any previous Act of Congress which governs the acquisition of land for Indians in any specific tribe, reservation or state.

At the present time, the acquisition regulations do not cover the acquisition of land in trust status in the State of Alaska, except acquisitions for the Metlakatla Indian Community of the Annette Island Reserve or its members. The Department's policy for not taking title to lands in trust in Alaska is based on a September 15, 1978, Opinion of the Associate Solicitor of Indian Affairs that concluded that the Alaska Native Claims Settlement Act precluded the Secretary from taking land into trust for Natives in Alaska, except Metlakatla. On January 16, 2001, the Solicitor, U. S. Department of the Interior, rescinded the Associate Solicitor's 1978 Opinion. In the preamble of the final rule for the acquisition of title to land in trust, the Department determined that the prohibition in the existing regulation on taking Alaska lands into trust (other than Metlakatla) ought to remain in place for a period of three years during which time the Department will consider the legal and policy issues involved in determining whether the Department ought to remove the prohibition on taking Alaska lands in trust. No action has been taken since the regulation was withdrawn.

Nationwide there are approximately 56 million acres of land held in trust or restricted status for American Indians and Alaska Natives. In 1961 there were 53 million acres in trust or restricted status; an increase of approximately 3 million acres over a 40-year period of time. Trust title is held by the United States of America for the use and benefit of an Indian tribe or individual, and restricted title is held by an individual Indian subject to the restriction that it cannot be alienated or encumbered without the consent of the Secretary or held in fee by an Indian tribe subject to the condition that it cannot be alienated without Congressional authority (25 U.S.C. 177). Approximately 46 million acres of the trust lands are owned by Indian tribes. Between 1887 and 1934, over 90 million acres passed out of Indian ownership under the allotment policies of the General Allotment Act. Of the approximately 90 million acres of tribal land lost though the allotment process, only about 8 percent have been re-acquired in trust status since the IRA was passed 67 years ago.

The fact remains that Indians today continue to contend with the loss of lands. Indian lands lose their trust and restricted status due to voluntary sales by the owners, individual Indians requesting and receiving a patent in fee for their land, foreclosures of mortgages on trust land, condemnation by states and entities possessing the right of eminent domain, and probates where non-Indians have inherited by intestate succession or devise an interest in Indian trust and restricted land.

Year	Data Source	Acres	Square Miles
1883	Report of the Commissioner of Indian Affairs	135,998,101	212,497
1888	Report of the Commissioner of Indian Affairs	118,484,302	185,131
1902	Report of the Commissioner of Indian Affairs	75,148,643	117,420
1907	Report of the Commissioner of Indian Affairs	53,549,103	Not Collected
1997	BIA Annual Report of Lands	55,737,451	Not Collected

REGULATORY HISTORY:

Regulations governing the process by which the Secretary exercises her discretionary authority to take land into trust under the IRA were first published in 1980, and can be found in Title 25, Code of Federal Regulations, (CFR), 151. In April 1999, the Department proposed amendments to the Part 151 regulations, 64 Fed. Reg. 17574. Comments were received on the proposed changes to the rule until December 29, 1999, from a wide variety of Indian tribes and individuals, tribal groups, local and state governments and other interested groups and individuals. Also during the comment period, the Department conducted meetings and consultations with Indian tribes and other interested parties in Washington D.C., Albuquerque, NM, St. Paul, MN, Sacramento, CA, Mesa, AZ, and Portland, OR. In total, comments were received from 343 Indian tribes, 335 individuals, 65 state and local governments, 9 congressional offices and 7 federal agencies. The Department considered all the comments received and

on January 16, 2001, published the final rule, 66 Fed. Reg. 3452. The final rule was to be effective on February 15, 2001.

Notices were published in the Federal Register extending the effective date of the final rule while the Department reviewed the final but not effective acquisition rule.

On April 1, 2001, the Office of the Federal Register published an update to Title 25, Code of Federal Regulations, and included both the final but not effective final acquisition rule as well as the existing land acquisition rule originally published in 1980. The April 2002 edition of Title 25, Code of Federal Regulations, only contains the existing rule (1980).

On April 26, 2001, the Department published a Notice, 66 Fed. Reg. 73, extending the effective date of the regulation for 120 days or August 13, 2001. During the first 60 days of the 120-day period the Department sought comments from the public on whether the final rule should be "amended in whole or in part" or "withdrawn in whole or in part." The comment period expired on June 15, 2001. During the second 60-day period, the Department was to review and evaluate the comments and make a determination on whether to amend the rule in whole or in part or withdraw in whole or in part.

On August 13, 2001, the Department published a Notice in the Federal Register, 66 FR 42474, requested public comment on whether to withdraw the final rule and proposed further rule making to address the public's continued concerns. The comment period expired on September 12, 2001, and the Department received a total of 139 submissions: 93 from Indian tribes, 18 from state and local governments and federally elected officials and 28 from interested groups and individuals.

In November 9, 2001, the Department published a Notice in the Federal Register,Vol. 66, No. 218, withdrawing the final but not effective acquisition rule in order to address five specific areas of concern (housing for home site purposes, land use plans, standards of review, availability for review of applications and use of computer technology).

The Department is presently preparing to begin a process to consult with Indian tribes and stakeholders. To this end, a consultation document will be prepared that will focus on the identified areas of concern. Planning for consultation is tentatively planned for March 2003 to obtain input on the ways to address the identified areas of concern.

AUTHORITY TO APPROVE ACQUISITIONS:

The delegated authority for the issuance of decisions on acquisition applications has been delegated from the Secretary of the Interior (209 Departmental Manual 8) to the Assistant Secretary -Indian Affairs who re-delegated the authority (230 Departmental Manual 1) to the Deputy Commissioner of Indian Affairs, except for gaming acquisitions, who re-delegated the authority (3 Indian Affairs Manual) to the Bureau of Indian Affairs' Regional Directors. In some instances, the Regional Directors have re-delegated the authority to the Bureau of Indian Affairs' Superintendents/Field Representatives.

The authority for issuance of decisions relating to the acquisition of land for gaming and gaming related purposes has not been re-delegated from the Assistant Secretary - Indian Affairs. Thus, all decisions for the acquisition of lands for gaming or gaming related must be issued by the Assistant Secretary - Indian Affairs. The Bureau of Indian Affairs at the Regional and Agency/Field office level is responsible for ensuring the proper preparation of the acquisition application in accordance with 25 CFR 151, and, submission of the application with a decision recommendation to the Central Office, Bureau of Indian Affairs, for review and issuance of the decision by the Assistant Secretary - Indian Affairs.

ACQUISITION APPLICATION PROCESS:

The acquisition of title to land in trust is governed by the acquisition regulation contained in Title 25, Code of Federal Regulations, Part 151. The vast majority of the acquisition applications are conversions of title. This means an Indian tribe acquires title to the land in fee simple in their name and request that the Secretary accept title in trust for the Tribe's use and benefit. The following is an overview of the of the application processing.

Step 1 Applicant makes an application (25 CFR 151.9). There is no prescribed form for the application. However, applications must contain: (151.3, 151.7, 151.8 and 151.9)

A. A resolution (if a tribe) or letter setting forth: identity of parties, describe the land and estate being acquired, other information such as whether the acquisition is on, off or adjacent to the reservation, purpose of the acquisition (tribal self-determination, economic development or Indian housing); statutory authority for the acquisition, tribal authority for the acquisition, and consent by tribe of having jurisdiction of the land for non-member acquisition.

B. Applicant must thoroughly address the following factors: (151.10)

- existence of the statutory authority for the acquisition;

- need for the land;

- purpose for which the land will be used;

- degree of assistance needed if applicant is an individual;

- impact on the state and its political subdivisions resulting from the removal of the land from the tax rolls;

- potential jurisdictional problems and conflicts of land use;

- ability of the Bureau of Indian Affairs to discharge the additional responsibilities with the taking of the land into trust;

- information to comply with the National Environmental Policy Act and other environmental laws;

- appraisal of property when land valued at more than $100,000 and an abstract of title is used to support title.

IF the land to be acquired is located off-reservation, then the following additional information must be supplied: (151.11)

- Applicant must provide a business plan that specifies the anticipated benefits associated with the proposed use.

Step 2 BIA notifies the State and its political subdivisions of the proposed acquisition (151.10).

- Provide 30 days for submission of comments. Grants extension of time to submit comments for justifiable reason. Request information on:

  - Annual amount of property taxes currently levied on the property, any special assessments with amount, which are currently assessed against the property;

  - Any governmental services which are currently provided to the property by your jurisdiction;

  - If subject to zoning, how the property is currently zoned;

  - Notice must include the name of applicant, proposed use of the land, description of the property and statement that application (excluding information exempted by the Freedom of Information Act) are available for review at the BIA office.

Step 3 Furnish any comments from State and its political subdivisions to applicant and seek applicant's rebuttal to the comments .

Step 4 BIA deciding official must thoroughly review application, comments and all relevant documentation, including environmental data, submitted in connection with the application (151.12), and if the land is located off-reservation, the deciding official must also consider (151.11).

The location of the land to be acquired relative to the state boundaries, and its distance from the boundaries of the tribe's reservation shall be considered as follows:

- As the distance between the tribe's reservation and the land to be acquired increases, greater scrutiny is given to the tribe's justification of anticipated benefits from the acquisition;

- Greater weight is given to the concerns raised in the comments of the State and its political subdivisions.

Step 5 BIA must promptly issue decisions on application, and:

Notify the applicant and interested parties of the decision and include a copy of the analysis used in the decision making process;

Advise applicant and interested parties of the right to appeal decision, and;

Provide 30 days to file notice of administrative appeal (25 CFR 2) . Appeals are to the next higher level of decision making; e.g., appeals to decisions of BIA Agency Superintendents are made to the Regional Directors and Regional Director decisions are appealed to the Interior Board of Indian Appeals (IBIA) or jurisdiction over the appeal can be assumed by the Assistant Secretary - Indian Affairs.

Step 6 Title evidence (title insurance or abstract of title) is requested from applicant if a decision to approve the application is made (151.13). BIA seeks a preliminary title opinion from the Department's Office of the Solicitor.

Step 7 **IF A DECISION IS TO APPROVE AN APPLICATION, AND**

AN ADMINISTRATIVE APPEAL IS NOT FILED - BIA prepares and publishes in a newspaper of general circulation serving the affected area a notice of the decision to take title to the land into trust **OR** the Federal Register if the Assistant Secretary - Indian Affairs makes the decision. Notice must state that a final agency determination to take land in trust has been made and the Secretary shall acquire title in the name of the U.S. no sooner than 30 days (judicial review period) after the notice is published.

Upon expiration of the 30 days (judicial review period) and if no action is initiated in federal court to challenge the acceptance of title, then the BIA deciding official executes a conveyance instrument accepting title to the land in trust after satisfying all of the title requirements imposed by the Office of the Solicitor (151.14).

If during the judicial review period (30 days) an action is filed in federal court that challenges the intent to take title in trust, no further action is taken until the judicial proceedings have been exhausted. If the BIA's decision is upheld, then it will accept title to the land after satisfaction of title requirements. If not, the applicant is notified and the application will be filed without further action, unless the applicant continues the legal proceedings.

IF AN ADMINISTRATIVE APPEAL IS FILED - BIA will adhere to the prescribed appeal process (25 CFR 2). The notice of the decision to take title to the land in trust is not published until the administrative appeal process is exhausted.

If the BIA decision is affirmed in the administrative appeal process and no further court appeal is initiated, BIA will:

- Prepare and publish in newspaper of general circulation serving the affected area a notice of the decision to take title to the land into trust;

- Notice must state that a final agency determination to take title to the land in trust has been made and the Secretary shall acquire title in the name of the U.S. no sooner than 30 days (judicial review period) after the notice is published;

~ Upon expiration of the judicial review period (30 days) and if no action is initiated in federal court, the BIA deciding official executes a conveyance instrument accepting title to the land in trust after satisfying all of the title requirements imposed by the Office of the Solicitor (151.14);

~ If during the judicial review period (30 days) an action is filed in federal court challenging the notice of intent to take title to the land in trust, no further action is taken until the judicial proceedings have been exhausted. If the BIA decision is upheld, then it will accept title to the land after satisfying all of the title requirements imposed by the Office of the Solicitor (151.14). If the BIA decision is not upheld, the application will be filed without further action unless the applicant continues the legal proceedings.

NOTE: Decisions issued by the Assistant Secretary - Indian Affairs are not appealable under the administrative appeal process and are final for the Department. Any challenge to a decision of the Assistant Secretary - Indian Affairs must be made in federal court.

IF A DECISION <u>IS TO DISAPPROVE</u> AN APPLICATION, AND:

AN ADMINISTRATIVE APPEAL IS NOT FILED - BIA will notify applicant, all interested parties and file the disapproved application without further action.

AN ADMINISTRATIVE APPEAL IS FILED - BIA will adhere to the prescribed appeal process (25 CFR 2). If the BIA decision is affirmed in the appeal process, the application will be filed without action unless the applicant files an action in federal court seeking a court ruling on the administrative decision. If the BIA decision is overturned in the administrative appeal process, the decision may be remanded for further consideration and issuance of a new decision.

Step 8 Applicant satisfies title requirements and furnishes documents to BIA. BIA reviews to determines if the documents satisfy title requirements and seeks advice from the Office of the Solicitor to resolve.

Step 9 BIA records the approved conveyance instrument in the State's land records system and BIA's land records system. The application case file is closed, retained for the prescribed period and the file is transferred to the Federal Records Center as specified.

Step 10 BIA furnishes recorded conveyance instruments together with documents evidencing satisfaction of title requirements and the Office of the Solicitor issues a Final Title Opinion setting forth that title to the land is owned by the United States in trust for the applicant.

Step 11 Final Title Opinion and title evidence (title policy or abstract of title) is filed of record in BIA' s land title system. The acquisition case file is submitted to the Federal Records Center in accordance with the records disposition schedule.

The submission of an application does not equate to an approved application. Each fee-to-trust application is unique and must be evaluated on its own merits using the criteria found in 25 CFR 151. The act of filing an application with the Secretary does not in itself mean or guarantee that the land will be placed into trust status.

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In the Absence of Title: Responding to Federal Ownership in Sacred Sites Cases

Kristen A. Carpenter*

This paper examines the challenge of protecting American Indian sacred sites located on federal public lands. Many have addressed this issue in the religious freedoms context,[1] but I believe the problem is just as much about property law. The Supreme Court's decision in *Lyng v. Northwest Indian Cemetery Protective Association,* for example, would appear to suggest that federal ownership of certain sacred sites trumps tribal free exercise clause claims regarding those sites.[2] This holding corresponds with a classic model in which "[p]roperty is about rights over things and the people who have those rights are called owners."[3] However, a closer look at property law reveals that "ownership" is only one factor in any analysis, and property also encompasses interests, obligations, and values beyond the narrow question of owners' rights.[4] Here I argue that recognizing the expansiveness of property law can be a useful tool in developing legal arguments that respond to the ownership bar presented by *Lyng*.[5]

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* Assistant Professor, Suffolk University Law School; J.D., Harvard Law School (1998); A.B., Dartmouth College (1994). This paper was originally delivered at the *New England Law Review* symposium entitled *The Role of Jurisdiction in the Quest for Sovereignty* held on October 25, 2002. The author wishes to thank Lorie M. Graham, Angela R. Riley, and Joseph William Singer for their helpful comments, and the editors and staff of the New England Law Review for their work on this piece.

1. *See, e.g.*, VINE DELORIA, JR., *Sacred Lands and Religious Freedom, in* FOR THIS LAND: WRITINGS ON RELIGION IN AMERICA 203–13 (1998). *See generally* Scott Hardt, *The Sacred Public Lands: Improper Line Drawing in the Supreme Court's Free Exercise Analysis*, 60 U. COLO. L. REV. 601 (1989).

2. *See* 485 U.S. 439, 453 (1988).

3. JOSEPH WILLIAM SINGER, ENTITLEMENT 2 (2000) [hereinafter, "ENTITLEMENT"].

4. *See id.* at 6–18.

5. This paper is meant only to provide an initial introduction to the use of certain property law arguments in sacred sites cases. The ideas discussed here will be developed and substantiated in a subsequent piece. This paper does not address the several federal statutes that may also be helpful to tribes in sacred sites cases; these statutes have been discussed in a number of articles. *See, e.g.*, Richard B. Collins, *Sacred Sites and Religious*

SACRED PLACES AND FEDERAL OWNERSHIP

Most American Indian cultures and religions are deeply connected to certain places in the natural world. These "sacred sites" include Sweet Grass Hills in Northern Montana, Devils Tower in Wyoming, the Black Hills of South Dakota, and hundreds or thousands of other places that have religious and cultural significance for Indian peoples.[6] Many sacred sites figure prominently in tribal oral traditions; some mark the place of creation, while others have more recent historical significance.[7] These sites maintain their significance today, and Indians visit them to hold ceremonies and engage in other activities that are crucial to community vitality. For example, in litigation involving Devils Tower, known to Lakota peoples as *Mato Tipila* or Bear's Lodge, Cheyenne River Sioux practitioners explained:

> [The sun dances, vision quests, and other spiritual practices that occur at Devils Tower] are: "vital to the health of our nation and to our self-determination as a Tribe. Those who use the butte to pray become stronger. They gain sacred knowledge from the spirits that helps us to preserve our Lakota culture and way of life. They become leaders. Without their knowledge and leadership, we cannot continue to determine our destiny."[8]

Today, however, Indian nations' ability to maintain their relationship with these sacred sites is threatened. As a result of European conquest and American colonization, Indian nations lost most of their traditional territories,[9] and today, former Indian lands are owned by private

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Freedom on Government Land, 5 U. PA. J. CONST. L. 241, 255–56 (2003) (analyzing the American Indian Religious Freedom Act and other laws); Sandra B. Zellmer, *Sustaining Geographies of Hope: Cultural Resources on Public Lands*, 73 U. COLO. L. REV. 413, 438–58 (2002) (discussing the Archeological Resources Protection Act, Native American Graves Protection and Repatriation Act, and other federal statutes).

6. *Compare* ANDREW GUILFORD, SACRED OBJECTS AND SACRED PLACES: PRESERVING TRIBAL TRADITIONS 67–176 (2000), *with* Thomas F. King, *"Sacred Sites" Protection: Be Careful What You Ask For*, May 28, 2002 (arguing that the term "sacred sites" fails to encompass all of the land and resources that are spiritually signficant to Indian peoples), *at* http://www.sacredland.org/thomas_king.html (last visited Jan. 3, 2003).

7. *See* VINE DELORIA, JR., GOD IS RED 272–82 (1992).

8. Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814, 817 (10th Cir. 1999) (quoting Intervenors, Cheyenne River Sioux Tribe).

9. Chief Justice John Marshall held in 1823 that Indian nations possessed original Indian title to their lands, and that the federal government held the sole and exclusive right to acquire their title "by purchase or by conquest." Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 587 (1823). *See generally* ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSES OF CONQUEST (1990) (discussing the origins of the doctrine of discovery and other legal doctrines that Europeans and Americans used to

individuals, companies, governments, and others.[10] This paper focuses on lands owned by the federal government and the conflicts that arise when the government wants to use the land in a way that would desecrate a sacred site or prevent Indian access to it.

THE OWNERSHIP BAR

The federal government holds over six hundred million acres of land in fee simple title, including national parks and forests, monuments, historic sites, and grazing lands.[11] Even though these lands are now owned and managed by the federal government, American Indians continue to visit sacred sites located on public lands and practice their religions to the extent possible.[12] But their ability to do so is hampered by some federal land management practices, including the development of timber, oil and gas resources, the construction of dams and roads, and the facilitation of commercial recreation and tourism. These, and other federal land use

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justify the dispossession of Indian lands). *See also* Nell Jessup Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 458 (1994) (stating that "although land transfers did result from armed conflicts with Indian tribes, much more land was acquired through treaties negotiated with Indian tribes"). *See also* Joseph William Singer, *Well Settled?: The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481, 486–503 (1994) (discussing the legal extinguishment of original Indian title).

10. American Indians tribes and individuals, who originally owned 100% of the present-day United States, now own only 4.2% of the land in the United States. *See* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 21 (4th ed. 1998) (citing figures from 1996).

11. *See* ROBERT L. GLICKSMAN & GEORGE CAMERON COGGINS, MODERN PUBLIC LAND LAW 1 (2d ed. 2001). In this paper I focus on the government as the "owner" of federal public lands, but I recognize it also acts as a "sovereign" over these lands. *See* Light v. United States, 220 U.S. 523, 536–37 (1911). *See also* James L. Huffman, *The Inevitability Of Private Rights In Public Lands*, 65 U. COLO. L. REV. 241, 255–56 (1994) (on whether the government's dominion over public lands is best described through an ownership or sovereignty model, and whether it is the government or the citizens who are the proprietors of the land). Indian tribes, too, are both sovereigns and owners, although in some cases courts have failed to recognize the duality. *See* Joseph William Singer, *Sovereignty and Property,* 86 NW. U. L. REV. 1, 5–6 (1991). The ramifications of the property/sovereignty tension will be considered in a subsequent article.

12. The story of how the federal government came to "own" vast tracts of "public lands" is closely linked to American Indian history, as described in several books focusing on the National Parks System. *See, e.g.*, PHILIP BURNHAM, INDIAN COUNTRY, GOD'S COUNTRY: NATIVE AMERICANS AND THE NATIONAL PARKS (2000); ROBERT H. KELLER & MICHAEL F. TUREK, AMERICAN INDIANS AND NATIONAL PARKS (1998); MARK DAVID SPENCE, DISPOSSESSING THE WILDERNESS: INDIAN REMOVAL AND THE MAKING OF THE NATIONAL PARKS (1999). Of course the government's ownership and management of public lands involves issues beyond Indian sacred sites that are not treated in this paper.

projects and programs, can threaten the physical integrity of sacred sites, as well as the quiet and privacy that American Indians require for religious and cultural practices.

In recent decades, tribal people brought several lawsuits challenging federal development projects on grounds that they would infringe on the Indians' freedom of religion in violation of the First Amendment.[13] In *Sequoyah v. Tennessee Valley Authority*, for example, the Eastern Band of Cherokees tried to stop the construction of the Tellico Dam on property owned by the Tennessee Valley Authority, an agency of the federal government.[14] The Cherokees claimed the project would flood historic Cherokee towns, destroying sacred sites, medicine gathering places, graves, and deadening the Tennessee River itself.[15] The Cherokees further argued that the proposed project would impose a substantial infringement on their religion and that, as a result, the government was required to demonstrate a compelling interest in the project and that no alternative could satisfy the government objective.[16]

Similar suits followed. In *Badoni v. Higginson*,[17] Navajo medicine people and others argued that federal management of Rainbow Bridge National Monument was drowning Navajo gods in the rising waters of Lake Powell.[18] Next, in *Wilson v. Block*,[19] the Hopi Tribe and Navajo Medicinemen's Association attempted to protect the sacred San Francisco

13. *See, e.g.*, Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 591–97 (N.D. Cal. 1983), *aff'd in relevant part*, 764 F.2d 581 (9th Cir. 1985), *rev'd sub nom* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Hopi Indian Tribe v. Block, Nos. 81-0481, 81-0493, and 81-0558 (D.D.C. May 14, 1982), *aff'd sub nom*, Wilson v. Block, 708 F.2d 735 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 956 (1983); Sequoyah v. Tennessee Valley Auth., 480 F. Supp. 608, 611–12 (E.D. Tenn. 1979), *aff'd*, 620 F.2d 1159 (6th Cir. 1980), *cert. denied*, 449 U.S. 953 (1980); Badoni v. Higginson, 455 F. Supp. 641, 644–45 (D. Utah 1977), *aff'd* 638 F.2d 172 (10th Cir. 1980). *See also* United States v. Means, 858 F.2d 404, 406–08 (8th Cir. 1988) (affirming Forest Service denial of special use permit to group of Sioux Indians for use of Black Hills National Forest for religious purposes); Inupiat Cmty. of the Arctic Slope v. United States, 548 F. Supp. 182, 188–89 (D. Ark. 1982) (rejecting claim that offshore mineral exploration and development affected religious interests); Crow v. Gullet, 541 F. Supp. 785, 793 (D. S.D. 1982) (rejecting challenge by Lakota and Tsistsistas Nations to state action interfering with religious practices at Bear Butte State Park).

14. *See* Sequoyah v. Tennessee Valley Auth., 620 F.2d 1159, 1160–61 (6th Cir. 1980).

15. *See id.*

16. *See id.* at 1163 (citing Sherbert v. Verner, 374 U.S. 398, 402–03 (1963); Wisconsin v. Yoder, 406 U.S. 205, 214–15 (1972)).

17. 638 F.2d 172 (10th Cir. 1980).

18. *See id.* at 175–76.

19. 708 F.2d 735 (D.C. Cir. 1983).

Peaks, located on national forest lands, from development as a ski area.[20] These cases culminated in *Lyng v. Northwest Indian Cemetery Protective Ass'n*,[21] where Yurok, Karok, and Tolowa Indians sought to stop the building of a forest service road through their sacred "High Country," located on national forest lands.[22]

These cases have been well-treated in legal scholarship, and I will not discuss them in detail here.[23] The relevant point is that the Indians lost in every one.[24] In *Lyng*, for example, the Court recognized that government action would "virtually destroy" the Indian religion, but held that the development plan did not violate the Free Exercise Clause because it would not coerce belief and because the government's interest in developing its land trumped any Indian religious claim.[25]

As scholars have pointed out, the tribes often lose because the federal courts do not understand Native religions.[26] Much of the jurisprudence appears to be grounded in a worldview that separates land from religion, history from spirituality, and belief from practice. These distinctions, such as the land/religion distinction, may be meaningful in Judeo-Christian religions:

> Those traditions ... emphasize the idea of an individual relationship with God developed as part of a religious community.... In the absence of coerced conformity, adherents to such traditions are free to practice their religions wherever they wish. For example, although specific places have deep religious significance to both Jews and Christians, it is generally assumed to be possible to practice these religions anywhere.[27]

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20. *See id.* at 737–38.

21. 485 U.S. 439 (1988).

22. *See id.* at 442–43.

23. *See* Allison M. Dussias, *Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases*, 49 STAN. L. REV. 773, 823–33 (1997). *See generally* BRIAN EDWARD BROWN, RELIGION, LAW, AND THE LAND: NATIVE AMERICANS AND THE JUDICIAL INTERPRETATION OF SACRED LAND (1999).

24. See BROWN, *supra* note 23, at 1–7.

25. *See Lyng*, 485 U.S. at 451–53.

26. *See, e.g.*, Lloyd Burton & David Ruppert, *Bear's Lodge or Devils Tower: Inter-cultural Relations, Legal Pluralism, and the Management of Sacred Sites on Public Lands*, 8 CORNELL J.L. & PUB. POL'Y 201, 204–05 (1999).

27. Joseph William Singer, *Property and Coercion In Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism*, 63 S. CAL. L. REV. 1821, 1832 (1990):

> What would you have to believe to think that there is no coercion involved in forcibly desecrating sacred lands? You would have to believe (1) that physical places are not central to religious practice; (2) that forcible removal of a person

But unlike Judeo-Christian religions, tribal religions often are inextricably tied to particular places in the natural world and cannot be relocated.[28] Cherokee plaintiffs made this point in the *Sequoyah* litigation, stating:

> When this place is destroyed, the Cherokee people cease to exist as a people .... The white man has taken nearly everything away from us, our heritage, culture, traditions, and our way of life that is our religion ... and I'm afraid of what will become of us and our children if we allow the TVA to cover our sacred land with water .... [A]s the water backs over the once Cherokee land, our people will feel a great pain. The earth will cry ... as water covers this beautiful, fruitful valley, members of our tribe will be in silence ....[29]

When the Sixth Circuit held that the First Amendment did not offer the Cherokees any protection in this case,[30] one can only assume that cultural barriers prevented the judges from understanding what "freedom of religion" would mean in a Cherokee context.

The cultural and religious issues are both important and complex but, for my present argument, I am most interested in how property law loses the case for the tribes. In *Lyng*, for example, the Supreme Court was particularly concerned about the Indians' claim that they needed "undisturbed naturalness" to practice their religion in the sacred High Country, located within the national forest.[31] In the Court's view, this claim challenged the federal government's right to use the land according to its

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> protesting desecration of a sacred place is not *religious* coercion; (3) that alteration by human beings of natural spaces is not an intrusion on religion; (4) that religion is not connected to a place and can be practiced anywhere; (5) that religion is a set of beliefs and rituals and that coercion arises only when the state requires forced avowals of belief or prohibits the practice of ritual. The concept of coercion, as Justice O'Connor defined it here, embodies the perspective underlying a particular set of monotheistic religious traditions ... particularly Jewish and Christian traditions.... This conception of religion differs from those that involve a spiritual world understood as both multiple and indissolubly linked with particular aspects of nature. These religions are place specific. Most members of American Indian nations who adhere to traditional beliefs understand all aspects of nature as spiritual.

Id. at 1832–33.

28. *See Lyng*, 485 U.S. at 460–61 (Brennan, J, dissenting). *See generally* DELORIA, *supra* note 7.

29. *See* BROWN, *supra* note 23, at 15 (quoting the testimonies of Lloyd Sequoyah, Emmalie Driver, Willie Walkingstick, and Lloyd C. Owle in the plaintiff's complaint, *Sequoyah v. Tenn. Valley Auth.*, 620 F.2d 1159 (6th Cir. 1980)) (alterations in original).

30. *See Sequoyah*, 620 F.2d at 1165.

31. *See Lyng*, 485 U.S. at 453.

own plans. Justice O'Connor explained: "No disrespect for these practices is implied when one notes that such beliefs could easily require *de facto* beneficial ownership of some rather spacious tracts of public property."[32] In reality, the Indians were not actually claiming ownership rights, such as the right to exclude others. Instead, they requested that the federal government manage *its* property in a way that would protect the "privacy and solitude" necessary for Indian religious practices.[33] But the majority held that the Indian position would require a "diminution of the Government's property rights, and the concomitant subsidy of the Indian religion."[34] While the Court speculated that Indians *might* have some rights, "[w]hatever rights the Indians may have to use of the area, however, those rights do not divest the Government of its right to use what is, after all, *its* land."[35]

After *Lyng*, the outlook is bleak for tribal religious practitioners: they seek access to, and protection of sacred sites on federal public lands because their relationship to the land is strong and essential to their religion and culture. Yet they lose every case in part because their relationship to the land does not constitute "ownership" in the sense of having fee simple title to the land. Thus, *Lyng* appears to serve as a potential bar to many tribal free exercise claims involving sacred sites located on federally-owned land.

A THEORETICAL RESPONSE TO THE OWNERSHIP BAR

Going forward, tribes need to confront the property law aspect of these cases.[36] In particular, tribes must develop legal arguments that respond to the notion that federal ownership trumps Indian religious freedoms in

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32. *Id.*

33. *See id.* at 476 (Brennan, J., dissenting).

34. *Compare id. at* 453, *with* JUDITH V. ROYSTER & MICHAEL C. BLUMM, NATIVE AMERICAN NATURAL RESOURCES LAW: CASES AND MATERIALS 23 (2002) ("Suppose a government action would not merely destroy a Catholic church, but also the place where an alleged religious miracle occurred? Would such an action penalize religion?... Would the Court describe enjoining the project to protect the free exercise rights of Catholics as a subsidy to the religion?").

35. *Lyng*, 485 U.S. at 453. *Compare with Sequoyah*, 620 F.2d at 1164 ("The district court ... based its holding [dismissing the Cherokee's Free Exercise Clause Claim] on the plaintiffs' lack of any property interest in the Tellico area.... While this is a factor to be considered, we feel it should not be conclusive in view of the history of the Cherokee expulsion from Southern Appalachia followed by the "Trail of Tears" to Oklahoma and the unique nature of the plaintiffs' religion.").

36. Other scholars also have acknowledged the property law challenge presented by *Lyng*. *See* Dussias, *supra* note 23, at 823–33; Kevin J. Worthen, *Protecting the Sacred Sites of Indigenous People in U.S. Courts: Reconciling Native American Religion and the Right to Exclude*, 13 ST. THOMAS L. REV. 239 (2000). *See generally* BROWN, *supra* note 23.

sacred sites cases. In his recent works, Professor Joseph Singer has articulated theories of property law that may be helpful to tribes as they confront this challenge.[37]

Singer argues that contemporary law and society are heavily influenced by an "ownership model" of property.[38] In this model, owners enjoy virtually unlimited rights to exclude, to transfer, to use, and to possess property.[39] Accordingly, in *Lyng*, the question was framed as: which party had rights to use the Forest Service land? As the owner, the government was the entity with the rights; as the non-owners, the Indians had few, if any, rights. The government wanted to develop its land, and its rights to do so were superior to the Indians' claims for religious freedoms. Thus, *Lyng* reflects the pervasive notion that owners "are free to use the[ir] property as they wish," that owners have virtually unlimited rights to exclude, to transfer, to use, and to possess property.[40]

Despite popular perceptions, however, a deeper examination reveals that the rights of owners are neither exclusive nor absolute.[41] In fact, owners' rights are limited by owners' obligations to other people and to society.[42] As a result, non-owners may have protectable interests in property—even while the owner maintains her rights to the property. Professor Singer outlines several examples.[43] A landlord's right to use his property can be limited by common law, statutes, and the terms of a lease with a tenant. The tenant has rights to enjoy a habitable apartment, to receive visitors, and to be secure from eviction during the term of his lease. The landlord retains

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37. *See generally* JOSEPH WILLIAM SINGER, THE EDGES OF THE FIELD: LESSONS ON THE OBLIGATIONS OF OWNERSHIP (2000) [hereinafter, "THE EDGES"]; ENTITLEMENT, *supra* note 3. Professors Angela Riley and Rebecca Tsosie have already considered Singer's social relations and entitlement theories in the context of Indian law issues. *See generally* Angela R. Riley, *Indian Remains, Human Rights: Reconsidering Entitlement Under the Native American Graves Protection and Repatriation Act*, 34 COLUM. HUM. RTS. L. REV. 49 (2002); Rebecca Tsosie, *Land, Culture, and Community: Reflections on Native Sovereignty and Property in America*, 34 IND. L. REV. 1291 (2001).

38. *See* ENTITLEMENT, *supra* note 3, at 3.

39. *See id.* at 2–3.

40. *Id.* at 2.

41. *See id.* at 30 (images popularly associated with property include a "single owner with consolidated rights;" a "title" that provides clear criteria and designation of the owner and her rights; "historical entitlement" as depending only on the moment of creation and transfer; "boundaries" delineating the space where an owner enjoys his "absolute powers" to use and possess, transfer, and exclude; ownership as involving "control of things;" property as comprised of "many owners" whose uses are "self-regarding;" and "harm" to others as the only legitimate reasoning for limiting one's ownership rights).

42. *See id.* at 3.

43. The examples provided in this section are drawn from ENTITLEMENT, *supra* note 3, at 19–94 and THE EDGES, *supra* note 37, at 7–17.

her right to take possession of the property at the end of the lease. A shopping mall owner's right to exclude patrons perceived as undesirable may be limited by laws that prohibit discrimination on the basis of race. In some instances, the limitations on ownership may not be strictly legal. Even in the absence of a union contract, for example, a factory owner's right to close the factory may be limited by moral obligations to support workers and the larger community.[44] Underlying these legal and moral limits on the rights of ownership include important societal values, such as racial equality, providing people with security in their homes, and human decency.

These examples, and others,[45] suggest that property is not just about protecting the owner's rights. Instead, property is better conceptualized through an "entitlement model" that recognizes "the conflicting interests of everyone with legitimate claims to rights in the property in question."[46] Once we accept that the law should acknowledge the interests of owners *and* certain non-owners, we can then turn to normative questions about the recognition and distribution of entitlements[47]—or deciding what the law should be. Here, Singer urges decision-makers to pay attention to the way property structures "social relations."[48] In many contexts, from condominium governance to informal agreements between neighbors to city ordinances regarding the homeless, property rules structure relationships between people by setting expectations, imposing obligations, and affecting power distribution. In all of these settings, the justification of any property right depends on the way in which it shapes relationships among people and expresses human values.[49]

Thus, in property law generally, ownership is just one aspect of the analysis; and the same should be true in Indian sacred sites cases. Both the federal government, as owner, and the Indians, as non-owners, have rights

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44. *See* ENTITLEMENT, *supra* note 3, at 38–39.

45. Another example might come from the intellectual property field. Federal law grants copyright owners the exclusive right to copy, distribute, perform, or display their works, but it limits these protections to a time period (life of the author plus seventy years), after which the work enters the public domain. The copyright statute thus balances competing public policy values. On the one hand, it fosters invention and authors' creativity, while on the other hand, it promotes the free exchange of ideas and marketability of intellectual property. It accomplishes these goals by simultaneously protecting and limiting owners' rights and recognizing the public's interests. *See* U.S. CONST. art. I, § 8, cl. 8; 17 U.S.C. §§ 101–1332 (2000).

46. ENTITLEMENT, *supra* note 3, at 91.

47. *See id.* at 92.

48. *See generally id.* at 95–139.

49. THE EDGES, *supra* note 37, at 21.

and obligations to sacred sites.[50] Moreover, the important questions may not be answered by arguing about either party's rights,[51] but rather by looking deeply at societal values regarding religious and cultural freedoms, and asking how the federal government and Indian nations wish to relate to one another on the sacred lands that they now share.[52]

POTENTIAL APPLICATIONS OF SOCIAL RELATIONS AND ENTITLEMENT THEORY

Following the classic property law model, the Supreme Court in *Lyng* held that the non-owner Indians had no interest that could limit the government's rights as owner.[53] This focus may have obscured several arguments in favor of Indian interests and federal obligations in sacred sites, including claims based on common law property doctrine, treaty rights, and the federal-Indian trust relationship.[54] Looking forward to future cases, I briefly outline these arguments in a general context, recognizing that their utility in any particular sacred site dispute will depend significantly on the facts.

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50. *See supra* notes 11–12 and accompanying text (recognizing that the government and Indian nations are both owners and sovereigns).

51. *See* Howard J. Vogel, *The Clash of Stories at Chimney Rock: A Narrative Approach to Cultural Conflict Over Native American Sacred Sites on Public Land*, 41 SANTA CLARA L. REV. 757, 759 (2001) ("[W]e need to recognize [sacred sites] disputes as *cultural conflicts* between communities, arising from a *clash between master stories*, which inform the identity and understanding of the peoples who are the parties to these disputes, rather than simply as disputes involving conflict between individual rights and government power.").

52. *See* Burton & Ruppert, *supra* note 26, at 204, 238–40.

53. *See* Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 452–53 (1988).

54. Certain arguments based on the trust relationship were raised in *Lyng*. The Hoopa parties claimed that the Forest Service's decision to build a road on certain National Forest Lands and its proposed timber management plan would violate water and fishing rights reserved to the Tribe when its reservation was created—as well as violate the government's trust duties to protect those rights. *See* Northwest Indian Cemetery Protective Ass'n v. Peterson, 565 F. Supp. 586, 605 (N.D. Cal. 1983). The district court accepted these arguments, holding that the proposed projects would adversely affect water quality and the fish habitat on the Hoopa Reservation, and would thereby violate the government's trust duties. *See id.* The Ninth Circuit held that the Hoopa Tribe was not a party to the litigation and vacated this portion of the district court holding. *See* Northwest Indian Cemetery Protective Ass'n v. Peterson, 764 F.2d 581, 697 n.10 (9th Cir. 1985). The Supreme Court did not further comment on the merits of this claim. *See Lyng*, 485 U.S. at 444. The trust argument was thus framed narrowly and quickly dismissed by the courts. None of the *Lyng* opinions considered whether the trust responsibility, treaties, common law property, or any other source of law, could establish tribal property rights or limit the near-absolute right of the government over its land.

First, tribes could examine whether there is any common law property doctrine that might help them overcome the hurdle of *Lyng*.[55] The common law has long recognized that non-owners may have certain rights as against title holders; these include, but are not limited to, rights established by adverse possession, easements, and covenants. At least one tribe has successfully used common law property arguments to establish a limited entitlement to lands owned by a third party that were necessary for a tribal religious practice. In *U.S. v. Platt*, the Zuni Tribe sought access to a path located on private lands and necessary for its pilgrimage from the reservation in New Mexico to Zuni Heaven in Arizona—a 110-mile trek which sixty religious leaders had been making on horseback and foot every four years since at least 1540.[56] The Tribe, cognizant of the limitations imposed by *Lyng*, sued for a prescriptive easement instead of seeking relief under the First Amendment.[57] Finding that the Tribe's use of the path demonstrated actual, open and notorious, continuous and uninterrupted use for the statutory period, the court granted a prescriptive easement to use the path for the pilgrimage to Zuni Heaven once every four years.[58] Following the Zunis' example in *Platt*, tribes should evaluate closely the various common law property claims available to them. In *Platt*, for example, the Zunis could frame their case under Arizona's law of prescription because they were suing a private defendant, but generally such claims are not actionable against the federal government.[59] Other common law claims may be appropriate depending on the facts of a particular case.[60]

Second, tribes could re-examine treaties to determine whether they contain residual rights to sacred sites.[61] Under the reserved rights doctrine, tribes retain any rights that have not been ceded in treaty language or divested by statute.[62] Moreover, the Indian canons of construction provide

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55. *See* Worthen, *supra* note 36, at 248.

56. *See* United States *ex rel.* Zuni Tribe of N.M. v. Platt, 730 F. Supp. 318 (1990).

57. *See* Hank Meshorer, *The Sacred Trail to Zuni Heaven: A Study in the Law of Prescriptive Easements*, *in* READINGS IN AMERICAN INDIAN LAW 319–20 (Jo Carillo ed., 1998).

58. *See id.* at 323–24.

59. *But see* JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES AND PRACTICES 221 (3d ed. 2002) (in some jurisdictions, property law is becoming more amenable to adverse possession claims against governments).

60. *See, e.g.*, Nome 2000 v. Fagerstrom, 799 P.2d 304, 308–09 (Alaska 1990) (holding Alaska Native claimants satisfied the elements of adverse possession through their use of certain lands for subsistence and recreational purposes).

61. *See* Robert Charles Ward, *The Spirits Will Leave: Preventing the Desecration and Destruction of Native American Sacred Sites on Federal Land*, 19 ECOLOGY L.Q. 795, 822–23 (1992); Worthen, *supra* note 36, at 251.

62. *See* Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 401–

that treaties must be read liberally in favor of the Indians, as they would have understood them, with ambiguous provisions resolved in favor of the Indians.[63] In the recent case of *Minnesota v. Mille Lacs Band of Chippewa Indians,* the Supreme Court applied the reserved rights doctrine and the Indian canons to uphold tribal hunting rights in traditional territories, even where the tribe had relinquished title to those lands by treaty.[64] An analogous argument may have potential in the sacred site context: where a treaty conveyed to the government fee simple title to lands encompassing Indian sacred sites but did not explicitly divest tribal practitioners of the rights to use those sites, the treaty should be interpreted as preserving the tribal religious use. Potential limitations to this approach include that the Supreme Court has applied the Indian canons with decreasing frequency in recent cases[65] and many of the treaties were signed during the period when the government was actively suppressing tribal religions.[66] Depending on the particular treaty language, however, Indians may be able to establish reserved treaty rights to access and use of sacred sites.

Third, tribes could argue the federal government has a duty to protect sacred sites under the federal-Indian trust doctrine. The trust doctrine provides that, as a result of dealings between the United States and Indian nations, the government assumed a fiduciary duty toward Indian peoples,

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02 (1993) (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 552–53 (1832); Winters v. United States, 207 U.S. 564, 576–77 (1908); United States v. Winans, 198 U.S. 371, 381–82 (1905)).

63. *See* Kristen A. Carpenter, *Interpreting Indian Country in* State of Alaska v. Native Village of Venetie, 35 TULSA L.J. 73, 74 (1999) (citing Choctaw Nation v. United States, 318 U.S. 423, 431–32 (1943); Choctaw Nation v. Oklahoma, 397 U.S. 620, 631–32 (1970); McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, 174 (1973)). *See generally* Frickey, *supra* note 62; Charles F. Wilkinson & John M. Volkman, *Judicial Review of Indian Treaty Abrogation: "As Long as Water Flows, or Grass Grows Upon the Earth" — How Long a Time Is That?*, 63 CAL. L. REV. 601 (1975).

64. *See* Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 195–202 (1999). *See also* Menominee Tribe v. United States, 391 U.S. 404, 412–13 (1968) (treaty-guaranteed hunting and fishing rights survived the Termination Act's extension of state law to former reservation lands); Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement as a Reserved Right*, 30 ENVTL. L. 279, 284 (2000) (arguing that tribes not only have reserved rights to hunt and fish off-reservation but also to participate in land management decisions affecting off-reservation habitats).

65. *See* David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit Of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 267–68 (2001).

66. *See* Bear Lodge Multiple Use Ass'n v. Babbitt, 175 F.3d 814, 817 (stating that "past federal policy was to assimilate American Indians into United States culture, in part by deliberately suppressing, and even destroying, traditional tribal religions and culture in the 19th and early 20th centuries").

their lands, and other assets.[67] This duty has been interpreted to require federal protection of Indians' natural resources against other threats.[68] In the context of sacred sites located on federally-owned lands, however, this argument may be somewhat difficult to make[69] because these lands are, by definition, not held by the government "in trust" for tribes.[70] But a broader view of the trust relationship suggests that it applies in most dealings between the government and Indian nations,[71] including the protection of

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67. *See* United States v. Mitchell, 463 U.S. 206, 225 (1983) (Mitchell II); Seminole Nation v. United States, 316 U.S. 286, 295–96 (1942); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

68. *See generally* Mary Christina Wood, *Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources*, 1995 UTAH L. REV. 109.

69. Federal courts have rejected trust responsibility claims even where sacred sites are located on tribal lands. *See, e.g.*, Miccosukee Tribe of Indians of Fla. v. United States, 980 F.Supp. 448, 460–63 (S.D. Fla. 1997) (holding that federal officials' decision not to take action to prevent flooding of tribal lands, including lands where the Tribe grew corn for the religious Green Corn ceremony, did not violate the trust responsibility and other laws). In denying the Tribes' claims for a writ of mandamus and damages on a breach of trust theory, *Miccosukee* held that "despite the general trust obligation of the United States to Native Americans, the government assumes no specific duties to Indian tribes beyond those found in applicable statutes, regulations, treaties or other agreements." *Id.* at 461 (citing *Mitchell II* and the Tucker Act). This holding may conflate requirements for breach of trust claims under two separate lines of cases. The Supreme Court has held that the Tucker Act, 28 U.S.C. §§ 1491, 1505, requires an affirmative legal basis, separate from the Tucker Act itself, to support an award of damages for breach of federal trust duties to Indians in suits brought in the Court of Federal Claims. *See* United States v. Navajo Nation, 123 S. Ct. 1079, 1091 (2003); United States v. Mitchell, 445 U.S. 535, 538 (1980) (Mitchell I); United States v. Mitchell, 463 U.S. 206, 216 (1983) (Mitchell II). However, scholars have argued that this standard does not apply outside of the Tucker Act context, such as in cases where tribes sue administrative agencies for equitable relief under the Administrative Procedure Act on grounds that an agency action unlawfully violated common law trust duties to tribes. *See* Mary Christina Wood, *Origins & Development of the Trust Responsibility: Paternalism or Protection?*, Remarks at the Federal Bar Association Indian Law Conference (April 10, 2003) (on file with the author) (citing *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256–57 (D.D.C. 1972) and numerous other federal cases holding that agencies' breach of trust duties supports equitable remedies); Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1521–22. *See generally* Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 STAN. L. REV. 1213 (1975) (courts should enforce federal trust obligations to American Indians through traditional common law equitable remedies).

70. *Compare* United States v. White Mountain Apache Tribe, 123 S. Ct. 1126, 1133 (2003) (the "fact that the property occupied by the United States is expressly subject to a trust supports a fair inference that an obligation to preserve the property improvements was incumbent on the [Government] as trustee," in a case for damages under the Tucker Act).

71. *See, e.g.*, Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual*

sacred sites on public lands.[72]

In sacred sites claims, then, Indian nations may be able to rely on common law property, treaty rights, and the federal-Indian trust doctrine to challenge the notion that federal ownership trumps Indian interests in sacred sites. This is only a partial list. Indian nations might also consider developing arguments based on international law's increasing protection for indigenous property rights[73] and tribes' own laws and customs on sacred sites.[74]

Finally, in some cases Indians may be unsuccessful in establishing tribal rights or federal obligations at federally-owned sacred sites; however they should still not face the destruction of their religion. Even where the federal government arguably has the legal "right" to destroy a tribal religion, it is not *required* to exercise that right. Consistent with the values underlying the First Amendment and citizens' expectations of religious freedom and tolerance, the federal government accommodates many mainstream religious practices.[75] It should do the same for Indian religions, within the parameters of the Establishment Clause.[76] Indeed, current federal policy

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Property in Indigenous Communities, 18 CARDOZO ARTS & ENT. L.J. 175, 210–11 (2000) (The trust relationship is "grounded . . . in a number of sources, including treaties, laws of Congress, and judicial rulings" giving rise to a "duty 'to protect and enhance the people, the property, and the self-government of Indian tribes.'") (quoting the AMERICAN INDIAN POLICY REVIEW COMM'N, 95TH CONG., FINAL REPORT TASK FORCE NO. 9, at 39 (Comm. Print 1977)). This broad view is consistent with both indigenous understandings of the trust relationship, see ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW & PEACE, 1600–1800 (1997), and international law on states' duties to indigenous peoples, see S. James Anaya, *International Law and the United States' Trust Responsibility Toward Native Americans*, *in* NATIVE VOICES: AMERICAN INDIAN IDENTITY AND RESISTANCE, (forthcoming June 2003).

72. *See generally*, Jeri Beth K. Ezra, *The Trust Doctrine: A Source of Protection for Native American Sacred Sites*, 38 CATH. U. L. REV. 705 (1989); Ward, *supra* note 61, at 821.

73. *See* Riley, *supra* note 37, at 78–83 (discussing The Mayagna (Sumo) Indigenous Cmty. of Awas Tingni v. Nicaragua, Case No. 79 Inter-Am. C.H.R. (2001)). *See generally* S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33 (2001).

74. *See, e.g.*, Laurie Anne Whitt, et al., *Belonging to Land: Indigenous Knowledge Systems and the Natural World*, 26 OKLA. CITY U. L. REV. 701, 722 (2001).

75. *See* Lynch v. Donnelly, 465 U.S. 668 (1984) (citing numerous examples of federal accommodation of religion, the Supreme Court ruled that a nativity scene on city property did not violate the Establishment Clause, even though it had religious significance to Christians).

76. *See* Bear Lodge Multiple Use Ass'n v. Babbitt, 2 F.Supp.2d 1448, 1454 (D. Wyo. 1998) (applying Lemon v. Kurtzman, 403 U.S. 602 (1971) where the Supreme Court ruled that a governmental action does not offend the Establishment Clause if it (1) has a secular purpose, (2) does not have the principal or primary effect of advancing or inhibiting

directs executive agencies to accommodate tribal religious practices on federal public lands.[77] Agencies have successfully implemented this policy, as in the National Park Service's development of a management plan for Devils Tower National Monument that accommodated Indian ceremonial practices, while also recognizing the interests of rock climbers and visitors to Devils Tower. The management plan survived Establishment Clause challenges and was upheld by the Tenth Circuit in *Bear Lodge Multiple Use Ass'n. v. Babbitt*.[78] The legislative branch, too, has an important role in recognizing tribal rights to federally-owned sacred sites, as evidenced in recent federal legislation settling a dispute over Sandia Mountain in New Mexico. This settlement simultaneously confirms ongoing federal ownership, the public's interest in access, and tribal rights to use the land for religious purposes and participate in decision making regarding the land.[79]

CONCLUSION

Lyng suggests that Indians are likely to lose Free Exercise Clause claims involving sacred sites located on lands owned by the federal government. Yet Indian religious practitioners and their advocates can develop legal arguments that respond to *Lyng*'s "ownership bar." Property law can be used to support Indian rights and federal obligations in sacred sites, even in cases of federal ownership. In a subsequent article, I will develop and substantiate these property-based arguments, and evaluate their potential efficacy in contexts such as litigation, legislation, and the administrative process. But this preliminary analysis suggests that a more expansive approach to property law can help both Indian nations and the federal government to approach sacred sites cases in a way that reflects common values in favor of religious freedoms.

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religion, and (3) does not foster an excessive entanglement with religion). *See also* Zellmer, *supra* note 5, at 416 (discussing the appropriateness of accommodating American Indian uses of sacred sites).

77. *See* Executive Order No. 13007, 61 Fed. Reg. 26,771 (May 24, 1996). *See* Charlton H. Bonham, *Devils Tower, Rainbow Bridge, and the Uphill Battle Facing Native American Religion on Public Lands*, 20 LAW & INEQ. 157, 164–74 (2002) (discussing federal statutes and other laws that offer protection to American Indian sacred sites).

78. 175 F.2d 814 (10th Cir. 1999) (holding that the plaintiffs lacked standing). *See also* Burton & Ruppert, *supra* note 26 (offering a detailed discussion of *Bear Lodge*). In my next article on this topic, I will focus on the administrative process as a potential forum for tribes to use more expansive notions of property law in sacred sites cases.

79. *See* T'uf Shur Bien Preservation Trust Area Act of 2003, H.R. 222, 108th Cong. (2003) (establishing the T'uf Shur Bien Preservation Trust Area within the Cibola National Forest in the State of New Mexico in order to resolve a land claim involving the Sandia Mountain Wilderness). *See also* Michael Coleman, *Sandia Dispute Comes to an End*, ALBUQUERQUE J., Feb. 21, 2003, *available at* 2003 WL 12460652.

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Sovereignty, Jurisdiction, and Environmental Primacy on Tribal Lands

Douglas Luckerman*

Good afternoon everybody. As Professor Dussias just mentioned, I came to Indian law sort of in a different fashion, in that, in 1992, I was just a white guy from Chicago working at the Environmental Protection Agency (EPA). My experience with Native Americans, at that time, consisted of television and maybe the odd book or two. In 1992, I had the opportunity, through no fault of my own, to work in the EPA Regional Environmental Program, which consisted initially of helping tribes in New England set up their own environmental programs.

Over the next several years, as part of that position, I became an enforcement coordinator working with the tribes in New England. However, what became very clear to me, from attending meeting after meeting with tribal environmental personnel and council members, and talking with various members of the tribes regarding their environmental concerns and the issues they were facing, today and in the future, was that there was a reoccurring theme: environmental protection for Native Americans is a matter of cultural survival.

History, legends, and traditions of these communities are all deeply rooted in nature. Hunting, fishing, and gathering plants and foodstuffs, all play a vital role in ceremony and tribal culture and tradition. In effect, even though these are not profound statements, the concept of sovereignty and jurisdiction that I came to was that sovereignty and jurisdiction are not words that have been thrown around historically in tribal communities. Rather, they're talking about their lands and about what they do—their cultures.

Thus, within a few years after I started working with tribal issues, what became even clearer was that while tribes pushed issues of sovereignty and jurisdiction, what they needed were tools to protect who they were. They needed tools to protect their environment so that they could protect their cultural and traditional practices.

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The comments I am going to make today are based on my experiences over the last ten years, and specifically on my understanding of the trends in federal Indian law arguments. I am going to say a few things with which people may or may not agree. Anyone who disagrees, I would love to hear the other side. Just for the sake of disclosure, I represent tribes. However, I have to say, my bias is really interpreting the law as the law is written and as the cases are decided. I am very, very picky about that; in particular, because I am in New England.

New England tribes entered into land claim settlements from the late 1970s, throughout the 1980s, and up through the early 1990s. All of these settlement agreements were started in essentially the same way: litigation was brought based on a violation, or alleged violation, of the Trade and Intercourse Act.[1] Eventually, these claims were settled and resulted in a number of settlement acts,[2]—federal statutes—for tribes in New England and, in fact, up and down the east coast.[3] As murky as the Supreme Court can make Indian law, there is really no comparison to the dark world that surrounds the language of these settlement acts. I refer to these settlement acts as legislative slights-of-hand. I call them that because Indian rights—tribal rights—apparently disappear before your very eyes when reading these documents. No language in these acts seems to remove tribal authority, but tribal rights seem to disappear somewhere within the documents, which is what I want to talk about today.

The New England settlement acts all started out pretty much the same. The acts legislative histories, what was said at the meetings, and what both the states argued and the tribes argued, may be boiled down to three common goals: (1) the clearing of any cloud of title and settlement of the particular land claim; (2) allocation of jurisdiction between the tribe and the state from the federal government; and (3) preserving a tribe's ability to be a tribe—to preserve the cultural and political integrity of the tribe. This last goal may have been achieved through federal recognition—which some tribes were granted immediately, while some tribes were not—through a

1. Indian Non-Intercourse Act, ch. 33, 1 Stat. 137 (1790) (codified as amended at 25 U.S.C. §177 (2000)). *See also* Oneida Indian Nation v County of Oneida, 414 U.S. 661 (1974) (providing a history and discussion of the statute).

2. *See* Rhode Island Land Claims Settlement Act, 25 U.S.C. § 1701 (1978); Maine Indian Settlement Act, 25 U.S.C. § 1721 (1980); Mashantucket Pequot Indian Land Claims Settlement Act, 25 U.S.C. § 1751 (1983); Wampanoag Tribal Council of Gay Head, Inc., Indian Claims Settlement Act, 25 U.S.C. § 1771 (1987); Aroostook Band of Micmacs Settlement Act, Pub. L. No. 102-171, 105 Stat. 1143 (1991); and Mohegan Nation of Connecticut Land Claims Settlement Act, 25 U.S.C. § 1775 (1994).

3. *See* Florida Indian Land Claims Settlement Act, 25 U.S.C. § 1741 (1982); Seminole Indian Land Claims Settlement, 25 U.S.C. § 1772 (1987); and Seneca Nation Settlement Act, 25 U.S.C. § 1774 (1990).

requirement that a tribe could purchase land and immediately place the lands into trust, or through the part of the settlement act that allowed a tribe to form its own government with its own powers, separate and distinct from that of the state, under the principles of the Indian Reorganization Act.[4]

What I find very interesting, looking at each of the settlement acts, is that there is invariably in the respective legislative history—as you can imagine—a lot of back and forth over jurisdiction: Who had it? What were we going to do with it? Why should the tribes have it? Why should the states have it? Yet, there was almost no argument once an agreement between the parties was reached—which generally was not that hard—over whether the tribe was a tribe and whether a particular tribe deserved the designation of having a government-to-government relationship with the United States. Generally, all parties agreed that the tribes deserved the protections of the federal government and that tribal culture should be protected; specifically, that the tribes' political integrity should be protected, and they should be able to function in perpetuity as a tribe, without being forced to acculturate to the dominant society.

Two principles, I think, really apply to these settlement acts. First, whether called authority over internal tribal matters, the right to self-determination, or inherent sovereignty, one of the principle tenants of federal Indian law is that tribes have the ability to protect who they are as tribes—to protect those traditions and those parts of their culture that make them who they are. Second, and this is the key piece here, is that the only way a tribe can be deprived of these rights is if Congress expressly says so. What I have found very interesting, and these are not concepts that are argued today, is that people are generally in agreement that tribes have the right to protect their interests and that only Congress has the authority to deprive them of those rights. Yet, today, we hear, over and over again, state governments insisting that tribes do not have the authority to protect a tribe's environment. How did we get here?

Well, part of the problem is that when Congress, or rather when these settlement acts were drafted, the language used was less than clear—imprecise. For most of these settlement acts, jurisdiction was allocated with Congress stating tribes would be "subject to" state law. Now, one may say, if unfamiliar with these principles, "Well, that's it. They [tribes] are subject to state law." The settlement acts sometimes even contained a provision stating tribes were subject to state law like everyone else in the state, leaving the observer of these settlements to believe, "Well, that's it, they [tribes] have no sovereignty. They have no jurisdiction."

The problem is that at the very same time these settlement acts were

4. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (2000)) (also known as the Wheeler-Howard Act).

created, the Supreme Court made clear that in order to remove a tribe's sovereign authority it is not good enough for Congress merely to grant states jurisdiction over tribes. The Supreme Court determined that it is not sufficient for Congress to provide that a state has jurisdiction over a tribe or a tribe is "subject to" state laws in order to divest a tribe of its authority to protect itself. Rather, Congress must specifically provide that, "State X, you have authority over Tribe Y, and Tribe Y, you have no authority."[5] Yet, this did not occur in any of the New England settlement acts.

In order for the states to prevail on the argument that these settlement act tribes were wholly divested of their inherent jurisdictional authority, states must be able to show that Congress granted the state exclusive authority over the tribes. States that take the position that Congress terminated the tribes own sovereign authority are really arguing that Congress terminated these tribes or terminated the ability of these tribes to remain culturally viable as tribes, and not just a nice gathering of folks who happen to have some rituals. However, such a grant of authority to a state from Congress is yet to be found in any of the settlement acts. It cannot be found in the legislative history of the settlement acts. It cannot be found in the language of the settlement acts. It does not exist. States are wrong. As the Supreme Court noted in *Montana v. United States*,[6] tribes retain all of their sovereignty and jurisdiction over their lands and people not specifically withdrawn by statute.[7] Tribal sovereignty may not be stripped by statutory silence. It cannot be taken from ambiguous language. Nor may it be inferred from conjecture. Congress must specifically state that tribal sovereignty and jurisdiction is being removed.

My favorite quote on this issue is from a 1976 case, which came out just before my favorite settlement act, the Maine Settlement Act,[8] which I think people drafted after drinking a lot of wine and partying because it just doesn't make a lot of sense. Given that many of the settlement acts lack any language that expressly removes jurisdiction from a tribe, it is well to note the Supreme Court comment on how to interpret this dearth of language—given that "Congress [knows] well how to express its intent directly when its intent [is] to subject reservation Indians to the full sweep of state laws," the absence of any such specific and express language can support an argument that the act was not intended to be an abrogation of the tribe's

5. *See generally*, Bryan v. Itasca County, 426 U.S. 373 (1976) (holding that state laws are inapplicable in Indian country unless Congress has expressly stated otherwise). *See also* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) (holding that a waiver of sovereign immunity could not be implied; rather, it must be "unequivocally expressed").

6. 450 U.S. 544 (1981).

7. *See id.* at 564.

8. Maine Indian Settlement Act, *supra* note 2.

sovereignty.[9]

More recently, in 1994, the First Circuit revisited this issue, and the circuit court used even stronger language. Looking at the Narragansett settlement act,[10] which contained the typical language asserting that tribal lands were "subject to" the scope of state law, the circuit court observed:

> By its terms, the [Rhode Island] Settlement Act purposes to do no more than grant jurisdiction to the state; it does not expressly strip the Tribe of jurisdiction, transfer jurisdiction from the Tribe to the state, or employ suggestive adjectives like "exclusive" or "complete" in describing the jurisdictional grant.[11]

I mention these cases to make the point that what most of the New England states possess is nonexclusive or concurrent jurisdiction. Therefore, when this concurrent jurisdiction exists, based on established federal law and on a tribe's federal recognition, a tribe cannot continue to be a tribe if its environment does not sustain their culture. There is an argument to be made that tribes have and must maintain environmental regulatory primacy on their lands when it is in support of protecting tribal cultural integrity. In order to do that, my advice to my clients is to create environmental ordinances and regulations based on each tribe's cultural values, fundamentally showing states and federal agencies what is important to each tribe.

I want to leave you with one more comment. When looking at the long history of the New England settlement acts, and how the wheel turns, I came across something that I found to be very, very interesting—something related to an ongoing and current debate in Maine: the debate over who has the authority to regulate water quality. What I came across was a quote from 1978. Again, it is interesting how the wheel turns. Today, the state of Maine is concerned that if tribes in Maine receive authority to regulate water quality, the limits placed by the tribes would be too stringent. The state is concerned that there will be too much environmental protection and that businesses will be either forced out of the area or there would be some penalty resulting in a loss of jobs. However, in 1978, Maine was concerned that the Maine tribes would not adequately protect and regulate their waterways and demanded that the state environmental laws apply to tribal lands in order to protect the public. In 1978, the Solicitor for the Department of the Interior wrote a letter to the Maine Attorney General and asked him why he insisted that Maine laws apply to the tribes and why is it

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9. *Bryan*, 426 U.S. at 389. *See also* Mattz v. Arnett, 412 U.S. 481, 504 n.22 (1973) (observing that Congress generally employs "clear language of express termination when that result is desired").

10. *See* Rhode Island Land Claims Settlement Act, *supra* note 2.

11. Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685, 702 (1st Cir. 1994).

that the state could not let the tribes, who did not have much land, regulate their property. The Attorney General of Maine wrote back in response that he was concerned that the tribes would take advantage of their exemption from state laws to ignore environmental regulations. He then ended with his own question:

> What protections if any will exist for wild animals and fish which live across the acquired Indian lands? What protections will thou be for abutting landowners from such problems such as stream siltation, air pollution, or noise, which may result from the uncontrolled industrial and commercial activity on Indian lands.[12]

In 2002, the tribes are asking the same question.

Thank you very much.

12. Letter from Joseph E. Brennan, Maine Attorney General, to Leo Krulitz, Solicitor, Department of the Interior; Eliot Cutler, Office of Management and Budget; and A. Stephen Clay 2 (March 2, 1978) (on file with author).

Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*

Joseph William Singer**

> We desire you to consider, brothers, that our only demand is the peaceable possession of a small part of our once great country. Look back and review the lands from whence we have been driven to this spot. We can retreat no farther ....[1]

When the Supreme Court decided *Bush v. Gore*[2] on December 12, 2000, the entire country paid attention. The Court not only decided the presidential election, but did so in a 5-4 vote that split the Justices along ideological lines, creating the appearance, if not the reality, of raw political partisanship. The decision was especially shocking to most lawyers and law professors because the five Justices in the majority acted contrary to their own jurisprudential philosophies and in a manner that was arguably contrary to precedents they themselves had authored. The Court had recently proved a strong champion of state sovereignty, striking down a number of federal statutes that had purported to regulate state government. However, in *Bush v. Gore*, instead of deferring to the sovereign powers of the State of Florida, three of the Justices who joined the Court majority[3] would have held, possibly for the first time ever, that a state supreme court

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1. HELEN HUNT JACKSON, A CENTURY OF DISHONOR: A SKETCH OF THE UNITED STATES GOVERNMENT'S DEALINGS WITH SOME OF THE INDIAN TRIBES 42–43 (1881), *reprinted in* GREAT SPEECHES BY NATIVE AMERICANS 37 (Bob Blaisdell ed., 2000) (quoting unknown author from among Delaware or twelve other tribes).

2. 531 U.S. 98 (2000).

3. Chief Justice Rehnquist and Justices Scalia and Thomas.

had interpreted a state statute incorrectly, and in a manner so egregiously wrong that it had purportedly violated the Constitution's grant of power over state elections to state legislatures rather than to courts. This would have been a striking assertion of federal authority over state election procedures—procedures one might have thought to be at the core of state sovereignty.

Those same Justices and others in the majority[4] invalidated the state actions on the additional ground that they violated a newly created right grounded in the Equal Protection Clause of the Fourteenth Amendment. This was not exactly an expected development; the Rehnquist Court had not previously been known as a champion of civil rights. In fact, it had been known for its penchant to limit the creation of new constitutional rights—especially rights of equality. The final nail in the coffin was the Court's suggestion that the case was so unique that it should not be thought to create new rights that might be applied in future cases.[5] This last argument especially shocked lawyers because it appeared to suggest that the Court's ruling was intended to apply to this case alone—a result that would appear to contradict the principle that like cases should be treated alike—a principle at the heart of the rule of law.

Six months after the decision in *Bush v. Gore*, the Supreme Court decided *Nevada v. Hicks*.[6] Like *Bush v. Gore*, *Hicks* involved fundamental issues of sovereignty, separation of powers, and equality. This time, however, the issue concerned tribal sovereignty, or the relations among the federal, state, and tribal governments. Like *Bush v. Gore*, the decision shocked specialists in the field. *Hicks* changed fundamental norms in the field of federal Indian law in a manner that flew in the face of both established precedent and existing federal policy. If we take the Court at its word, the *Hicks* decision will radically alter the nature of tribal sovereignty by substantially limiting the power of tribal governments.

The ruling ignored, or overturned, prior law while purporting to explicate existing doctrine. It effectively rewrote the law in a manner that stripped tribal governments of powers they had previously possessed. In so doing, it breached existing treaties that remain in force, contravened longstanding congressional and executive policy, and infringed on retained property rights of American Indian nations. Moreover, the Court ignored its recent rulings protecting state sovereignty; if it had used the same principles to define the scope of tribal sovereignty that it has recently used

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4. Justices O'Connor and Kennedy.

5. *See Bush*, 531 U.S. at 109. "Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities." *Id.*

6. 533 U.S. 353 (2001).

to define the scope of state sovereignty, it would have ruled in a manner that protects tribal retained powers rather than stripping them to the bone.

As in *Bush v. Gore*, the opinion in *Hicks* suggested that the case was a mere application of established precedent and that nothing new or astonishing was occurring. However, one thing was different: unlike the decision in *Bush v. Gore*, the case of *Nevada v. Hicks* garnered almost no public attention. Neither the New York Times nor the Washington Post saw a reason to report the decision of the Court.

I believe the case was wrongly decided, and I want to explain why. More fundamentally, I want to explain why it matters—in other words, why the case was important. *Hicks* concerned not a technical legal issue of concern to a few, but principles that go to the core of our constitutional structure and the American way of life.

Over the last twenty years, the Supreme Court has led a massive assault on tribal sovereignty. Although it has acted to affirm expansive tribal powers over tribal members, it has substantially curtailed tribal power over nonmembers, including both non-Indians and Indians who are not tribal members. At the same time the Court has stripped tribes of governmental powers they had previously held in Indian country, it has increased the powers of state governments in Indian country. This transfer of power from tribes to states has occurred without congressional authorization or executive approval; indeed, it contradicts both congressional and executive policy which, in recent years, has strongly supported the revitalization of tribal governments.

These recent developments might be explained by the Supreme Court's recent forays into the field of state sovereignty. A stable feature of the Rehnquist Court over the last ten years is the effort to limit congressional power over state governments. This has been achieved both by narrowly construing the powers granted by the Constitution to Congress and by interpreting the Constitution in such a way as to immunize states from certain types of intrusions by federal power. This conflict presents a zero sum game. Increases in state power are achieved by decreases in federal power. Because state power is assumed to be plenary, and federal power limited to those powers expressly granted by the Constitution, any decrease in federal power is immediately filled by reserved state powers.

In recent years, the Supreme Court appears to have assumed that a similar situation exists with respect to the relation between state and tribal power. State power is inherent, and tribal power is limited. When tribal power is curtailed, the state steps in to fill the void. But this view about the relation between state and tribal power is inaccurate and misleading. When state powers are increased at the expense of tribal powers, there is not a mere shift in the relation between these two sovereigns as there is in the case of state-federal relations. Rather, there is an intervening actor: the

federal government. When tribal power is decreased, state power does not immediately fill the void. The sovereign that fills the void is the federal government. The Constitution grants the federal government exclusive power over Indian affairs. Thus, when tribal powers are decreased, the federal government steps in as sovereign, not the states. If state power fills the void left by a decrease in tribal power, it can only do so by an exercise of federal power delegating its authority to the states.

The recent cases that have led to an increase in state power vis-à-vis the federal government have been achieved by a concomitant decrease in federal power. The recent increases in state power vis-à-vis tribes have decreased tribal powers, but that decrease can only come from a concomitant *increase* in federal power. In the non-Indian case, states have plenary power and the federal government has limited and enumerated powers. In the Indian case, it is the federal government that traditionally has had plenary power while the states have had only those powers over tribes expressly delegated to them by Congress. This means that any limitation on tribal power has to be achieved by an act of the federal government that strips them of inherent, pre-existing sovereignty. Any increase of state power in Indian country has to come from a second act of federal power delegating the plenary power of Congress to state governments.

The Supreme Court's recent actions curtailing tribal sovereignty are thus not merely an extension of recent doctrinal developments that have increased state sovereignty at the expense of federal powers. Rather, they represent affirmative exercises of federal power that strip tribes of inherent powers they previously possessed and transfer those powers to the states, who never had those powers.

This exercise of federal power is especially troubling because it comes not from Congress nor from the President, but from the Supreme Court. It is troubling enough that the Court has interpreted the Constitution as granting Congress plenary power over Indian tribes, effectively depriving them of constitutional protections to which they would be entitled if they were non-Indian institutions. It is far more worrisome that the Supreme Court has itself begun to exercise this plenary power in a manner that limits tribal sovereignty. The Constitution grants Congress the power to regulate Indian affairs[7] and the President the power to enter treaties with Indian nations, with the advice and consent of the Senate.[8] There may well be a role for federal common law to adjudicate disputes among the tribes, the states, and the federal government. In recent years, however, both Congress and the President have affirmatively acted to preserve and expand tribal

7. *See* U.S. CONST. art. I, § 8, cl. 3.

8. *See* U.S. CONST. art. II, § 2, cl. 2.

sovereignty. The Supreme Court's limitations on tribal sovereignty are contrary to the policy of the other branches. More importantly, the Court's attack on tribal sovereignty is itself a form of conquest—one that is happening today, not long ago.

Why doesn't the Court see things this way? I believe most Americans have the view that the United States conquered the Indian nations long ago and that remaining vestiges of tribal sovereignty are an anomaly. The Supreme Court seems to share this view, at least with regard to purported assertions of tribal power over non-Indians. The Court appears to view tribal governments as racially exclusive and undemocratic, and thus, inherently suspect, particularly because existing laws do not allow federal court review of tribal court judgments. To protect the rights of nonmembers, the Court has slowly chipped away at the retained sovereignty of Indian nations. This trend began in 1978 with a case that stripped tribes of all criminal jurisdiction over non-Indians[9] and continued in 1981 with a case that substantially limited civil jurisdiction over non-Indians.[10]

Hicks continues this line of cases. However, it is not merely an incremental step in the process. *Hicks* has the potential to destroy tribal sovereignty as we have known it. The decision not only misunderstands the historical role of tribal governments in the federal system, but it also misunderstands established federal Indian law principles and treaty obligations. The Supreme Court views itself as engaged in the task of reconciling anomalous tribal governments with the United States Constitution, and the balance of power between state and federal governments, while protecting the civil rights of those who might otherwise find themselves under the power of tribal governments to which they cannot belong and which would not accept them as citizens. I view the situation differently. The Supreme Court has effectively deprived tribes of rights and powers that would have been protected had they been non-Indians.

In Part I below, I will explain the issues in *Nevada v. Hicks* and trace the history of federal Indian law that led up to the decision. I will criticize the reasoning in the case and explain why it misstates precedent, ignores current congressional and presidential policy, and violates existing treaties. Rather than a careful application of existing principles of law, *Hicks* represents a wholesale rewriting of federal Indian law in a manner that is as unexpected and as politically activist as was the Court's decision in *Bush v. Gore.*

In Part II, I will explore the Supreme Court's recent rulings on state

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9. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

10. *See* Montana v. United States, 450 U.S. 544 (1981).

sovereignty. I will consider the interpretive techniques the Court has used to limit congressional power and to create a newly expanded sphere of state sovereign immunity. These recent federalism cases have ignored the text of the Constitution and have relied on the historical context within which the Constitution was adopted and the Court's own views about the proper relations between the federal and state sovereigns. I will then apply these same techniques to the question of tribal sovereignty. I will not argue that the Court's state sovereignty rulings are correct. Rather, I will argue that, if the Court applied the same interpretive techniques to tribal sovereignty that it uses with state sovereignty, it would interpret the Constitution in a manner that would be vastly more protective of tribal sovereignty.

In Part III, I will consider recent Supreme Court rulings on property rights. The Supreme Court has been expanding constitutional protection for property rights. I will argue that, if the Supreme Court granted American Indian nations the same level of protection for their property rights as it grants non-Indians, it would have greater respect for the reserved rights of tribes and their expectations based on both treaties and statutes. These recent property rulings, if consistently applied, would also have led the Court to rule differently in *Hicks*.

Finally, in Part IV, I will make the affirmative case for protecting tribal sovereignty. Whether or not one agrees with the Supreme Court's recent expansion of protection for state sovereignty, it should be understood that protection of tribal sovereignty is in accord with core values underlying the United States Constitution, as well as the basic norms that have been developed over 200 years to regulate the relations between the United States and the various Indian nations. Those core values and norms seek to minimize the injustices associated with conquest. The Supreme Court has not consistently adhered to those norms, and its decision in *Hicks* is a particularly egregious example of the Court having lost its way. The canons of construction in federal Indian law should not support the continuation of conquest; they should do precisely the opposite. In recent memory, the United States went to war to prevent a large, powerful country from swallowing up a weaker one. Tribal sovereignty may appear anomalous to some, but protection of tribal sovereignty is consistent both with American values and our constitutional structure. It is the recent attack on tribal sovereignty by the Supreme Court that represents abandonment of our core principles. We should resist canons of interpretation that would justify or allow the continued conquest of American Indian nations.

I. WHAT THE SUPREME COURT HAS DONE TO TRIBAL SOVEREIGNTY

A. *Nevada v. Hicks*

In *Nevada v. Hicks*,[11] a state game warden received a tip that Floyd Hicks had a killed a California bighead sheep—an endangered species protected by Nevada law— off the reservation. The warden went to state court to obtain a warrant to search Hicks' property on the Fallon Paiute-Shoshone Reservation.[12] The state judge granted the warrant on condition that the warden get a similar warrant from the Fallon Tribal Court.[13] When the Tribal Court granted the warrant, "the warden, accompanied by a tribal police officer, searched [Hicks'] yard, uncovering only the head of a Rocky Mountain bighorn, a different (and unprotected) species of sheep."[14] About a year later, "a tribal police officer reported to the warden that he had observed two mounted bighorn sheep heads in [Hicks'] home. The warden again obtained a search warrant from state court."[15] Although this warrant did not explicitly require the warden to get a tribal warrant, the warden nonetheless did so and a second search was made of Hicks' home by three wardens and additional tribal officers. Again, nothing incriminating was found.[16]

Hicks then sued the tribal judge, the tribal officers, the state wardens in their individual and official capacities, and the State of Nevada, alleging that his sheep-heads had been damaged and that the second search exceeded the scope of the warrant.[17] His claims "included trespass to land and chattels, abuse of process, and violation of civil rights—specifically, denial of equal protection, denial of due process, and unreasonable search and seizure, each remediable under Rev. Stat. § 1979, 42 U.S.C. § 1983."[18] Eventually, all the claims were dismissed voluntarily or involuntarily except Hicks' suit against the state officials in their individual capacities.[19] His major claims were that his property rights had been violated. His claim under tribal law focused on trespass, while his claim under federal civil rights and constitutional law alleged unreasonable search and seizure.

The Supreme Court held that the Tribal Court had no jurisdiction over state law enforcement officials who entered the reservation to investigate

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11. 533 U.S. 353 (2001).
12. *See id.* at 356.
13. *See id.*
14. *Id.*
15. *Id.*
16. *See id.*
17. *See Hicks*, 533 U.S. at 356.
18. *Id.* at 356–57.
19. *See id.*

an off-reservation crime.[20] However, the opinion went beyond this. It came close to holding that tribes have no jurisdiction to regulate the conduct of nonmembers—whether Indian or non-Indian—even if they enter an Indian reservation and trespass on tribal lands. If the opinion in *Hicks* means what it appears to mean, it will transform tribes from sovereigns, who have governmental power over both their members and their territory, into associations that have the power to regulate only those who voluntarily agree to regulation, either by membership or by engaging in consensual relationships with the tribe. This would represent an astonishing incursion on tribal sovereignty.

B. Self-Determination and Judicial Divestment

The *Hicks* case can only be understood in light of history. Over the last 200 years, the United States has reversed itself numerous times on Indian policy. In some periods, it acted affirmatively to protect and strengthen tribal sovereignty. In other periods, it acted affirmatively to destroy tribal government, culture, and religion. In texts on federal Indian law, the current period is generally described as a period supportive of tribal sovereignty and is dubbed the era of Self-Determination. Since around 1960, a relatively consistent policy of both Republican and Democratic administrations, as well as Congress, has been to revitalize tribal governments and to transfer powers from the Bureau of Indian Affairs to those governments. Republicans like tribal sovereignty because it devolves control from the federal government to local government and because the reinvigoration of tribal sovereignty increases the likelihood that tribes will promote economic development in Indian country and, thus, be less dependent on federal dollars. Democrats like tribal sovereignty because Indians represent an oppressed minority who deserve equal respect and dignity and because past policies have represented a form of colonialism and racial injustice.

Both congressional and presidential policy have supported this era of self-determination. Numerous statutes affirm and delegate powers to tribal governments, and appropriations have supported the development of tribal courts and tribal colleges. Executive orders have affirmed that the tribes have a "government-to-government relationship" with the United States and that they are not merely private associations but a third tier of sovereigns within the federal system.

Starting in 1978, however, the Supreme Court has altered the nature of the relations among the tribes, the states, and the federal government. It has affirmed the policies of Congress and the President by recognizing and protecting capacious powers of tribes over their members. At the same

20. *See id.* at 364.

time, the Court has divested tribes of powers they previously enjoyed over nonmembers. We might, therefore, call the period since 1978, the era of Judicial Divestment.

Before 1978, the 1832 case of *Worcester v. Georgia*[21] remained good law. At that time, the Cherokee Nation was physically located within the borders of the State of Georgia. The state of Georgia had passed legislation purporting to abolish the Cherokee Nation government and prohibited any non-Indian from entering Cherokee country without a permit from the State of Georgia.[22] When two ministers defied this Georgia law, they were arrested by the State. The Supreme Court threw out their convictions, holding that the laws of the State of Georgia could not be applied inside Cherokee country.[23] Georgia could regulate neither tribal members nor its own citizens who entered Indian country.[24]

This holding remained the law until 1881, when the Supreme Court held that states had the power to prosecute crimes by non-Indians against non-Indians that occurred in Indian country.[25] This ruling only applied, however, to criminal law and had no effect on civil regulation. Beginning in 1887, with passage of the General Allotment Act (Dawes Act),[26] Congress began to break up tribal land and allot it to tribal members while forcing the tribes to sell so-called "surplus lands" left over after allotment. These surplus lands were purchased by the United States and then sold to non-Indians. Some of the allotments granted to tribal members eventually fell into non-Indian hands as well, when previously enforced restraints on alienation were lifted. The allotment process led to a situation where many non-Indians owned land and/or lived in Indian country.

At the time of the allotment acts, Congress intended eventually, but not immediately, to destroy tribal government, and it provided that tribal land that ended up in non-Indian hands would become subject to state law. However, this provision did not apply to land that remained in tribal hands or in the hands of tribal members. Moreover, the allotment process was deemed a colossal failure and was repudiated fifty years later in 1934 with passage of the Indian Reorganization Act.[27] That Act reversed the allotment policy and sought to revitalize tribal government rather than

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21. 31 U.S. (6 Pet.) 515 (1832).

22. *See id.* at 515–16.

23. *See id.* at 520.

24. *See id.*

25. *See* United States v. McBratney, 104 U.S. 621, 624 (1881).

26. *See* The Indian General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331–334, 339, 341–342, 348–349, 354, 381 (2000) (repealed 1934).

27. *See* Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (2000)).

destroy it.

A new reversal of policy occurred in the 1940s and 1950s when Congress sought to terminate the government-to-government relationship between many tribes and the United States. However, this policy too was repudiated around 1960. Since that time, both Congress and the President have supported tribal sovereignty and affirmed the government-to-government relationship existing between federally recognized tribes and the United States.

However, the Supreme Court began a process of attacking tribal sovereignty in 1978. It held in *Oliphant v. Suquamish Indian Tribe*[28] that tribes have no power whatsoever to impose criminal penalties on non-Indians. No tribal criminal statute can apply to a non-Indian even if the non-Indian enters the reservation and commits a crime against a tribal member on tribal land. The Court based its ruling partly on its conception of the history of criminal jurisdiction in the United States.[29] Ultimately, however, its conclusion was premised on the notion that, although tribes are recognized sovereigns, their sovereignty is inherently limited.[30] The Supreme Court held that, as "domestic dependent nations" they are not entitled to powers that are "inconsistent with their status."[31] These inherent limitations were not based on legislation, prior precedent, existing congressional policy, or executive practice. Rather, the Court used its power to create federal common law—a power it rarely exercises—to define what it saw as the legitimate scope of tribal sovereignty.[32]

In 1981, the Supreme Court extended the *Oliphant* ruling to civil regulation in the case of *Montana v. United States*.[33] That case held that tribes presumptively have no power to regulate hunting and fishing by non-Indians on land owned by them.[34] However, rather than depriving tribes of all civil powers over non-Indians, the Court limited its new intrusion on tribal sovereignty in two ways. First, it limited its holding to the context of tribal regulation of non-Indians on non-Indian land.[35] It ruled that the tribe's "inherent sovereignty" did not include the power to regulate the conduct of non-Indians on land owned by non-Indians within reservation

28. 435 U.S. 191 (1978).

29. *See id.* at 201–06.

30. *See id.* at 208–10.

31. *Id.* at 208 (quoting Oliphant v. Schlie, 544 F.2d 1007, 1009 (9th Cir. 1976)).

32. The Supreme Court's ruling is a common law ruling, and not a constitutional ruling, because it is subject to being changed by Congress, which, if it wished to do so, could exercise its plenary power over Indian affairs to pass legislation expressly authorizing the tribes to exercise those governmental powers.

33. 450 U.S. 544, 565–66 (1981).

34. *See id.* at 566.

35. *See id.* at 563–65.

borders.[36] Second, although it created a presumption against the exercise of tribal power over non-Indians on non-Indian-owned land, it also ruled that this presumption could be rebutted if the non-Indian had a consensual relationship with the tribe, or if the tribe could demonstrate that the non-Indian conduct at issue "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[37]

When *Montana* was decided, many believed or hoped that these exceptions would be broadly applied. In the *Montana* case, the tribe did not articulate a strong reason for exercising regulatory power over hunting and fishing on non-Indian land; if it could have done so, it arguably would have had the power to regulate it. Certainly, no one expected the ruling to apply on tribal land. After all, the ruling was premised on the idea that transfer of property to non-Indian owners, under a statute that suggested that such property would be relegated to state sovereignty, led to displacement of tribal authority by state authority. The case in no way suggested that the tribes had lost the power to regulate their own lands. Indeed, both *Montana* itself and later cases, including *Brendale v. Confederated Tribes and Bands of Yakima Nation*[38] and *South Dakota v. Bourland*,[39] explicitly stated that the tribes retained the power to regulate tribal lands.[40] Indeed, less than a year after the *Montana* decision, the Supreme Court held in *Merrion v. Jicarilla Apache Tribe*[41] that an Indian nation had the power to impose an oil and gas severance tax on a non-Indian company that had leased tribal land.

However, our expectations were dashed by a series of cases since 1981, which effectively held that tribes have no jurisdiction over nonmembers on nonmember land even if substantial tribal interests are at stake.[42] In 1989, the Supreme Court ruled in *Brendale* that tribes generally have no power to impose their zoning laws on non-Indian owners of land within Indian country, despite the fact that no coherent land use policy or zoning law can exist with checkerboard jurisdiction determined by land ownership.[43] Similarly, the Court held in *Strate v. A-1 Contractors*[44] that tribes have no

36. *See id.* at 565.

37. *Id.* at 566.

38. 492 U.S. 408 (1989).

39. 508 U.S. 679 (1993).

40. *See Brendale*, 492 U.S. at 411 (holding that tribes have the power to zone their own property within reservations). *See also Bourland*, 508 U.S. at 689 (noting a tribe's "right of absolute and exclusive use and occupation" of its reservation lands).

41. 455 U.S. 130 (1982).

42. *See, e.g.*, Atkinson Trading Co. v. Shirley, 532 U.S. 645 (2001); Strate v. A-1 Contractors, 520 U.S. 438 (1997); *Bourland*, 508 U.S. at 697; *Brendale*, 492 U.S. at 425–26.

43. *See Brendale*, 492 U.S. at 409–10.

44. 520 U.S. 438 (1997).

power to apply their tort law to lawsuits between non-Indians for car accidents that take place on state-owned roads inside the reservation, even though the tribe has an interest in regulating driving within reservation borders to protect the safety of its own members who drive on the reservation.[45] Then, in 2001, the Supreme Court ruled in *Atkinson Trading Co. v. Shirley*[46] that tribes have no power to impose taxes on non-Indian owners of land inside the reservation, even if the tribe provides significant services to the owner.[47]

The Supreme Court has not yet addressed the question of whether a tribe has the power to apply tribal tort law to actions by a nonmember in Indian country when that conduct hurts a tribal member. It might conclude that application of tribal tort law is justified in this instance. However, if recent rulings are any guide, the Court is likely to hold that the tribe has no jurisdiction in such cases, because its focus has not been on tribal interests but on the rights of nonmembers to be free from tribal jurisdiction—even when their actions impinge on tribal rights. The exception in *Montana* for economic interests and political integrity has been interpreted exceedingly narrowly.

The *Hicks* case, however, goes substantially beyond the *Montana* line of cases to hold that the tribe has no jurisdiction over a nonmember who enters tribal land. This comes close to extending *Oliphant* to civil jurisdiction, limiting tribal regulatory power to tribal members and nonmembers who agree to such jurisdiction. The Supreme Court attempted to justify this significant departure from prior law in *Hicks* by claiming that it was a mere application of the *Montana* rule, and that the *Montana* rule was based on the *Oliphant* holding that the inherent sovereignty of tribes is substantially limited, and that tribes cannot exercise power over nonmembers unless that power is expressly delegated by Congress, nonmembers agree to such power, or that power is essential to preserving tribal existence.

It is important to note that this reading of prior law is impossible to sustain. The ruling in *Montana* effectively limited or overruled the holding of the foundational 1832 case of *Worcester v. Georgia*[48] that states have no power in Indian country. The *Montana* ruling was not based on longstanding precedent but was itself a substantial change in the law. The dissenters in the later case of *Brendale* pointedly explained this unexpected change in the law.[49] As Justice Blackmun noted, the cases prior to *Montana*

45. *See id.* at 442.

46. 532 U.S. 645 (2001).

47. *See id.* at 647.

48. 31 U.S. (6 Pet.) 515 (1832).

49. *See* Brendale v. Confederated Tribes and Bands of Yakima Nation, 492 U.S. 408,

held precisely the opposite of the ruling announced there.

These cases, landmarks in 150 years of Indian-law jurisprudence, establish a very different "general principle" governing inherent tribal sovereignty—a principle according to which tribes *retain* their sovereign powers over non-Indians on reservation lands unless the exercise of that sovereignty would be "inconsistent with the overriding interests of the National Government."[50]

The Court today implicitly recognizes that the *Brendale* dissenters were right when it characterizes *Montana* as a foundational case.[51] It is a foundational case, although not decided until 1981, because no prior cases stand for the proposition for which it is now routinely cited. This means that the deprivation of sovereignty affected by the line of cases from *Oliphant* to *Montana* to *Hicks* cannot be justified by the fiction that such tribal sovereignty was lost long ago. Rather, that sovereignty is being taken *now* and it is being taken not by congressional action, but by the Supreme Court itself through its rulings on tribal sovereignty.

This deprivation of tribal sovereign power flies in the face of consistent congressional and presidential policy, as well as violating existing treaties with Indian nations. Those treaties established a government-to-government relationship between the United States and the tribes. They also formed the process by which most Indian nations became legally associated with the United States and partially incorporated into the federal system. Because the tribes did not sign the Constitution, the treaties represent the only consent they ever gave to a legal relationship with the United States; they therefore represent quasi-constitutional documents.[52] To strip tribes of pre-existing sovereign powers without renegotiation of those treaties, and without any formal act of Congress taking such a drastic step, constitutes a violation of those treaties and a shameful breach of what the tribes understood as sacred obligations.[53]

II. SOVEREIGNTY

In recent years, the Supreme Court has substantially increased the reserved protections granted to state sovereignty from imposition or control

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450 (1989) (Blackmun, J., dissenting).

50. *Id.* at 450 (Blackmun, J., dissenting).

51. *See* Nevada v. Hicks, 533 U.S. 353, 358 (2001) (calling *Montana* the "pathmarking case" on tribal power over nonmembers).

52. *See generally* ROBERT A. WILLIAMS, JR., LINKING ARMS TOGETHER: AMERICAN INDIAN TREATY VISIONS OF LAW AND PEACE, 1600-1800 (1997); Philip P. Frickey, *Domesticating Federal Indian Law*, 81 MINN. L. REV. 31 (1996); Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381 (1993).

53. *See generally* WILLIAMS, *supra* note 52.

by the federal government. How would the tribes fare if the Supreme Court applied the same reasoning to them? In *Alden v. Maine*,[54] for example, the Supreme Court held that Congress has no power to subject states to suits for damages in state courts to enforce federally protected anti-discrimination rights that are founded on the Commerce Clause rather than on the Fourteenth Amendment. This ruling is based not on the text of the Constitution, but on the Supreme Court's view of the history of the Constitution, the understandings of the Framers of the Constitution at the time it was adopted, and extra-textual indications of what the common law provided at the time the Constitution was adopted.[55]

The Court did not base its ruling on the text of the Eleventh Amendment because that amendment speaks only to suits by one citizen against a different state in federal court.[56] The Court had long ago ruled that the Eleventh Amendment prohibited suits by one citizen against her own state in federal court, thus going beyond the text.[57] However, it had never previously held that the Eleventh Amendment applied in state court. Nor did it base its ruling on the text of the Tenth Amendment, which merely provides that the states retain any rights not taken away by the Constitution, since the question was whether the right to sovereign immunity from otherwise lawful federally created rights in state court is a retained right of state sovereignty.[58] Rather, the Supreme Court ruled that the Constitutional structure and the original understanding supported state sovereign immunity. According to the Court, states have plenary governmental power, while the federal government has limited and enumerated powers.[59] Even when the Constitution expressly grants Congress the power to regulate interstate commerce, Congress' power is limited when exercise of that power would infringe on the Court's own understanding of the retained rights of state sovereigns.

The Supreme Court ruled in *Alden* that the federal government cannot force states to defend suits by private citizens in state courts because "the States entered the federal system with their sovereignty intact."[60] This means, according to the Supreme Court, that states retain sovereign immunity from suits, without their "consent," unless there has been a

54. 527 U.S. 706 (1999).

55. *See id.* at 713–16.

56. *See* U.S. CONST. amend. XI.

57. *See* Hans v. Louisiana, 134 U.S. 1, 21 (1890).

58. *See* U.S. CONST. amend. X.

59. *See Alden*, 527 U.S. at 713. "The limited and enumerated powers granted to the Legislative, Executive, and Judicial Branches of the National Government, moreover, underscore the vital role reserved to the States by the constitutional design." *Id.*

60. *Id.* (quoting Blatchford v. Native Village of Noatak, 501 U.S. 775, 779 (1991)).

"surrender" of that immunity "in the plan of the convention."[61] Retention of powers not expressly given up by the states when they ratified the Constitution is required by the "dignity" that is consistent with their status as sovereign entities.[62]

If we apply this method of reasoning to the tribes, we reach a similar conclusion that exempts the tribes from infringement of their sovereignty. To begin with, tribes, like states, have inherent sovereignty. They are not governments with limited and enumerated powers. Rather, they have all the powers that are exercised by states. They can pass legislation on any subject and have the power to regulate both persons and property within their borders. Now it is true that the Supreme Court has held that tribal sovereignty has been limited and that tribes are "domestic[,] dependent nations" rather than foreign nations.[63] They cannot enter treaties with foreign nations, and if the federal government takes lawful actions that limit their powers, they are obligated under current law to comply with federal law as the supreme law of the land.[64] However, these limitations on tribal power do not differentiate tribes from states. States are similarly disabled by the Constitution from entering treaties with foreign nations.[65] State law is similarly subject to the Supremacy Clause.[66] Thus, the Supreme Court's view that tribes have limited sovereignty in these respects does not distinguish them from the states.

The tribes' relation to the federal government is indeed different from the states' relation to the federal government. The states are the ratifying parties to the Constitution, and they are the structural bases for representation in Congress. They also have rights that are expressly protected by the Tenth and Eleventh Amendments, although the exact scope of those rights is unclear. The tribes are unprotected by the Tenth Amendment. Moreover, although the Supreme Court has recently interpreted federal power under the Interstate Commerce Clause to be limited to commercial matters, it has interpreted the Indian Commerce Clause to give Congress plenary power to pass any legislation it deems necessary to regulate Indian affairs.[67] Thus, with respect to Indian affairs,

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61. Fed. Mar. Comm'n v. S.C. State Port Auth., 535 U.S. 743, 752 (2002) (quoting *Alden*, 527 U.S. at 730 (quoting Alexander Hamilton approvingly)).

62. *See Alden*, 527 U.S. at 714.

63. *See* Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

64. *But see* Robert N. Clinton, *There is No Federal Supremacy Clause for Indian Tribes*, 34 ARIZ. ST. L.J. 113, 132–133 (2002) (arguing the contrary).

65. *See* U.S. CONST. art. I, § 10, cl. 1. "No State shall enter into any treaty, alliance, or confederation ...." *Id.*

66. *See* U.S. CONST. art. VI, cl. 2.

67. *See* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 62 (1996). "If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the

the Supreme Court has held that Congress has, not limited powers, but plenary powers. Another way to say this is that plenary power over Indian affairs is one of the enumerated powers granted by the states to Congress.

The plenary power granted by the Constitution to Congress over Indian affairs has important consequences. A central effect of this delegation of power by the states to the federal government is a simultaneous loss of power by the states over Indian affairs.[68] The Articles of Confederation similarly granted Congress the exclusive right to manage Indian affairs.[69] However, it contained two vague, and indeed incomprehensible, exceptions. It preserved state jurisdiction over Indians who were "members" of the states and had provided that the "legislative right" of states within their borders would not be infringed.[70] James Madison made fun of this provision in Federalist Paper No. 42, noting that it was contradictory and unclear to grant the federal government exclusive powers over Indians while reserving undefined powers in the states.[71] One of the

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Federal Government than does the Interstate Commerce Clause. This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes." *Id. See also* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989). "It is also well established that the Interstate Commerce and Indian Commerce Clauses have very different applications. In particular, while the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation, the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." *Id.* (citations omitted).

68. *See* FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 207–16, 259–79 (1982 ed.).

69. ROBERT N. CLINTON, NELL JESSUP NEWTON, & MONROE E. PRICE, AMERICAN INDIAN LAW: CASES AND MATERIALS 141–42 (1991).

70. *Id.*

71. Madison wrote:

> The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What descriptions of Indians are to be deemed members of a State, is not yet settled; and has been a question of frequent perplexity and contention in the Federal Councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the articles of confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a mathematical axiom, by taking away a part, and letting the whole remain.

THE FEDERALIST NO. 42, at 284–85 (James Madison) (J.E. Cooke ed., 1961) (quoted in

major purposes of the Constitution was to excise these references to state power over Indian affairs and to grant the federal government *exclusive* power to regulate Indian tribes.

The history of the period supports this interpretation.[72] The states were failing to prevent non-Indians from invading tribal lands after ratification of the Articles of Confederation in 1781 and the signing of the Treaty of Paris of 1783. The United States was militarily weak after 1783 and, although it at first treated the tribes as conquered nations, it quickly reversed itself, developing the policy of compensating tribes for any land it took and arranging for treaties between tribes and the federal government to effect any transfers of property.[73] The tribes were upset at the United States' highhanded policy after the war, which threatened the security of the United States. It was evident to everyone at the Constitutional Convention that the states could not be trusted to manage Indian affairs or to protect the tribal lands from invasion by non-Indians. The Constitution centralized power over Indian affairs in the Congress, thereby stripping the states of their pre-existing sovereign powers that might have existed in Indian country.

Plenary power over Indian affairs, therefore, exists in Congress and not in the states. This was the basis of the 1832 holding in *Worcester v. Georgia*[74] to the effect that state laws have no effect in Indian country. Plenary power does not mean that tribes have no reserved rights. They have all the inherent powers of any sovereign government until they are taken away by Congress. This sovereignty is recognized and affirmed in the Constitution and in many Supreme Court opinions. Tribes are mentioned along with the states and foreign nations in the Commerce Clause. They are treated as nations capable of entering into treaties with the United States, and only governments or sovereigns are capable of entering treaties. Although Congress passed a law in 1871 that said tribes were not sovereigns for the purpose of entering new treaties with the United States, Congress did not repeal the treaties already made. Those treaties recognize and affirm the pre-existing inherent sovereignty of Indian nations. Moreover, Supreme Court precedent and congressional and presidential policy affirm the continued existence of tribal governmental powers.

Alden v. Maine held that the structure of the Constitution, and the original understanding of the Framers, protected a realm of state

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Clinton, *supra* note 64, at 132–33).

72. *See generally* REGINALD HORSMAN, EXPANSION AND AMERICAN INDIAN POLICY, 1783-1812 (1967).

73. *See generally id.*

74. 31 U.S. (6 Pet.) 515 (1832).

sovereignty that was not taken away by the Constitution.[75] Similarly, both the structure of the Constitution and the original understanding of the Framers were that the states have no inherent powers in Indian country. Further, nowhere did tribes consent to be governed by the states. Only Congress itself—and not the Supreme Court—has the power to pass laws limiting tribal sovereignty. Moreover, the states joined the United States by ratifying the Constitution or by subsequently voting to do so. The tribes never signed the Constitution; they were brought into the federal system involuntarily. To the extent they agreed, they did so through signing treaties that affirmed their prior powers. The Constitution itself has been interpreted to preserve inherent tribal sovereignty, except to the extent Congress acts expressly to limit it.

This means that tribes have retained sovereign rights within the Constitutional structure. They also have rights affirmatively recognized by Congress through treaty or statute. States, on the other hand, do not have inherent powers in Indian country. The Constitution stripped them of those powers when the country repudiated the Articles of Confederation and adopted the United States Constitution.

One might argue that Congress acted to transfer tribal powers to the states when it opened up Indian country to non-Indian settlement. I will argue below that this policy was repudiated when Congress ended allotment in 1934 with the Indian Reorganization Act.[76] Be that as it may, there is no warrant for concluding that states have powers over tribal land in Indian country that would justify stripping tribal courts of powers to protect tribal members at home on tribal land from trespass by state officials. Nor is there any law enforcement need to grant states these powers. The Supreme Court has interpreted the Constitution to grant Congress—and not the states—plenary power over Indian affairs. If tribal jurisdiction needs to be limited to protect the rights of non-Indians, or to promote law enforcement in the states, then Congress is fully capable and empowered to accomplish these ends. It has done so before by taking jurisdiction over affairs in Indian country.[77] The Constitution preserved and affirmed tribal sovereignty as did the original understanding of the Framers. The history of the early years of this country, as well as foundational Supreme Court precedents, affirmed that tribal powers persisted unless limited by congressional action, while state powers did not

75. 527 U.S. 706, 713–16 (1999).

76. Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461–479 (2000)).

77. *See* Major Crimes Act, ch. 645, 62 Stat. 758 (1948) (codified as amended at 18 U.S.C. § 1153 (2000)). *See also* Act of April 11, 1968, Pub. L. No. 90-284, Title II, § 201, 82 Stat. 77 (codified as amended at 25 U.S.C. § 1301 (2000)) (also known as the Duro-fix legislation).

extend to regulating Indian country, especially when tribal members and tribal land were at issue.

The Supreme Court's ruling in *Nevada v. Hicks* represents a massive shift in this received understanding.[78] It reverses the presumption of *Worcester v. Georgia* entirely, concluding that states have "inherent" powers in Indian country.[79] The history and structure of the Constitution support the opposite conclusion. The Constitution took state power away from Indian country and vested it in Congress. The Supreme Court has, in *Hicks,* transferred a large portion of that power back from Congress to the states. In so doing, it has violated existing treaties and engaged in an act of conquest. This loss of tribal sovereignty is not something that happened long ago; it was accomplished by the nine Justices of the United States Supreme Court in their 2001 ruling in *Hicks.*

In the case of state sovereignty, the Supreme Court appeals to original intent and the understanding of the Framers in 1789 at the time of the adoption of the Constitution, and in 1791, when the Eleventh Amendment was passed. However, in the case of tribal sovereignty, the Court decided to forego the original intent analysis or the situation at the time of the adoption of the Constitution, and instead appealed to the policies underlying the General Allotment Act of 1887—an Act that was later repudiated by the Indian Reorganization Act of 1934—whose policies of termination of tribal government are flatly inconsistent with current congressional and executive policy. Why does the Supreme Court reject looking at the Framers' original intent in the case of Indian nations? It does so because it believes the parameters of tribal sovereignty must be defined "in light of ... subsequent alienations" of land to non-Indian purchasers, despite the fact that the policy of "destroy[ing] tribal government" in the General Allotment Act was repudiated by later law and policy.[80] I will address below the suggestion that non-Indian purchasers had vested rights to be free from tribal regulation. For now, it is crucial to see that the Court interprets the legal dimensions of tribal sovereignty as crucially affected by later events and the course of history. In contrast, when state sovereign immunity is at issue, the Court is uninterested in later events that substantially changed the relations between the states and the federal government, including such minor events as the Civil War, passage of the Reconstruction Amendments, and the New Deal. Rather, what matters in the area of state sovereignty is original intent alone.

It is not unusual for the Supreme Court—or any other court—to be

78. 533 U.S. 353 (2001).

79. *See id.* at 360–66.

80. Brendale v. Confederated Tribes and Bands of Yakima Nation, 492 U.S. 408, 409 (1989).

inconsistent. However, it is incumbent on the Court either to distinguish the two cases—of state and tribal sovereignty—or to acknowledge that a tension exists between competing theories, principles, and interests, and to justify the resulting choices by contextual explanations. However, the Supreme Court has failed to do either of these things in *Hicks*. The Court rejects the original understanding of tribal sovereignty embedded in the Constitution and precedents of the Supreme Court that prevailed from 1832, when *Worcester* was decided, to 1978, when *Oliphant* was decided. The 1981 case of *Montana* is now hailed as the hallmark defining tribal sovereignty over nonmembers. The Court suggests that tribes cannot have inherent sovereignty over nonmembers because this is "inconsistent with the dependent status of the tribes"[81]—as if this were something that had been true for 200 years. But this is not true. For example, in Justice Marshall's opinion in the 1823 case of *Johnson v. M'Intosh,*[82] the Court suggested that a non-Indian "who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws."[83] In other words, nonmembers would be subject to tribal law and sovereignty if they entered Indian country, unless a federal statute or treaty had effectively limited tribal powers.

The Supreme Court has failed to provide tribes protection for their sovereignty that would have been provided to them had they been states. If the Court used the same methods of analysis it used to vindicate state sovereignty in *Alden v. Maine,* it would have decided *Hicks* differently. In failing to accord tribes the same protections it has accorded the states, the Supreme Court not only treated the tribes unequally but also rewrote the Constitution in a manner that authorizes the conquest of Indian nations today.

III. PROPERTY

Suppose we think about tribal rights through the lens of property rather than sovereignty. Why might we do this? Treaties and statutes set up Indian reservations. Treaties are contracts that recognize or affirm both pre-existing tribal sovereignty and property rights and constitute an exchange of promises. Statutes do not represent agreements, but they nonetheless may establish vested rights, especially when they include the transfer of property rights to a tribe or the recognition of preexisting rights.

In recent years, the Supreme Court has been increasing constitutional

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81. *Hicks*, 533 U.S. at 359.

82. 21 U.S. (8 Wheat.) 543 (1823).

83. *Id.* at 593. *See generally* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) (holding that state law has no force in Indian country).

protection for property rights. One of its most recent rulings on regulatory takings was the 2001 case of *Palazzolo v. Rhode Island*[84]—decided the same term as *Hicks*. In *Palazzolo*, a property owner acquired title to property after the state of Rhode Island had passed a regulatory law limiting development of his wetlands.[85] The Supreme Court of Rhode Island held that the wetlands law at issue could not constitute a taking of his property rights because he took title knowing that the lands were restricted.[86] Thus, he could not have had a reasonable expectation of being able to develop the lands in violation of existing statutory limitations; moreover, any investment in the lands would have been discounted by the knowledge that the land use was restricted. State law, such as environmental law, defines property rights and restrictions on use that are designed to prevent substantial public harm; they form the backdrop against which property rights exist. Since the owner in *Palazzolo* never had any pre-existing property rights taken by state law, the regulations could not have effectuated a taking of his property rights.

The Supreme Court reversed, disagreeing with the analysis of the Rhode Island Supreme Court.[87] Justice Kennedy noted that, if the state supreme court's argument was taken to the extreme, a state could effectively repeal the takings clause by enacting prospective general legislation announcing that all property in the state is subject to regulation in the public interest, thereby immunizing itself from any claims for regulatory takings by future purchasers or property owners in the state.[88] The Supreme Court held that states should not be able to prospectively repeal the takings clause merely by passing legislation.[89] In effect, the court held that the owner did have expectations about the land use that were independent of what positive legislation said was permissible. Thus, he had reasonable investment-backed expectations, despite the fact that the law prohibited him from doing what he proposed to do with the land, and despite the fact that the prohibition was designed to protect both other property owners and the public at large. The Court held that his property rights were defined by his justified expectations as determined by customary understandings of what it means to own property, even if those customary understandings were contradicted by legislation.

This ruling creates a paradox. The Supreme Court has said that property

84. 533 U.S. 606 (2001).

85. *See id.* at 611.

86. *See id.* at 616.

87. *See id.* at 632.

88. *See id.* at 627.

89. Of course, in this case, the statute was not a general repeal of the takings clause but rather a regulation designed to prevent harm to public resources in water; it arguably prevented a public nuisance as defined by the common law.

rights are rooted in state, not federal law. Thus, the states are allowed to define what property rights entail, including what limitations exist on those rights. However, the takings clause prevents the states from retroactively altering those rights in a manner that strips owners of what used to be called "vested rights"—referred to today as legitimate investment-backed expectations. Moreover, there are certain rights so central to traditional understandings of property that states are not allowed to take them away even prospectively, such as the right to be free from a forced physical invasion of property by a stranger.[90] This means that the Constitution does place some limits on the ability of the states to define and redefine property. These limitations are justified by the Supreme Court because they rest on social expectations about the meaning of property that the Court believes are independent of law and that are justifiable regardless of what state law actually says.

Now let us apply this understanding to the case of tribal sovereignty. When the United States entered treaties with Indian nations, it generally took some of their real property in exchange for promises to respect the tribe's powers over the property they retained, as well as a recognition of the government-to-government relationship between the tribe and the United States and the tribe's concomitant power to exercise its sovereign authority within the area it retained. In some cases, where the United States removed tribes from their ancient lands and resettled them in the West, the United States granted lands to the tribes rather than the tribe granting lands to the United States. The deal was, however, the same. In return for agreeing to leave their lands, the United States granted these tribes new lands they would both own and have the power to govern. When Congress passed a law ending treaty-making with Indian nations in 1871, Congress substituted statutes for treaties to establish or affirm Indian reservations. The use of a statute rather than a treaty means that we no longer have a deal; there is no contract between the parties. We *do*, however, have a grant or affirmation of property rights, and the terms of the grant remain the same: a congressional recognition of tribal property, or a grant of property to a tribe for the purpose of establishing an Indian reservation, presumes not only a recognition of property rights but the recognition of tribal sovereignty within the territory in question. After all, ownership of the land was in the tribe, and the tribe is a political entity that would determine how to use the land by exercising its sovereign regulatory powers and not just its ownership rights. The tribal political processes and property laws would determine the use of tribal land. For this reason, reservations established by statute have been treated in federal Indian law exactly the same as

90. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1982). *But see* PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980).

reservations established by treaty.

What expectations did the tribes have based on these treaties and statutes? The answer is clear. In return for giving up roughly 98% of the land in the United States, the tribes were promised the right to retain the lands they had left and *the right to govern those lands.* These promises were contradicted by later legislation. The allotment laws enacted between the 1880s and the 1930s, for example, divided tribal property into individual holdings while forcing a sale of "surplus" lands. The introduction of non-Indians into Indian country might be thought to have changed everything, particularly because the allotment laws provided that lands transferred into non-Indian hands would become subject to state law.[91] However, this policy of destroying tribal sovereignty was *repudiated* by the Indian Reorganization Act of 1934 which explicitly ended allotment and provided for the drafting of tribal constitutions that affirmed the power of tribes to govern their territory.[92]

The Supreme Court, however, held in the 1981 *Montana* case that the repudiation of the allotment policy did not alter the fact that non-Indians were living in Indian country.[93] This fact was treated as irreversible and as necessarily leading to the conclusion that tribes could not exercise powers over non-Indian actions on non-Indian land. In effect, the court treated the right of non-Indians to be free from tribal regulation as a vested property right that was not, and could not have been, repealed by passage of the subsequent Indian Reorganization Act. This conclusion was supported by the democratic argument that it is wrong to subject property owners to regulation by governments in which they are not, and cannot become, citizens. If non-Indian owners cannot vote in the tribal elections for the governments that regulate their property, it is undemocratic for those governments to regulate their property.

Are these conclusions justified? The answer is no. First, there is no right recognized by the Supreme Court to vote in the government that regulates your property. I am a citizen of Massachusetts and if I buy property in Vermont, I will be subject to Vermont zoning and environmental law despite the fact that I cannot vote in Vermont. Nor is there a recognized constitutional right not to have one's real property transferred to the regulatory jurisdiction of another government entity. If the Commonwealth of Massachusetts saw fit to move the boundary between Somerville and Cambridge, subjecting a Somerville resident to regulation by Cambridge,

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91. *See* County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation, 502 U.S. 251 (1992) (holding that lands allotted under the Dawes Act that were held in fee by the tribe or its members were subject to state property taxation).

92. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (2000)).

93. *See* Montana v. United States, 450 U.S. 544, 557–63 (1981).

the resident would have no constitutional right to be protected from the change. There is no recognized vested property right or democratic right to be protected from such changes. Nor is there a recognized right to vote to control the government that regulates one's land when one buys land subject to federal jurisdiction. Recall that Washington, D.C. was long run by Congress rather than local government, even though its citizens have no voting representatives in Congress. Similarly, Puerto Rican citizens are not entitled to vote in presidential elections. Thus, the Supreme Court's treatment of non-Indian purchases of lands in Indian country as irrevocably altering tribal sovereignty has no support in the law generally.

Moreover, if non-Indian landowners have vested rights not to be subject to tribal jurisdiction, then it must similarly be true that the tribes originally had vested rights not to be subject to state regulation. When tribal rights are recognized by treaty or statute, they are subject to constitutional protection from uncompensated takings.[94] The Supreme Court cannot have it both ways. If the rights of non-Indian owners to state jurisdiction cannot be changed by subsequent legislation, then the tribes similarly have vested property rights in being free from state jurisdiction in Indian country.

Consider also whether non-Indian purchasers of land inside reservation borders have legitimate expectations to be free from tribal regulation. They may not know about federal Indian law, and they may not know that the Indian Reorganization Act repealed the allotment policy. They may believe that they are subject only to state jurisdiction. Generally, however, ignorance of the law is no excuse. An owner who buys property that is subject to restrictive covenants enforceable by a homeowners association is subject to such covenants even if she did not know about them. An owner who seeks to use land in a manner prohibited by local zoning or environmental law is not excused from compliance because she failed to discover those laws before she purchased the land.

In addition, the case of *Nevada v. Hicks* involved tribal land. No vested non-Indian rights were at issue there. Floyd Hicks was at home on tribal land within Indian country. The statute setting up the Fallon Paiute-Shoshone Reservation vested both property and sovereignty rights in the tribal government. At the time the statute was passed, *Worcester v. Georgia* remained good law, depriving the state of Nevada of the power to regulate in Indian country. Moreover, until the *Hicks* decision itself, the Supreme Court had almost never before ruled that a state could exercise jurisdiction over Indians in Indian country.

The *Hicks* case deprived the tribe of the ability to apply tribal law in tribal courts to protect its land and its people from invasion by state

94. This was not always the case. *See generally* Lone Wolf v. Hitchcock, 187 U.S. 553, 564 (1903).

governmental officials. It prevented the tribe from formulating and applying tribal trespass law to protect its members and its lands from state incursion. If the statute setting up the reservation did anything, it affirmed the property rights of the tribe, as well as its sovereign power to enforce those rights to protect its members and its territory from invasion.[95]

The Supreme Court held that Anthony Palazzolo had justified expectations in being able to develop his property even though the law prohibited that development at the time he acquired the property, and even though that development would substantially harm both other owners and the public. The Court did not hold that he had a constitutionally protected right to be free of the development restriction; the case was remanded in order to determine that question. If we apply this same reasoning to *Hicks*, it is evident that tribes have justified expectations in being free from state incursion on tribal property that is recognized by federal legislation and treaties. Not only that, but the tribes have justified expectations, based on treaties and statutes, that they will be able to exercise governmental powers within their territory to protect their land from invasion and their members from trespass to their property rights and personal interests in privacy. Indeed, the tribe's expectations are arguably much stronger than those of Anthony Palazzolo because they are based, not merely on customary understandings, but on a statutory recognition of rights.

IV. THE CASE FOR TRIBAL SOVEREIGNTY

The Supreme Court has often held that tribes retain rights to their property and sovereignty unless they are taken away by express congressional action. Even when Congress does limit tribal rights, its power to do so, while plenary, is not unlimited. Tribes have the right to be protected by the Constitution from deprivation of property without just compensation, and they also have the right to exercise sovereign powers in a manner that is consistent with the fact that they are domestic, rather than foreign, nations.

This notion of retained inherent sovereignty is not only longstanding but is compatible with core American values. International law condemns aggression by one nation against another. The United States acted to protect Kuwait from being absorbed and invaded by Iraq even though Iraq claimed that Kuwait was historically part of Iraq. The United States has protected Taiwan from being absorbed into China despite a strong policy

95. Of course, Hicks could have tried to sue the state wardens in state court if he could convince a state judge to apply tribal law to determine whether a trespass occurred; but then it would have been a state judge, not a tribal judge, who would have defined what tribal law is—a substantial deprivation of lawmaking power that would otherwise inhere in tribal governmental institutions.

by China that Taiwan is a rogue province. Colonialism and imperialism have long been condemned by the United States. Although some may believe that the tribes were conquered long ago and lost their sovereignty, this is not true. Federal Indian law has consistently held that tribes retain their original sovereignty within the federal system. That sovereignty is recognized by the United States Constitution, by numerous treaties, statutes, executive orders, and by many precedents, all of which subsist to this day.

The notion of retained property and contract rights is a long-standing American tradition. A contract with a private entity cannot be repudiated by the United States without violating the takings clause.[96] If a tribe were granted rights similar to those granted to business corporations, then Congress could not abrogate a treaty without compensation. Nor would the Supreme Court ever hold that a statute conferring property rights should be ignored because those rights were contrary to the public interest.

The big concern with tribal sovereignty over nonmembers is that tribes are not directly subject to the Bill of Rights; they are regulated only by the 1968 Indian Civil Rights Act.[97] That Act does impose some version of the Bill of Rights on tribes. However, by interpretation of the Supreme Court in the 1978 case of *Santa Clara Pueblo v. Martinez,*[98] there is no right of action in federal court to enforce these civil rights.[99] Nor is there a right to remove a tribal court case to federal court, as there is in the case of lawsuits in state court that involve federal constitutional questions. Nor is there a right of review, by certiorari or otherwise, in the United States Supreme Court, as there is in the case of state supreme court decisions that adjudicate federal questions. With no federal oversight of tribal court decisions there comes a danger of fundamental unfairness and discriminatory treatment of nonmembers, both Indian and non-Indian alike.

It is possible that tribal courts may be unfair to nonmembers. However, it is also true that state courts may be unfair to tribal members, especially in states where state court judges are elected and subject to political pressure

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96. *See* United States v. Winstar Corp., 518 U.S. 839, 875–76 (1996). "Although the Contract Clause has no application to acts of the United States, it is clear that the National Government has some capacity to make agreements binding future Congresses by creating vested rights." *Id.* (citations omitted).

97. Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 77 (codified at 25 U.S.C. §§ 1301–1303 (2000)). *See also* Santa Clara Pueblo v. Martinez, 520 U.S. 438 (1997).

98. 436 U.S. 49 (1978).

99. The sole exception is that there is a right of habeas corpus in criminal cases, but of course, *Oliphant* held that tribes have no criminal jurisdiction over non-Indians—the only parties protected by this provision are nonmember Indians. *See* Oliphant v. Suquamish Indian Tribe, 439 U.S. 191 (1978).

to limit tribal jurisdiction and property rights. More important, the Supreme Court has interpreted the Constitution as granting Congress plenary power over Indian affairs. It is Congress, after all, that passed the Indian Civil Rights Act and chose not to create a right of action in federal court to review tribal court actions. Under current interpretations of the Constitution, Congress is fully free to create federal court review of tribal court decisions. If tribes are acting unfairly to non-Indians, Congress has the power to respond. It is not clear why the Court should step in to remedy a problem that Congress has not determined exists. Even if the problem exists, the Supreme Court could have handled this problem by creating a limited constitutional right to challenge tribal court actions in federal court to vindicate fundamental constitutional rights. The Court did not need to protect non-Indian rights by stripping tribes entirely of jurisdiction over non-Indians, particularly where this infringement on tribal sovereignty violates both congressional and executive policy and constitutes a breach of existing treaties.

It also rings hollow to have the Supreme Court indulge in hand wringing about civil rights. The Rehnquist Court is not generally known as a great champion of civil rights. It has turned habeas corpus into a hollow remedy in most cases and has generally limited the reach of the Equal Protection Clause and the Due Process Clause, except where they impinge on property rights, where the Court has been more receptive to such claims. To become anxious about violation of civil rights by tribes, while generally remaining indifferent to such claims when non-Indians bring them against non-Indian governments, suggests that an intentional or unintentional double standard is being used. State governments are generally trusted by the Supreme Court to exercise their powers wisely—even when those powers are exercised over racial minorities and Indians. However, its recent judicial divestment policy suggests that the Court does not trust tribal governments to be sensitive to the rights of non-Indians. This fear is wholly unrealistic—at least as a general matter. The tribes know that at various periods of United States' history, the federal government has acted to diminish or abolish tribal government. Tribes know that the Supreme Court has granted Congress plenary power to do this. Tribes have not historically been protected by the Tenth or Eleventh Amendments. Tribes have, in other words, extremely strong incentives to act fairly to non-Indians in their dealings. If they do not, Congress has the power to take away their sovereign powers entirely.

The Supreme Court should return to foundational principles, not only of federal Indian law, but of American law generally. Tribes retain whatever rights are not expressly taken away by Congress. Those rights include property rights and sovereignty. If Congress wants to restrict tribal sovereignty, let it do so in express legislation—legislation that can later be

reviewed by the Supreme Court for constitutionality. The Supreme Court should not, on its own initiative, limit tribal power in a manner that breaches existing treaties and takes retained tribal property rights. If a tribe engages in unfair behavior, the Supreme Court can step in at that point, either to let Congress know that it thinks Congress should pass legislation to protect the rights of nonmembers in tribal courts or to pass more limited restrictions on tribal sovereignty designed to protect fundamental rights. The Court does not need to strip tribes of their sovereignty without congressional authorization or tribal consent. Such attacks on tribal sovereignty are contrary to American values and longstanding legal principles.

It is not possible to reconcile a colonial process with democratic norms. Federal Indian law has attempted—not always successfully and not always consistently—to minimize the injustices associated with colonialism. Basic American values of respect for human rights, including property and contract rights, as well as international norms protecting the sovereignty of nations from external attack, demand that the United States assiduously honor both its treaty commitments and existing legal principles that respect preexisting tribal sovereignty and property rights. Neither Congress, the President, nor the Supreme Court has consistently adhered to these principles. Yet, as often as they are submerged or ignored, they are revived and revitalized, and they remain the foundation of the relations between the United States and the tribes. The United States has, in recent memory, gone to war to protect a small nation from being swallowed up by a larger, more powerful one. Whether the United States can be true to its first principles is the question that is at the heart of federal Indian law.

Tough Love for Tribes: Rethinking Sovereignty After *Atkinson* and *Hicks*

L. Scott Gould*

It is an article of faith among American Indian tribes, and most scholars who write about them, that tribes possess the powers of inherent sovereigns. The reasoning, based on an 1832 opinion by Chief Justice Marshall, is that tribes are free to govern their territories as they choose, except as limited by acts of Congress.[1] What many tribes and scholars are only now discovering is that the Supreme Court all but ended this territorial conception of tribal power more than twenty years ago. In 1981, in *Montana v. United States*,[2] the Court announced a general proposition that the inherent powers of a tribe do not extend beyond the membership.[3] Sovereignty, in other words, is not a matter of inherent power over territory, but of authority over those who consent to be governed. Subject to only two limited exceptions, *Montana* decided that tribes do not have inherent power over nonmembers unless Congress delegates the power to them.[4]

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* In memory of Judge Wanda Miles of the Nez Perce Tribal Court. I thank Professors Edward S. Godfrey and Kenneth Gallant for their insights and encouragement.

1. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 595 (1832). Chief Justice John Marshall wrote that the Cherokee Nation, then located in the State of Georgia, was a distinct community with its own boundaries in which state laws had no force, and into which state residents could not enter without Cherokee consent. *See id.* at 561. While *Worcester* decided only the limitations on state power over tribal territory, it forms the basis for contemporary conceptions of inherent sovereignty. Felix S. Cohen, the foremost advocate of tribal rights, expressed the modern formulation in 1934: "Perhaps the most basic principle of all Indian law ... is the principle that those powers *which are lawfully vested in an Indian tribe are not, in general, delegated powers granted by* express *acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished.*" FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 122 (1945).

2. 450 U.S. 544 (1981).

3. *See id.* at 565.

4. *See id.* at 565–66. The two exceptions listed in *Montana* relate to activities of nonmembers who enter into consensual relationships with tribes, and to those whose conduct on non-Indian fee lands within a reservation has a direct effect on the political

For those who had not gathered *Montana*'s portent, a rude awakening to consent-based sovereignty occurred in 2001.[5] In that year the Court announced two decisions that effectively discard what little may have remained of territorial sovereignty. In *Atkinson Trading v. Shirley*, [6] the Court decided that the Navajo Tribe lacked authority to impose an occupancy tax on guests of a hotel located on fee land within the reservation, because the sovereign power to tax does not reach beyond tribal land.[7] Justice Rehnquist wrote that "[o]nly full territorial sovereigns enjoy the 'power to enforce laws against all who come within [their] territory,' and Indian tribes 'can no longer be described as sovereigns in this sense.'"[8] Neither of *Montana*'s exceptions was sufficient to assert inherent sovereignty, despite evidence that the tax was an important source of revenue for the tribe, and that it benefited nonmembers by supporting tribal services.[9] The fiscal repercussions of *Atkinson* may well be catastrophic for some tribes.[10]

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integrity, economic security, or health or welfare of a tribe. *See id.* Although the limitation on sovereignty announced in *Montana* was expressed as one of a general limitation on tribal power, the case itself dealt with the narrower question whether tribes could assert regulatory powers over non-tribal members on fee lands within a reservation. At the time it was decided, many commentators greeted *Montana* with relief, because it did not foreclose all civil tribal power over nonmembers on tribal territory. Subsequent decisions, however, extended *Montana*'s reach. *See, e.g.*, Strate v. A-1 Contractors, 520 U.S. 438, 459 n.14 (1997) (holding that tribes' adjudicatory powers do not exceed their regulatory powers).

5. A few commentators discussed the shifting paradigm in the 1990s. *See, e.g.*, Allison M. Dussias, *Geographically-Based and Membership-Based Views of Indian Tribal Sovereignty: The Supreme Court's Changing Vision*, 55 U. PITT. L. REV. 1, 4 (1993); L. Scott Gould, *The Consent Paradigm: Tribal Sovereignty at the Millennium*, 96 COLUM. L. REV. 809 (1996) [hereinafter Gould, *Consent Paradigm*]. As used in this essay, consent refers to voluntary membership in an Indian tribe recognized by the federal government.

6. 532 U.S. 645 (2001).

7. *See id.* at 659.

8. *Id.* at 653 (quoting Duro v. Reina, 495 U.S. 676, 685 (1990)).

9. *See id.* at 655. Applying the first of *Montana*'s two exceptions, the Court decided that "a nonmember's actual or potential receipt of tribal police, fire, and medical services" was insufficient to constitute consent. *Id.* "If it did," observed the Court, "the exception would swallow the rule" that there be a nexus between the tribal tax or regulation and the consensual relationship of the nonmember. *Id.* To construe generalized benefits to nonmembers as constituting consent would "ignore[ ] the dependent status of Indian tribes and subvert[ ] the territorial restriction upon tribal power." *Id.* The Court also rejected application of the second *Montana* exception, stating that it was triggered only where nonmembers' conduct was so severe that it "actually 'imperil[s]' the political integrity of the Indian tribe." *Id.* at 657–58 n.12.

10. Amicus briefs were filed by sixteen separate and confederated tribes in support of the respondent Navajo Tribe. Many of these tribes had levied taxes on nonmembers that the tribes contended were essential for supporting public services for both members and

The second opinion, *Nevada v. Hicks*[11] ignored a principle laid down almost half a century ago—that states cannot regulate the affairs of Indians on reservations without authority from Congress.[12] Instead, in deciding that a tribal court did not have jurisdiction over a civil proceeding brought against state game wardens for conduct occurring on tribal land, the Court embraced a converse principle. Justice Scalia wrote that states possess "inherent jurisdiction" over reservations, except where their authority is limited by Congress.[13] "[I]t was 'long ago' that 'the Court departed from Chief Justice Marshall's view that 'the laws of [a State] can have no force' within reservation boundaries. 'Ordinarily,' it is now clear, 'an Indian reservation is considered part of the territory of the State.'"[14]

To Justice Souter, joined by Justices Kennedy and Thomas, the principal determinate of jurisdiction over civil matters on a reservation should be the membership status of the nonconsenting party, not the status of the underlying real estate.[15] That is, the paradigm for judging tribal sovereignty

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nonmembers. These services ranged from fire and police protection to building code enforcement, public health inspections, and public transportation. The revenue sources affected by *Atkinson* included, among others, real and personal property taxes, ad valorem taxes on utility rights-of-way, gasoline taxes, and sales and use taxes.

11. 533 U.S. 353 (2001).

12. *See* Williams v. Lee, 358 U.S. 217 (1959). The Court decided that an Arizona state court did not have jurisdiction to entertain a civil suit by a non-Indian against an Indian over conduct occurring on a reservation. Justice Black wrote that "Congress has ... acted consistently upon the assumption that the States have no power to regulate the affairs of Indians on a reservation." *Id.* at 220. "Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." *Id.* Justice Black added that "[i]t is immaterial that respondent is not an Indian. He was on the Reservation and the transaction with an Indian took place there." *Id.* at 223. In *Hicks*, an Indian brought suit in tribal court against state officers for trespass, abuse of process, and violation of civil rights in connection with execution of a warrant. *See Hicks*, 533 U.S. at 353. Although the warrant related to an off-reservation crime, the tribal court proceeding involved conduct on the reservation. *See id.* at 356. Nonetheless, and despite *Williams*, Justice Scalia pointedly observed that the Court had thus far avoided the question whether a tribal court may ever assert jurisdiction over a non-Indian. *See id.* at 374.

13. *See Hicks*, 533 U.S. at 365.

14. *Id.* at 361–62 (citations omitted) (quoting U.S. Dep't of Interior, Federal Indian Law 510, and n.1 (1958)) (citing Utah & Northern R. Co. v. Fisher, 116 U.S. 28 (1885)). The 1958 publication has been repudiated by some scholars. *See, e.g.*, Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405 (2003). *See also* Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 154 (1980) (observing "it must be remembered that tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States").

15. *See Hicks*, 533 U.S. at 375–76 (Souter, J., concurring).

should be membership, not territory. "The path marked best is the rule that, at least as a presumptive matter, tribal courts lack civil jurisdiction over nonmembers."[16]

Atkinson and *Hicks* have provoked concern and outrage among both tribal organizations and academics. The National Congress of American Indians (NCAI) has called for legislation to "reconfirm Tribes' inherent authority and place Tribes in their original position of full sovereignty."[17] Numerous scholars have offered remedies to strengthen tribal sovereignty. For example, Robert Clinton called upon Congress to amend 28 U.S.C. § 1738 to require that full faith and credit be extended to tribal court adjudications.[18] Gloria Valencia-Weber advocates, among other solutions, a revision of the Indian country statute to give tribal courts express jurisdiction over all reservation lands.[19] Carol Tebben calls upon the Court

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16. *Id.* at 376–77.

17. National Congress of American Indians, *Sovereignty Protection Comm. Descriptions, Legislative Options* (Sept. 11, 2001), *available at* http://www.ncai.org/main/pages/issues/governance/documents/committees.pdf. *See also infra* note 103 (describing NCAI legislative agenda for the 108th Congress).

18. Robert Clinton, Remarks at the University of Pennsylvania School of Law Symposium on Native Americans and the Constitution (Feb. 1–2, 2000). This legislation was enacted pursuant to the full faith and credit clause of the United States Constitution. *See* U.S. CONST. art. IV § 1. The Act states in relevant part that the "judicial proceedings of any court of any such State, Territory or Possession ... shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." Congress has not required federal and state courts to accord full faith and credit to all tribal court decisions, although it has required that full faith and credit be extended in specific matters. *See, e.g.*, 18 U.S.C. § 2265 (domestic violence orders); 25 U.S.C. § 1911(d) (child custody orders). Some states have accorded full faith and credit to tribal court decisions. *See, e.g.*, Gesinger v. Gesinger, 531 N.W.2d 17 (S.D. 1995); Barrett v. Barrett, 878 P.2d 1051 (Okla. 1994); *In re* Custody of Sengstock, 477 N.W.2d 310 (Wis. Ct. App. 1991); Fredericks v. Eide-Kirschmann Ford, Inc., 462 N.W.2d 164 (N.D. 1990); Sheppard v. Sheppard, 655 P.2d 895 (Id. 1982); *In re* Marriage of Red Fox, 542 P.2d 918 (Or. Ct. App. 1975); *cf.* Jones v. Meehan, 175 U.S. 1, 31–32 (1899). Other commentators have also appealed for the extension of full faith and credit to tribal court decisions. *See, e.g.*, Stacy L. Leeds, *Full Faith and Credit After* Nevada v. Hicks, Fall Judicial Conference, Montana Judges for Courts of Special Jurisdiction, Billings, Montana, October 2, 2001; Stacy L. Leeds, *Working Collaboratively on Full Faith and Credit across Tribal and State Lines*, Five-State Judicial Conference, Montana Supreme Court, Bozeman, Montana, June 25, 2001.

19. *See* Valencia-Weber, *supra* note 14 at 473–74 (referring to 18 U.S.C. § 1151 (1994)). Amending this statute to provide tribal court civil jurisdiction over rights-of-way within a reservation would affect a legislative override of *Strate v. A-1 Contractors*, in which the Court decided that a tribal court lacked jurisdiction over a tort occurring on a right-of-way within the reservation. *See* Strate v. A-1 Contractors, 520 U.S. 438, 459 (1994). The term Indian country is defined in 18 U.S.C. § 1151 as including:

to acknowledge the constitutional status of tribal governments as members of a "trifederal" republic.[20] Frank Pommersheim envisions protecting tribal sovereignty by a constitutional amendment.[21]

Among these and other scholars, at least three themes recur. First, the Court's continuing diminishment of territorial sovereignty owes to the majority's fixation on expanding the powers of the states. Second, salvaging sovereignty depends on implementing solutions that will insulate tribes and tribal courts from federal judicial inquiry. Third, implicitly, finding these solutions depends on conceptualizing sovereignty from a tribal point of view.

This essay suggests that themes such as these misperceive the underlying reason for the Court's new consent paradigm, and that because they do, prophylactic measures aimed at insulating tribes from judicial attack may only further isolate them. It may well be that the majority's preoccupation with states' rights sheds light on why it denied the Navajos the right to tax nonmembers on fee lands in *Atkinson*, despite substantial benefits to those taxed, while elsewhere it permitted New Mexico to tax nonmembers within the Jicarilla Apache reservation, despite evidence the state provided only modest benefits.[22] But federalism does not explain the Court's diminishment of tribal sovereignty in cases where states' rights have no bearing. In *Oliphant v. Suquamish Indian Tribe*[23] and *Duro v. Reina*[24] the Court stripped tribes of jurisdiction over crimes committed by non-Indians and nonmembers without any reference to state interests. Indeed there were none.[25] Neither does a conservative majority explain the reluctance of the

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> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government ... (b) all dependent Indian communities within the borders of the United States ... whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same[.]

Id.

20. Carol Tebben, *An American Trifederalism Based Upon the Constitutional Status of Tribal Sovereignty*, 5 U. PA. J. CONST. L. 318 (2003).

21. *See* Frank Pommersheim, *Is There a (Little or Not So Little) Constitutional Crisis Developing in Indian Law?: A Brief Essay*, 5 U. PA J. CONST. L. 271 (2003).

22. *See* Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1988) (upholding state taxation of oil and gas production of non-Indian leases within a reservation, despite evidence that state provided services amounting to less than four percent of revenues collected).

23. 435 U.S. 191 (1978).

24. 495 U.S. 676 (1990).

25. Historically, state courts did not have jurisdiction over crimes occurring in Indian country that involved Indians and non-Indians. *See* 18 U.S.C. § 1152 (1988). Jurisdiction was limited to the tribes or federal government. In 1953, Congress enacted Public Law 280,

Court's liberal members to support broad-based tribal jurisdiction. Justices Ginsburg[26] and Breyer[27] have each authored opinions that limit tribal powers.

The root cause of the Court's unwillingness to vest tribes with regulatory or adjudicatory jurisdiction over non-Indians and nonmembers is its inability to reconcile the constitutional protection of individual rights with the tribal conception of group rights. There is virtually no textual basis in the Constitution to support tribal authority over nonmembers, while the rights of individuals to due process and equal protection are hallmarks of the Constitution and the Court's modern jurisprudence.[28] Hence, when contests have pitted a tribe against an individual, unless the individual was a member of the tribe, the tribe has almost always failed.[29] In those few cases where the Court has found that tribes may exercise authority over nonmembers, it has done so because Congress delegated the authority,[30] or

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which supplanted tribal court jurisdiction in several states. Act of August 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified and amended at 18 U.S.C. § 1162 (2000)); 25 U.S.C. §§ 1321–26 (2000); 28 U.S.C. § 1360 (2000). Shortly before *Oliphant* was decided, Washington relinquished Public Law 280 jurisdiction over reservations in that state, including the Port Madison reservation of the Suquamish Indian Tribe. *See* Chief Seattle Properties, Inc. v. Kitsap County, 541 P.2d 699 (1975).

26. Justice Ginsburg wrote for a unanimous Court in *Strate v. A-1 Contractors*, which decided that tribes' adjudicatory powers do exceed their regulatory powers. *See* Strate v. A-1 Contractors, 520 U.S. 438, 442 (1997).

27. Justice Breyer wrote for the Court in *Chickasaw Nation v. United States*, which discounted a canon of construction that ambiguous statutory provisions are to be interpreted for the benefit of Indians, deciding instead that the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(d), fails to exempt tribes from federal gambling-related excise and occupational taxes. *See* Chickasaw Nation v. United States, 534 U.S. 84, 86 (2001).

28. *See* U.S. CONST. art. I, § 8, cl. 3 (conferring power on Congress to "regulate Commerce ... with the Indian Tribes"). Tribes are referred to expressly only once in the Constitution. *See id.* Indians are mentioned twice, in Article I and the Fourteenth Amendment, but only in reference to persons counted in congressional apportionments. *See* U.S. CONST. art I, § 2, cl. 3; U.S. CONST. amend. XIV (excluding "Indians not taxed" from population counts). Elsewhere, the Constitution confers power on the President to make treaties with the advice and consent of the Senate. *See* U.S. CONST. art. II, § 2, cl. 2.

29. The paradigms are *Oliphant*, finding tribes lack inherent power to prosecute non-Indians for crimes, and *Talton v. Mayes*, deciding tribal prosecution of tribal members is not subject to Fifth Amendment grand jury requirements because of tribal exercise of the power of inherent sovereignty. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 212 (1978); Talton v. Mayes, 163 U.S. 376, 384 (1896).

30. *See, e.g.*, United States v. Mazurie, 419 U.S. 544, 557 (1975) (upholding congressional delegation of authority to tribes to regulate introduction of liquor into Indian country on grounds that tribes possess attributes of sovereignty over both their members and their territory).

because it found an instance of consent.[31]

If there is any chance to shift the paradigm of tribal sovereignty back toward *Worcester* from *Montana*, it depends on finding solutions that will persuade a reluctant, often hostile, Court that tribes can appropriately assert regulatory and adjudicative authority over all individuals in their territory, regardless of consent, because their authority is subject to the safeguards of the Constitution. Meaningful sovereignty after *Atkinson* and *Hicks*—sovereignty over territory, not just tribal members—requires that tribal powers be centered in, not insulated or conjured from the Constitution.

WEAKNESSES IN THE DOCTRINAL BEDROCK OF INHERENT SOVEREIGNTY AND CONGRESSIONAL TRUST RESPONSIBILITY

The failure of two opposing doctrines accounts for much of the Court's new emphasis on consent-based sovereignty. The failure also illuminates the Court's unwillingness to identify tribal rights superior to those of nonmember individuals, and helps explain why *Atkinson* and *Hicks* will not be overcome by focusing on measures aimed only at protecting tribal power. These failed doctrines, one the virtual reciprocal of the other, are the doctrines of inherent sovereignty and Congressional trust responsibility. Each doctrine has roots in *Worcester*. The one asserts that tribes are sovereigns whose powers are both pre- and extra-constitutional,[32] the other that tribal powers, indeed tribes themselves, are subject to complete defeasance by the Congress.[33]

As I argue elsewhere, the doctrine of inherent sovereignty has been unequal to the task of protecting tribal power because it has no textual support within the Constitution.[34] Bold as it was, Justice Marshall's view

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31. *See, e.g.*, Washington v. Confederated Tribes of the Colville Indian Reservation, 447 U.S. 134, 152 (1980). In 1980, the Court determined that tribes possess inherent power to tax nonmembers for transactions occurring on trust lands, such power being deemed a fundamental attribute of sovereignty. *See id.* Subsequent decisions suggest that *Colville* does little more than confirm tribal power over nonmembers who consent to deal with them, as by buying cigarettes at tribal smokeshops. *See id. See also* Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 492 U.S. 408, 427 (1989) (opinion of White, J.) (reconciling *Colville* with *Montana* on basis of consensual relationship). In *Atkinson*, Chief Justice Rehnquist suggests that consent must be based on express commercial dealings or similar arrangements, not simply on the receipt of benefits. *See* Atkinson Trading Co., Inc. v. Shirley, 532 U.S. 645, 655 (2001).

32. *See, e.g.*, CHARLES WILKINSON, AMERICAN INDIANS, TIME AND THE LAW 111–13 (1986) (describing tribal powers as existing outside the constitution).

33. *See, e.g.*, FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 206–36 (1988) (contending tribes possess those inherent powers that have not been expressly limited by Congress).

34. *See* Gould, *Consent Paradigm*, *supra* note 5, at 895–902.

that Georgia had no authority to impose its laws within the territory of the Cherokees was what now would be regarded as federal common law, interstitial rather than constitutional.[35] This is why Justice Scalia could discard *Worcester* so easily in *Hicks*.[36] More to the point, because the doctrine of inherent sovereignty lacks constitutional underpinnings, it has consistently failed the tribes whenever it has been advanced as a basis for asserting power over nonmembers. Thus, the Court has found inherent power insufficient for tribes to prosecute non-Indians[37] or nonmember Indians for crimes.[38] It has found inherent power insufficient for tribes to regulate hunting and fishing by non-Indians on fee lands within their reservations,[39] even when Congress has acquired the lands without intent to limit tribal jurisdiction.[40] While the Court has held that tribes can regulate land use on fee lands in areas of their reservations that are essentially closed to non-Indians,[41] it has effectively limited the reach of this holding to its facts.[42] The Court has also found that a tribe's inherent sovereignty is insufficient to extend its adjudicative jurisdiction beyond its capacity to

35. *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). Federal common law ordinarily refers to that body of law decided by federal courts which is neither governed by the Constitution, Acts of Congress, nor by state law pursuant to the Erie Doctrine. *See* Erie R. Co. v. Thompkins, 304 U.S. 64 (1938). As applied to federal Indian law, it refers to decisions in which the Court construes congressional intent in the absence of explicit legislation. *See id.*

36. *See supra* text accompanying note 12. Of course, the *Hicks* Court was also declaring federal common law, and is presumably subject to contrary legislation by the Congress, lest the Court exceed its Article III authority. *See* Nevada v. Hicks, 533 U.S. 353 (2001). This is the basis of legislation designed to overturn *Duro v. Reina*, 495 U.S. 676 (1990), discussed in *infra* text accompanying notes 111–14. *See also* Nell Jessup Newton, *Permanent Legislation to Correct* Duro v. Reina, 17 AM. INDIAN L. REV. 109, 115 (1992) (discussing legislative correction of Court's misunderstanding of congressional intent).

37. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978) (finding inherent sovereignty proscribed when tribes assert powers inconsistent with their status).

38. *See Duro*, 495 U.S. at 685 (declaring retained sovereignty limited to authority necessary to control internal tribal matters). *But see infra* text accompanying note 110 (discussing congressional override of *Duro*).

39. *See* Montana v. United States, 450 U.S. 544, 564 (1981) (citing United States v. Wheeler, 435 U.S. 315, 326 (1977) (declaring that exercise of tribal power beyond internal relations requires congressional delegation of authority)).

40. *See* South Dakota v. Bourland, 508 U.S. 679, 691 (1993) (declaring that inherent tribal rights to regulatory control are destroyed when treaty rights are abrogated, regardless of congressional purpose).

41. *See* Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation, 492 U.S. 408, 442 (1989) (Stevens, J., concurring).

42. *See* Atkinson Trading v. Shirley, 532 U.S. 645, 658 (2001) (finding *Brendale* judgment turned on closed nature of tribal lands and jeopardy to tribe that would occur from non-Indian development).

regulate,[43] and recently, in *Hicks*, left open the possibility that it may find tribes' adjudicative powers fall short of even their diminished regulatory powers over nonmembers.[44]

One commentator writing in these pages observes that inherent sovereignty has become so doubtful a basis for asserting tribal power that it constitutes malpractice to urge it as grounds for bringing suit.[45] Responses to *Atkinson* and *Hicks* that try to resurrect this power are likely to be equally unavailing. Yet proposals that would reconstruct inherent sovereignty are what many tribal advocates champion, aided, ironically, by the doctrine of congressional trust responsibility.

According to the latter doctrine, Congress has plenary authority over tribes, hence power to correct the Court's impoverished view of tribal sovereignty. But this congressional authority has little more textual support within the Constitution than the doctrine of inherent sovereignty. At best, it is a fiduciary responsibility that can be extrapolated from the treaty power[46] and the Indian Commerce Clause.[47] At worst, it is a judicial grant of unbridled power to the Congress to act without constitutional basis or constraint.

In the nineteenth century, the doctrine enabled Congress to impose criminal laws on tribal Indians on reservations,[48] to divide tribal lands into allotments,[49] and to abrogate its treaties.[50] In the twentieth century, the

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43. *See* Strate v. A-1 Contractors, 520 U.S. 438, 453 (1997).

44. *See* Nevada v. Hicks, 533 U.S. 353, 358 (2001).

45. *See* Steven Paul McSloy, *The "Miner's Canary": A Bird's Eye View of American Indian Law and Its Future*, 37 NEW ENG. L. REV. 733, 738 (2003).

46. *See* U.S. CONST. art. II, § 2, cl. 2.

47. *See* U.S. CONST. art. I, § 8, cl. 3; *infra* notes 49–53 and accompanying text (discussing Morton v. Mancari, 417 U.S. 535 (1974)).

48. The Major Crimes Act of 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153 (2000)) subjects Indians to federal court prosecution for certain crimes committed in Indian country, originally including murder, manslaughter, rape, arson, burglary, larceny, and assault with intent to kill. Following enactment of the legislation in 1885, it was challenged in *United States v. Kagama*, 118 U.S. 375 (1886) as exceeding Congress' Article I authority. Hitherto, only tribes had jurisdiction over crimes committed in Indian county by Indians. The Court observed that no provisions of the Constitution empowered Congress to regulate the internal affairs of tribes. *See Kagama*, 118 U.S. at 378–79 (referring to the phrases "Indians not taxed" in U.S. CONST. art. I, § 2, cl. 3, and U.S. CONST. amend. XIV, §2, and to the Indian Commerce Clause, U.S. CONST. art. I, § 8, cl. 3). It nonetheless upheld the legislation, concluding that Congress' plenary power over tribes must exist "because it has never been denied, and because [Congress] alone can enforce its laws on all the tribes." *Id.* at 384–85.

49. The Indian General Allotment (Dawes) Act, ch. 119, 24 Stat. 388 (1887), provided for division of tribal lands into farming and grazing tracts, the ostensible purpose being to "civilize" tribal Indians by turning them into farmers. The allotment policy was a

doctrine lay behind legislative acts that terminated several tribes.[51] Even in its most benign formulation, the doctrine has often disadvantaged Indians and their tribes. It is this capacity to cause unexpected harm that cautions great care be taken before invoking congressional power to undo *Atkinson* and *Hicks*.

The present Court's conception of the doctrine of congressional trust responsibility was announced in *Morton v. Mancari*, a decision that upheld an employment preference for Indians in the Bureau of Indian Affairs (BIA).[52] In deciding that the preference did not violate the equal protection component of the Due Process Clause, the Court made two determinations that have since become mixed blessings for tribes and Indians. It decided, first, that the preference was not racial because it applied only to members of federally-recognized tribes, not to Indians in general.[53] As such, the preference was political.[54] Hence legislation that applied to Indians as members of quasi-sovereign entities was not susceptible to challenge on grounds that it improperly benefited a particular racial group.[55] Second, the Court decided that when Congress legislated respecting tribes, its actions did not require heightened scrutiny so long as the legislation was tied rationally to the fulfillment of Congress' trust obligation.[56]

These two determinations have fueled much debate and many articles, mine among them, because they have been turned against tribes and individuals at least as often as they have benefited them.[57] Only two years

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disastrous failure, resulting in an estimated 90-million-acre loss of tribal lands. *See* MONROE E. PRICE & ROBERT N. CLINTON, LAW AND THE AMERICAN INDIAN: READINGS, NOTES AND CASES 629 (2d ed. 1983).

50. *See, e.g.*, Lone Wolf v. Hitchcock, 187 U.S. 553, 566 (1903) (deciding Congress had power to abrogate treaty provisions requiring tribal consent to allot a reservation, and that treaty abrogations presented nonjusticiable political questions).

51. Congress passed fourteen tribal termination acts between 1954 and 1962. *See* Michael C. Walch, *Terminating the Indian Termination Policy*, 35 STAN. L. REV. 1181, 1187 (1983). Virtually all of these tribes were later successful in regaining tribal status, although many recovered only a small portion of their former lands. *See* L. Scott Gould, *The Congressional Response to* Duro v. Reina: *Compromising Sovereignty and the Constitution*, 28 U.C. DAVIS L. REV. 53, nn.8–9 (1995) [hereinafter Gould, *Congressional Response*].

52. 417 U.S. 535, 555 (1974).

53. *See id.* at 553 n.24.

54. *See id.*

55. *See id.* at 554.

56. *See* Morton v. Mancari, 417 U.S. 535, 555 (1974).

57. *See, e.g.*, L. Scott Gould, *Mixing Bodies and Beliefs: The Predicament of Tribes*, 101 COLUM. L. REV. 702, 711–18, 726–36 (2001) [hereinafter Gould, *Mixing Bodies*]; Gould, *Consent Paradigm*, *supra* note 5, at 854–64; Ralph W. Johnson & E. Susan Crystal, *Indians and Equal Protection*, 54 WASH. L. REV. 587, 605 (1979); David C. Williams, *The Borders of the Equal Protection Clause: Indians as Peoples*, 38 UCLA L. REV. 759, 759

after *Mancari* was decided, for example, its concept of political classifications was invoked to deny Indians access to a state court in an adoption proceeding.[58] The Court reasoned that although the Indian plaintiff was denied a right available to any other citizen of the state, the disparate treatment was justified because the authorizing legislation was beneficial to the class of which the Indian plaintiff was a member.[59] One year later, again applying *Mancari*, the Court decided that an Indian, charged with murdering another Indian on a reservation, could be prosecuted under the Major Crimes Act[60] even though a non-Indian could not.[61] Federal regulation of Indian affairs, the Court concluded, was not based on impermissible racial classifications because it dealt with Indians and tribes as "political communities."[62]

The effect of these decisions was to permit Congress and the Court to deal with Indians in ways that would be constitutionally offensive if applied to other groups. Moreover, even when the Court was willing to consider an equal protection challenge brought by Indians, *Mancari* required only minimal judicial scrutiny. In one case, the Court upheld legislation that treated equally situated Indians differently, even though Congress was completely unaware of the disparate treatment when it acted.[63] All that was required was that there be some rational connection between the legislation and fulfillment of the trust responsibility.[64]

Mancari has influenced not only the Court's disposition of equal protection claims by individual Indians; it has also influenced the Court's conception of tribes and tribal powers. Shortly after *Mancari* was decided, the Court applied its rationale to uphold the immunity of Flathead reservation Indians from various Montana taxes.[65] The Court rejected the state's equal protection claim on grounds that the immunity was created as an exercise of Congress' trust responsibility toward tribes as polities, not as

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(1991).

58. *See* Fisher v. Dist. Ct. of the 16th Jud. Dist. of Mont., 424 U.S. 382, 390 (1976) (per curiam) (denying tribal member access to state court on grounds Congress had authorized tribe to exercise exclusive jurisdiction).

59. *See id.* at 390–91 (citing Morton v. Mancari, 417 U.S. 535, 551–55 (1974)).

60. *See supra* note 48 (discussing Major Crimes Act).

61. *See* United States v. Antelope, 430 U.S. 641 (1977).

62. *Id.* at 646.

63. *See* Del. Tribal Bus. Comm'n v. Weeks, 430 U.S. 73, 85 (1977) (citing *Mancari*, 417 U.S. at 555 (1974) (holding unequal distribution of Indian Claims Commission award not violative of equal protection when tied rationally to Congress' responsibility to tribes)).

64. *See id.*

65. *See* Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463 (1976) (rejecting equal protection claim brought by state attempting to impose taxes on cigarette sales to Indians on reservation and on personal property used on reservation).

racial groups.[66] Unfortunately, this rationale also meant that tribal members could be isolated from others present on their reservations.

In 1980, the Court permitted the State of Washington to impose sales taxes on Indians on the Colville reservation who were not members of the reservation tribes.[67] The Court reasoned that because nonmembers were not part of the governing tribes, they were no different from non-Indians, and therefore had no tax immunity.[68] The immediate result of the decision was to destroy a competitive advantage the Colville tribes had enjoyed in selling cigarettes.[69] A graver consequence was that the Court could use political status distinctions, and its concept of the congressional trust responsibility, to trivialize tribal claims for equal protection. Still graver was the prospect that the Court would use the concept of political status to confine the powers of tribal governments to their membership, thereby eliminating their sovereignty over their territory.

The first of these possibilities was realized when the Yakima tribes challenged the authority of the State of Washington to impose its laws within their reservation.[70] They contended that state enabling legislation singled out Indians in violation of the equal protection and due process guarantees of the Fourteenth Amendment.[71] Nevertheless, the Court decided that the state's powers were derivative from Congress, and that "the unique legal status of Indian tribes under federal law" permitted the federal government to single out tribal Indians with legislation that might otherwise offend the Constitution.[72] The congressional trust responsibility, which the Court had invoked as a rationale to uphold greater rights for Indians in *Mancari*, now supplied the reasoning to diminish constitutional protections.

The second of these possibilities, that of using political distinctions to limit the territorial authority of tribes, was realized in a succession of

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66. *See id.* at 480.

67. *See* Wash. v. Confederated Tribes of Colville Reservation, 447 U.S. 134 (1980).

68. *See id.* at 156.

69. The Makah, Lummi, and Colville tribes had generated substantial revenues selling cigarettes to purchasers who visited the Colville reservation, since they collected tribal taxes but not state taxes. As a result of the *Colville* holding, the tribes were forced to either forego their own cigarette taxes or to lose sales by imposing both state and tribal taxes. *See id.* at 170–71 (Brennan, J., dissenting).

70. *See* Wash. v. Confederated Bands & Tribes of Yakima Indian Nation, 439 U.S. 463 (1979).

71. *See id.* at 467. The state had enacted legislation under provisions of Public Law 280, a congressional grant of authority for states to exercise criminal and limited civil jurisdiction over reservations. *See supra* note 25.

72. *See Yakima Indian Nation*, 439 U.S. at 500–01 (quoting Morton v. Mancari, 417 U.S. 535, 551–52 (1974)).

decisions following *Mancari*.[73] The current ramification is the Court's constricting view of tribal sovereignty in *Atkinson* and *Hicks*.

Taken together, the doctrines of inherent sovereignty and trust responsibility have helped produce a state of affairs in which tribal powers are denigrated when tribes are pitted against nonmembers, and in which the rights of Indians as individuals are minimized in contests with their tribes. The fulcrum is consent. For those outside the fold—nonmembers and non-Indians—the Court expresses great solicitude for protected liberties.[74] For those inside, it frequently exhibits scorn.[75] The result is that the two doctrines have injured both tribes and their members.

What will surely fail in attempts to overcome *Atkinson* and *Hicks* are solutions that enlist Congress and its trust responsibility to revest tribes with inherent powers—implicitly nonreviewable powers—because doing so will only renew the losing contest between non-constitutional group rights and individual (nonmember) rights. Better to protect tribal sovereignty by making tribal actions subject to the Constitution.

RECONSIDERING *MARTINEZ*

In 1968, Congress responded to criticism that tribal governments abused the rights of members by enacting the Indian Civil Rights Act (ICRA), which extended most of the protections of the Bill of Rights into tribal territory.[76] The legislation, however, did not contain an express provision for federal enforcement in civil actions.[77]

Santa Clara Pueblo v. Martinez posed the question whether a federal

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73. *See, e.g.*, Duro v. Reina, 495 U.S. 676, 693 (1990) (observing that inherent sovereignty of tribes amounts to authority over only those consenting to be tribal members); Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 208–10 (1978) (deciding tribal criminal jurisdiction over non-Indians implicitly divested by tribes' dependent status); United States v. Wheeler, 435 U.S. 313, 326 (1978) (indicating inherent tribal powers over nonmembers implicitly divested).

74. *See, e.g.*, Gould, *Consent Paradigm*, *supra* note 5, at 861 (contending that differing treatment of non-Indians by Court may turn on tribal membership).

75. *See, e.g.*, Gould, *Mixing Bodies*, *supra* note 57, at 738–41 (discussing the Court's hostility to groups whose memberships are based on ancestry, in reference to *Rice v. Cayetano*, 528 U.S. 495 (2000)).

76. *See* Indian Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 77 (codified at 25 U.S.C. §§ 1301–1303 (2000)). There are significant differences between ICRA and the Bill of Rights. For example, ICRA does not guarantee indigents the right to appointed counsel. It also does not prohibit the establishment of religion (as a means to protect Pueblo theocratic governments).

77. ICRA does provide for federal habeas corpus review in criminal matters. *See* 25 U.S.C. § 1303 (2000).

remedy for ICRA violations could be implied.[78] A Santa Clara ordinance permitted the children of male members who married outside the tribe to become tribal members but not the children of female members who married outside the tribe.[79] Julia Martinez, a full-blooded tribal member married to a Navajo, brought suit in federal district court on grounds that her daughter was denied equal protection under ICRA.[80]

In an opinion written by Justice Thurgood Marshall, the Court decided that sovereign immunity prevented ICRA violations from being tried in federal courts, absent an express congressional directive to the contrary.[81] The Court reasoned that ICRA had the dual objectives of protecting the rights of Indians vis-á-vis their tribes and strengthening tribal governments.[82] It declined to infer a remedy from Congress' silence that might unbalance these objectives.[83]

Martinez is a difficult decision. At least one commentator has viewed it as an affirmation of group rights,[84] and, without question, in upholding the sovereign immunity of tribes, the decision protected tribal resources from depletion in federal civil suits for damages. Yet Julia Martinez, who had sought only declaratory and injunctive relief, was left without a remedy.[85] Indeed, Justice Marshall wrote a year after *Martinez* was decided that the case marked the only instance in which the Court had reviewed an explicit federal right and failed to find a remedy.[86]

In recent years, much academic ink has been spilled over the Court's decision in *Alden v. Maine*[87] in which the Court held that sovereign

78. 436 U.S. 49, 52 (1978).

79. *Id.* at 51.

80. *Id.*

81. *Id.* at 63–64.

82. *Id.* at 62.

83. *Id.* at 60.

84. *See* Ronald R. Garet, *Community and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001, 1035 (1983) (reasoning *Martinez* is coherent only as a recognition of group rights).

85. She had already sought unsuccessfully to persuade the Santa Clara Pueblo to change its membership requirements and later sought unsuccessfully for action by the Congress. *See* Judith Resnick, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671, 675 n.15 (1989).

86. *See* Cannon v. University of Chicago, 441 U.S. 677, 690 n.13 (1979) (distinguishing *Martinez* on grounds federal remedies would interfere with matters relegated to semisovereign tribes). In recent years, the Court has become decidedly less willing to find implied private rights of action to enforce federal laws. *See, e.g.*, Gonzaga University v. Doe, 536 U.S. 273 (2002) (deciding creation of new rights enforceable by private parties under 42 U.S.C. § 1983 requires clear and unambiguous evidence of congressional intent).

87. 527 U.S. 706 (1999). The Supreme Court held that state probation officers could not seek damages against the State of Maine for violations of the Fair Labor Standards Act

immunity protects states from most damage suits by citizens in state courts to enforce federal rights.[88] No such widespread hue and cry was raised for Julia Martinez.[89] Nor did Congress respond to *Martinez* as it might have, but could not have done to *Alden*, by providing express civil remedies in federal courts.

At its core, *Martinez* dealt with an exercise of Congress' trust responsibility. ICRA was a congressional divestiture of tribal sovereignty intended to benefit Indians as individuals.[90] This occurred because tribes exercising their inherent powers were not subject to the Constitution.[91] *Martinez* turned ICRA's purpose on its head. But whether even tribes benefited from the Court's solicitude for sovereignty is doubtful.

(FLSA), 29 U.S.C. §§ 201–219 (1994) in state court, deciding that Congress lacks power to waive states' Eleventh Amendment sovereign immunity under the Necessary and Proper Clause. *Id.* at 732. Three years earlier, the Court had decided that the states' sovereign immunity protected them from damage suits by private citizens to enforce federal laws in federal court, unless such laws were enacted pursuant to Section 5 of the Fourteenth Amendment. *See* Seminole Tribe v. Florida, 517 U.S. 44, 59, 76 (1996). The effect of these decisions is to immunize states from damage suits by individuals seeking to redress violations of federal law.

88. *See, e.g.*, Erwin Chemerinsky, *The Hypocrisy of* Alden v. Maine*: Judicial Review, Sovereignty Immunity and the Rehnquist Court*, 33 LOY. L.A. L. REV. 1283 (2000) (decrying Eleventh Amendment decisions as preferring state government power over individual rights); Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001) (contending *inter alia* that sovereign immunity frustrates deterrence because states can violate federal laws with impunity); Louise Weinberg, *Of Sovereignty and Union: The Legends of* Alden, 76 NOTRE DAME L. REV. 1113, 1181 (2001) (lamenting that until *Alden* the Constitution would have protected individuals from state deprivations of property without due process: "The [Court's] message is that Congress does not have the capacity to govern this country with which, we supposed, the Founders endowed it, the power that Chief Justice Marshall made plain, that the Civil War paid for in blood, and that the post New Deal Court, we imagined, finally acknowledged."). *But see* William P. Marshall, *Understanding* Alden, 31 RUTGERS L. J. 803 (2000) (concluding *Alden* does not compromise constitutional integrity by only prohibiting individuals from seeking damage awards).

89. *But see, e.g.*, Resnick, *supra* note 85, at 719–21 (describing federal influence concerning tribal membership and significance of loss of federal benefits when membership is denied); Christina D. Ferguson, Martinez v. Santa Clara Pueblo*: A Modern Day Lesson on Tribal Sovereignty*, 46 ARK. L. REV. 275, 301 (1993) (faulting Court for denying civil rights to Indians while upholding tribal sovereignty that elsewhere it had crippled).

90. One commentator faults *Martinez* on precisely this basis. *See* Milner S. Ball, *Stories of Origin and Constitutional Possibilities*, 87 MICH. L. REV. 2280, 2295 (1989) (contending that in upholding ICRA the Court affirmed an unconstitutional exercise of congressional power).

91. *See, e.g.*, Santa Clara Pueblo v. Martinez, 436 U.S. 49, 55 (1978) (observing tribes historically unconstrained by constitutional limitations imposed on federal and state governments); Talton v. Mayes, 163 U.S. 376, 384 (1896) (holding that the Fifth Amendment did not apply in tribal prosecution of tribal member).

Had Julia Martinez been sued in a civil action by her tribe, she would have been subject to its jurisdiction by virtue of her membership. Arguably, she would also have been subject to its jurisdiction in any criminal proceeding.[92] But nonmembers did not necessarily need to be involved with ICRA or with tribal courts. Weeks before *Martinez* was decided, the Court ruled that tribes lacked jurisdiction to try non-Indians in criminal proceedings.[93]

Following *Martinez*, various avenues were sought by civil litigants to circumvent actions in the tribal courts.[94] Among the most notable challenges were *National Farmers Union Insurance Cos. v. Crow Tribe*[95] and *Iowa Mutual Insurance Co. v. LaPlante*,[96] which upheld, respectively, the power of federal district courts to review tribal court decisions on the basis of federal question[97] and diversity jurisdiction.[98] These decisions, which manifested deference to tribal court adjudications, have since been held to state only prudential exhaustion rules.[99]

What if *Martinez* had come out the other way? Deference to the ICRA rights of individual Indians would have meant that Julia Martinez had a remedy in federal court. It seems equally possible that if federal review of tribal court decisions were generally possible, nonmember litigants might also have been willing over the years to submit to tribal court jurisdiction. By insulating tribes from federal ICRA remedies, *Martinez* may well have injured tribes themselves by inviting the challenges that have undercut their

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92. She would also have been subject to the tribe's jurisdiction in a misdemeanor criminal proceeding, but possibly not for commission of a crime subject to the Major Crimes Act. *See* Gould, *Congressional Response*, *supra* note 51, at 85–86 & n.141.

93. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978). Kevin Gover and Robert Laurence observe that Mark Oliphant, a non-Indian accused of misdemeanors by the Suquamish Tribe, had a clear ICRA claim for which a federal habeas corpus remedy was available. He chose instead to challenge the sovereign power of the tribe. In *Oliphant*, the authors point out, discussion of ICRA is relegated to a footnote. *See* Kevin Gover & Robert Laurence, *Avoiding* Santa Clara Pueblo v. Martinez*: The Litigation in Federal Court of Civil Actions Under the Indian Civil Rights Act*, 8 HAMLINE L. REV. 497, 511 (1985).

94. *See generally*, Gover & Laurence, *supra* note 93 (discussing litigation of ICRA cases in federal court).

95. 471 U.S. 845 (1973).

96. 480 U.S. 9 (1987).

97. *See* 28 U.S.C. § 1333. In *National Farmers* the Court decided that non-Indian defendants properly invoked federal jurisdiction on allegations that tribal court jurisdiction had been divested by federal law. *See* 471 U.S. at 852.

98. *See* 28 U.S.C. § 1332. In *Iowa Mutual* the Court declined to find that federal diversity jurisdiction divested tribal courts of jurisdiction over nonmembers, but did hold that if a tribal appeals court held that the tribe had jurisdiction, the defendant could challenge the determination in federal court. *See* 480 U.S. at 17–19.

99. *See* Strate v. A1 Contractors, 520 U.S. 438, 448–50 (1997).

jurisdiction. Three members of the current Court openly express doubts about the fairness of the tribal courts and the adequacy of their laws and procedures by pointedly observing that losing parties are unable to remove or appeal to state or federal courts.[100] The majority, citing *National Farmers*, now hints darkly that it may find there is no civil jurisdiction whatsoever over nonmember defendants in tribal court proceedings.[101]

Reconsidering *Martinez* from an individual point of view, that in some respect involves the federal judiciary, will entail a loss of tribal sovereignty. Yet the loss will only be superficial if, in exchange, tribal courts receive broader jurisdiction. The NCAI hopes to initiate legislation emphasizing such an exchange in the 108th Congress.[102] A draft version would provide for federal appellate court review of tribal court decisions, while empowering tribes to assume both civil and criminal jurisdiction over all persons in their territory.[103] Surely, proposals such as these, that protect the rights of individuals, are the surest way to regain sovereignty lost in the decades from *Montana* through *Atkinson* and *Hicks*.[104]

THE *DURO* LEGISLATION POINTING WHERE A *HICKS* FIX SHOULD NOT GO

In its 2002 term, the Supreme Court denied certiorari in *United States v. Enas*.[105] In failing to review the case, the Court let stand an exercise by Congress of its trust responsibility that is inflicting a continuing injury on tribes and Indians. *Enas* is one of a handful of appellate decisions to consider the constitutionality of legislation that overturns the Court's decision in *Duro v. Reina*.[106] *Duro* held that tribes do not have jurisdiction to bring criminal prosecutions in tribal court against Indians who are not

100. *See* Nevada v. Hicks, 533 U.S. 353, 384–85 (Souter, J., joined by Kennedy, J. and Thomas, J., concurring).

101. *See id.* at 358 n.2 (citing 471 U.S. at 855–56).

102. Telephone Interview with John Dossett, NCAI General Counsel (Apr. 4, 2003).

103. *See id.* (discussing draft §§ 5 and 7). The final version of the legislation is expected to exempt from federal review tribal actions based on "traditional and customary governance practices." Resolution #SD-02-005, NCAI (Nov. 15, 2002).

104. *See also infra* text accompanying notes 141–47 (discussing a dual-court system as a possible compromise to restore broad-based tribal jurisdiction).

105. *See* 225 F.3d (9th Cir. 2001), *cert. denied*, 534 U.S. 1115 (2002).

106. 495 U.S. 676 (1990). *See also, e.g.*, Means v. N. Cheyenne Tribal Ct., 154 F.3d 941 (9th Cir. 1998); United States v. Weaselhead, 156 F.3d 818 (8th Cir. 1998). On Mar. 24, 2003, shortly before this article was published, the Eighth Circuit Court of Appeals decided a double jeopardy challenge to the *Duro* legislation differently from the Ninth Circuit's resolution of a similar challenge in *Enas*. *See* United States v. Lara, No. 01-3695, 2003 WL 1452033 (8th Cir. 2003). The conflict between the circuits may at last lead to Supreme Court review.

members of the forum tribe.[107] The decision paralleled *Oliphant*, which had earlier reached the same result concerning tribal jurisdiction over non-Indians.[108]

Duro caused an uproar among tribes because it created a jurisdictional void in which neither tribes, nor states, nor the federal government had authority to try nonmember Indians for misdemeanors committed on tribal lands.[109] Shortly after *Duro* was announced, Congress passed corrective legislation. It amended ICRA to acknowledge the "inherent power of Indian tribes, hereby recognized and affirmed, to exercise criminal jurisdiction over all Indians."[110] Congress did not, however, restore tribes' ability to prosecute non-Indians; it left *Oliphant* intact.

The wording of the legislation is significant. It does not purport to delegate congressional authority to tribes; instead it recognizes tribes' inherent power.[111] The distinction is critical because the Court has made plain that when Congress delegates authority, the powers delegated must be constitutional.[112] If the *Duro* legislation operated as a delegation, it would be susceptible to challenge as a violation of the equal protection component of the Fifth Amendment.[113] But if the legislation simply corrected the Court's errant view of tribes' inherent power, equal protection would not become an issue.[114] Tribes would be required by ICRA to treat defendants equally, but their jurisdiction could be exercised only over those they had the inherent right to prosecute.

The legislation passed unanimously, hailed by tribes and scholars.[115]

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107. *See Duro*, 495 U.S. at 688.

108. *See* Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 209 (1978).

109. *See* Gould, *Congressional Response*, *supra* note 51, at 84–87 (discussing limits of tribal, state, and federal jurisdiction over crimes occurring in Indian country).

110. Department of Defense Appropriations Act, Pub. L. No. 101-511, § 8077, 104 Stat. 1856, 1892–93 (1990) (made permanent by Criminal Jurisdiction Over Indians Act of 1991, Pub. L. No. 102-137, 105 Stat. 646 (1991)).

111. *See id.*

112. The *Duro* Court itself expressed doubt as to whether Congress could delegate authority to tribunals that do not provide constitutional protections as a matter of right. *See* Duro v. Reina, 495 U.S. 676, 693–94 (1990) (citing Reid v. Covert, 354 U.S. 1 (1957)).

113. *See* Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (incorporating the equal protection clause of the Fourteenth Amendment into the Fifth Amendment).

114. At least it would not become an issue unless the Court determined that even congressional recognition of inherent power is subject to strict scrutiny under the Fifth Amendment. *See* Gould, *Mixing Bodies*, *supra* note 57, at 744–47 (contending that *Rice*, 528 U.S. 495 (2000) contemplates that Congress' powers under the Indian Commerce Clause are limited by other provisions of the Constitution).

115. *See, e.g.*, Philip S. Deloria & Nell Jessup Newton, *The Criminal Jurisdiction of Tribal Courts over Non-Member Indians*, 38 FED. B. NEWS & J. 70 (1991); Newton, *supra* note 36; Alex Tallchief Skibine, Duro v. Reina *and the Legislation that Overturned It: A*

Consider, however, the import of this tribe-centered approach to sovereignty for individuals: Albert Duro is subject to the jurisdiction of a tribe, but not Mark Oliphant.[116] The basis for this distinction is that Duro is an Indian and Oliphant is not. Julia Martinez might at least be said to be a member of the class that benefited from the Court's decision in her case, as Josephine Runsabove was said to be in *Fisher*.[117] Each was a member of her tribe. But the *Duro* fix is aimed specifically at Indians who are not and likely never will be members of the prosecuting tribe.[118]

In writing for the Court in *Duro*, Justice Kennedy observed that "[t]ribes are not mere fungible groups of homogenous persons among whom any Indian would feel at home."[119] The Court could perceive no reason to distinguish nonmember Indians from non-Indians.[120] Yet the *Duro* legislation divides not only reservations, it also reaches into households.[121]

Had the Court decided *Duro* on the basis of the Fifth Amendment, Congress could not have substituted its own vision. But the *Duro* holding did not turn upon the Constitution. It expressed federal common law: a judicial second-guess of congressional policy in the absence of express intent.[122] Congress has no power to insist on its own interpretation of the Constitution,[123] but as we have seen, it does have plenary power over

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Power Play of Constitutional Dimensions, 66 S. CAL. L. REV. 767 (1993).

116. The method of this legislative override, which I criticize here and extensively in Gould, *Congressional Response*, *supra* note 51, was conceived by Philip S. Deloria and Nell Jessup Newton, than whom Native Americans could not find more devoted advocates.

117. *See supra* notes 58 & 59 and accompanying text (discussing Fisher v. District Court, 424 U.S. 382 (1976)). Josephine Runsabove and her husband, who had attempted to adopt the child of a tribal member in a state proceeding, were both members of the Northern Cheyenne tribe.

118. Most nonmember Indians cannot become tribal members, because membership usually turns on the requirement that an individual possess a specified quantum of blood in the particular tribe. *See* Gould, *Mixing Bodies*, *supra* note 57 at 721–23 (discussing requirements used in determining tribal membership).

119. Duro v. Reina, 495 U.S. 676, 695 (1990).

120. *See id.* at 695–96 (comparing non-Indians and nonmember Indians on reservations and concluding that their similar jurisdictional characteristics logically require similar jurisdictional status).

121. *See* Gould, *Congressional Response*, *supra* note 51, at 83–93 (discussing the jurisdictional quandary among Indians, nonmember Indians, and non-Indians that can occur within a single household). Thelma Oberly, Clerk of the Tribal Court on the Nez Perce reservation in northern Idaho (where I once supervised University of Idaho law students in a tribal public defender program) explained in a conversation on February 6, 2003, that domestic crimes on the reservation often go unpunished because neither tribal nor state law enforcement officers can decide who has jurisdiction.

122. *See supra* note 35 and accompanying text (discussing federal common law).

123. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

Indian affairs. The *Duro* legislation is a congressional correction of the Court.[124]

But think about the implications of this exercise of Congress' trust responsibility. The *Duro* fix does not simply substitute Congress' view for the Court's; it makes that view essentially non-justiciable. Why? Because the legislation "recognizes" inherent power and does not purport to delegate authority.[125] Remember that inherent power is not subject to the Constitution unless Congress limits it.[126] If this legislation stands, Congress could recognize the inherent right of Chippewa Indians to prosecute their traditional enemies, the Sioux, but not the other way around.[127] Or it could recognize an inherent right for Cherokees to hold slaves, as they, the Founding Fathers, and other tribes once did.[128] Absurd you say? Congress would never legislate unequal rights? *It already has.* It passed the *Duro* legislation. The Court would never stand for it? *It already has.* Nine to zip, it refused to review the challenge to the legislation.[129]

In failing to grant certiorari in *Enas*, the Court let stand an exercise of the trust responsibility whose express purpose is to permit incarceration of Indians by tribes who are forbidden to incarcerate non-Indians. This distinction is anything but trivial.[130] Yet, incredibly, one scholar advocates future exercise of this new brutal instrument by Congress until the day (which will never arrive) when states ratify a constitutional amendment that he proposes to protect the sovereignty of tribes.[131]

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124. *See* Gould, *Congressional Response*, *supra* note 51, at 79 (discussing *Duro* legislation as correction of federal common law, citing Philip S. Deloria & Nell Jessup Newton, *The Criminal Jurisdiction of Tribal Courts over Non-Member Indians*, 38 FED. B. NEWS & J. 70 (1991)).

125. Department of Defense Appropriations Act, Pub. L. No. 101-511, § 8077(b), 104 Stat. 1856, 1892 (1990).

126. *See supra* notes 32 & 33 and accompanying text.

127. *See, e.g.*, Greywater v. Josuah, 846 F.2d 486, 493 (8th Cir. 1988) (noting record evidence of cultural, legal, and racial differences between Devils Lake Sioux Tribe and Turtle Mountain Band of Chippewa Indians, and citing treaties brokered by United States to enforce peace between certain tribes).

128. *See, e.g.*, Gould, *Mixing Bodies*, *supra* note 57, at 719 n.121 (citing references to slavery in DEWARD E. WALKER, JR., INDIANS OF IDAHO 145 (1982) and SCOTT L. MALCOMSON, ONE DROP OF BLOOD: THE AMERICAN MISADVENTURE OF RACE 119 (2000)).

129. *See* Enas v. United States, 534 U.S. 1115, 1115 (2002) (denying petition for writ of certiorari to the Ninth Circuit Court of Appeals in *United States v. Enas*, 225 F.3d 662 (2001)).

130. The deprivation of liberty can be significant. *See* 25 U.S.C. § 1302(7) (1988) (permitting Indian tribes to impose imprisonment for up to one year and fines of up to $5,000 for any one offense). Sentences for different crimes can run consecutively.

131. *See generally* Pommersheim, *supra* note 21 at 279–87 (discussing *Duro* legislation and proposed constitutional amendment to protect tribal sovereignty).

If the Court had granted certiorari in *Enas*, various outcomes would have been possible. The Court may have construed *Duro* as a constitutional holding and thrown out the legislation as exceeding Congress's powers. More likely, since *Duro* is silent on the application of the Fifth Amendment, the Court would have confronted the question whether the legislation is in fact a delegation of authority, despite its purported recognition of inherent rights.

Considering that the current Court has reined in Congress's powers vis-à-vis the states, it seems unlikely that the Court would uphold recognition as a valid means of exercising power. More likely, the Court would decide that the legislation is a delegation of authority. If it did, might the Court nonetheless uphold the legislation? Michael Enas' case would certainly be reversed, because it dealt with Double Jeopardy. A tribe prosecuting the same crime as the federal government could not be both a delegate and a separate sovereign.[132] But what about Mark Oliphant and Albert Duro? The Court demands that laws that classify by race withstand strict scrutiny.[133] Can the legislation carve the distinction that it makes between Indians and non-Indians and yet withstand an equal protection challenge?

Yes, conceivably it could. The Court could summon hoary *Mancari* and its toothless level of review. It could decide, in the manner it decided *Antelope* and *Fisher*, that Mark Oliphant is a person and Albert Duro is a polity. One commentator advocates essentially this result.[134] Should the Court take this approach? Surely not. Among a lamentable number of decisions in which the current Court has diminished tribal powers and denigrated rights of Indians as individuals, *Duro v. Reina* is one decision that got it right. Indians are neither fungible nor different from non-Indians in their legal relationships or potential contacts with a prosecuting tribe. *Duro* got it right because, whether one agrees with *Oliphant*, once *Oliphant* came down, no fair consideration of nonmember Indians could come out

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132. The challenges to the *Duro* legislation in *Enas* and *United States v. Weaselhead*, 156 F.3d 818 (8th Cir. 1998) involved successive prosecutions in tribal courts and federal district courts for the same criminal activity. The defendants asserted that the legislation delegated congressional authority to the tribes, such that tribes were not exercising powers of a separate sovereign when prosecuting nonmember Indians. *See Enas*, 255 F.3d at 665–66; *Weaselhead*, 156 F.3d at 818. The Fifth Amendment forbids any person from being subjected twice to jeopardy for the same offense. *See* U.S. CONST. amend. V.

133. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 236 (1995); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1988).

134. *See* Skibine, *supra* note 115, at 797–99 (contending that the *Duro* legislation is a proper exercise of Congress' trust authority, but advocating jurisdiction be confined to enrolled members of tribes to avoid using political status as mask for race-based distinctions). *But see* Gould, *Congressional Response*, *supra* note 51, 98–99 (questioning Skibine's reasoning).

otherwise.[135]

Suppose the *Duro* fix were overturned. For a time there would be pandemonium. Nonmember Indians comprise a significant percentage of the population on many reservations.[136] If tribes were stripped of criminal jurisdiction over them, many reservations might become ungovernable. Yet, non-Indians comprise almost half the total population on the average reservation.[137] Indeed, on nine of the most populated reservations, non-Indians vastly outnumber Indians.[138] Because the *Duro* fix did not reach non-Indians, they have been free to commit crimes on reservations with virtual impunity.[139] Evidence indicates they have.[140]

Pandemonium did occur in 1990 when *Duro v. Reina* was announced. Stopgap measures had to be employed until Congress acted.[141] If the *Duro* fix were overturned, such measures would again be needed; but this time Congress could not wink at the Constitution. Congress might pass the problem on to the states, as it did with Public Law 280 in the 1950s,[142] but this seems unlikely. States have little interest in asserting jurisdiction over tribal lands, where they collect few taxes. Since ICRA was enacted, states have also needed tribes' consent.[143] Few if any tribes are likely to cede jurisdiction to what many regard as their arch enemies.

What seems likely if the *Duro* fix were overturned is that Congress

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135. *Adarand* should trump *Mancari,* because Congress could exercise its powers under the Indian Commerce Clause by race-neutral means; that is, by enacting legislation that would empower tribes to assert criminal jurisdiction over both Indians and non-Indians. *See* Gould, *Mixing Bodies*, *supra* note 57, at 745 (discussing this result in light of *Rice v. Cayetano*, 528 U.S. 495 (2000)).

136. *See* Gould, *Congressional Response*, *supra* note 51, at 138–39 (discussing census data indicating that in 1980, 36.5% of Indians on the nation's ten most populous reservations, excluding the Navajo reservation, were not members of the reservation tribe).

137. *See id.* at 256, tbl.2.

138. *See id.* at 133–35 (discussing census data indicating that in 1990 among the ten most populous reservations, excluding the Navajo reservation, non-Indians comprised more than 83% of total population).

139. *See* Gould, *Congressional Response*, *supra* note 51, at 88–89 (discussing jurisdictional quagmire on reservations depending on race or ethnicity of perpetrator and victim and likelihood that crimes by non-Indians often go unpunished).

140. Keith Harper, Senior Staff Attorney with the Native American Rights Fund, Remarks at the Pennsylvania School of Law Symposium on Native Americans and the Constitution (Feb. 1–2, 2000). "Non-Indian crime rates are running rampant on many reservations." *Id.*

141. *See* Gould, *Congressional Response*, *supra* note 51, at 76–78 (discussing jurisdictional fixes proposed by the *Duro* Court).

142. *See supra* note 71 (discussing congressional delegation of authority to states to assert civil and criminal jurisdiction over tribal territory).

143. *See* 25 U.S.C. § 1323 (2000).

would finally have to confront tribes' needs for sovereignty with teeth—sovereignty over territory, not just tribal members—because any new criminal jurisdiction delegated by it to them would necessarily extend to both Indians and non-Indians. Restoring sovereignty, that is, will require solutions centered squarely in the Constitution; solutions that uphold first and foremost the rights of individuals.

It is not inconceivable that this could happen. Dumping the *Duro* fix will certainly get Congress to move in this direction. Yet even if the *Martinez* Court was right in concluding that Congress enacted ICRA without a federal civil remedy for Indians, no Congress ever will cede jurisdiction to another sovereign to wield power over the polity that counts—the one that elects it—without some mechanism for review. Neither would any tribe. For Congress, that polity is overwhelmingly non-Indian.

So what to do? Concede that might makes right? Hardly. Realize instead that a sovereign power play is the essential failing of *Martinez* and the *Duro* fix. Each is a cram down—this time by the tribes, aided respectively by the Court and Congress—that trivializes the equal rights of individuals. Realize that tribes themselves have suffered from these power plays, as they have helped prepare the way for *Atkinson* and *Hicks*. What is needed is to approach the problem of tribal sovereignty from the standpoint of the individual rather than the group. The Bill of Rights was designed to work that way.

The NCAI proposal to give federal appellate courts power to review decisions of the tribal justice system is certainly a step in the right direction.[144] Nonetheless, it does not go far enough. Few litigants will have the wherewithal to launch federal appeals. For much the same reason, proposals, such as that of Charles Wilkinson, seem unlikely to succeed.[145] Solutions acceptable to individuals, the Congress, and the Court, must almost certainly focus on the tribal courts themselves. Tribes not wishing to participate in broader jurisdiction should have the right to opt out, while those that do participate might be required to employ federal rules of evidence and procedure, to adopt codes of judicial and attorney conduct, to ensure separation of governmental powers, to apply federal appellate precedents, to permit removal, and to extend the right to appointed counsel.[146] Tough love for tribal courts, for sure, but hardly a death knell.

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144. *See supra* note 103 (discussing NCAI legislative proposal).

145. *See* WILKINSON, *supra* note 32, at 113–19. Professor Wilkinson would empower federal courts, after tribal remedies were exhausted, to review violations of rights protected by ICRA under an elevated standard of review.

146. ICRA was enacted without a right to appointed counsel because of concern that attorney fees would drain tribal treasuries. One unfortunate consequence of this circumstance, based on my experience in the Nez Perce and Coeur d'Alene tribal courts in the 1980s, is that few tribal defendants have any notion of their ICRA rights. This

When asserting jurisdiction over consenting members, tribes should still be free to assert traditional and customary law[147]—but the overarching goal of restoring tribal sovereignty must involve solutions that respect the rights of individuals.

CONCLUSION

Montana has replaced *Worcester* as the paradigm of tribal sovereignty. For those who failed to see the shift, *Atkinson* and *Hicks* bring a sobering reality. Sovereignty over territory is now supplanted by sovereignty based upon consent. This new paradigm is shaped not only by a Court whose conservative majority is fixated on states' rights, but also by its liberal minority. Tribes must grasp that the entire Court now perceives tribal sovereignty differently from *Worcester*. The reason lies in a confrontation never faced by Chief Justice Marshall's Court: that of the constitutional rights of tribal groups in contest with individuals. The cause of the current Court's diminishment of tribal sovereignty is this very confrontation, and the inability of tribes to muster adequate constitutional support.

Among proposals to overcome *Atkinson* and *Hicks*, many center on efforts to protect tribal courts from federal review, or to expand their jurisdiction, or protect them with a constitutional amendment. Yet proposals that focus only on tribes, not individuals, are bound to fail. This is because tribe-centered proposals rely on the doctrines of inherent sovereignty and congressional trust responsibility—doctrines that themselves have failed.

In the hands of Congress and the Court, these two doctrines, virtually lacking in constitutional support, have disappointed tribes and members, helping to isolate tribes within their reservations and to trivialize the constitutional rights of Indians as individuals. Tribes that would embrace a new awakening of sovereignty should avoid these doctrines. They should

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undoubtedly explains why there are few cases challenging the *Duro* legislation, and why, of those there are, most have resulted from federal district court proceedings in which counsel has been appointed. Consider how few tribal court prosecutions of nonmember Indians could go forward if hearsay objections were made to tribes' evidence that the defendants are even Indians, let alone enrolled members of a tribe. *But see* United States v. Broncheau, 597 F.2d 1260, 1263–64 (9th Cir. 1979), *cert. denied*, Broncheau v. United States, 444 U.S. 859 (1983) (presumably finding it sufficient that the district judge who tried Broncheau identified him as an Indian.)

147. I discuss how such a dual-court system could operate in Gould, *Congressional Response*, *supra* note 51, at 155–60, through use of "CFR" courts, so-called because they were originally established by the BIA through rules promulgated in the Code of Federal Regulations. *Id.* at 156 n.402. I do not mean to suggest, however, that *Martinez* should continue to compromise the ICRA rights of tribal members.

instead seek solutions that recognize that tribal sovereignty is best protected by first protecting individuals.

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We Stand United Before the Court: The Tribal Supreme Court Project

Tracy Labin*

INTRODUCTION: BIRTH OF THE TRIBAL SUPREME COURT PROJECT

In the 2001 term, the Supreme Court of the United States rendered two devastating Indian law opinions. In the first, *Atkinson Trading Co. v. Shirley*,[1] the Court ruled that tribes lack authority to tax within their own reservations.[2] In the second, *Nevada v. Hicks*,[3] the Court ruled that tribal courts lack jurisdiction to entertain suits by tribal members, even for wrongs allegedly done to those tribal members on their own trust land within reservation boundaries.[4] These decisions were devastating in that they struck crippling blows to tribal sovereignty and tribal jurisdiction—the most fundamental elements of continued tribal existence. Additionally, the opinions departed from what had been longstanding, established principles of Indian law, and constituted a wholesale re-writing of the very conceptions of tribal sovereignty and jurisdiction by the Court.[5]

While the losses in *Hicks* and *Atkinson* are some of the most severe to

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1. 532 U.S. 645 (2001).

2. *See id.* at 647. The specific question in *Atkinson* was whether the Navajo Nation could impose a hotel occupancy tax on a hotel located on privately owned fee land within the exterior boundaries of the Navajo Nation Reservation. *See id.* at 647–49.

3. 533 U.S. 353 (2001).

4. *See id.* at 361. The specific question in *Hicks* was whether the Fallon Paiute-Shoshone Tribal Court could entertain a civil suit brought by one of its members against state game wardens for alleged harm that occurred during the execution of a search warrant on the tribal member's property. *See id.* at 355–56. Although the case had originally been filed, inter alia, against the game wardens in their official capacities, the only remaining question at the time the case reached the Supreme Court was whether the tribal court had jurisdiction to hear suit against the state officials in their individual capacities. *See id.* at 355–57.

5. *See generally* David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267 (2001) (providing an in-depth analysis of the Court's re-writing of Indian law).

have befallen Indian tribes, they are not the only losses. Unfortunately, over the past two decades Indian tribes have suffered consistent defeat before the Supreme Court. During this time period, Indian tribes lost approximately eighty percent of the cases they brought before the Court.[6] This percentage is significant in itself; however, it is even more significant when looked at comparatively. For instance, in the period covering the 1986-2000 terms, convicted criminals seeking reversals of their convictions were the only group of litigants to have fared nearly as badly as the tribes. Convicted criminals were successful thirty-six percent of the time compared to the tribes' success rate of twenty-three percent in the same period.[7]

Indians tribes are not falling apart in the face of the Supreme Court's virtual attack on tribal sovereignty and jurisdiction, however. Rather, they are uniting to face the Court. Following the *Hicks* and *Atkinson* rulings, the Native American Rights Fund (NARF)[8] and the National Congress of American Indians (NCAI)[9] joined forces to create the Tribal Supreme Court Project. They created this Project to coordinate and strengthen the advocacy of Indian issues before the Supreme Court, and ultimately to improve the win-loss record of tribes before that tribunal.

Tribes are not alone in developing an institutional structure such as the Supreme Court Project. In fact, the time for such a project is long overdue. The fifty states, acting through the National Association of Attorneys General (NAAG) created a similar project to improve the quality of their advocacy in 1990, and the effects have been notable.[10] No one would question that the 1990s were a successful decade for the states, due in no small part to their project. Today the NAAG Supreme Court Project is an integral part of the states' efforts to protect their sovereign interests before

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6. *See id.* at 280.

7. *See id.* at 281.

8. NARF, the nation's largest non-profit legal organization dedicated to defending and protecting tribal rights, was established 1971. The organization specializes in tribal law relating to the preservation of tribal existence; the protection of natural resources; the promotion of human rights; the accountability of governments to Native Americans; the development of Indian law; and the education of the public about Indian rights, laws, and issues. *See* Native American Rights Fund, *Our History*, *at* http://www.narf.org/intro/history/html (last visited Jan. 29, 2003).

9. The NCAI, the nation's largest organization of Indian tribes, represents more than 250 Indian tribes and has, since 1944, been dedicated to protecting the rights and improving the welfare of Native Americans. *See* National Congress of American Indians, *Welcome to NCAI*, *at* http://www.ncai.org/index.asp (last visited Jan. 29, 2003).

10. *See* National Association of Attorneys General, *NAAG Projects: Supreme Court*, *at* http://www.naag.org/issues/issue-supreme_court.php (last visited Jan. 26, 2003).

the nation's highest tribunal.[11] Other entities that have initiated Supreme Court projects include the Public Citizen Litigation Group[12] and the Defender Services Division Training Branch (formerly the Federal Defender Training Group) established by the Judicial Conference Committee on Defender Services.[13]

DESCRIPTION OF THE SUPREME COURT PROJECT

A. Structure of the Project

Currently housed at NARF's offices in Washington, D.C., the project is staffed by one NARF attorney plus support staff. An ever-growing Supreme Court Project Working Group is also dedicating time and energy to make the Project work. The Working Group is a group of more than 200 noted attorneys and academics from around the nation who specialize in Indian law and other areas of law impacting Indian cases—like property law, trust law, and Supreme Court litigation. These attorneys participate in the Project as their time and interest allows. Among the group there is a former Solicitor General of the United States, several attorneys who clerked for the Supreme Court, as well as attorneys who have many years of Supreme Court litigation experience. The Project, through NARF, is continuing to develop relationships with, and recruit new members to, the Working Group.[14] The group holds regular conference calls to discuss strategy, pending litigation, and related matters. The group also is connected through email and receives case updates, materials submitted to the Supreme Court (many of which are not obtainable in any other way except at the Court itself or from the individual attorneys involved in the litigation), and other relevant information from the Project staff. This open forum of communication provides an excellent network of expertise and resources to the Project and all those involved. Regular contact fosters discussions among tribes and tribal attorneys about the impact of litigation

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11. *See id.* During the 2001 term, the NAAG Project conducted seventeen moot courts, edited more than thirty-five briefs, conducted a Supreme Court Advocacy Seminar, and published a bi-weekly newsletter to keep all state attorneys generals educated and current on litigation before the Supreme Court affecting state interests. *See id.*

12. *See* Public Citizen, *Supreme Court Assistance Project*, *at* http://www.citizen.org/litigation/court_assist (last visited Jan. 26, 2003).

13. *See* Defender Services Training Branch (DSTB) of the Administrative Office of the U.S. Courts, *DSTB Supreme Court Update: As of October 15, 2002*, *at* http://www.fd.org/Publications/GenRef/SCU/101502.html (last visited Jan. 26, 2003).

14. Attorneys interested in joining the Tribal Supreme Court Project Working Group should contact the author at the Native American Right's Fund, 1712 N St., NW, Washington, D.C. 20036; (202) 785-4166 (phone); (202) 822-0068 (fax); labin@narf.org (email).

and keeps this very important issue at the forefront.

An Advisory Board of Tribal leaders, comprised of NCAI Executive Committee members and other tribal leaders willing to volunteer their time, also assists the Project. The Board's role is to provide necessary political and tribal perspective to the legal and academic expertise. This input is critical, particularly in assisting tribes make the intensely difficult decisions they will be faced with, due to the Project's collective approach to Supreme Court advocacy. Given the reality that individual tribal interests do not always coincide with the collective interest of Indian country, success under the Supreme Court Project model will, occasionally, depend on tribes sacrificing their individual interests for the greater good. Sacrifice may come, for instance, by a tribe's deciding not to appeal a case to the Court, and thus not providing the Court with further opportunity to erode tribal rights.

B. Functions of the Project

As appeal to the Supreme Court is predominantly subject to the discretion of the Court,[15] the Project's role begins even before the Court has decided to take an Indian law case. The Project monitors Indian cases in the state and federal appellate courts that have the potential to reach the Supreme Court. Members of the Project reach out to counsel in those cases to offer assistance in determining whether to seek Supreme Court review of a particular case where the tribe has lost or to assist in opposing review in cases where the tribe has won.

The Tribal Supreme Court Project also assists tribes once a petition for a writ of certiorari has been granted. Through conference calls and other means (e.g., panel discussions, networking of papers, etc.), the Project fosters discussions among attorneys nation-wide about pending Indian law issues. By drawing together Supreme Court specialist counsel, experts in Indian law, as well as other particular areas of law, the Project makes available to all tribes and counsel with Indian issues the immense value of combined nationwide expertise.

The Project also coordinates a nation-wide Indian amicus brief writing network. An amicus brief, also known as a "friend of the Court brief,"[16] allows those not directly involved in litigation, but potentially impacted by its outcome, to raise points before the Court. Through amicus brief writing and coordination, the Project assists Indian country as a whole in most effectively supporting the tribes going before the Court. Project staff

15. *See generally* ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE 219–71 (8th ed. 2002).

16. See Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997).

members write amicus briefs drawing on the input of the working group, coordinate tribes to join together in submitting briefs, or even work with Supreme Court specialist firms to produce briefs. The rationale of the Project is to submit to the Court the fewest number and the highest quality briefs in support of the Indian argument. This coordinated approach is meant to ensure that the briefs and the Indian voice receive the Court's maximum attention.

The Supreme Court Project also provides numerous services to tribes and attorneys with cases before the Court. Project staff and Working Group members provide counsel with any other type of brief writing assistance they may require, whether it be drafting, editing, reviewing principal briefs, or providing research assistance. In addition, the Project helps educate attorneys as to the specialized nature of Supreme Court advocacy and provides advice on Supreme Court procedure and strategy. The Project also coordinates and creates moot court and roundtable discussion opportunities to assist attorneys in preparing their oral arguments.[17] All of these services are aimed at making better tools available to enhance the overall quality of tribal advocacy before the Supreme Court.

ONE RECENT PROJECT: AMICUS CURIAE BRIEF IN *UNITED STATES V. WHITE MOUNTAIN APACHE TRIBE*[18]

In the year following the creation of the Tribal Supreme Court Project, the Court granted petitions for writ of certiorari in three Indian law cases: *United States v. White Mountain Apache Tribe*,[19] *United States v. Navajo Nation*,[20] *and Inyo County v. Bishop Paiute Tribe*.[21] The Project assisted, and is continuing to assist, the attorneys for the tribes in all three cases and has filed, or will file, amicus curiae, or "friend of the court," briefs in support of the tribes in all three cases. The NARF, as counsel for the NCAI, filed an amicus curiae brief in support of the Tribe in *White Mountain Apache*, which is attached.[22]

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17. For moot courts, the Tribal Supreme Court Project relies primarily on the services of the Georgetown University Law Center Supreme Court Institute's Moot Court Program. *See* Georgetown University Law Center, *Supreme Court Institute Moot Court Program*, *at* http://www.law.georgetown.edu/SCI/moot.html (last visited Jan. 28, 2003).

18. Brief of Amicus Curiae National Congress of American Indians, United States v. White Mountain Apache Tribe, 249 F.3d 1364 (Fed. Cir. 2001), *cert. granted*, 122 S. Ct. 1604 (2002) (No. 01-1067).

19. 249 F.3d 1364 (Fed. Cir. 2001), *cert. granted*, 122 S. Ct. 1604 (2002) (No. 01-1067).

20. 263 F.3d 1325 (Fed. Cir. 2001), *cert. granted*, 122 S. Ct. 2326 (2002) (No. 01-1375).

21. 291 F.3d 549 (9th Cir. 2002), *cert. granted*, 123 S. Ct. 618 (2002) (No. 02-281).

22. John E. Echohawk, Tracy Labin* of the Native American Rights Fund for Amicus

The question to be decided in *White Mountain Apache* is whether the Tribe can sue the United States for damages in a breach of trust action for the United States' alleged mishandling of the Tribe's trust property. The United States argues that it cannot. It argues that the Tribe has no right to money damages against the United States for the breaches of trust alleged by the Tribe. Rather, the United States essentially argues that it is immune from such a suit.

The property at issue in *White Mountain Apache* was taken into trust [23] by the United States for the Tribe by the Act of March 18, 1960 (1960 Act).[24] In addition to taking the land in trust for the Tribe, the 1960 Act also provided the Secretary of the Interior rights to use the land, or make improvements thereon, for purposes of operating an Indian school.[25] The Tribe alleges that the United States did use the property, as the Act allowed but, while using the property, failed to care for the property and hence, breached its trust responsibilities to the Tribe. After the United States refused to make any reparations for the damaged property, the Tribe sued. The Tribe prevailed in the Court of Appeals, which recognized that the Tribe did have a right to sue the United States for such breaches of trust.[26] The United States appealed.

The amicus curiae brief submitted by the Supreme Court Project supported the Tribe and its right to sue the United States in damages for breaches of trust.

Curiae, the National Congress of American Indians (*Counsel of Record).

23. Indian property is typically held in trust, which means the underlying fee title to the property is owned by the United States in trust for the Indian tribe, who owns the beneficial title to the property.

24. Act of Mar. 18, 1960, Pub. L. No. 86-392, 74 Stat. 8 (codified as amended at 25 U.S.C. § 277 (2000)).

25. *See id.*

26. *See White Mountain Apache*, 249 F.3d at 1364.

No. 01-1067

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

WHITE MOUNTAIN APACHE TRIBE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF AMICUS CURIAE OF THE NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF RESPONDENT

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September 2002

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QUESTION PRESENTED

In 1960, Congress declared that a former military post in Arizona would "be held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose." Act of Mar. 18, 1960, Pub. L. No. 86-392, 74 Stat. 8. The question presented is whether that Act authorizes the award of money damages against the United States for alleged breach of trust in connection with such property.

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1

INTEREST OF AMICUS CURIAE[1]

Amicus Curiae, the National Congress of American Indians (NCAI), is the oldest and largest national organization of tribal governments in the United States. Like the White Mountain Apache Tribe, NCAI's tribal members all have trust resources, resources over which they do not have sole ownership. As is the case here, their ownership is a beneficial ownership, which means that fee title is held by the United States in trust for the benefit of the tribes. Also, as is the case here, the United States often exercises extensive control over these trust resources.

While the narrow question presented in this case involves the interpretation of a unique statute passed for the benefit of the White Mountain Apache Tribe, several underlying issues in this case are of broad importance to NCAI members. The statute at issue here, the 1960 Act is being interpreted for the purpose of determining whether the White Mountain Apache Tribe may sue the United States for damages on a breach of trust claim. In this context, broader principles concerning the fundamental federal/tribal trust relationship and questions regarding when the United States may be held liable in damages for breaches of trust in the context of that relationship are

[1] Counsel for Petitioner and Counsel for Respondent have consented to the filing of the brief of amicus. The consents are submitted for filing herewith.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than Amicus Curiae, their members or their counsel made a monetary contribution to the preparation and submission of this brief.

raised. NCAI's members all have substantial interest in these underlying issues and hence, have a substantial interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1960 Congress passed a unique act for the benefit of the White Mountain Apache Tribe ("Tribe"): the Act of Mar. 18, 1960, Pub. L. No. 86-392, 74 Stat. 8. ("1960 Act"), which provides:

> All right, title, and interest of the United States in and to the lands, together with the improvements thereon, included in the former Fort Apache Military Reservation, created by Executive order of February 1, 1887, and subsequently set aside by the Act of January 24, 1923 (42 Stat. 1187), as a site for the Theodore Roosevelt School, located within the boundaries of the Fort Apache Indian Reservation, Arizona, are hereby declared to be held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose.

Act of Mar. 18, 1960, P.L. 86-392, 74 Stat. 8.

The Tribe claimed that pursuant to this Act the United States used portions of the Tribe's trust property for the authorized purposes and in so doing exercised complete and exclusive control over that property. Recently, the United States completed its need for portions of the land and buildings and proposed to release its use

interest. The Tribe refused to accept the release without indemnification however, because the Tribe alleged, that while under its exclusive use and control, the United States, "destroyed, materially altered, caused to deteriorate, ... unreasonably and improperly used, abused, neglected, mismanaged, and failed to act to protect" that property. Complaint at 6-7, para. 27. It further alleged that the United States, "committed waste by deliberately pulling down buildings, and removing things affixed to and constituting a material part of the trust corpus, and has failed to exercise even the ordinary care of a prudent person for the preservation and protection of the Tribe's trust corpus.... " *Id.* at 7, para. 28. Claiming that the United States breached its fiduciary duty to the Tribe by allowing or causing waste of the tribal trust property over which it had exclusive control, the Tribe sued in the United States Court of Federal Claims for money damages against the United States.

The Tribe invoked the jurisdiction of the Court of Claims under the Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505.[2] As the Court has held, the Tucker Act waives the United States' sovereign immunity from suit whenever the "source of substantive law" upon which the claim is based, "can fairly be interpreted as mandating compensation by the Federal Government.... "

[2] The Indian Tucker Act, 28 U.S.C. § 1505, provides tribal claimants the same access to the Court of Claims that the Tucker Act provides to individual claimants. As any analysis regarding Tucker Act jurisdiction applies to Indian Tucker Act jurisdiction, *see United States v. Mitchell*, 445 U.S. 535, 539-40 (1980), any reference herein to Tucker Act jurisdiction is meant also to include and apply to Indian Tucker Act jurisdiction.

United States v. Mitchell, 463 U.S. 206, 216-217 (1983) (*Mitchell II*). No additional waiver of sovereign immunity need be found. *Id.* at 218-219.

Hence, if the positive law relied on here, the 1960 Act, can fairly be interpreted as mandating compensation by the Federal Government, it authorizes the Court of Claims to award damages for any proven breach of trust. As the Court held in *Mitchell II,* statutes and regulations are so fairly interpreted when:

> All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian allottees), and a trust corpus (Indian timber, lands, and funds). [Referencing Restatement (Second) of the Law of Trusts § 2, Comment h, at 10 (1959).] '[W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.' (quoting *Navajo Tribe of Indians v. United States*, 224 Ct.Cl. 171, 183, 624 F.2d 981, 987 (1980)).

Mitchell II, 463 U.S. at 225. Here, the language of the 1960 Act creates a trust, vests the Tribe with beneficial title in the trust property, makes the United States the trustee of that property, and authorizes the United States, the trustee, to exercise exclusive control over portions of the property (a right which it did in fact, exercise). Hence, here, like in *Mitchell II*, a fiduciary relationship arises under the 1960 Act.

Contrary to the United States' suggestion, the purpose of the United States' control here does not negate the fiduciary relationship and the duties that "naturally" arise therefrom. *Id.* at 226. Although the United States was authorized to use the Tribe's trust property to run an Indian school, and not to generate profit for the Tribe, the fact that the property was trust property and that the United States was the trustee of that property, did not change. The fiduciary duties naturally implied in the 1960 Act remained, as did the liability in damages for breach of those duties.

As part of its fiduciary responsibilities, the United States here is also liable to the Tribe for waste of the Tribe's property in its capacity as tenant – which, Amicus argues, describes the United States' use status here. *See, e.g., United States v. Bostwick*, 94 U.S. 53 (1876) (which held the United States impliedly liable for waste under a lease).

As in *Mitchell II*, the conclusion that the 1960 Act can fairly be interpreted as mandating compensation for the damages sought here is reinforced by the well-established, long-standing general trust relationship between the United States and Indian tribes. And, as in *Mitchell II*, the substantive source of law at issue here can easily be distinguished from the source of law which was at issue in *United States v. Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*") – a source of law which could not be fairly interpreted as mandating compensation because it gave the United States no active role in managing or taking care of the property.

Amicus comes before this Court in support of the White Mountain Apache Tribe. It respectfully urges this

Court to affirm the Court of Appeals' holding that the 1960 Act is an act that can "fairly be interpreted as mandating compensation by the federal government" for the particular breaches of trust allegedly committed here, and to affirm the jurisdiction of the Court of Federal Claims to hear the Tribe's suit under the Tucker Act.

ARGUMENT

I. THE TUCKER ACT WAIVES THE UNITED STATES' IMMUNITY FROM SUIT FOR DAMAGES WHERE THE SUBSTANTIVE LAW UPON WHICH CLAIMANTS RELY "CAN FAIRLY BE INTERPRETED AS MANDATING COMPENSATION BY THE FEDERAL GOVERNMENT"

The question here is whether the Court of Federal Claims has authority to award damages in a suit brought by the White Mountain Apache Tribe ("Tribe") under the Tucker Act. The Tucker Act provides in relevant part: "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department . . . . " 25 U.S.C. § 1491(a)(1). For jurisdiction to lie, there must be a waiver of sovereign immunity. As the Court explicitly held in *United States v. Mitchell*, 463 U.S. 206, 215-16 (1983) (*Mitchell II*), if a claim falls within its terms, the Tucker Act provides a waiver of sovereign immunity.

> [T]here is simply no question that the Tucker Act provides the United States' consent to suit for claims founded upon statutes or regulations that create substantive rights to money damages. If a

> claim falls within this category, the existence of a waiver of sovereign immunity is clear.

Mitchell II, 463 U.S. at 218; *see also Id.* at 215-217. *See also Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 734 (1982) (recognizing that waiver of the United States' sovereign immunity to suit must be unequivocally expressed and holding that "the Tucker Act effects . . . such explicit waiver. . . . "). Because the Tucker Act waives the United States' sovereign immunity, determination of the lower court's jurisdiction here turns on the analytically distinct question: "whether the statutes or regulations at issue can be interpreted as requiring compensation." *Id.* Because this question is distinct from that of waiver of sovereign immunity, the rule requiring that waivers of sovereign immunity be strictly construed does not apply. The Court also made this clear:

> Because the Tucker Act supplies a waiver of immunity for claims of this nature, the separate statutes and regulations need not provide a second waiver of sovereign immunity, nor need they be construed in the manner appropriate to waivers of sovereign immunity. 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.'

Id. at 218-219. This holding in *Mitchell II* is crucial. However, its importance is ignored and even contradicted by the United States in its brief as it repeatedly tries to extend the notion of strict construction into this case. *See* U.S. Br. at 14, 17, 18 (*citing* numerous pre-*Mitchell II*, and non-Tucker Act cases). Amicus respectfully urges this Court to adhere to the precedent it established in *Mitchell II* and

reject the United States' invitations "to add to the rigor" of construction here "where consent has been announced."

II. THE 1960 ACT CAN FAIRLY BE INTERPRETED AS MANDATING COMPENSATION BY THE FEDERAL GOVERNMENT FOR THE DAMAGES SUSTAINED IN THIS CASE

A. The Language Of The 1960 Act Creates A Specific Trust And Establishes The United States' Exclusive Use And Control Of Portions Of The Tribe's Trust Property

As with all cases of statutory interpretation, the Court's task begins with the language of the Act. *See Williams v. Taylor*, 529 U.S. 420, 431 (2000). Here, the language is examined to determine whether the Act "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." As the Court has made clear, the language may do so either explicitly or implicitly. *Mitchell II*, 463 U.S. at 217, n.16 and 218. And, any ambiguity as to whether the language may be so fairly interpreted should be resolved in favor of the Tribe. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985).

The language, "held . . . in trust," places land in trust for the Tribe and creates a trust relationship between the United States and the Tribe. Indeed, the language of the 1960 Act creates a very specific trust: it clearly identifies a trustee ("the United States"), a beneficiary ("the White Mountain Apache Tribe") and a trust corpus ("the lands, together with the improvements thereon, included in the former Fort Apache Military Reservation. . . . ").

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In addition to creating a specific trust, Congress, through the language "subject to the right of the Secretary of the Interior to use," authorized the United States to use and control portions of the trust property that it had just conveyed to the Tribe.[3] Although Congress granted the United States the right to use portions of the trust property, it did not eliminate the trust responsibility, remove or reserve any part of the property from trust status, nor did it relieve the United States of its status as trustee over that property.

The federal government suggests otherwise. In arguing that the language "carves out of the trust" the right of the federal government to use the property, the United States seems to suggest that either the property at issue is not trust property, or that it is no longer a trustee. *See* U.S. Br. at 11, 24-25. Nothing in the language supports such a reading. Indeed, the language compels the opposite conclusion. The language "*[a]ll* right, title, and interest" (emphasis added) indicates that Congress' intended to vest the Tribe with beneficial title to the *entirety* of the trust property.[4] Also, any suggestion that the United States is

[3] Although Congress authorized use, this use interest was limited. First, the statute specifically uses the words of limitation "so long as" which temporally limits the United States' use, and second, the statute specifies that the property may be used only for two purposes– administrative or school purposes.

[4] That intent is supported by language in the legislative history of the 1960 Act. For instance, the Senate Report explicitly stated that the purpose of the bill which was to become the 1960 Act was, "to provide that the United States holds in trust approximately 7,579 acres of land, together with improvements thereon, for the White Mountain Apache Tribe of Arizona." S. Rep. No. 86-671 at 1 (1959) (7,579 acres of land and the improvements being the entirety of the conveyance). And, in

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not currently the trustee of the property is rebutted by Congress' explicit use of the present tense in the 1960 Act, "are hereby declared to be held." This language indicates that Congress intended to create the trust immediately, make the United States the trustee of all the land immediately, and vest the Tribe with beneficial title immediately. *United States v. Wilson*, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes."). If there is any ambiguity as to any of these points, however, that ambiguity should be resolved in favor of the Tribe. *Montana v. Blackfeet*, 471 U.S. 759 (1985).

As the Court held in *Mitchell II*, federal control of tribal trust property is crucial in determining whether a source of law may be fairly interpreted as mandating compensation such that it gives rise to a cognizable claim for breach of trust. On this point, the Court held:

> [W]here the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists

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describing the value of the lands and improvements placed in trust for the Tribe, the record explicitly described the value of *all* the land and improvements. The record stated that the "lands to be donated, exclusive of improvements, are valued at $141,000. The improvements are located in the Theodore Roosevelt School area and consist of school building and plant valued at $495,980, roads and streets valued at $160,000 and irrigation laterals and ditches valued at $24,372. *Id.* at 2. The understanding was the same in the House of Representatives. In discussing the conveyance, Congressman Stewart L. Udall, "acknowledged that the department has agreed *the whole thing* would go back to trust status.... " Hearing on H.R. 8796 and S. 2268 Before the Subcommittee on Indian Affairs, Committee on Interior and Insular Affairs, 86th Cong. (Feb. 11, 1960) (Statement of Stewart L. Udall, Representative of the State of Arizona) (Emphasis added).

> with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.

Mitchell II, 463 U.S. at 225. As in *Mitchell II*, the Tribe here alleges that the United States did exert control, indeed, exclusive control over portions of the Tribe's trust property pursuant to the terms of the 1960 Act. While the purpose of the United States' control of the trust property here differs from that in *Mitchell II*, the import of the exclusive control is no less important to the conclusion that the 1960 Act can fairly be interpreted as mandating compensation for the damages sought here.

In its brief, the United States argues that for federal control to play a part in determining whether the United States is subject to liability, such control must be specifically, "for the benefit of the Indians." See U.S. Br. at 31. In this way, the United States suggests that the purpose of control, rather than the extent of control is what governs. *Id.* at 7. From this premise, it tries to impress upon the Court that its use of the Tribe's trust property was not for the Tribe's benefit but for its "own benefit" or its "*own* purposes." U.S. Brief at 7, 22 (emphasis in original), 25. In addition to being disingenuous,[5] this assertion is irrelevant.

[5] The United States has the right to use this property to operate an Indian school, for the benefit of Indians. As Stewart Udall recognized during hearings on the 1960 Act, "[t]he department approves the legislation and proposes merely that a proviso be put in that the

(Continued on following page)

It is true that the United States did not manage and control the property in question for "the purpose of protecting the Tribe's financial interest," U.S. brief at 7, or to manage the property solely for the benefit of the Tribe to generate proceeds and ensure profit for the Tribe. *Id.* at 27. However, the Tribe here is not suing to recover damages for mismanagement of this nature.[6] Rather, the Tribe here is suing to recover for the United States' outright neglect, waste and destruction of tribal trust property. *See* Complaint at para. 17. Hence, language requiring the United States to "manage the property for the benefit of the Indians" is neither necessary nor appropriate to create the duty to not waste the property.

B. Duties Giving Rise To Damages Are Implied In The 1960 Act

As explained above, the 1960 Act creates a trust for the Tribe and grants the trustee, the United States,

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government right to continue to operate the school, *which of course, is for the benefit of the Indians. . . .* " Hearing on H.R. 8796 and S. 2268 Before the Subcommittee on Indian Affairs, Committee on Interior and Insular Affairs, 86th Cong. (Feb. 11, 1960) (Statement of Stewart L. Udall, Representative of the State of Arizona) (Emphasis added).

[6] In both *Mitchell I* and *Mitchell II*, the question presented to the Court was whether the United States was liable for the mismanagement of timber resources. The allegations in both *Mitchell I* and *Mitchell II* were that "the Government: (1) failed to obtain fair market value for timber sold; (2) failed to manage timber on a sustained-yield basis and to rehabilitate the land after logging; (3) failed to obtain payment for some merchantable timber; (4) failed to develop a proper system of roads and easements for timber operations and exacted improper charges from allottees for roads; (5) failed to pay interest on certain funds and paid insufficient interest on other funds; and (6) exacted excessive administrative charges from allottees." 445 U.S. at 537, 463 U.S. at 210.

limited rights to use the trust property. Under even the most rudimentary principles of the obligations of a trustee in using and controlling trust property, it can fairly be implied that the Secretary has a duty not to waste that property. For, that "would not be an exercise of guardianship, but an act of confiscation." *Shoshone Tribe v. United States*, 299 U.S. 476, 497 (1937). As stated in the Restatement (Second) of Trusts § 176 (1959), "[t]he trustee is under a duty to the beneficiary to use reasonable care and skill to preserve the trust property." This duty includes protecting the property from loss, damage, or destruction. *See Id.* Comment (b); Bogert, Trusts and Trustees, § 582, at 346 (rev. 2d ed. 1980). And, under the law, breach of this trust duty gives rise to a claim for monetary damages. Scott, The Law of Trusts, § 176, at 482-489 (4th ed. 1987). *Mitchell II* plainly confirmed this when it held:

> Given the existence of a trust relationship, it naturally follows that the Government should be liable in damages for breach of its fiduciary duties. It is well established that a trustee is accountable in damages for breaches of trust. . . . This Court and several other federal courts have consistently recognized the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for damages resulting from a breach of trust.

Mitchell II, 463 U.S. at 226. Given this clear precedent, the government's repeated suggestions that for a statute to be fairly interpreted as mandating compensation, it must be of a money character, is ill-founded. See U.S. Br. at 11, 16-17, 21.

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Also ill-founded are the United States' assertions that the general law of trusts plays no role in informing the interpretation of the 1960 Act – an Act which clearly creates a trust and designates the United States the trustee. See U.S. Br. at 12. This Court has explicitly stated that "[i]t may be that where only a relationship between the government and the tribe is involved, the law respecting obligations between a trustee and a beneficiary in private litigation will in many, if not all, respects adequately describe the duty of the United States." *Nevada v. United States*, 463 U.S. 110, 127 (1983). *See also Mitchell II*, 463 U.S. at 226 & n.30; *United States v. Mason*, 412 U.S. 391, 398 (1973); *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942) (the federal government has "charged itself with moral obligations of the highest responsibility and trust . . . [and] should therefore be judged by the most exacting fiduciary standard"); *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11 (2001) (recognizing that the Federal-Indian trust relationship "has been compared to one existing under a common law trust"). Also, in other contexts, when in interpreting the statutory phrase, "held in trust," the Court has held that "[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *National Labor Relations Board v. Amex Coal Co.*, 453 U.S. 322, 330 (1981).

Similar duties, obligations, and liabilities not to permit or commit waste[6] can also be implied under the most basic tenets of American property law, tenets which are so basic that they must surely be implied to be part of the United States' duties as trustee of tribal trust property. Even if the United States is regarded here just in its capacity as tenant, there is an implied duty not to waste the Tribe's property.[7]

The "concept of waste . . . is an old one: '[F]or he that suffereth a house to decay, which he ought to repaire, doth the waste. . . . " Gregory M. Stein, The Scope of the Borrower's Liability in a Non-Recourse Real Estate Loan, 55 Wash. & Lee L. Rev 1207, 1284 n.146 (1988) (quoting Edward Coke, The Second Part of the Institutes of the Laws of England Chap. 24, 145 (Professional Books Ltd. 1986) (1817)). English common law defined waste as: "[a]ny act or omission which diminished the value of the estate or its income, or increased the burdens upon it or impaired the evidence of title thereto." *Hausmann v. Hausmann*, 596 N.E.2d 216, 219 (Ill.App. 1992). "More recently, '[w]aste occurs when someone who lawfully has possession of real estate destroys it, misuses it, alters it or neglects it so that

[6] The new Restatement abandons the distinction between voluntary (intentional) and permissive (negligent) waste. See Restatement (Third) of Property: Mortgages § 4.6 & cmt. b (1997). *See City of New York v. United States*, 97 F. Supp. 808 (Ct. Cl. 1951) (U.S. responsible for damages caused by neglect of leased property).

[7] Amicus argues that the United States' use right is comparable to the use right of a tenant. A leaseholder or tenant is one who has a possessory estate, or a right to possession in the property, as the United States has here. Powell on Real Property §§ 16.02, 34.02 (1981). *See also* Restatement (Second) of Property § 1.2 (1977); Restatement of Property § 9 (1936).

the interest of persons having a subsequent right to possession is prejudiced in some way or there is a diminution in the value of the land being wasted.' " *Id. See also* Restatement (Second) of Property § 12.2 (1977).

Under these basic principles, the 1960 Act can be "fairly interpreted" as including the implied duty "to surrender the premises at the expiration of his term in as good a condition as when they were taken, ordinary wear and tear and damages from the elements excepted." *Dehn v. S. Brand Coal & Oil Co.*, 63 N.W.2d 6, 11 (Minn. 1954). Breach of this duty also gives rise to a claim for money damages. *See United States v. Bostwick*, 94 U.S. 53 (1876); Restatement (Second) of Property § 12.2.

This Court has confirmed that the doctrine of waste applies when the United States is a tenant and that when the United States does commit waste, it is implicitly liable in damages. *United States v. Bostwick*, 94 U.S. 53 (1876). In *Bostwick* a suit was brought against the United States for damages to property over which the United States had possession and control.[8] The United States had possession and control pursuant to a lease which provided only the term of the lease and the rent, "without restriction as to the use to which the property might be put." 94 U.S. at 65. Nothing in the lease explicitly imposed a duty on the

[8] The damages held to be waste in *Bostwick* are comparable to those alleged by the Tribe here. As correspondence from the property owner's trustee stated, "While the United States occupied the premises . . . the main house was burned; the flower-garden and shrubbery were destroyed; three and one-half miles of fence torn down . . . some sheds were torn down. . . . The part of the house not burned . . . was greatly damaged. . . . The premises were left in a dilapidated condition, and the house unfit for occupancy." *Bostwick*, 94 U.S. at 56.

United States not to commit waste during the tenancy. The Court found this language was implicit in the lease. The Court held that the United States was bound by certain implied duties, such as the obligation "to use the property as not unnecessarily to injure it . . . that the estate may revert to the lessor undeteriorated. . . . " *Id.* at 65-66. The Court held that this implied duty applied to the United States just as if it had been obligated by express language. *Id.* at 66. The Court continued, "[a]ll obligations which would be implied against citizens under the same circumstances will be implied against [the United States]." *Id.* The Court held that the United States was liable in damages for harm occurring while the United States was in possession, not "to make good any loss which necessarily results from the use of the property, but only such as results from the want of reasonable care in the use," hence binding the United States "not to commit waste." *Id.* at 68.

Here, the same duty not to commit waste and to return the property to the Tribe in the same condition as when taken, normal wear and tear excepted, is implied in the 1960 Act as much as if it had been expressly stated. Likewise, the implication that where the United States does commit waste, it is liable to the Tribe in damages, is as plain as if specific language stating that "the United States is liable in damages for waste committed" had been used. That is the teaching of *Bostwick.*

C. The General Trust Relationship Reinforces The Conclusion That The 1960 Act Is Fairly Interpreted As Mandating Compensation For The Damages Here

The Court has explained that the existence of the general trust relationship is relevant in cases addressing

whether a statute can fairly be interpreted as mandating compensation for breach of trust in the Indian law context. As the Court indicated in *Mitchell II*, "[o]ur construction of these statutes and regulations is reinforced by the undisputed existence of a general trust relationship between the United States and the Indian people." *Mitchell II*, 463 U.S. at 225. Likewise here, the trust relationship reinforces the interpretation of the 1960 Act as mandating compensation for the United States' destruction of property put in trust by that Act.

Where property is held in trust by the federal government for a tribe, the United States holds legal title and the Tribe holds equitable or beneficial title. *See United States v. Algoma Lumber Co.*, 305 U.S. 415, 421 (1939). This relationship traces back to the first contact between the Indian and European nations when it was recognized that even though fee title vested in the "discovering" nations and eventually, in the United States, Indians had the right of use and occupancy. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823). This right of use and occupancy was as "sacred as that of the United States to the fee." *Shoshone Tribe v. United States*, 299 U.S. 476, 497 (1937); *see also Mitchel v. United States*, 34 U.S. 711, 746 (1835). *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 48 (1831).

Only last term, this Court recognized:

> The existence of a trust obligation is not, of course, in question. . . . The fiduciary relationship has been described as 'one of the primary cornerstones of Indian law,' . . . and has been compared to one existing under a common law trust, with the United States as trustee, the Indian tribes or individuals as beneficiaries, and the property and natural resources managed by the United States as the trust corpus.

Department of the Interior v. Klamath Water Users Protective Ass'n, 532 U.S. 1, 11 (2001) (citations omitted). Also, the Court "has long recognized 'the distinctive obligation of trust incumbent by the government' in its dealings with Indian tribes, *see e.g., Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)." *Nevada v. United States*, 463 U.S. 110, 127 (1983).

Inherent in the trust relationship are concomitant trust duties – duties which trace to the first treaties and mutual promises made between the federal and tribal governments, when in exchange for vast relinquishments of land and promises of peace, the United States guaranteed that it would protect the ability of Indian tribes to continue their traditional way of life on remaining tribal homelands or reservations. *See* American Indian Policy Review Comm'n, 94th Cong., Final Report 126 (Comm. Print 1977) (finding that the federal trust responsibility emanates from "the unique relationship between the United States and Indians in which the federal government undertook the obligation to ensure the survival of Indian tribes"). *See also Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974) ("the federal Government took early steps to deal with the Indians through treaty, the principle purpose often being to recognize and guarantee the rights of Indians to specified areas of land").

In addition to its treaty foundations, the United States' trust duty also traces to judicial opinions of this Court and statutes of Congress. The Court first acknowledged the trust duty over 170 years ago in the Cherokee cases: *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832). *Worcester* recognized "Indian nations as distinct political communities, having territorial boundaries, within

which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States."

In addition to the judicial recognition, there is also a long history of congressional recognition of the United States' trust duty. The most specific examples of early congressional recognition of the trust duty are found in the Trade and Intercourse Acts, see 25 U.S.C. § 177, which prohibited non-Indians from encroaching on Indian lands, regulated trade with the tribes, and prevented the alienation of Indian land – all purposes aimed at fulfilling its duty to protect the tribal land base. The Northwest Ordinance of 1787, also demonstrated Congress' early recognition of the federal duty of protection as part of the trust relationship:

> The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in justified and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

Northwest Ordinance of 1787, art. III, reprinted in 32 Journals of the Continental Congress 340-41 (Roscoe R. Hill ed., 1936) (reenacted by Act of Aug. 7, 1789, ch. 8, 1 Stat. 50). *See generally* Mary Christina Wood, Protecting the Attributes of Native Sovereignty: A New Trust Paradigm for Federal Actions Affecting Tribal Lands and Resources, 1995 Utah L. Rev. 109 (1995) and Mary Christina Wood, Indian Land and the Promise of Native Sovereignty: the

Trust Doctrine Revisited, 1994 Utah L. Rev. 1471 (1994) (providing a thorough discussion of the federal-Indian trust relationship and responsibility).

Trust duties "are not gratuitous obligations assumed on the part of the United States. They are obligations founded upon a consideration paid by the Indians by cession of part of their territory." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 58-59 (1831) (Thompson J., dissenting). As reiterated by President Nixon, the federal government has *not* "taken on a trusteeship responsibility for Indian communities as an act of generosity toward a disadvantaged people" and it can*not* "discontinue this responsibility on a unilateral basis whenever it sees fit." President's Message to the Congress of the United States on the American Indians, July 8, 1970, at 2. As President Nixon recognized:

> [T]he unique status of Indian tribes does not rest on any premise such as this. The special relationship between Indians and the Federal government is the result instead of solemn obligations which have been entered into by the United States government. Down through the years, through written treaties and through formal and informal agreements, our government has made specific commitments to the Indian people. For their part, the Indians have often surrendered claims to vast tracts of land and have accepted life on government reservations. In exchange, the government has [made agreements]. . . . [T]he special relationship between the Indian tribes and the Federal government which arises from these agreements continues to carry immense moral and legal force.

Id.

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D. The 1960 Act Is Distinguishable From The General Allotment Act

The United States argues that the 1960 Act cannot be fairly interpreted as mandating compensation for the waste and destruction alleged here; that the substantive basis for suit here is even more limited than the basis relied upon in *United States v. Mitchell,* 445 U.S. 535 (1980) ("*Mitchell I*"). See U.S. Br. at 23-25.

In *Mitchell I* the Tribe claimed that the General Allotment Act, 25 U.S.C. § 331 et seq. ("GAA"), provided a substantive basis for suit for the alleged mismanagement of tribal trust timber resources. The Court disagreed, holding that, "[t]he Act does not unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands." 445 U.S. at 542. Rather, the Court concluded that "the Act created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources." *Id.* In multiple important ways, the situation here is distinguishable from that in *Mitchell I.*

First, the trust created by the 1960 Act is a specific trust pertaining to a particular tribe about a particular and well defined piece of property. Unlike the GAA, the 1960 Act is not a general statute of general applicability.

Second, as noted above, supra, the Tribe here is not claiming that the United States mismanaged its trust property in the way that it was alleged to have mismanaged the property in *Mitchell I.* The question here is not whether the 1960 Act imposed on the Federal Government the duty to manage the property for the economic benefit of the Tribe. Rather, the question here is whether the Act

imposed on the Federal Government the duty not to waste the Tribe's property.

Third, unlike in *Mitchell I*, the 1960 Act created a trust that specifically authorized the United States' use of the Tribe's trust property. That crucial element of control was missing in the GAA. The Court in *Mitchell I* explicitly noted that the GAA did not "provide that the United States has undertaken full fiduciary responsibilities as to the management" of the trust property. *Mitchell I*, 445 U.S. at 542. The opposite was true. Under the GAA, "the Indian allottee and not a representative of the United States, is responsible for using the land for agricultural or grazing purposes. . . . Under this scheme, then, the allottee and not the United States, was to manage the land." *Mitchell I*, 445 U.S. at 542-543.

Finally, both the purposes and federal policies toward Indians underlying the 1960 Act and the GAA completely differed. As the Court emphasized in *Mitchell I*, the entire purpose of the GAA was to limit, even extinguish, the United States' management role with respect to the allotted properties. Congress "intended that the United States 'hold the land . . . in trust' not because it wished the Government to control use of the land and be subject to money damages for breaches of fiduciary duty, but simply because it wished to prevent alienation of the land and to ensure that allottees would be immune from the state taxation." *Id.* at 544.

These goals reflected the larger goals and policies in existence when the GAA was passed. The GAA was passed

during one of the two periods in United States' relations with Indian tribes in which the federal government's recognition of its trust responsibility ebbed.[9] *See* Felix S. Cohen, Handbook of Federal Indian Law, 127-143 (1982 ed.) ("Cohen"). The GAA was rightfully interpreted by the Court to incorporate congressional intent at that time.

United States policy toward Indians and the trust responsibility had shifted by the time the 1960 Act was passed, however. In 1934 Congress passed the Indian Reorganization Act, 25 U.S.C. §§ 461-479 ("IRA") – an Act which was meant specifically to reverse the policy of allotment and the devastating effects of the GAA and reaffirm its trust duties toward tribes. *See* Cohen at 144-152. Indeed, as the provisions of the IRA itself demonstrate, see 25 U.S.C. §§ 461-465, when the 1960 Act was passed, Congress clearly intended to encourage and protect tribal trust property – an intent which should be read into the 1960 Act.

[9] The other period was the period known as the termination era, *see* Cohen at 152-180, which is not applicable here.

CONCLUSION

For the reasons stated above, the decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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The "Miner's Canary:" A Bird's Eye View of American Indian Law and Its Future

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American Indian law is often metaphorical. As Chief Justice Marshall stated in one of the foundational Indian law cases, the relationship between American Indian nations and the United States is like "that of a ward to his guardian."[1] The classic Indian law metaphor, however, is the "miner's canary." As Felix Cohen, the Blackstone of American Indian law, wrote in 1953, the year he died:

> [T]he Indian plays much the same role in our American society that the Jews played in Germany. Like the miner's canary, the Indian marks the shifts from fresh air to poison gas in our political atmosphere; and our treatment of Indians, even more than our treatment of other minorities, reflects the rise and fall in our democratic faith.[2]

Cohen was right, of course, if a bit Manichean. But we must remember what Cohen was writing about: Federal Indian Law.[3] He was writing as an

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This essay is based on a speech first delivered at the *University of Pennsylvania Journal of Constitutional Law's* symposium on *Native Americans and the Constitution* held February 1–2, 2002, and later delivered at the *New England Law Review* symposium entitled *The Role of Jurisdiction in the Quest for Sovereignty* held on October 25, 2002. The views expressed herein are the author's personal views and do not represent, in any way, official positions of Cravath, Swaine & Moore LLP or the Oneida Indian Nation of New York.

I would like to thank the editors of the *New England Law Review* and the *University of Pennsylvania Journal of Constitutional Law* for their invitations and Cravath, Swaine & Moore LLP for their support.

1. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 2 (1831).

2. Felix S. Cohen, *The Erosion of Indian Rights, 1950-53: A Case Study in Bureaucracy*, 62 YALE L.J. 348, 390 (1953). Use of this metaphor has become widespread, going beyond Indian law. *See, e.g.*, LANI GUINIER & GERALD TORRES, THE MINER'S CANARY (2002).

3. Cohen's magnum opus was the HANDBOOK OF FEDERAL INDIAN LAW (1942).

observer, looking at Indian law from a sympathetic perspective but, nonetheless, he was wearing the miner's headlamp, looking at the canary.

On the other hand, the canary, or the Indian, is like the protagonist in the Talking Heads song who is asking himself, "Well, how did I get here?"[4] The answer, of course, is that the canary was brought down into the coal mine, just as the Indians were, as scholars have politely put it, "incorporated" into the United States.[5] Indian nations were at first just pushed westward, but then gold was discovered in California and settlement leapfrogged the Indians, locking them in the middle[6]—in the coal mine, if you will.

And what sort of place was that? A constitutional federalist republic, split along two major axes, as per Federalist No. 51:[7] the state/federal axis and the separation of powers axis. Indians have been constantly buffeted along these dimensions ever since. David Getches has described Indian law as the "crucible for forging a larger agenda important to majorities of the Court."[8] Similarly, Richard Monette has called tribes "federalism['s] football,"[9] but I think the canary metaphor goes the furthest. Remember, the miners did not just plunk the canary down somewhere; they carried it around to explore new areas—to test them, to find the seams and fissures, the dangerous places, the safe harbors. Indians, despite the good arguments by Barsh and Henderson,[10] Carol Tebben[11] and others, are not really part of federalism. They are an instrument of federalism, a means by which the dominant society has explored the boundaries between state and federal power and among executive, legislative, and judicial power.

A cursory review of the Supreme Court's major Indian cases reveals this

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4. TALKING HEADS, *Once in a Lifetime*, *on* REMAIN IN LIGHT (Sire 1980).

5. *See* Frank Pommersheim, *Is There a (Little or Not so Little) Constitutional Crisis Developing in Indian Law?: A Brief Essay*, 5 U. PA. J. CONST. L. 271 (2003).

6. *See* Steven Paul McSloy, *Back to the Future: Native American Sovereignty in the 21st Century*, 20 N.Y.U. REV. L. & SOC. CHANGE 217, 240–42 (1993).

7. THE FEDERALIST No. 51 (James Madison).

8. David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 329 (2001).

9. Richard A. Monette, *Sovereignty and Survival: The Status of Indian Tribes Under American Law Is Key to Their Cultural Existence*, 86 A.B.A. J. 64, 65 (2000). *See also* Richard A. Monette, *A New Federalism for Indian Tribes: The Relationship Between the United States and Tribes in Light of Our Federalism and Republican Democracy*, 25 U. TOL. L. REV. 617, 618 (1994); Kevin J. Worthen & Wayne R. Farnsworth, *Who Will Control the Future of Indian Gaming?: A Few Pages of History are Worth a Volume of Logic*, 1996 BYU L. REV. 407.

10. RUSSEL LAWRENCE BARSH & JAMES YOUNGBLOOD HENDERSON, THE ROAD: INDIAN TRIBES AND POLITICAL LIBERTY (1980).

11. Carol Tebben, *An American Trifederalism Based upon the Constitutional Status of Tribal Nations*, 5 U. PA. J. CONST. L. 318 (2003).

dynamic. In the 1831 case of *Cherokee Nation v. Georgia*,[12] an Indian nation challenged the power of the State of Georgia to apply its law in Indian territory. This was an easy result to forecast—the State won. A year later in *Worcester v. Georgia*[13] the Court was presented with the same case, but Indians were not parties. A Vermont Yankee who was a federal employee living in Indian country was imprisoned by a southern state demanding he take a loyalty oath. The State lost on the ground that its laws were "repugnant to the Constitution, laws, and treaties of the United States."[14] As a result of this Supreme Court decision, the Cherokees won a ringing endorsement of their sovereignty, yet they were not parties in the case.

The 1871 Act that ended treaty-making with Indian tribes also was not about Indians.[15] Instead, it reflected a separation of powers fight. The House, tired of appropriating money for treaties that only the Senate had a role in ratifying, with the Senate, struck a constitutional (or unconstitutional) compromise, ending treaty-making and replacing it with the regular congressional legislative process.[16] Indians were the subject of the Act, but they were bystanders to its passage.

Another example is the 1883 *Crow Dog*[17] case. By the 1870s, Indians were no longer a frontier concern but rather an "Interior" matter,[18] and the Bureau of Indian Affairs (BIA) was feeling fettered in its efforts to control them.[19] The Commerce Clause, the power constitutionally delegated to the federal government regarding Indians, did not authorize things like criminal laws.[20] To change this, the BIA created a sham case—one it wanted to lose—after Spotted Tail, a Chief popular in the East, was murdered by another Indian, Crow Dog.[21] As Professor Sidney Harring's

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12. 30 U.S. (5 Pet.) 1 (1831).

13. 31 U.S. (6 Pet.) 515 (1832).

14. *Id.* at 562.

15. *See* Act of Mar. 3, 1871, ch. 120, 16 Stat. 566 (codified as amended at 25 U.S.C. § 71 (2000)).

16. *See* McSloy, *supra* note 6, at 243.

17. *Ex parte* Crow Dog, 109 U.S. 556 (1883).

18. In 1849, Indian affairs were reassigned from the War Department to the Interior Department. *See* McSloy, *supra* note 6, at 242.

19. *See* SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW AND UNITED STATES LAW IN THE NINETEENTH CENTURY 115 (1994).

20. U.S. CONST. art. I, § 8, cl. 3. *See also* United States v. Kagama, 118 U.S. 375, 378–79 (1886) ("[W]e think it would be a very strained construction ... that a system of criminal laws for Indians living peaceably in their reservations ... was authorized by the grant of power to regulate commerce with the Indian tribes.").

21. *See Ex parte* Crow Dog, 109 U.S. at 557. *See also* HARRING, *supra* note 19, at 100.

book uncovered, the BIA actually paid Crow Dog's legal bills in order to get the case to the Supreme Court, where it was held that tribal justice was the only applicable jurisdiction, and Crow Dog would not hang under federal law.[22] The federal government lost the case, but, as predicted, the ensuing outrage about "Red Man's Justice" led to the passage of the Major Crimes Act shortly thereafter—the first direct application of federal criminal law to inter-Indian crimes and the fulfillment of the BIA's long-sought goal.[23] The next year, in *Kagama*, also an inter-Indian murder case, the BIA obtained another decision it wanted.[24] The Supreme Court held that the federal government had the power to pass laws regulating Indians even if such power was not authorized by the Constitution[25]—even if the power had never been delegated to the federal government by the states or by the people.

On the strength of this holding, Congress passed the General Allotment Act the following year,[26] resulting in the loss of 80% of the remaining Indian-held lands and completing the settlement of America.[27] Commentators frequently call *Kagama* an "extra-constitutional" case,[28] but in reality it was a "supra-constitutional" case, as it increased federal power beyond the federalist design. *Crow Dog* and *Kagama* involved only two dead Indians and their Indian murderers, yet they were used to create the basis for federal plenary power over the Indians and the concomitant loss of huge portions of the continent to settlement by states.

Another example of Indians being caught in a federalism firefight is the 1968 Indian Civil Rights Act,[29] which at first blush seems a noble enterprise, applying the Bill of Rights statutorily to Indian tribes. Yet Indians did not lobby for it. It was a states' rights issue introduced by Sam Ervin, Senator from North Carolina, to take the heat off civil rights violations of southern states by pointing at tribal governments as more egregious violators.[30] However, when the law later came before the

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22. *See* HARRING, *supra* note 19, at 126.

23. *See* Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified as amended at 18 U.S.C. § 1153 (2000)).

24. *See Kagama*, 118 U.S. at 375.

25. *See id.* at 383–85. *See also* McSloy, *supra* note 6, at 245–47.

26. *See* Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331–334, 339, 341–342, 348–349, 354, 381 (2000) (repealed 1934)). *See generally* McSloy, *supra* note 6, at 247.

27. *See* McSloy, *supra* note 6, at 247–48.

28. *See, e.g.*, Pommersheim, *supra* note 5, at 277–78 & n.42.

29. Pub. L. No. 90-284, 82 Stat. 77 (1968) (codified as amended at 25 U.S.C. § 1301 (2000)).

30. *See* Donald L. Burnett, *An Historical Analysis of the 1968 "Indian Civil Rights" Act*, 9 HARV. J. ON LEGIS. 557, 575–76, 605, 607 (1972). "In the angry clash of black and

Supreme Court in 1978 in *Santa Clara Pueblo v. Martinez*,[31] the Court realized that it did not want to have to adjudicate all those cases. There was no new money for judges or courthouses from Congress, so the Court left enforcement up to the tribes, denying any federal cause of action under the law despite the fact that the law was an almost verbatim recitation of the Bill of Rights.[32]

The 1978 Indian Child Welfare Act[33] is another seemingly noble statute, one for which Indians did lobby. States had acted inappropriately in removing Indian children to non-Indian foster homes, and the tribes successfully lobbied Congress to uphold tribal jurisdiction over Indian children. In the 1989 *Holyfield* case,[34] a state court challenged tribal court jurisdiction over adoption matters and lost—but why? The state lost because the federal law was clear in preferring tribal court jurisdiction, and thus, it was a supremacy issue.[35] However, had the case involved inherent tribal authority, as opposed to federal power, the result would have been much different, as it was in the recent *Strate*,[36] *Atkinson*,[37] and *Hicks*[38] cases.

It is the same story with Indian land claims.[39] Whatever the history is regarding the 1790 Non-Intercourse Act, whether it was supposed to apply in the original thirteen colonies or not,[40] the text is clear—no state can buy

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white, North and South, Indian law was made." *Id.* at 614.

31. 436 U.S. 49, 49–50 (1978).

32. The Court did uphold the statute's explicit habeas corpus remedy as the only cause of action allowable in federal court under the Act. *See id.* at 50.

33. Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified as amended at 25 U.S.C. §§ 1901–1963 (2000)).

34. Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989).

35. *See id.*

36. Strate v. A-1 Contractors, 520 U.S. 438, 439–41 (1997).

37. Atkinson Trading Co. v. Shirley, 532 U.S. 645, 645–46 (2001).

38. Nevada v. Hicks, 533 U.S. 353, 353–54 (2001). *Hicks* has been widely criticized. *See* Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641 (2003); Catherine Struve, *How Bad Law Made a Hard Case Easy,* Nevada v. Hicks *and the Subject Matter Jurisdiction of Tribal Courts*, 5 U. PA. J. CONST. L. 288 (2003); Gloria Valencia-Weber, *The Supreme Court's Indian Law Decisions: Deviations from Constitutional Principles and the Crafting of Judicial Smallpox Blankets*, 5 U. PA. J. CONST. L. 405 (2003).

39. *See generally* Tim Vollman, *A Survey of Eastern Indian Land Claims 1970-79*, 31 ME. L. REV. 5 (1979); Ray Halbritter & Steven Paul McSloy, *Empowerment or Dependence? The Practical Value and Meaning of Native American Sovereignty*, 26 N.Y.U. J. INT'L L. & POL. 531 (1994); John Tahsuda, *The Oneida Land Claim: Yesterday and Today*, 46 BUFF. L. REV. 1001 (1998).

40. The question itself is a federalism debate. *See* Steven Paul McSloy, *Border Wars: Haudenosaunee Lands and Federalism*, 46 BUFF. L. REV. 1041 (1998).

Indian land.[41] Thus, 200 years later, the Supreme Court held that a state could not have ignored such a clear federal command grounded in the Commerce Clause of the Constitution, even if the case was not filed for two centuries.[42] If, however, a federal command was not so clearly grounded in constitutional bedrock and sought to subject a state to federal court jurisdiction, you get *Seminole Tribe v. Florida*[43] and an opposite result. In enacting the Indian Gaming Regulatory Act,[44] Congress was explicit in subjecting recalcitrant states to federal court jurisdiction to resolve disputes about gaming, but the Supreme Court in *Seminole* held that such jurisdiction violated state sovereignty.[45]

Justices Rehnquist, Brennan, and Scalia all have (or had) their miner's headlamps on, dragging the canary hither and yon in search of doctrine, testing the boundaries of the federal/state relationship and the interrelationships among the three branches, including their own. The usual result, however, is that the bird dies.

So what are Indian nations to do? Avoid being a canary. Stay out of the Supreme Court. I am glad to hear about the Native American Rights Fund's Supreme Court Project,[46] which seeks to screen cases before they go before the Court, but to me, taking Indian cases to the Supreme Court has been prima facie malpractice for the last twenty years.[47]

Indian nations should particularly stay away from state/tribal conflicts, and, if they are unavoidable, settle them. Couldn't somebody have just paid Floyd Hicks for his damaged stuffed sheep heads rather than let it go all the

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41. Indian Non-Intercourse Act of 1790, ch. 33, 1 Stat. 137 (codified as amended at 25 U.S.C. § 177 (2000)).

42. *See* County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985).

43. 517 U.S. 44 (1996).

44. Pub. L. No. 100-497, §§ 2–22, 102 Stat. 2467 (1988) (codified as amended at 25 U.S.C. §§ 2701–2721 (2000)).

45. David Getches has argued that *Seminole* "was intended by the Court primarily to announce a new rule on the sovereign immunity of states and to limit Congress' power under the Commerce Clause." Getches, *supra* note 8, at 335. State sovereign immunity under the 11th Amendment has been a critical federalism battleground in recent Supreme Court terms. Catherine Struve has written instructively about these cases and their implications for Indian nations. *See, e.g.*, Catherine T. Struve, *Turf Struggles: Land, Sovereignty, and Sovereign Immunity*, 37 NEW ENG. L. REV. 571 (2003); Catherine T. Struve, *Raising Arizona: Reflections on Sovereignty and the Nature of the Plaintiff in Federal Suits Against States*, 61 MONT. L. REV. 105 (2000).

46. *See* Tracy Labin, *We Stand United Before the Court: The Tribal Supreme Court Project*, 37 NEW ENG. L. REV. 695 (2003).

47. For statistics and commentary, see Sarah Krakoff, *Undoing Indian Law One Case at a Time: Judicial Minimalism and Tribal Sovereignty*, 50 AM. U. L. REV. 1177 (2001); Getches, *supra* note 8; Valencia-Weber, *supra* note 38.

way to the Supreme Court?[48] The only time an Indian nation should take a state to court is if the federal government is strongly and soundly on the Indian nation's side, thereby changing the federalism calculus. For example, in the *Oneida*,[49] *Mohawk*,[50] and *Cayuga*[51] land claims, the courts essentially have dismissed all suits against private landowners, saying there can be a complete recovery from the state. This would be problematic but for the fact that the federal government has strongly intervened in all of the cases.[52] If an Indian nation feels the need to sue somebody, it should sue the federal government—it at least has a trust responsibility of some sort.[53]

In general, Indian nations should stay out of court. Cases force a decision—they put the tribe in the coal mine. Bringing a case means that someone else is doing the deciding. After Justice Rehnquist became ascendant, the courts were no longer the answer. Maybe it is my corporate lawyer bias, but what tribes should do is make deals.[54] Compacts and quasi-treaties have been made about water,[55] roads,[56] taxes,[57] gaming,[58]

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48. *See* Nevada v. Hicks, 533 U.S. 353, 356 (2001). The genesis of the dispute was the alleged damage to Mr. Hicks' stuffed sheep heads in a warrant search executed by Nevada state officials on tribal land. *See id.*

49. Oneida Tribe of Indians of Wis. v. AGB Properties, Inc., No. 02-CV-233, 2002 U.S. Dist. LEXIS 16538 (N.D.N.Y. Sep. 5, 2002) (dismissing claims against private landowners and enjoining plaintiff from bringing any further claims against private landowners). *See also* Oneida Indian Nation of N.Y. v. County of Oneida, 199 F.R.D. 61 (N.D.N.Y. 2000) (denying plaintiff's motion to add landowners and non-state entities as defendants).

50. Canadian St. Regis Band of Mohawk Indians v. New York, 205 F.R.D. 88 (N.D.N.Y. 2002) (allowing United States, as intervenor, to drop all claims and remedies against non-state defendants).

51. Cayuga Indian Nation v. Cuomo, 188 F. Supp. 2d 223 (N.D.N.Y. 2002) (dismissing all claims of the United States, as intervenor, against non-state defendants). *See also* Cayuga Indian Nation of N.Y. v. Pataki, 79 F. Supp. 2d 66 (N.D.N.Y. 1999) (denying as "manifestly inequitable" to individual landowners the motion of the United States, as intervenor, to hold them jointly and severally liable with the State).

52. *See Oneida*, 199 F.R.D. at 68; *Cayuga*, 188 F. Supp. 2d at 229; Canadian St. Regis Band of Mohawk Indians v. New York, 146 F. Supp. 2d. 170, 177 (2001).

53. *See* United States v. White Mountain Apache Tribe, 123 S. Ct. 1126 (2003). *See also* Cobell v. Norton, 240 F.3d 281 (D.C. Cir. 2001) (affirming the government's "substantial trust responsibilities toward Native Americans").

54. *See* Phillip P. Frickey, *Adjudication and its Discontents: Coherence and Conciliation in Federal Indian Law*, 110 HARV. L. REV. 1754, 1779–84 (1997).

55. *See, e.g.*, UTAH CODE ANN. § 73-21-2 (2002) (Ute Indian Water Compact); CROW INDIAN TRIBE, RESOURCES REPORT, *Water Compact Status*, at 3, *at* http://www.mt.blm.gov/mcfo/cbm/eis/CrowTribeNarrativeReport/assets.pdf (last visited Mar. 31, 2003).

56. *See, e.g.*, OKLA. STAT. tit. 19, § 339(A)(16) (2002).

57. See, for example, the many tax-related tobacco and motor fuel compacts between Oklahoma and the Indian nations located therein, at http://www.oiac.state.ok.us/cca.html#

cross deputizations,[59] full faith and credit agreements,[60] and even land claims. Indian nations should engage other governments and be proactive, not just sit around and then sue when some action is taken against them. Indian nations need to be practical sovereigns—not all or nothing litigants.

The United States is the most powerful nation on earth. Small nations, not just Indian tribes, get caught up in its wheels. Like the canary, they get used by the United States as it experiments in its ongoing journey of self-discovery about its society and federalist structure. Indian nations should thus do what small countries do—make deals. If you have a strong suit, like oil or water, play it. If you have a weak hand, at least market what you do have. Indian gaming, for example, is not a recent idea. Look at Monaco, a principality smaller than many reservations and more controlled by France than Indian tribes are by the United States.[61] The Grimaldi princes, however, realized they were just sovereign enough to legalize gambling when France and Italy banned it.[62] Up in the Pyrenees, Spanish and French people today flock to tiny Andorra to buy cigarettes,[63] just as people in the

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tob (last visited Mar. 30, 2003); http://www.oiac.state.ok.us/cca.html#mf (last visited Apr. 14, 2003).

58. See, for example, the many gaming compacts between Oklahoma and the Indian nations located therein, at http://www.oiac.state.ok.us/cca.html#g (last visited Mar. 31, 2003).

59. See, for example, the many cross-deputization compacts between Oklahoma and the Indian nations located therein, at http://www.oiac.state.ok.us/cca.html#cd (last visited Mar. 31, 2003).

60. *See, e.g.*, P.S. Deloria & Robert Laurence, *Negotiating Tribal-State Full Faith and Credit Agreements: The Topology of the Negotiation and the Merits of the Question*, 28 GA. L. REV. 365 (1994).

61. According to the 1918 treaty between Monaco and France, Monaco must "exert its sovereignty rights in perfect agreement with the political, military, naval and economic interests of France." FLAGS OF THE WORLD, *History and Status of the Principality of Monaco*, *at* http://flagspot.net/flags/mc.html (last visited Apr. 14, 2003). *See also* U.S. DEP'T OF STATE, BUREAU OF EUROPEAN AND EURASIAN AFFAIRS, *Background Note: Monaco*, *at* http://www.state.gov/r/pa/ei/bgn/3397.htm#foreign (last visited Apr. 14, 2003). The succession to the throne of Monaco must be approved by the French government. *See* THE COLUMBIA ENCYCLOPEDIA (6th ed.), *at* http://www.bartleby.com/65/mo/Monaco.html (last visited Apr. 14, 2003). Monaco's State Minister is appointed by the monarch from a list of candidates presented by the French government. *See* THE WORLD FACT BOOK 2002, *at* http://www.bartleby.com/151/164.html (last visited Apr. 14, 2003). Finally, two Parisian judges constitute Monaco's Court of Appeal. *See* 8 THE NEW ENCYLOPEDIA BRITANNICA 243 (15th ed. 1986).

62. *See* FLAGS OF THE WORLD, *supra* note 61; UNITED KINGDOM PARLIAMENT, SELECT COMM. ON CULTURE, MEDIA AND SPORT, Memorandum submitted by Professor Peter Collins, *at* http://www.parliament.the-stationery-office.co.uk/pa/cm200102/cmselect/cmcumeds/827/2061105.htm (last visited Apr. 14, 2003).

63. *See* Maureen Moore, *Let's Smoke Out the Real Smugglers*, EVENING NEWS

United States do when they drive out to the reservations.

Indian nations should get out of the sovereignty talk, get out of the rights talk, and get out of the constitutional talk, because it is not going to work before the current Supreme Court. Litigation is only one weapon in the arsenal of tribal sovereignty—it should not be a tribal way of life. The best way for the canary to survive is to stay out of the mine.

(Edinburgh), Aug. 8, 2002, at 10.

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COMMENT

Karuk Tribe of California v. United States: The Courts Need a History Lesson

> [T]he Supreme Court has been inattentive, flippant, and disrespectful of Indian rights, and has seen its task as one of finding arguments that will make actions by the other two branches appear legal. Many "doctrines" have emerged over the course of 170 years of hearing Indian cases, but the various courts have felt no compulsion to follow precedent, nor have they paid much attention to the historical activities of the federal government toward Indians, often inventing their own version of history[.][1]

The Supreme Court, in 2001, decided not to even attempt its hand at creativity and passed on hearing "possibly the most important Indian-lands takings case to come before the federal courts in this generation."[2] That case is *Karuk Tribe of California v. United States*,[3] and the decision reached in the case can only be detrimental to the future of Indians in this country. At a time when the government claims to be emphasizing the self-determination of Indians, the courts also must take a step in that direction if the goal is ever to be fully realized.

I. INTRODUCTION

Currently there are 187 Indian reservations existing within the United States that were created by executive order.[4] More than 200 additional

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1. VINE DELORIA, JR. & DAVID E. WILKINS, TRIBES, TREATIES, AND CONSTITUTIONAL TRIBULATIONS 51 (1999).

2. Tony Mauro, *U.S. Supreme Court Considering Indian Tribe Takings Case*, AM. LAW. MEDIA (Mar. 15, 2001), *at* http://www.law.com (last visited Apr. 8, 2003) (quoting William Wunsch of Faulkner, Sheehan & Wunsch who represents the Karuk Tribe).

3. 41 Fed. Cl. 468 (1998), *aff'd sub nom.* Karuk Tribe of Cal. v. Ammon, 209 F.3d 1366 (Fed. Cir. 2000), *cert. denied sub nom.* Karuk Tribe of Cal. v. United States, 532 U.S. 941 (2001) (mem.).

4. Petition for a Writ of Certiorari, Appendix G at 96a, Karuk Tribe of Cal. v. United States (filed Dec. 18, 2000) (No. 00-1012), *cert denied*, 532 U.S. 941 (2001) (mem.)

executive orders were utilized to affect other Indian reservations in one way or another.[5] When the Supreme Court refused to hear the claim of the plaintiffs in *Karuk Tribe*, it let stand a decision that denied a Fifth Amendment claim to just compensation to which any Indian, similarly situated, may legally be entitled. The court accomplished this task by basing its decision on one simple fact—the reservation was originally created by an executive order.[6] To allow this verdict to stand as precedence is to give the government the power to appropriate land belonging to the Indian community without any concerns about the ramifications of its actions. It also gravely impacts that community in general, as their main source of survival is the land on which they live.[7]

The most disturbing issue in this case, aside from the taking of land without the payment of just compensation, is the actual settlement agreement from which this case evolved.[8] Not only were the tribes forced to accept something far less than just compensation, they also were forced to either organize their government in accordance with the United States government's rules[9] or else forfeit any rights to even the small compensation the U.S. government was willing to make.[10] This settlement agreement is indicative of the history the U.S. government shares with Indian communities in this country and resembles the eras of assimilation and termination that are a part of our country's shameful past.[11]

In order to understand the grave implications of the Supreme Court's denial of certiorari, a complete understanding of how this thirty-year-old case evolved, the issue embedded in it, and the history from which it stems

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[hereinafter Petition].

5. *See id.* at 94a. Examples where executive orders were used to affect a reservation include three that consolidated tribes within a reservation, forty-seven that enlarged the borders of reservations, eleven that corrected the boundaries of national forest reserves that mistakenly included Indian land, and seventy-one that revoked reservation status and returned the land to the public. *See id.*

6. *See Karuk Tribe*, 209 F.3d at 1381.

7. *See* Joseph William Singer, *Well Settled? The Increasing Weight of History in American Indian Land Claims*, 28 GA. L. REV. 481, 525 (1994). Indians' "traditional connection with the land is stronger, closer, and of far greater cultural significance to personal and group identity than it [is] for non-Indians." *Id.* If the courts do not take action "to protect the land and resources upon which they depend, native cultures that have endured 500 years of conquest may simply fade[.]" Mary Christina Wood, *Indian Land and the Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1569.

8. *See generally* Hoopa-Yurok Settlement Act, Pub. L. No. 100-580, 102 Stat. 2924 (1988) (codified as amended at 25 U.S.C. § 1300i (2000)).

9. *See* §§ 1300i-9–10.

10. *See* § 1300i-5(d).

11. *See infra* Parts II.C and II.E.

is essential. To facilitate this understanding, this article will be broken into three major sections: (1) a historical background of the U.S. government's relationship with Indian nations,[12] (2) a summary of *Karuk Tribe*, along with an overview of its objectionable settlement agreement,[13] and (3) the correct analysis and application of precedent to this case.[14] The article will conclude with a proposal to the courts on how to take their long-awaited step in the direction of Indian self-determination.[15] This step is urgently needed to achieve equality in adjudication until Congress takes the ultimate step necessary to achieve the goal of self-determination: return to the original understanding of the trust doctrine.[16]

II. A HISTORICAL BACKGROUND

No analysis of the law pertaining to Indians would be complete without first understanding its development and the effect its history has had on the Indian communities of this country. As this history will show, "U.S. society has not always dealt equitably with Indian tribes."[17] However, it is only through an understanding of this history that the courts can achieve equality in their decision-making. This also is the only means by which Congress will be able to formulate effective and just policies in the future.

The most efficient way to achieve this understanding is to view the history as broken into specific time periods. These major time periods begin with the discovery of the United States and continue through to the present time.[18]

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12. *See infra* Part II.

13. *See infra* Part III.

14. *See infra* Part IV.

15. *See infra* Part V.

16. *See* United States v. Mitchell, 463 U.S. 206 (1983). The current trust doctrine creates a fiduciary duty between the United States and Indians, whereby the U.S. government, and not the Indians, manages the land and resources of the Indians. *See id.* However, this current exercise of the trust doctrine has strayed beyond its original intention, which was to "recognize and develop a model in which the Indian tribes could exist quite separate from the dominant society, yet fall under the protection of the United States[.]" Ray Torgerson, *Sword Wielding and Shield Bearing: An Idealistic Assessment of the Federal Trust Doctrine in American Indian Law*, 2 TEX. F. ON C.L. & C.R. 165, 165 (1996). In addition, as the current exercise of the trust doctrine is based on an assumption that Congress has plenary power over the Indians, it is inconsistent with the Constitution. *See* Mark Savage, *Native Americans and the Constitution: The Original Understanding*, 16 AM. INDIAN L. REV. 57, 72–78 (1991). The Indian Commerce Clause of the Constitution clearly states that Congress is to regulate commerce "*with* the Indian Tribes" and not *for* the Indian Tribes. U.S. CONST. art. I, § 8, cl. 3 (emphasis added).

17. GARY A. SOKOLOW, NATIVE AMERICANS AND THE LAW: A DICTIONARY xiii (2000).

18. *See*, VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 2–24 (1983) (discussing specific time periods).

A. Discovery, Conquest, and Treaty-Making (1532–1828)

When the Europeans first came to the United States, their settlements were small and posed little threat to the Indians.[19] In turn, the Europeans recognized the Indians "as legitimate entities capable of dealing with the European nations by treaty."[20] By the time the colonies were officially organized into the United States, treaty-making between the Indians and the settlers had become a well-established practice.[21] Within the first 100 years of its existence, the United States entered into more than 600 treaties with the Indian community.[22]

However, as the number of settlers grew, and as they expanded into the western territories, this 'harmony' between the European settlers and the Indians soon came to an end, and the treaty-making process became nothing more than a means of preventing prolonged and expensive wars between the settlers and the Indians they encountered.[23] Furthermore, when these treaties were negotiated, the Indians were not always on equal ground with the settlers.[24] This inequality in the treaty-making process has resulted in lengthy disputes within the past and present American court system.

Three major cases to appear before the Supreme Court early in the country's history laid the foundation for what is now known as the trust relationship between the Indian nations and the U.S. government. These cases, known as the Marshall Trilogy,[25] defined the relationship as one between a ward and its guardian[26]—the ward being the Indians, and the guardian being the U.S. government:

> They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.
>
> They look to our government for protection; rely upon its kindness and

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19. *See* DAVID E. WILKINS & TSIANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW 27 (2001).

20. DELORIA & LYTLE, *supra* note 18, at 3.

21. *See id.*

22. *See id.* at 3–4.

23. *See id.* at 5.

24. *See id.* (noting that treaties were written in English and usually interpreted by those who had a stake in the outcome).

25. *See* Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). All three cases concerned the ownership of Indian land and the legal authority Indians held over their own land. *See* SOKOLOW, *supra* note 17, at 229.

26. *See Cherokee Nation*, 30 U.S. at 17.

its power; appeal to it for relief of their wants[.][27]

Despite the creation of a trust relationship in these cases, the Court did not intend for it to extend to the taking of Indian land without their prior consent.[28] Rather, the relationship was deemed to be based on the treaties that were already formed, or the future treaties to be formed.[29]

B. Removal and Relocation (1828–1887)

"[A] preview of future Indian policy"[30] came in 1830 with the passage of the Indian Removal Act.[31] Under President Andrew Jackson,[32] and in response to pressure from white settlers, Congress enacted this policy to force the removal of Indians from all areas east of the Mississippi River to reservations in the west.[33] This policy "was dominated by a desire to segregate tribes from interaction with non-Indian society except under tightly regulated circumstances."[34]

The result of this removal policy was the loss of tens of millions of acres of Indian land[35] and a greatly weakened Indian force.[36] Despite the fact that the U.S. government was successful in achieving a portion of its goal, the U.S. plan was "doomed from the beginning."[37] As the expansion of America continued, it became increasingly difficult to keep the Indians and the white settlers from coming in contact with one another.[38]

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27. *Id.*

28. *See* DAVID E. WILKINS, AMERICAN INDIAN SOVEREIGNTY AND THE U.S. SUPREME COURT 43–45 (1997) (discussing Justice Taney's inaccurate reading of the Marshall Trilogy in *United States v. Rogers*, 324 U.S. 335 (1945)).

29. *See Worcester*, 31 U.S. at 559–60.

30. DELORIA & LYTLE, *supra* note 18, at 6–7.

31. Act of May 28, 1830, ch. 148, 4 Stat. 412 (codified as amended at 25 U.S.C. § 174 (2000)).

32. *See* DELORIA & WILKINS, *supra* note 1, at 35. "Andrew Jackson had an extreme anti-Indian stance stemming from his military days. He pushed through Congress the Indian Removal Act ... which enabled the federal government to place the veneer of legality over a policy that encouraged treaty violations by setting in motion a punitive alternative should tribes wish to remain east of the Mississippi." *Id.*

33. *See* CONFERENCE OF WESTERN ATTORNEYS GENERAL, AMERICAN INDIAN LAW DESKBOOK 15 (2d ed. 1998) [hereinafter DESKBOOK]. *See also* DELORIA & LYTLE, *supra* note 18, at 6–8.

34. DESKBOOK, *supra* note 33, at 15.

35. *See* DELORIA & LYTLE, *supra* note 18, at 7.

36. *See* SOKOLOW, *supra* note 17, at 5. "The confinement of many Indian nations to a fixed area, often hundreds of miles away from their ancestral lands, wreaked havoc on their culture, health, and very existence." *Id.*

37. DELORIA & LYTLE, *supra* note 18, at 7.

38. *See id.* at 7–8.

C. Allotment and Assimilation (1887–1928)

"In the 1880s a radical reversal of thinking occurred: if you [could] no longer push Indians westward to avoid contact with civilization, and it [was] inhumane to conduct wars of extermination against them, the only alternative [was] to assimilate them."[39] This policy of assimilation was based on the belief that the only means left to civilize the Indians was to absorb them "into the mainstream of American life and culture."[40]

One such attempt to "civilize" the Indians and assimilate them into American society was the General Allotment Act (also known as the Dawes Act), which was passed by Congress in 1887.[41] By distributing allotments to individual Indians through this Act, Congress hoped the concept of land ownership would encourage the individual Indians to eventually become farmers, like their white neighbors.[42] What Congress did not take into consideration though, was that farming was not the usual way of life for a majority of Indians. More than simple land ownership would be required to change the way of life to which Indians were accustomed.[43] Yet, the government did not recognize this flaw in the General Allotment Act and failed to provide individual Indians with the adequate resources[44] and knowledge necessary to achieve the government's

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39. *Id.* at 8.

40. SOKOLOW, *supra* note 17, at 38.

41. The Indian General Allotment (Dawes) Act, ch. 119, §§ 1–6, 8, 10–11, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331–334, 339, 341–342, 348–349, 354, 381 (2000) (repealed 1934)) (providing "for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes"). One of the "other purposes" of the allotment was to open up the reservations to white settlers who were permitted to purchase the "surplus lands" of the reservations not allotted to individual Indians. *See* Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991).

42. *See* SOKOLOW, *supra* note 17, at 34. Many Indians resisted this effort by Congress, as "tribes are collectives" and "wish[ed] to continue communal ownership." Nell Jessup Newton, *Compensation, Reparations, & Restitution: Indian Property Claims in the United States*, 28 GA. L. REV. 453, 479 (1994). One example of these failed attempts at resistance is found in *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), in which the Court held that tribal consent to allotment was not required, though previously it had been considered unconstitutional to take land without consent. *See* Singer, *supra* note 41, at 29.

43. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 209–10 (1988) (discussing how the majority of the Indian community opposed the General Allotment Act and how the few that supported it did so only out of a hope that it would protect their lands from further encroachment of the white man). "There seems to have been little understanding or desire for a new agricultural economy on the part of the Indians." *Id.* at 209.

44. *See id.* at 212 (discussing how each allottee was provided less than $10 with which to begin a farming career, and how this amount was intended to be sufficient to

goal.[45]

The key provision of the General Allotment Act was that the government would hold the Indian land in trust for twenty-five years, while the Indians worked their individual allotted plots, then the government would convey land patents to the individual Indians for these plots.[46] Upon delivery of the patent, the individual Indian would become a citizen of the United States and, thereby, come under the jurisdiction of the state in which he or she resided.[47] Until such time, title to the plot would remain with the United States, however, it could be extinguished earlier if the government deemed the individual had met the government's definition of "assimilated."[48] The General Allotment Act failed due to the culture of the Indian community, the lack of federal assistance in accomplishing the assimilation task, and the inability of the individual Indians to pay taxes on the acquired land once they received title. As a result of this abysmal Act, more than 100 million acres of Indian land passed into the hands of their white neighbors.[49]

D. Reorganization and Self-Government (1928–1945)

Realizing the mistakes it had made during the allotment period, Congress adopted the Citizenship Act of 1924,[50] which declared all Indians to be citizens of their tribe and citizens of the United States. While this Act was intended to be a benefit to the Indians, it proved only to cause more confusion in the relationship between the United States and Indians.[51] By

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purchase seeds, farming equipment, and anything else that might be necessary to start farming).

45. *See* DELORIA & LYTLE, *supra* note 18, at 9–12.

46. *See* General Allotment Act §§ 2–5. *See also* COHEN, *supra* note 43, at 206–07 (discussing the background of the General Allotment Act). The ultimate goal of the General Allotment Act was to eliminate all reservations and obliterate the trust responsibilities of the U.S. government. *See id.* at 208–09.

47. *See* General Allotment Act § 6. "That upon the completion of said allotments and the patenting of the lands to said allottees, each ... shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside." *Id.*

48. *See id.* "[E]very Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe ... and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States[.]" *Id.*

49. *See* DELORIA & LYTLE, *supra* note 18, at 10.

50. Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401 (2000)) (declaring "[t]hat all non-citizen Indians born within the territorial limits of the United States ... are ... citizens of the United States: *Provided*, That the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property").

51. *See* DESKBOOK, *supra* note 33, at 22.

passing this Act, Congress ultimately "complicate[d] the jurisdictional relationship among the states, [the] federal government, and [the] tribes."[52] Despite popular belief, it did not automatically confer on Indians the same protections afforded other citizens of this country.[53]

Again, realizing the errors it had continuously made throughout its prior Indian policies, and hoping finally to achieve a just resolution, Congress enacted the Indian Reorganization Act of 1934,[54] which put an official end to the allotment period. The goal behind the Indian Reorganization Act was to decentralize control over the Indians and return the power of deciding what was best for the Indian community into the hands of the reservation governments.[55] To achieve this goal, the Indian Reorganization Act appropriated various funds to the reservation governments—though these funds were insufficient to undo what prior wrongs had brought about.[56]

Despite good intentions, the Indian Reorganization Act was not a

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52. *Id.*

53. *See id.* While the Citizenship Act of 1924 gave Indians the right to vote in national elections, "it did not provide full protection under the Bill of Rights to Indians living under tribal governments ... [and] states could still suppress Indian rights. Several [Indian] nations ... declined citizenship in favor of retaining sovereign nationhood." Videotape: Homeland (Philomath Films 2000) (on file with the University of California Extension Center for Media and Independent Learning).

54. Act of June 18, 1934, ch. 576, §§ 1–19, 48 Stat. 984 (1934) (codified as amended at 25 U.S.C. §§ 461–479 (2000)). This Act was also known as the Wheeler-Howard Act, after the two Senators who presented it to Congress. The first step toward passage of this Act was the realization by Congress of the effects its actions had on the Indian community. Congress came to this realization when it received a survey in 1928 titled *The Problem of Indian Administration* (also known as the Meriam Report, after its author). *See* DELORIA & LYTLE, *supra* note 18, at 12. This survey provided an in-depth analysis of the social and economic status of Indians throughout the country, and concluded that the Indian community was severely deprived and in grave danger. *See id.* at 12–13. It recommended significant funding to implement corrective programs. *See id.* Congress did not immediately accept this report and proceeded to conduct its own survey, which took eight years to complete. *See id.* at 13. In the end, Congress reached the same conclusions and began a new policy of reorganization and self-government. *See id.* at 14.

55. *See* SOKOLOW, *supra* note 17, at 131 (stating that the Indian Reorganization Act was "intended to increase self-governance, and to foster the economic independence of Indian tribes"). *See also* Annual Report of the Commissioner of Indian Affairs 1934 (declaring the goal of the Indian Reorganization Act to be that of repairing the "incalculable damage done by the allotment policy and its corollaries" and "economic and ... spiritual rehabilitation of the Indian race").

56. *See generally* Indian Reorganization Act § 7. However, Commissioner John Collier noted in his Annual Report that the "maximum appropriation, even if continued over a term of years, [would] meet only the most pressing ... needs of the Indians." 1934 COMM'R OF INDIAN AFFAIRS ANN. REP. TO THE SEC'Y OF THE INTERIOR.

complete success.[57] While it did return some level of self-governance back to the tribes, the Act also imposed a non-Indian form of government upon them.[58] "Traditional Indians of almost every tribe strongly objected to this method of organizing and criticized the Indian Reorganization Act as simply another means of imposing white institutions on the tribes."[59]

E. Termination (1945–1961)

After the end of World War II, the "conservative Republican Congress ... desiring to find ways to reduce federal expenditures"[60] sought an evaluation of the tribal conditions to see which tribes could succeed without further federal assistance.[61] Despite the concerns that were raised by this valuation and the conflicting views in Congress, the federal government decided it wanted out of the Indian business and prepared to transfer its responsibilities concerning Indians to the states.[62] To accomplish this, the U.S. government terminated its relationship with more than one hundred tribes and revoked their federal recognition, ultimately removing their lands from trust status.[63]

Another part of this termination process was the creation of the Relocation Program.[64] This Program removed Indians from the

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57. *See generally* John C. Mohawk, *Indian Economic Development: An Evolving Concept of Sovereignty*, 39 BUFF. L. REV. 495, 501 (1991) (arguing that the Indian Reorganization Act failed in its efforts because it did not take into consideration Indian culture and because it was "organized by non-Indians for non-Indians' purposes").

58. *See* Indian Reorganization Act § 16 (giving tribes authority to organize and adopt a constitution and bylaws, subject to approval by the Secretary of the Interior). If the tribe wanted to make any changes to this constitution or organization, it too would be subject to the approval of the Secretary of the Interior. *See id.* "These constitutions did not come into being as a result of tribal constitutional conventions that might have distilled the wisdom and insights of tribal people and their traditions, but rather were the handiwork of the top-down Bureau of Indian Affairs." Timothy W. Joranko & Mark C. Van Norman, *Indian Self-Determination at Bay: Secretarial Authority to Disapprove Tribal Constitutional Amendments*, 29 GONZ. L. REV. 81, 93 (1993/1994).

59. DELORIA & LYTLE, *supra* note 18, at 15. *See also* Robert T. Coulter, *A History of Indian Jurisdiction*, *in* RETHINKING INDIAN LAW 5, 12 (1982).

60. DELORIA & LYTLE, *supra* note 18, at 16.

61. *See id.* A valuation was provided by Indian Commissioner William Zimmerman, who cautioned that serious reparations must be made before any tribe would be able to make it on their own. *See id.*

62. *See* H.R. Con. Res. 108, 83rd Cong., 67 Stat. B132 (1953) (declaring the new policy of the United States to be that of terminating federal support for Indians). *See also* DELORIA & LYTLE, *supra* note 18, at 16.

63. *See* SOKOLOW, *supra* note 17, at 220–21.

64. *See generally* 1954 SEC'Y OF THE INTERIOR ANN. REP. 242–43 (discussing success of the Relocation Program, while disregarding the effects it actually had on Indians and

reservations and transplanted them into large cities, such as Chicago and Los Angeles.[65] The ultimate outcome was the loss of more land, the loss of customs and traditions, and a deteriorated economic situation for most Indians in this country.[66] "If the policy did not completely destroy Indian culture, it encroached substantially upon Indian attempts to remain Indian."[67]

F. Self-Determination (1961–Present)

When the states realized that they would be responsible for the costs of supporting the Indians that were displaced during the termination period, they withdrew their support for the policy, and the federal government changed its policy from one of termination to one of self-determination.[68] This policy shift was vocalized by President Johnson in an address he gave to Congress in which he proposed "a new goal for our Indian programs: [a] goal that ends the old debate about 'termination' of Indian programs and stresses self-determination; a goal that erases old attitudes of paternalism and promotes partnership self-help."[69]

Similar to the goal of the Reorganization Act of 1934, this self-determination policy attempted to put control back into the hands of the Indians by encouraging the tribes to manage their own affairs and deliver federal services to their members through their own agencies. [70] While

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reservation life).

65. *See* SOKOLOW, *supra* note 17, at 201. *See also* Matthew Atkinson, *"Traditional" Legal Perspective: Red Tape: How American Laws Ensnare Native American Lands, Resources, and People*, 23 OKLA. CITY U. L. REV. 379 (1998) (explaining how Indians were required to sign an agreement promising never to return to their reservations to live).

66. *See* DELORIA & LYTLE, *supra* note 18, at 20.

67. *Id.*

68. *See id.* at 21 (discussing the fact that while the policy was changing, termination was "not formally repudiated" until July, 1970). *See also* SOKOLOW, *supra* note 17, at 210.

69. Lyndon B. Johnson, 1968–69, 1 PUB. PAPERS 336. Johnson went even further by stating that the freedom of choice and respect for Indian culture must be affirmed by the U.S. government in order for the Indian community to "grow and flourish." *Id.* at 343–44.

70. Examples of how the government attempted to put the management of Indian affairs back into the hands of Indians are illustrated by the following Acts of Congress: Indian Self-Determination and Educational Assistance Act of 1974, Pub. L. No. 93-638, 88 Stat. 2203 (codified at 25 U.S.C. § 450 (2000)) (giving Indians more control over the education of their children); Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1963 (2000)) (authorizing funds for family service programs and encouraging placement of Indian children into Indian homes); Indian Gaming Regulatory Act of 1988, Pub. L. No. 100-497, 102 Stat. 2467 (codified as amended at 25 U.S.C. §§ 2701–2721 (2000)) (regulating gaming activities on reservations); Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. 104-330, 110 Stat. 4017 (codified as amended at 25 U.S.C. §§ 4101–4243 (2000)) (providing funding to

various agencies have been set up, and more control has been placed in the hands of the reservation governments, it is not a true policy of self-determination.[71] A true policy of self-determination would not require the approval of the Secretary of the Interior on a multitude of matters, as does the self-determination policy.

Though this policy of self-determination has fluctuated over the years, as the control of Congress has fluctuated, it continues to govern the relationship between the U.S. government and the Indian community. However, despite Congress' attempts to correct the wrongs committed against Indians in the past and to acknowledge them as sovereign nations, courts have not followed its lead and continue to make erroneous decisions to the detriment of the Indian community.

III. THE CONTROVERSY OF *KARUK TRIBE OF CALIFORNIA V. UNITED STATES*

A. Reservation Establishment

With the Act of April 8, 1864,[72] Congress first authorized the President to establish the Hoopa Valley Reservation in northern California.[73] Prior to this Act, eighteen treaties had been negotiated with the various tribes located throughout California.[74] However, these treaties never came into

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develop, maintain, and operate affordable housing on reservations).

71. *See* AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000) (defining self-determination as the "[d]etermination of one's own fate or course of action without compulsion; free will .... [f]reedom of the people of a given area to determine their own political status; independence"). *See also* Catherine J. Iorns, *Indigenous Peoples and Self-Determination: Challenging State Sovereignty*, 24 CASE W. RES. J. INT'L L. 199, 345 (1992).

> Self-determination is used to refer to a people's control over their own destiny. As such it is used to refer to the protection of a wide range of rights, including: the right to use one's language; to develop one's own culture, to use and ownership of lands and resources; and to achieve political autonomy, self-government and ultimate independence[.]

Id.

72. Act of April 8, 1864, ch. 48, 13 Stat. 39. This Act provided:

> [T]here shall be set apart by the President ... not exceeding four tracts of land, within the limits of said state, to be retained by the United States for the purpose of Indian reservations, which shall be of suitable extent for the accommodation of the Indians of said state, and shall be located as remote from white settlers as may be found practicable[.]

Id.

73. *See* Short v. United States, 486 F.2d 561, 562 (Ct. Cl. 1973).

74. *See* Petition, *supra* note 4, at 5 (stating that all of these treaties were negotiated in

effect, as the Senate refused to ratify them[75] over concerns that gold might be found on Indian land.[76]

When the tensions between the white settlers and the Indians became increasingly violent and difficult to manage, Congress recognized the need for resolution[77] and passed the Act of April 8, 1864, which authorized the creation of four reservations in California to accommodate all of the Indians of the State.[78] Shortly after the Act was passed, a public notice was issued announcing the decision to create a reservation in northern California, and the provisional boundary lines were drawn for the Hoopa Valley Reservation in 1865.[79] President Grant made this establishment official via an executive order issued in 1876.[80]

At the time the Hoopa Valley Reservation was created, numerous tribes were either already living on the land or were forced to relocate to the reservation shortly thereafter.[81] At no time did any one Indian tribe dominate the reservation. "Neither the public notices of 1864 and 1865 nor the executive order of 1876 mentioned any Indian tribe by name, nor intimated which tribes were occupying or were to occupy the reservation."[82]

While the original Act authorized the creation of only four reservations, it gave the President discretion to enlarge any of the four reservations, if it was deemed necessary.[83] In 1891, President Harrison exercised that right

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1851 and 1852).

75. *See* Newton, *supra* note 42, at 460 n.26 (discussing the Senate's failure to ratify treaties in California that would have provided the Indians of that state with a substantial land base).

76. *See* Petition, *supra* note 4, at 5.

77. *See id.*

78. *See id.* at 5–6. *See also* Act of April 8, 1864, ch. 48, § 2, 13 Stat. 39.

79. *See* Short v. United States, 486 F.2d 561, 562 (Ct. Cl. 1973). For a detailed analysis of this litigation and how it relates to the Hoopa Valley Reservation, see *infra* Part III.B.

80. *See Short*, 486 F.2d at 563 n.3 (reprinting Exec. Order of June 23, 1876). In this executive order, President Grant defined the exterior boundaries of the Hoopa Valley Reservation and declared the land to be "withdrawn from public sale, and set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in California, by act of Congress approved April 8, 1864." *Id.*

81. *See Short*, 486 F.2d at 566. *See also* Petition, *supra* note 4, at 6–7 (emphasizing that because the creation of only four reservations was authorized, it was expected that the reservations would contain more than one tribe, as there were numerous tribes in California).

82. *Short*, 486 F.2d at 563.

83. *See* Act of April 8, 1864 § 2 (providing authorization for a reservation to "be enlarged to such an extent as in the opinion of the President may be necessary, in order to its complete adaptation to the purposes for which it is intended").

and extended the boundary lines of the Hoopa Valley Reservation.[84] With that extension came more Indians claiming an equal interest in the reservation. These claims led to a series of cases known as the *Short Litigation*, which spanned more than thirty years.[85]

B. The Not So Short *Short* Litigation

The *Short Litigation* originally erupted from a dispute over who was entitled to partake in the revenues generated from the sale of the timber cultivated on the reservation.[86] More than 3,000 Indian plaintiffs filed the original complaint in 1963.[87] The plaintiffs consisted of those Indians residing on the reservation who were not members of the Hoopa Valley Tribe but were either members of another tribe or were those who had resided on the reservation since its incorporation in the 1800s.[88]

At the time of the original suit, and even up until the time of the settlement, only one tribe had become formally organized in accordance with the federal regulations.[89] Organized in 1950, that tribe, known as the Hoopa Valley Tribe, accounted for approximately thirty percent of the Indians residing on the reservation.[90] Despite their minority position, the

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84. *See* Petition, *supra* note 4, at 6. The original reservation became known as the Square, and the extension became known as the Addition. *See id.* Originally, in 1861, a separate reservation, known as the Klamath River Reservation, had been created for various Indian tribes located in California. *See* Rights of Indians in the Hoopa Valley Reservation, California, 65 I.D. 59, M-36450 (Feb. 5, 1958) *available at* 1958 DOINA LEXIS 154. Located approximately 20 miles from the Hoopa Valley reservation, this reservation was destroyed by a flood, and the Indians residing thereon were relocated temporarily to the Smith River Reserve—though many returned to the area only a year later. *See id.* In 1868, the federal government discontinued the Smith River Reserve, and then, for administrative convenience, enlarged the Hoopa Valley Reservation to include the Klamath River lands in 1891. *See id.* The following year, in 1892, the federal government permanently discontinued the Klamath River Reservation leaving only the enlarged Hoopa Valley Reservation as a home for the displaced Indians. *See id.*

85. *See* Short v. United States, 12 Cl. Ct. 36, 38 (1987) (noting that the case, originally filed on March 27, 1963 "has outlasted some 400 now deceased plaintiffs").

86. *See Short*, 486 F.2d at 562.

87. *See id.* at 561.

88. *See id.* at 562.

89. *See Short*, 12 Cl. Ct. at 38 (1987). *See also generally* Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 25 C.F.R. § 83 (2002) (defining steps required before a group may be recognized as an Indian Tribe by the federal government). *See also* Barbara N. Coen, *Tribal Status Decision Making: A Federal Perspective on Acknowledgment*, 37 NEW ENG. L. REV. 491 (2003) (discussing federal recognition process). *See also* Henry Sockbeson, *Reflections on a Flawed System*, 37 NEW ENG. L. REV. 483 (2003) (emphasizing difficulties that exist within the current recognition system).

90. *See Short*, 12 Cl. Ct. at 38.

members of the Hoopa Valley Tribe were the only Indians dwelling on the reservation to receive revenues from the timber, which was cultivated from the Square portion of the reservation and not the Addition.[91] The Secretary of the Interior began distributing those revenues to the Hoopa Valley Tribe and its individual members in 1955.[92] By the time the first suit was filed, those revenues exceeded one million dollars annually.[93]

A question soon arose as to whether or not those Indians residing on the Hoopa Valley Reservation, who were not eligible for membership in the Hoopa Valley Tribe—particularly those Indians residing on the Addition—were entitled to share in the timber revenues based on their status as Indians of the reservation.[94] The Court of Claims answered affirmatively and stated that not only were they entitled to share in the timber revenues but also that "Indians of the Addition and the Square were equal [with] respect to [their] rights in the lands."[95] That ruling, decided thirty years ago, was just the beginning of a lengthy controversy that would ultimately deny those Indians any right to the revenues generated from the Hoopa Valley Reservation.

After continuous appeals, and approximately eight years after the ruling by the Court of Claims, the government attempted to have the Yurok Tribe substituted for all of the plaintiffs, whose number had then risen to 3,800.[96] The government based its attempt on the assertion that Indians of the reservation were not entitled to share in the timber revenues as individuals.[97] The Court of Claims denied the government's motion for two reasons: (1) the motion was contradictory to the court's original 1973 ruling concerning the rights of individual Indians, and (2) the Yurok Tribe had overwhelmingly rejected the idea of formal organization.[98]

In addition to the government's motion, the Hoopa Valley Tribe also attempted to thwart the case by having it dismissed on political question grounds.[99] However, the court also rejected the Hoopa Valley Tribe's

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91. *See id. See also supra* note 84 (defining the Square and the Addition).

92. *See Short*, 12 Cl. Ct. at 38.

93. *See* Short v. United States, 486 F.2d 561, 562 (Ct. Cl. 1973).

94. *See id.*

95. *Id.* at 568. As a result of this decision, the Yurok Tribe began to receive a proportionate share of the timber revenues; however, due to concerns over who should manage the funds and how the funds should be distributed, further litigation resulted. *See Oversight Hearing on the Hoopa-Yurok Settlement Act Before the Sen. Comm. on Indian Affairs*, 107th Cong. (2002) (testimony of Neal A. McCaleb, Asst. Sec'y for Indian Affairs) [hereinafter *Oversight Hearing-McCaleb*].

96. *See* Short v. United States, 661 F.2d 150, 151 (Ct. Cl. 1981).

97. *See id.* at 153–54.

98. *See id.* at 155.

99. *See id.* at 156. The Tribe claimed that it was up to Congress and the Executive

argument, stating that it was completely within the court's power to determine whether an individual met a particular standard.[100] The government and the Hoopa Valley Tribe continued their various tactics focused on having the case either dismissed or altered on more favorable grounds, yet each of these tactics was frustrated by the court.[101] Some of the tactics included: (a) raising concerns over procedural issues, such as whether Congress had waived its right to immunity,[102] (b) disagreeing over the standards to be used by the court in determining who was or was not an Indian of the reservation,[103] (c) questioning the method of measuring damages,[104] and (d) raising concerns about the awarding of interest.[105]

To settle the matter once and for all, Congress passed the Hoopa-Yurok Settlement Act of 1988.[106] The ultimate result of this Act was to overrule the prior twenty years of decision-making by the lower courts.

C. Hoopa-Yurok Settlement Act of 1988

The goal behind the Settlement Act was to sever any claims that the Indians residing on the Addition had to the timber revenues generated by the Square.[107] To accomplish this, the Act specifically called for new boundary lines dividing the reservation into two smaller reservations: the Hoopa Valley Reservation (the Square) and the Yurok Reservation (the Addition).[108] The Act also converted the escrow fund that had existed throughout the thirty years of litigation into what became known as the

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Branch to determine who was or was not an Indian of the reservation. *See id.*

100. *See id.* at 157.

101. *See* Short v. United States, 719 F.2d 1133, 1137–44 (Fed. Cir. 1983) (affirming the trial judge's definition of "Indians of the Reservation" and his determination that federal sovereign immunity had been waived); Short v. United States, 12 Cl. Ct. 36, 45 (1987) (finding that the plaintiff Indians were to be awarded amounts from the escrow fund based on their wrongful exclusion from prior per capita distributions). Even after the Hoopa-Yurok Settlement Act was passed in 1988, the defendants continued their attempts at preventing the plaintiffs from collecting a damage award. *See* Short v. United States, 25 Cl. Ct. 722, 728 (1992) (denying the defendant's motion and holding that the plaintiff Indians were entitled to interest earned from the settlement fund); Short v. United States, 28 Fed. Cl. 590, 595–96 (1993) (rejecting the defendants' argument by determining that counsel for the plaintiff tribe did not have a disqualifying conflict of interest).

102. *See, e.g.*, Short v. United States, 719 F.2d 1133 (Fed. Cir. 1983).

103. *See id.*

104. *See, e.g.*, Short v. United States, 12 Cl. Ct. 36 (1987).

105. *See, e.g.*, Short v. United States, 25 Cl. Ct. 722 (1992).

106. Pub. L. No. 100-580, 102 Stat. 2924 (1988) (codified at 25 U.S.C. § 1300i (2000)).

107. *See* Karuk Tribe of Cal. v. Ammon, 209 F.3d 1366, 1372 (Fed. Cir. 2000).

108. *See* 25 U.S.C. § 1300i-1(a)–(c).

Settlement Fund.[109] The Settlement Fund was to be divided proportionally between the Hoopa and Yurok Indian Tribes.[110]

In order to carry out the distribution of the Settlement Fund, the Act called for the organization of the Yurok Tribe according to specifications outlined within the Act.[111] Until the Tribe was organized, the proceeds from the Settlement Fund would not be dispersed to members of the Tribe, other than an initial payment ($5,000 for those under 50 years of age and $7,500 for those over 50 years of age).[112] For those Indians who chose not to enroll in either the Hoopa Tribe or the soon-to-be-formed Yurok Tribe, an option was given to receive one lump sum payment of $15,000.[113] Upon selection of this option, the individual Indian was required to sign a sworn affidavit waiving "any interest or right whatsoever in the tribal, communal, or unallotted land, property, resources, or rights within, or appertaining to" either part of the Joint Reservation.[114] Even for those individual Indians electing to join one of the tribes authorized by the Act, by participating in the Settlement Act they forfeited any claim they might have "against the United States arising out of the provisions of this Act."[115]

The Settlement Act is unsettling for two major reasons. First, it defies the ruling that had been held time and time again throughout twenty years of litigation—that all of the Indians residing on the reservation shared an equal interest in the reservation, which entitled those Indians residing on the Addition to share in the timber revenues generated from the Square.[116] Second, by requiring the formation of the Yurok Tribe and forcing the Indians residing on the reservation to elect membership in either the Yurok Tribe or the Hoopa Valley Tribe, the Act resembles the eras of assimilation and termination from which Indians are still experiencing the effects.[117] It

109. *See* § 1300i-3(a)(1) (directing the Secretary to "cause all the funds in the escrow funds, together with all accrued income thereon, to be deposited into the Settlement Fund").

110. *See* Short v. United States, 28 Fed. Cl. 590, 591–92 (1993).

111. *See* § 1300i-8.

112. *See* § 1300i-6.

113. *See* § 1300i-5(d).

114. § 1300i-5(d)(3).

115. § 1300i-1(a)(2)(A)(i). As a result of bringing a Fifth Amendment challenge to the Settlement Act, the plaintiffs were deemed to have forfeited their rights to any compensation they may have received from the Settlement Act. *See Oversight Hearing-McCaleb, supra* note 95. This determination has resulted in ongoing deliberations about how to "address [the] injustices [of the federal government] and "fulfill [the Indians'] current economic development ... needs," now that the plaintiff Tribes may receive nothing at all. *Oversight Hearing on the Hoopa-Yurok Settlement Act Before the Sen. Comm. on Indian Affairs*, 107th Cong. (2002) (testimony of Clifford Lyle Marshall, Chairman, Hoopa Valley Tribe of Cal.).

116. *See* Short v. United States, 486 F.2d 561 (Ct. Cl. 1973).

117. *See supra* text accompanying notes 39–49, 60–67.

resembles assimilation[118] because it forces organization according to U.S. standards upon the Indians[119] despite the fact that the Yuroks had consistently argued against formal organization.[120] Furthermore, by mandating that all of the other Indians join one of the two tribes in order to partake in future payments from the Settlement Fund,[121] or other revenues that may be generated from the Joint Reservation, the Act resembles the era of termination.[122] The original Hoopa Valley Reservation was comprised of a number of tribes, not just the Hoopa Valley or Yurok Tribes.[123] Some of the Indians residing on the Joint Reservation may not meet the requirements for membership in one of those two tribes.[124] Thus, those Indians could become displaced Indians without even minimal rights to the lands on which they reside.

Finally, and perhaps most disturbing, the last section of the Settlement Act proves that the decision reached by the Court of Appeals for the Federal Circuit was wrong. In that section, the Act specifically recognizes that the Indians involved were legally entitled to submit a takings claim under the Fifth Amendment.[125] It states:

> Any claim challenging the partition of the joint reservation pursuant to section 1300i- or any other provision of this Act as having effected a taking under the [F]ifth [A]mendment of the United States Constitution or as otherwise having provided inadequate compensation shall be brought, pursuant to 28 U.S.C. 1491 or 28 U.S.C. 1505, in the United States Claims Court.[126]

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118. *See supra* text accompanying notes 39–49.

119. *See* § 1300i-8.

120. *See supra* text accompanying note 98. Similar to the prior Indian legislation, the Hoopa-Yurok Settlement Act was "imposed" on the Indians, who were "not asked and did not participate in the legislative process" that created the Act. *Oversight Hearing-McCaleb*, *supra* note 95.

121. *See* 25 U.S.C. § 1300i-5(a)–(c) (2000).

122. *See supra* text accompanying notes 60–67.

123. *See supra* text accompanying notes 81–82.

124. *See* § 1300i-5(a)–(b) (outlining the procedures utilized in determining the eligibility of an Indian to join one of the two tribes). One of the requirements for membership is a "quantum of Indian blood" to be set by the Secretary of the Interior. § 1300i-5(b)(3), (c)(2). As determined by a prior court decision, the degree of Indian blood required by an individual in order to be considered an Indian of the Reservation was one quarter, meaning that one of the individual's grandparents must have been a full-blooded Indian and a member of one of the recognized tribes of the reservation. *See* Short v. United States, 661 F.2d 150 (1981).

125. *See* § 1300i-11(a). *See also* U.S. CONST. amend. V. "[N]or shall private property be taken for public use, without just compensation." *Id.*

126. § 1300i-11(a).

Since this section of the Act authorized takings claims, the plaintiffs in *Karuk Tribe* did just that.[127] However, as discussed in the next section, the Court of Appeals for the Federal Circuit disregarded the wording in the Settlement Act, claiming it was irrelevant.[128] According to that court, the Indians held no interest in the reservation property that could be recognized as compensable under the Fifth Amendment.[129]

D. *Karuk Tribe of California v. United States*—The Final Word

The case brought to the Federal Court of Claims by the plaintiffs in *Karuk Tribe* argued that each of the plaintiffs had been deprived of their compensable expectancy interest in the Joint Reservation.[130] However, the court determined that none of the plaintiffs ever possessed a vested interest that would be considered "property" for Fifth Amendment purposes and denied their motion for summary judgment.[131] The court then proceeded to grant the defendants' motion for summary judgment, forcing the plaintiffs to seek an appeal with the Court of Appeals for the Federal Circuit. [132] Unfortunately, the Court of Appeals continued to misinterpret precedent and disregarded the history between Indians and the U.S. government by affirming the Federal Court of Claims' decision.[133]

In finding in favor of the defendants, the Federal Circuit "determined that the plaintiffs did not possess a vested, compensable property interest in the Hoopa Valley Reservation."[134] To reach this conclusion, the majority focused on what *they* thought was the intent of Congress when the reservation was created and what *they* thought it meant to have title

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127. *See* Karuk Tribe of Cal. v. United States, 41 Fed. Cl. 468 (1998). In the last *Short* case to go to trial, the court refused to deal with one of the main issues of the case, which asserted a takings claim under the Fifth Amendment. *See* Short v. United States, 50 F.3d 994, 1000 (Fed. Cir. 1995). The reason for that denial was that three cases were being brought through the U.S. Federal Court of Claims asserting that exact issue, and each of the three cases were composed of virtually the same plaintiffs that were a part of the *Short Litigation*. *See id.* One of these cases was brought by the Yurok Tribe, another by the Karuk Tribe of California, and a third by individual Indians who were not members of either the Hoopa, Yurok, or Karuk Indian tribes. *See id.* at 1000–01. Those three cases were eventually consolidated, resulting in *Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366, 1373 (Fed. Cir. 2000).

128. *See Karuk Tribe*, 209 F.3d at 1380.

129. *See id.*

130. *See Karuk Tribe*, 41 Fed. Cl. at 469.

131. *See id.* at 477.

132. *See id.*

133. *See Karuk Tribe*, 209 F.3d at 1380.

134. *Id.* at 1370. It is interesting to note that at one point, the "[p]otential exposure to the U.S. Treasury was ... estimated at close to $2 billion." *See Oversight Hearing-McCaleb*, *supra* note 95.

retained by the United States.[135] The Federal Circuit held that because the original reservation was created by an executive order and not by a treaty or other Act of Congress, only a permissive right of occupancy was created and not a permanent right of occupancy.[136] In order to convey a permanent right in the land of the reservation, the court reasoned there must be a definitive action of Congress authorizing or intending that right to exist.[137] While the court admitted that there is no specific way of proving the intent of Congress, they concluded that the plaintiffs had not proven intent in this case.[138]

In response, the plaintiffs argued that the Act of April 8, 1864, which authorized the creation of the reservation, was intended to create a permanent peace between the Indians of northern California and the white settlers.[139] The court agreed that this was the intent of Congress when it passed the Act of 1864, but claimed Congress achieved that goal "by giving the President broad discretion [to create the reservation], rather than conferring upon the California Indians vested property rights."[140]

In further support of its erroneous conclusion, the Federal Circuit claimed that not only did the Act of 1864 confer only a discretionary power upon the President, but that the United States also retained title to the land under the Act.[141] The court concluded that while the United States government may grant rights in the land of a reservation, in accordance with acts like the Indian Mineral Leasing Act of 1927,[142] the United States will always retain title to the reservation. It is on the basis of this retention of title that the court concluded there is no legal obligation on the part of the government to pay Indians for any action that could otherwise be deemed a taking under the Fifth Amendment.[143] In short, without title or a clear intent by Congress, Indians residing on a reservation created by an

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135. *See id.* at 1375–76.

136. *See id.* at 1373–74.

137. *See id.* at 1374 (stating that "[a]n Act granting permanent, rather than permissive, occupancy, must expressly create those rights").

138. *See id.* at 1374–76.

139. *See id.* at 1376. *See also supra* text accompanying notes 72–84 (discussing the Act of April 8, 1864).

140. Karuk Tribe of Cal. v. United States, 209 F.3d 1366, 1376 (Fed. Cir. 2000).

141. *See id.* at 1375.

142. Act of Mar. 3, 1927, ch. 299, 44 Stat. 1347 (codified as amended at 25 U.S.C. §§ 398a–398e (2000)) (providing for oil and gas leases to executive order reservations). The Federal Circuit specifically dismissed references to this Act raised by the plaintiffs, stating that if Congress actually recognized equitable title to the land by passage of this Act, such recognition only pertained to mineral rights and nothing more. *See Karuk Tribe*, 209 F.3d at 1379–80.

143. *See Karuk Tribe*, 209 F.3d at 1379–80.

executive order retain no right to the land on which they reside.[144] Without that right, these Indians are not entitled to just compensation for the taking of their land, regardless of how long they have resided on the land and regardless of the injustice of such a taking by the U.S. government.[145]

Of the three judges deciding *Karuk Tribe*, only one realized the importance this holding would have and refused to follow the reasoning put forth by the other two judges.[146] Judge Newman sharply dissented from the majority's opinion and began her dissent by stating, "[i]t is not tenable, at this late date in the life of the Republic, to rule that Native Americans living on a Reservation are not entitled to the constitutional protections of the Fifth Amendment."[147] Judge Newman based her argument on the historical record behind the Act of 1864, the case law defining what is a compensable right (which is not determined by title alone), and the Hoopa-Yurok Settlement Act itself, which recognizes the possibility of a Fifth Amendment claim by the Indians of the Reservation.[148]

IV. CORRECT ANALYSIS OF THE CASE AND APPLICATION OF PRECEDENT

A. Canons of Construction

From the beginning, the Federal Circuit misconstrued precedent[149] in deciding how this case would be analyzed. Stating the general rule surrounding summary judgment motions, the court declared that it was required to view the "facts in a light most favorable to the non-moving party."[150] While this is the general rule when reviewing a grant of summary judgment, it is not always the rule utilized when that summary judgment relates to a matter involving the rights of Indians.[151] Rather, rules that have

144. *See id.* at 1379.

145. *See id.* at 1374.

146. *See id.* at 1380–85 (Newman, J., dissenting).

147. *Id.* at 1380 (citation omitted).

148. *See id.* at 1380–85.

149. *See, e.g.*, N. Bruce Duthu & Dean B. Suagee, *Supreme Court Strikes Two More Blows Against Tribal Self-Determination*, 16 NAT. RESOURCES & ENV'T 118, 119 (2001) (arguing that the mistake by the Federal Circuit may partially be blamed on the Supreme Court, which "has set a course that is fundamentally at odds with its prior precedents ... [and] is making up federal common law with nominal deference to the intent of Congress").

150. Karuk Tribe of Cal. v. Ammon, 209 F.3d 1366, 1373 (Fed. Cir. 2000) (citation omitted).

151. *See* David M. Blurton, *Canons of Construction, Stare Decisis and Dependent Indian Communities: A Test of Judicial Integrity*, 16 ALASKA L. REV. 37, 39 (1999). "If Indians are involved, [the court] should infuse all federal laws ... with the policy of the special Indian trust relationship and read those laws with a heavy bias in favor of Indian and tribal prerogatives." *Id.* (quoting CHARLES F. WILKINSON, AMERICAN INDIANS, TIME AND THE

become known as the canons of construction should be applied.[152]

As far back as 1832, when the Supreme Court decided *Worcester v. Georgia*,[153] the canons of construction have been determined to be the controlling rules of interpretation in Indian cases.[154] The much-cited opinion of Chief Justice Marshall stated:

> The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import ... they should be considered as used only in the latter sense .... How the words of the treaty were understood by [these] people, rather than their critical meaning, should form the rule of construction.[155]

The use of these canons came about out of concern over how the original treaties, and other rules governing Indians and their rights, were formed.[156] It was assumed that the federal government was much more skilled than the Indians when it came to negotiating treaties, and that the government was not always honest when interpreting these treaties and rules for the Indians.[157]

If the Federal Circuit in hearing this detrimental case had begun its analysis by applying the canons of construction, it would have realized that a material fact *was* in dispute and, thereby, denial of the defendants' summary judgment motion was required. If it had done so, the outcome would surely have been different.[158] As the executive order, which created

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LAW 52 (1987)).

152. *See* SOKOLOW, *supra* note 17, at 49. "These canons, or rules of interpretation, assume that Congress' intent toward the Indians is benevolent and hold that treaties, statutes, and other federal rules and actions should therefore be read as protecting Indian rights and in a manner favorable to Indians." *Id.* at 50. *See also* COHEN, *supra* note 43, at 37–38.

153. 31 U.S. (6 Pet.) 515 (1832).

154. *See* Torgerson, *supra* note 16, at 183 (explaining how canons of construction have been extended to include all legal matters relating to Indians). *See also* David H. Getches, *Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law*, 84 CAL. L. REV. 1573 (1996) (discussing how the canons have changed over time, as the fiduciary relationship between the United States and Indians has evolved).

155. *Worcester*, 31 U.S. at 582. Other cases reiterating Marshall's opinion include *In re Kansas Indians*, 72 U.S. (5 Wall.) 737, 737 (1867) (declaring that "[r]ules of interpretation favorable to the Indian tribes are to be adopted") and *Jones v. Meehan*, 175 U.S. 1, 11 (1899) (reaffirming that it must be construed "not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians").

156. *See* SOKOLOW, *supra* note 17, at 50.

157. *See Jones*, 175 U.S. at 10–11.

158. *See* Blurton, *supra* note 151, at 54–56 (analyzing another case in which the

the reservation, was proclaimed during the time period with which the canons of construction are most concerned, their application would have prevented the majority of the errors ultimately made by the Federal Circuit.[159]

B. Misplaced Precedent

One of the most obvious errors the Federal Circuit made was in emphasizing the word "discretion" as utilized in the Act of April 8, 1864.[160] The court found that by using the word "discretion" in the Act, Congress did not intend for the President to create anything more than a permissive right of occupancy,[161] which, according to the court, is not a compensable property right.[162] This assumption by the court derived from its misuse and misstatement of three cases that did not even deal with the particular issue presented by *Karuk Tribe*, which is whether Indians residing on an executive order reservation are entitled to just compensation when they are dispossessed of their land. The three major cases most heavily relied upon by the Court of Appeals were *Donnelly v. United States*,[163] *Hynes v. Grimes Packing Co.*,[164] and *Tee-Hit-Ton Indians v. United States*.[165]

In discussing *Donnelly*,[166] the court attempted to discern what Congress

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Supreme Court failed to apply the canons of construction). If the Court had applied the canons in *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), "the ultimate outcome of the decision would have been different." *Id.* at 59. *See also* David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values*, 86 MINN. L. REV. 267, 267–68 (2001) (discussing how courts have begun to disregard the legal requirement of applying the canons of construction).

159. *See* Blurton, *supra* note 151, at 43. The correct application of the canons requires that the law being interpreted be read broadly if the issue is the establishment or recognition of Indian rights and read narrowly if the issue is the extinguishment or limitation of an Indian right. *See id.*

160. *See* Karuk Tribe of Cal. v. Ammon, 209 F.3d 1366, 1375–76 (Fed. Cir. 2000). *See also supra* notes 72–73 and accompanying text.

161. *See Karuk Tribe*, 209 F.3d at 1376.

162. *See id.* at 1380.

163. 228 U.S. 243 (1913).

164. 337 U.S. 86 (1949).

165. 348 U.S. 272 (1955).

166. Donnelly v. United States, 228 U.S. 243 (1913). This case questioned the legality of the enlargement of the Hoopa Valley Reservation by two executive orders. *See id.* The plaintiff, who was charged with murdering an Indian on the reservation, contended that the President had exhausted his authorization under the Act of April 8, 1864 when the original reservation was created. *See id.* at 252–55. If the plaintiff's contention was proven true it would have denied the federal court jurisdiction over the case. *See id.* However, the

meant when it utilized the word "discretion" in the Act of April 8, 1864.[167] In doing so, it relied solely on a few quotes from the case that clearly demonstrated that Congress authorized the President to create and enlarge the reservation as he deemed necessary.[168] The Court in *Donnelly* explicitly stated "that Congress intended to confer a discretionary power,"[169] yet when the Supreme Court stated this, it was referring to a discretionary power to *enlarge* a reservation, not *diminish* one.

However, the Federal Circuit in *Karuk Tribe* expanded this definition of discretion to uphold its contention that no compensable property right was created.[170] "An act that confers such broad discretion ... does not create compensable rights in such reservations."[171] Yet such an expansion is clearly a misuse of the holding in *Donnelly*, which never even discussed that assumption.[172] The only quote the Federal Circuit could have possibly misconstrued to support its holding is the quote that discussed the dissolution of reservations by other past executive orders.[173] However, such actions were barred in 1927[174] and do not affect the issue presented in *Karuk Tribe*. That issue, again, was whether a reduction of an executive order reservation involves the taking of a compensable property interest. The Court in *Donnelly* was only concerned with whether or not the enlargement of the reservation was authorized by Congress, which it ultimately decided in the affirmative.[175]

To further expand on the *Donnelly* Court's determination of the word "discretion" in the Act of April 8, 1864, the Federal Circuit turned to

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Supreme Court upheld the validity of the executive order and prosecuted the plaintiff. *See id.* at 258–59.

167. *See Karuk Tribe*, 209 F.3d at 1375.

168. *See id.* at 1375–76.

169. *Donnelly*, 228 U.S. at 256.

170. *See Karuk Tribe*, 209 F.3d at 1376.

171. *Id.*

172. *See Donnelly*, 228 U.S. at 243.

173. *See id.* at 258 (in discussing how the Act of 1864 "conferred a continuing discretion upon the Executive," the Court stated the orders were used to "abolish[] reservations once made"). While a few executive orders have included language that permitted a president to dissolve an Indian reservation, whether in whole or in part, that discretion "has been seriously questioned and not without strong reason; for the Indian rights attach when the lands are ... set aside[.]" 4 Indian Affairs: Laws and Treaties 1059 (Kappler ed., 1929) *at* http://digital.library.okstate.edu/kappler/Vol4/html_files/v4p1056.html.

174. *See Karuk Tribe*, 209 F.3d at 1384 (explaining how Congress forbade alterations to executive order reservations without its consent when it passed the Indian Mineral Leasing Act of 1927). "Changes in the boundaries of reservations created by Executive order ... shall not be made except by Act of Congress." 25 U.S.C. § 398d (2000).

175. *See Donnelly*, 228 U.S. at 256–59.

another case that did not have any true bearing on the issue in *Karuk Tribe*. That case was *Hynes v. Grimes Packing Co.*[176] The charge given to the Court in *Hynes* was to determine the scope of authority granted by Congress to the Secretary of the Interior when establishing an executive order reservation in Alaska.[177] While *Hynes* is similar to *Karuk Tribe* in that it involves another executive order reservation, it can be distinguished on two very important grounds. First, the statute authorizing the Secretary of the Interior to act in *Hynes* contained additional wording not found in the statute in *Karuk Tribe*, which wording tended to give any reservation created in Alaska a temporary nature.[178] Second, *Hynes* involved not only the statute authorizing land to be set aside for the Native Alaskans, but it also involved another statute that prohibited exclusive rights to be granted in any of the fisheries in Alaska.[179]

Despite these differences, the Federal Circuit chose to rely on *Hynes* to the detriment of the Indians residing on the Hoopa Valley Reservation.[180] To reach its result, the Federal Circuit narrowed in on one specific quote from *Hynes*: "[w]hen Congress intends to delegate power to turn over lands to the Indians permanently, one would expect to and doubtless would find

176. 337 U.S. 86 (1949). This action, to enjoin the enforcement of regulations prohibiting commercial fishing in the waters off the Karluk Reservation, was brought by canning companies in Alaska. *See id.* The Court vacated the injunction granted by the lower courts because (1) the creation of a new and permanent reservation by the Secretary of the Interior was beyond the scope of authority actually granted by Congress, and (2) the regulations were in direct conflict with another statute and therefore invalid. *See id.* at 102, 123.

177. *See id.* at 101.

178. *See id.* at 91. "[T]he President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States ... and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress." Act of June 10, 1910, ch. 421, 36 Stat. 847, § 1 (repealed 1976).

179. *See* Act of June 18, 1926, ch. 621, 44 Stat. 752 (omitted from 48 U.S.C. § 220 as obsolete upon admission of Alaska into the Union). "[N]o exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce." *Id.* § 1.

180. *See* Blurton, *supra* note 151, at 44–45. This action by the Federal Circuit contradicts prescribed practice from the Supreme Court, which requires that when a court is interpreting the intent of Congress to *extinguish or diminish* a reservation, this intent must be clear from the statute. *See* South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343 (1998) (stating that "only Congress can alter the terms of an Indian treaty by diminishing a reservation, and its intent to do so must be clear"); Montana v. United States, 450 U.S. 544, 552 (1981) (instructing that courts are to "begin with a strong presumption against conveyance by the United States and must not infer such conveyance 'unless the intention was definitely declared or otherwise made very plain'") (citing United States v. Holt State Bank, 270 U.S. 49, 55 (1926)).

definite indications of such a purpose."[181] However, by focusing on only one small quote in *Hynes*, the Federal Circuit again failed to realize that the underlying facts and statutes in the case were clearly distinguishable from those of *Karuk Tribe*.

As previously stated, unlike the statute in *Karuk Tribe*, the statute authorizing the creation of an executive order reservation in *Hynes* unambiguously declared that the creation was not permanent in nature.[182] The Secretary of the Interior was granted the authority only to restore tribal ownership to lands previously owned or occupied by the Native Alaskans,[183] which establishment could later be revoked by the Secretary of the Interior or by an Act of Congress.[184] This is unmistakably different from the Act of April 8, 1864, which did not contain any such language.[185] Rather, the Act of April 8, 1864 specifically authorized the creation of new reservations in California,[186] and Congress appropriated funds to ensure the Indians were moved to the newly created reservations.[187] No language concerning revocability or temporariness can be found anywhere in the statute. Furthermore, there was "no suggestion ... that a temporary arrangement was contemplated by either the United States government who established it or the Native Americans who complied with it."[188]

In addition, the Court in *Hynes* concluded that the Secretary of the Interior had overstepped the authority granted to him by Congress when he gave the Native Alaskans of the Karluk Reservation exclusive fishing rights in direct conflict with another statute prohibiting such exclusiveness.[189] Although a completely separate issue, the Federal Circuit erroneously emphasized its importance. *Hynes* has no bearing on a matter once it is determined that the statute in question authorized the explicit action undertaken in the executive order. In the case of *Karuk Tribe*, the statute authorizing the use of executive orders to create new reservations in California left no doubt that they were to be utilized for the creation of new reservations.

Hynes' overall conclusion was that the Secretary of the Interior undertook action that was outside the scope of the authority granted.[190]

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181. Karuk Tribe of Cal. v. Ammon, 209 F.3d 1366, 1375 (Fed. Cir. 2000) (quoting Hynes v. Grimes Packing Co., 337 U.S. 86, 104 (1949)).

182. *See supra* note 178 and accompanying text.

183. *See Hynes*, 337 U.S. at 101–02.

184. *See supra* note 178 and accompanying text.

185. *See supra* notes 72 & 83 and accompanying text.

186. *See supra* notes 72–73, 77–78 and accompanying text.

187. *See* Karuk Tribe of Cal. v. Ammon, 209 F.3d 1366, 1371 (Fed. Cir. 2000).

188. *Id.* at 1382.

189. *See* Hynes v. Grimes Packing Co., 337 U.S. 86, 123 (1949).

190. *See id.*

This has no correlation to *Karuk Tribe*, where the President acted in full compliance with the Act of April 8, 1864.

To further support its proposition that no compensable property interests were created in conjunction with the Hoopa Valley Reservation, the Federal Circuit relied on a third case that is controversial in its own right—*Tee-Hit-Ton Indians v. United States*.[191] The opinion in that case, which was written during one of the worst periods ever to haunt Indian relations with the U.S. government, the Termination Era,[192] has been argued to be "so rife with historical inaccuracies, misstatements of fact, and misinterpretations of Supreme Court precedent"[193] that it is shocking to see that the Federal Circuit relied so heavily upon it.[194] However, since it was the case the court apparently found most relevant to the case at hand, it must be dealt with in depth.

The simplest way to distinguish *Tee-Hit-Ton* from *Karuk Tribe* is to take the route Justice Newman took in her dissent, which entailed a plain reading of *Tee-Hit-Ton* and then a comparison of its fact pattern and reasoning with that of *Karuk Tribe*.[195] When the two cases are read in that manner, a clear distinction appears between *Tee-Hit-Ton* and *Karuk Tribe*. While the majority failed to acknowledge this distinction, Justice Newman summarized it in just two words: "recognized reservation."[196]

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191. 348 U.S. 272 (1955). *See, e.g.*, Singer, *supra* note 7, at 484–85 (criticizing *Tee-Hit-Ton* and noting that its reasoning is "reminiscent of the reasoning in *Lone Wolf v. Hitchcock* [187 U.S. 533 (1903)], a case which has aptly been characterized as the *Dred Scott* [*v. Sanford*, 60 U.S. (19 How.) 393 (1857)] of American Indian law"). Any court that cites to *Tee-Hit-Ton* has been compared to a court that would cite *Dred Scott* with approval. *See id.* In addition, "[o]n its facts and reasoning, *Tee-Hit-Ton* was outrageous." Philip P. Frickey, *Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law*, 78 CAL. L. REV. 1137, 1223 (1990). This case was brought by the Tee-Hit-Ton Indians of Alaska to recover compensation they believed to be due them by the U.S. government. *See Tee-Hit-Ton*, 348 U.S. at 273. Shortly after Russia ceded Alaska to the United States, the government entered into a contract with various paper companies to develop the timber located on land occupied by the Tee-Hit-Ton. *See* Tee-Hit-Ton Indians v. United States, 120 F. Supp. 202, 203 (Ct. Cl. 1954). The Tee-Hit-Ton sought compensation for the taking of the timber. *See id.* The Court ruled that the Tee-Hit-Ton did not have a compensable property interest as the title they retained in the land was unrecognized aboriginal title. *See Tee-Hit-Ton*, 248 U.S. at 279.

192. *See supra* notes 60–67 and accompanying text. *See also* Singer, *supra* note 7, at 529–30. "To the extent that courts currently define Indian rights by reference to doctrines designed to promote the invasion and unjust seizure of Indian lands, they participate in the current deprivation of property of Indian nations." *Id.*

193. WILKINS, *supra* note 28, at 177.

194. *See* Karuk Tribe of Cal. v. Ammon, 209 F.3d 1366, 1374–78, 1380 (Fed. Cir. 2000).

195. *See id.* at 1384–85 (Newman, J., dissenting).

196. *Id.* at 1384 (Newman, J., dissenting).

Unlike the land of the Tee-Hit-Tons in Alaska, the Hoopa Valley Reservation was clearly recognized by Congress.[197] This may be illustrated in a variety of ways, such as (1) the fact that the Act of April 8, 1864 authorized its creation,[198] (2) the fact that it was actually established as authorized,[199] and (3) the fact that Congress had dispersed funds for the benefit of the reservation.[200] While all of this may be said about the Hoopa Valley Reservation, the same cannot be said about the land in dispute in the *Tee-Hit-Ton* action.[201] The Indians in that suit were arguing for just compensation for the taking of timber from the land they had resided on "from time immemorial."[202] The land rights had never been "recognized" by Congress, according to the majority in *Tee-Hit-Ton*, because no treaty, statute, or executive order had ever been established.[203]

When read in light of this distinction, it becomes obvious that the majority in *Karuk Tribe* once again misinterpreted precedent.[204] However, not only is this misinterpretation disturbing, the use of this precedent alone is cause for concern. While *Tee-Hit-Ton* has not been overruled, its holding has been debated from its inception.[205] Not only did the case itself misstate

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197. *See id.* at 1385. (Newman, J., dissenting) (noting that "the Joint Reservation is a recognized reservation formed under congressional and executive authority").

198. *See supra* note 72.

199. *See supra* notes 72–80 and accompanying text.

200. *See Karuk Tribe*, 209 F.3d at 1371.

201. *See id.* at 385 (Newman, J., dissenting) (emphasizing that the claims in *Karuk Tribe* "do not remotely resemble those discussed in *Tee-Hit-Ton*").

202. *Tee-Hit-Ton*, 348 U.S. at 277.

203. *See id.* The dissent argued that Congress "recognized" the Indians and their claim when it passed the Organic Act for Alaska on May 17, 1884, ch. 53, 23 Stat. 24, which stated that Native Alaskans "shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them." *Tee-Hit-Ton*, 248 U.S. at 291 (Douglas, J., dissenting) (quoting Organic Act for Alaska § 8). However, this case was argued and decided during a time when the U.S. government was set on terminating any duties or responsibilities it might have toward Native Alaskans and Indians in general. *See supra* notes 60–67 and accompanying text. Further, many commentators assert that the actual reason the Court failed to give credence to the genuine recognition of Native Alaskan rights to the land they occupied was because a great resource of minerals had been discovered in Alaska, and the government needed a "legitimate" way to acquire the land without the great expense. *See* Newton, *supra* note 42, at 471. *See also* Singer, *supra* note 41, at 18 (stating that the *Tee-Hit-Ton* holding was a way to "justify the seizure of land").

204. *See* Singer, *supra* note 7, at 529. Time and time again, the courts have misinterpreted precedent to the detriment of Indians. "The courts rewrite precedent by relying on cases which misstate or distort the meaning of earlier cases and by failing to recognize conflicting lines of precedent and competing and contradictory policies." *Id.*

205. For further criticisms of *Tee-Hit-Ton* see Steven Paul McSloy, *American Indians and the Constitution: An Argument for Nationhood*, 14 AM. INDIAN L. REV. 139, 170 (1989) (arguing for the abolishment of the *Tee-Hit-Ton* ruling and for recognition of compensable

precedent to the detriment of Indian rights,[206] it also played a major role in propelling the termination process.[207] By utilizing this case in its analysis of *Karuk Tribe*, the majority of the Federal Circuit furthered an injustice to the Indians residing throughout the United States that does not comport with Congress' current policy of self-determination.[208] That injustice is found in the departures from established law that the Supreme Court took in *Tee-Hit-Ton*. Those departures include the Court's insistence that aboriginal title and treaty title are different and that compensation was generally not given to Indians when their land was misappropriated.

The most egregious mistake the *Tee-Hit-Ton* Court made, which carries through to the decision in *Karuk Tribe*, is its determination that aboriginal title and treaty title are distinctly different.[209] By this conclusion, the Court decided that the latter is protected by the Fifth Amendment, but not the former.[210] This conclusion not only has no basis in law,[211] but it also has no basis in common sense,[212] and courts before and after *Tee-Hit-Ton* have agreed.[213]

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property rights in all Indian land, whether held in fee or in trust). *See also* Milner S. Ball, *John Marshall and Indian Nations in the Beginning and Now*, 33 J. MARSHALL L. REV. 1183, 1190 (2000) (stating that the reasoning in *Tee-Hit-Ton* can only be arrived at by "importing interpretive devices from Wonderland and then employing them to do real harm to real tribes"). *See generally* Daniel G. Kelly, *Indian Title: The Rights of American Natives in Lands They Have Occupied Since Time Immemorial*, 75 COLUM. L. REV. 655 (1975).

206. *See Singer*, *supra* note 7, at 483–84. "The ruling in *Tee-Hit-Ton* amounts to a formal declaration that [Indians] remain ... outside the normal protection of the ... Constitution and can therefore be subjected to formally unequal treatment ...." *Id.* This failure to protect Indian rights has the effect of causing greater harms as time moves forward. *See* Ball, *supra* note 205, at 1195.

207. *See* WILKINS, *supra* note 28, at 167–68.

208. *See* Getches, *supra* note 154, at 1626. The Court's role is "to ensure that interpretations of [C]ongressional intent comport with a legal tradition that perpetuates tribal self-government." *Id.*

209. *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

210. *See id.* at 285.

211. *See* Nell Jessup Newton, *The Judicial Role in Fifth Amendment Takings of Indian Land: An Analysis of the Sioux Nation Rule*, 61 OR. L. REV. 245, 264 (1982). "As a matter of constitutional law ... there is no justification for treating Indian property differently from non-Indian property." *Id.*

212. *See* Kelly, *supra* note 205, at 669 (stating that aboriginal title and treaty title are both the same property right, as each is a "privilege of possession" with the United States retaining fee title). *Cf.* Joseph William Singer, *Canons of Conquest: The Supreme Court's Attack on Tribal Sovereignty*, 37 NEW ENG. L. REV. 641, 663–64 (2003) (arguing that current Supreme Court "treatment of non-Indian purchases of lands within Indian country as irrevocably altering tribal sovereignty has no support in the law").

213. *See* United States v. Alcea Band of Tillamooks, 329 U.S. 40, 47 (1946). Oneida Tribe of Indians of Wis. v. United States, 165 Ct. Cl. 487, 490–91 (1964). "As a matter of

When the Federal Circuit in *Karuk Tribe* cited *Tee-Hit-Ton*, it did so in conjunction with another case, *United States v. Alcea Band of Tillamooks*.[214] However, the Court in *Tillamooks* did not reach the same conclusion as that reached in *Tee-Hit-Ton*, specifically that "[t]he United States may terminate Indian title—a permissive right of occupancy—'without any legally enforceable obligation to compensate the Indians.'"[215] What the *Tillamooks* Court explicitly stated was:

> The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute. It does not "enable the United States to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them."[216]

The *Tillamooks* Court also discussed, at great length, the notion of "recognized" (treaty) title versus "unrecognized" (aboriginal) title and found no justification for it in the law.[217] Instead, the Court concluded that recognition was nothing more than a "possible method" for proving title, but not a requirement.[218] This conclusion follows the well-established principles of *Cherokee Nation v. Georgia*, which defined Indian title, or aboriginal title, as "sacred as the fee-simple, absolute title of the whites."[219]

Tillamooks also is more factually similar to *Karuk Tribe* than any other case previously cited. Like the Hoopa Valley Reservation, the reservation in *Tillamooks* was created by an executive order after the Senate failed to ratify treaties that had been negotiated with the tribe.[220] On this identical fact pattern, the *Tillamooks* Court held that the Indians had more than a moral claim to compensation[221] and, that in order to "satisfy the 'high standards for fair dealing' required of the United States in controlling Indian affairs,"[222] compensation must be paid.[223]

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strict property law, Indian and treaty title are on the same footing. Conceptually, an Indian reservation ... is no more than an area over which Congress extends protection to Indian title without changing its titular attributes for property law purposes." Kelly, *supra* note 205, at 661 n.42.

214. 329 U.S. 40 (1946). *See also* Karuk Tribe of Cal. v. Ammon, 209 F.3d 1366, 1374 (Fed. Cir. 2000).

215. *Karuk Tribe*, 209 F.3d. at 1374.

216. *Tillamooks*, 329 U.S. at 54 (citations omitted).

217. *See id.* at 49–54.

218. *See id.* at 50. *See also* Kelly, *supra* note 205, at 661 n.42 (stating that treaties are just one method of recognizing pre-existing rights to the land).

219. 30 U.S. (5 Pet.) 1, 48 (1831).

220. *See Tillamooks*, 329 U.S. at 43.

221. *See id.* at 47.

222. *Id.* (quoting United States v. Santa Fe Pac. R.R. Co., 314 U.S. 339, 356 (1941)).

223. *See id.* at 49.

Although the holding in *Tillamooks* contradicts the holding in *Tee-Hit-Ton*, the *Tee-Hit-Ton* Court cited it with approval and attempted to distinguish it on statutory grounds.[224] The *Tee-Hit-Ton* Court stated that because the *Tillamooks* Court had not "expressed the view that recovery was grounded on a taking under the Fifth Amendment"[225] it must only have been decided on statutory grounds. Yet the *Tee-Hit-Ton* Court failed to recognize that *Tillamooks* was decided on November 25, 1946,[226] and that prior to the Indian Claims Commission Act of 1946, Indians were barred from bringing claims based on the Fifth Amendment against the United States.[227]

Another aspect to consider when analyzing *Tee-Hit-Ton* versus *Tillamooks*, in relation to *Karuk Tribe*, is that *Tillamooks* was decided during the Reorganization Era,[228] an era which is, in many ways, similar to the current Congressional policy of self-determination.[229] Conversely, *Tee-Hit-Ton* was decided during the Termination Era.[230] If the courts are required to give credence to the intentions of Congress, it is more logical to follow precedent that is both factually related to the case at hand and more in line with current Congressional policies, rather than follow precedent that espouses principles that hinder current policy progress.

While the failure to acknowledge that aboriginal title and treaty title are the same was a crucial error made by the *Tee-Hit-Ton* Court, another error that had a dire effect on *Karuk Tribe* was the Court's assumption that the U.S. government generally did not compensate Indians when it took their land.[231] However, this assumption is clearly inaccurate.[232] While compensation has not always been equitable, since the founding of this country, the government has compensated Indians whenever it appropriated their land,[233] whether it was in the form of land, goods, or money.[234]

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224. *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 282–85 (1955).

225. *Id.* at 282.

226. *See Tillamooks*, 329 U.S. at 40.

227. *See* Singer, *supra* note 7, at 520. *See also* Act of Aug. 13, 1946, ch. 959, 60 Stat. 1049 (codified at 25 U.S.C. § 70 (repealed 1978)).

228. *See supra* notes 50–56 and accompanying text.

229. *See supra* notes 68–70 and accompanying text.

230. *See supra* notes 60–67 and accompanying text.

231. *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272, 281–82 (1955). *See also* Singer, *supra* note 7, at 526. When Justice Reed concluded "that the United States generally took Indian lands without compensation, [he rewrote] history to suit his purposes. He acknowledge[d] the original sin of the United States only in order to authorize continued expropriation." *Id.*

232. *See* Newton, *supra* note 42, at 464 (stating that the U.S. government always attempted to make either compensation or restitution).

233. *See* Singer, *supra* note 7, at 527.

C. Disregarded Legislation

The reliance on flawed precedent—and misinterpretation of sound precedent—led the Federal Circuit to its erroneous holding in *Karuk Tribe*. When given the opportunity, the court chose to ignore the intent of Congress[235] and gave no deference to the canons of construction—this was accomplished not only through the court's inaccurate "analysis" of precedent, but also by the court's disregard of pertinent legislation.[236]

The legislation at issue in *Karuk Tribe* was the Mineral Leasing Act of 1927.[237] Unlike any other act debated in Congress, this Act specifically acknowledged the intent of Congress to recognize as equal all Indian rights found in reservations,[238] whether the reservation was created by a treaty, a statute, or an executive order.[239] However, the Federal Circuit completely disregarded that Act.[240]

While the Mineral Leasing Act of 1927 was concerned with oil and gas leases, it was enacted to recognize that reservations created via the executive order process were entitled to the same rights and benefits as those created by a treaty or statute.[241] The Act focused on which mineral leasing act should apply to executive-order reservations, the Act of 1920, which would have given all proceeds from the leases to the United States, or the Act of 1924, which would have given the proceeds to the Indians.[242] Congressional debates illustrate that the intent of the Act was to decide whether title of executive-order reservations was equal to that of treaty reservations.[243] After much debate, the Senate agreed with Senator La Follette's statement:

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234. *See* Kelly, *supra* note 205, at 670–71 n.118. The Court has always awarded compensation. *See id.* The change of course in *Tee-Hit-Ton* was due to the size of the award the Indians would have been entitled to receive. *See id.*

235. *See* Karuk Tribe of Cal. v. Ammon, 209 F.3d 1366, 1379–80 (Fed. Cir. 2000).

236. *See supra* notes 152–59 and accompanying text.

237. *See* Act of Mar. 3, 1927, ch. 299, 44 Stat. 1347 (codified as amended at 25 U.S.C. §§ 398a-398e (2000)). *See also Karuk Tribe*, 209 F.3d at 1379–80.

238. *See Tribal Property Interest in Executive-Order Reservations: A Compensable Indian Right*, 69 YALE L.J. 627, 631 (1960).

239. *See* § 398a; Title to Lands, M-18604 (Mar. 6, 1926) *available at* 1926 DOINA LEXIS 65 (stating that "as to all three classes of ... reservations—treaty, act of Congress, or Executive order—the legal title is ... exactly the same"). *See also* McFadden v. Mountain View Min. & Mill Co., 97 F. 670, 673 (1899) (determining that the "effect of [an] executive order was the same as [it] would have been [had] a treaty [been formed] with the Indians").

240. *See Karuk Tribe*, 209 F.3d. at 1379 (declaring that even if the legislative history contained language concerning the equality of the reservations, it did not affect this case).

241. *See Tribal Property Interest*, *supra* note 238, at 631.

242. *See* 67 CONG. REC.10912–19 (1926).

243. *See id.* at 10914.

> Congress did not intend when it ended the treaty-making power to change the nature of the Indian ownership in reservations previously created or to be created in the future; and that the Indian ownership in the case of *Executive-order reservations has been recognized by Congress as being identical with the ownership in the case of treaty reservations.*[244]

The Senate further noted that if the Supreme Court did not currently recognize this right held by executive-order reservations in the past, it would have to do so in the future,[245] and "mere legal technicalities" should not determine the U.S. government's obligations to the Indians.[246]

Despite the clear evidence presented in the legislative hearings, the Federal Circuit in *Karuk Tribe* passed it off as irrelevant, instead supporting its own conclusions with additional case law.[247] In citing *Sioux* and *Southern Pacific*, the court stated that each case dealt with the issue of the legislative intent found in the Mineral Leasing Act and "discerned no title-granting power in the Act."[248] Yet that statement is visibly inaccurate, as neither case discussed the Mineral Leasing Act: *Sioux* discussed the General Allotment Act,[249] and *Southern Pacific* never reached the issue of the Mineral Leasing Act because neither party had contended that an executive-order reservation existed.[250]

Even without ascertaining the legislative history in question, the court simply had to look at the history of Indian takings claims since the Act was passed in 1927. Until the ruling in *Karuk Tribe*, in 2000, no taking of Indian land had gone without the payment of just compensation since 1927.[251]

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244. *Id.* at 10920 (emphasis added).

245. *See Tribal Property Interest*, *supra* note 238, at 636 n.45 (quoting the Senate as saying the right was created "regardless of what the Supreme Court might say").

246. 68 CONG. REC. 4578 (1927).

247. *See* Karuk Tribe of Cal. v. Ammon, 209 F.3d 1366, 1379 (Fed. Cir. 2000) (citing Sioux Tribe of Indians v. United States, 316 U.S. 317 (1942) and United States v. S. Pac.Transp. Co., 543 F.2d 676 (9th Cir. 1976)).

248. *Id.*

249. *See Sioux Tribe of Indians*, 316 U.S. at 329–30. The Mineral Leasing Act followed the General Allotment Act, and the Committee on Indian Affairs emphasized that the Mineral Leasing Act was the first time Congress ever officially recognized the rights of Indians and the title they held in executive-order reservations. *See Tribal Property Interest*, *supra* note 238, at 634.

250. *See S. Pac. R.R.*, 543 F.2d at 687.

251. *See Karuk Tribe*, 209 F.3d at 1384. *See also* United States v. Truckee-Carson Irrigation Dist., 649 F.2d 1286, 1312 (9th Cir. 1981) (holding that executive-order reservations merited the same protections as those found in treaty or statute reservations).

D. Settlement Clause

As the Federal Circuit left no table unturned in its misguided attempts at interpreting case law, legislation, and Congressional intent, it continued to ignore an obvious implication of Congress' intent to recognize the compensable interest the Indians held in the Hoopa Valley Reservation. Specifically, the court's blindness is demonstrated by its analysis of the Hoopa-Yurok Settlement Act of 1988,[252] the grounds for the lawsuit.

The Act specifically recognized that the Indians were entitled to bring an action against the U.S. government, under the Fifth Amendment, for just compensation:[253]

> Any claim challenging the partition of the joint reservation pursuant to section 1300i-1 of this title or any other provision of this subchapter as having effected a taking under the [F]ifth [A]mendment of the United States Constitution or as otherwise having provided inadequate compensation shall be brought, pursuant to section 1491 or 1505 of title 28, in the United States Court of Federal Claims.[254]

Therefore, the Federal Circuit's conclusion was wrong. It should have found that Indians hold a vested interest in the reservation on which they reside that is compensable under the Fifth Amendment, regardless of how that reservation was created. As stated previously, no other finding is supported by law, legislation, or common sense.

E. The Meaning of "Title" in a Trust Relationship

The final misstatement of law the Federal Circuit formulated was when it defined the Indians' right of occupancy. The court stated that this right does not vest in the Indians residing on the reservation appurtenant rights compensable under the Fifth Amendment. The Federal Circuit reached this conclusion based solely on the fact that the United States retained title to the land.[255] As Justice Newman outlined in her dissent, however, a vested property interest is not defined solely by title held in real property.[256] Examples of rights that have been recognized under the Fifth Amendment as being entitled to just compensation include: trade secrets,[257] security interests,[258] leaseholds,[259] and, directly on point, beneficial interests in

252. *See supra* notes 106–29 and accompanying text.
253. *See supra* notes 125–26 and accompanying text.
254. 25 U.S.C. § 1300i-11(a) (2000).
255. *See Karuk Tribe*, 209 F.3d at 1376–77, 1380.
256. *See id.* at 1382–83.
257. *See, e.g.*, Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984).
258. *See, e.g.*, Sheldon v. United States, 7 F.3d 1022 (Fed. Cir. 1993).
259. *See, e.g.*, United States v. General Motors Corp., 323 U.S. 373 (1945).

reservation trust property.[260]

The concept of beneficial interests in reservation property arose out of the trust relationship existing between the United States and Indians, as first espoused by Chief Justice Marshall,[261] who developed the original idea but did not provide any guidelines for future courts to follow.[262] The original intent of the trust relationship espoused was to import fairness into all transactions that occurred between the Indians and the United States.[263] Courts, however, have taken this original moral intent and misinterpreted the trust relationship as an exercise of Congress' plenary power over the Indians.[264] In doing so, the courts have instilled further confusion into the federal law concerning the taking of reservation land.[265] This confusion led to the Federal Circuit's current error, in *Karuk Tribe*, of interpreting the trust relationship to mean that where title remains with the United States, compensation cannot be granted.[266] However, it has long been established that title is not a prerequisite to compensation.[267]

The Supreme Court made it emphatically evident that title was not a prerequisite to a claim for just compensation under the Fifth Amendment when it stated in *Shoshone Tribe of Indians*:

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260. *See, e.g.*, Shoshone Tribe of Indians v. United States, 299 U.S. 476 (1937).

261. See *supra* note 16 for a definition of the trust doctrine. *See also supra* notes 25–27 and accompanying text.

262. *See Rethinking the Trust Doctrine in Federal Indian Law*, 98 HARV. L. REV. 422, 425 (1984) [hereinafter *Rethinking the Trust Doctrine*] (explaining that since the trust doctrine was based on a moral judgment, and not statutes or the Constitution, ambiguities have arisen that allow the courts to turn immoral acts into legitimate ones).

263. *See* Blurton, *supra* note 151, at 41.

264. The concept of plenary of power over Indians is an unconstitutional extension of Congress' power. *See* Savage, *supra* note 16, at 116. "Examination of the text of the Constitution, the intentions of the Framers, contemporary notions about sovereignty, the records of the Continental Congress, and contemporary treaties with Native American nations makes it clear that the Constitution has never granted to the United States a plenary power over Native Americans." *Id. See also* Yuanchung Lee, *Rediscovering the Constitutional Lineage of Federal Indian Law*, 27 N.M. L. REV. 273, 357 (1997) (stating that "the plenary power doctrine has no place in federal Indian law").

265. *See* Newton, *supra* note 211, at 265. The trust relationship should not be utilized to "justify actions that would be confiscations in any other setting." *Id.* The confusion created by the courts has resulted in the U.S. government being permitted to take Indian land in ways that would not be permitted if the land belonged to a non-Indian. *See id. See also Rethinking the Trust Doctrine*, *supra* note 262, at 427 (describing how Congress misused its "trust" responsibility "to seize tribal lands without compensation, to disband tribes, and to exploit tribal assets). "Not even a tortured interpretation" of the Constitution and the plenary power would permit the taking of Indian property without payment of just compensation. Savage, *supra* note 16, at 116.

266. *See* Karuk Tribe of Cal. v. Ammon, 209 F.3d 1366, 1378–79 (Fed. Cir. 2000).

267. *See id.* at 1382 (Newman, J., dissenting).

> Title in the strict sense was always in the United States, though the Shoshones had the treaty right of occupancy with all its beneficial incidents. What those incidents are, it is needless to consider now. The right of occupancy is the primary one to which the incidents attach and division of the right with strangers is an appropriation of the land pro tanto, in substance, if not in form.[268]

Once the Court in *Shoshone Tribe of Indians* determined that title was not the only defining characteristic of a compensable property right, the Court proceeded to quote various other cases that have held "retention of legal title by the United States as trustee [does] not free it from the obligation to pay just compensation to the tribe."[269] In addition, the Supreme Court reiterated that policy in 1983 with *United States v. Mitchell*, when Indians brought suit against the government for mismanagement of forest resources, which had been held in trust status by the government for the benefit of the Indians.[270] In that case, the Court compared the trust relationship existing between the U.S. government and Indians to that of a fiduciary duty existing between a beneficiary and a trustee.[271] As in a fiduciary relationship, the trust relationship holds the trustee accountable in damages for breach of that trust.[272]

In light of the cases mentioned, the plaintiffs in *Karuk Tribe* were entitled to just compensation due to the beneficial interest arising from the trust relationship. Retention of title by the United States was clearly not an appropriate deciding factor on which the Federal Circuit should have relied.

F. Citizenship

One major issue the Federal Circuit failed to address is that Indians are entitled to protection under the Fifth Amendment as citizens of the United States.[273] The Citizenship Act of 1924,[274] which originally granted

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268. Shoshone Tribe of Indians v. United States, 299 U.S. 476, 496 (1937).

269. *Karuk Tribe*, 209 F.3d at 1383. "The power does not extend so far as to enable the government to give the tribal lands to others, or to appropriate them to its own purposes, without rendering ... just compensation ... for that would not be an exercise of guardianship, but an act of confiscation." *Shoshone Tribe of Indians*, 299 U.S. at 497 (quoting United States v. Creek Nation, 295 U.S. 103, 110 (1935)) (internal quotations omitted). "The right of the Indians to the occupancy of the lands pledged to them, may be one of occupancy only, but it is 'as sacred as that of the United States to the fee.'" *Id.* (quoting United States v. Cook, 86 U.S. 591, 593 (1873)).

270. *See generally* United States v. Mitchell, 463 U.S. 206, 207–10 (1983).

271. *See id.* at 224.

272. *See id.* at 226.

273. *See* DELORIA & LYTLE, *supra* note 18, at 246. Native Americans are "entitled to the full benefits and privileges that are offered to all citizens." *Id.*

274. Act of June 2, 1924, ch. 233, 43 Stat. 253 (codified as amended at 8 U.S.C. § 1401

citizenship to all Indians, states: "The following shall be nationals and citizens of the United States at birth: ... (b) a person born in the United States to a member of an Indian ... tribe: *Provided*, That the granting of citizenship ... shall not in any manner impair ... the right of such person to tribal or other property[.]"[275]

All citizens in this country are entitled to the protections outlined in the United States Constitution, including Indians. To conclude otherwise does not comport with our government's practice of affording protections to immigrants and other foreigners living within in the United States[276]—those who have not been granted U.S. citizenship.

Although Indians are citizens, the Supreme Court has found parts of the Constitution to be inapplicable to them. This may be one reason the courts fail to provide Fifth Amendment protections. The granting of citizenship, however, should not impact Fifth Amendment protections. The only explanation for not affording constitutional protections to Indians is that certain protections could impact the sovereignty of Indian nations. Such protections would be those that impinge on the jurisdictional boundaries that govern Indian nations' dealings with their own people and those residing on their lands.[277] The protection of the Fifth Amendment is not one of those protections. The Fifth Amendment sets limits on the federal government's right to act in a particular manner.[278] It does not prevent Indians from receiving compensation when the government acts in that manner.

V. CONCLUSION AND RECOMMENDATION FOR THE FUTURE

Notwithstanding the clear evidence illustrating that executive order reservations are no different from those reservations created by treaty or statute,[279] the Federal Circuit denied that the Indians residing on the reservation held a vested property interest for which they were entitled to just compensation.[280] This denial was based solely on the manner in which

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(2000)).

275. § 1401.

276. *See* DELORIA & LYTLE, *supra* note 18, at 217.

277. *See id.* at 221. *See also* WILKINS & LOMAWAIMA, *supra* note 19, at 280.

278. The trust doctrine has been used as an excuse by the courts not to extend the protections of the Constitution and protect Indian rights. *See* Wood, *supra* note 7, at 1507–08 (discussing the misuse of the trust doctrine and how it should be recognized as a doctrine of federal restraint "and as an important source of protection for Indian rights").

279. *See* Karuk Tribe of Cal. v. Ammon, 209 F.3d 1366, 1384 (Fed. Cir. 2000) (Newman, J., dissenting). "The argument, pressed by the panel majority, that reservations established by Act of Congress and implemented by executive order are somehow inferior in their property attributes, is without force or support." *Id.*

280. *See id.* at 1380.

the Hoopa Valley Reservation was created.

The Federal Circuit erred gravely in failing to utilize the canons of construction,[281] which are required in cases affecting the rights of Indians. Furthermore, the Supreme Court let this egregious error stand by denying certiorari when hearing the case was necessary to undo a mistake of judgment that will undoubtedly result in further harm to Indians.[282]

Such a decision by the Federal Circuit, and such indecision by the Supreme Court, is paramount to giving the federal government authorization[283] to do as it will with those reservations currently existing in the United States that were originally created by an executive order. It also prevents Indians from achieving true self-determination, as their land is key to that process.[284] Until such confiscation by the courts is put to an end, Indians "can never be secure in their land."[285]

Courts need to begin moving in the same direction as Congress and recognize that Indian communities are sovereign nations[286] that should be treated accordingly. This means that the courts need to make decisions based on the goals of self-determination[287] and self-government rather than rely on inconsistent precedent decided in a time when our government was determined to annihilate Indians from the United States. To accomplish this, the courts must educate themselves on the history the United States shares with the Indian community.[288] In addition, the courts must realize that the current congressional policy emphasizes Indian self-determination

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281. *See supra* notes 152–59 and accompanying text.

282. *See* Blurton, *supra* note 151, at 48. "[C]ourts may depart from [precedent] when the reasons underlying the earlier holdings no longer exist, are clearly wrong, or will cause more harm than good." *Id. See also* Singer, *supra* note 41, at 14. "Although it may in fact be too late to undo some past injustices, it is not too late to adjust the consequences of those past events where such adjustments" would prevent a "continuing injustice." *Id.*

283. *See* Newton, *supra* note 211, at 247–48. While the current policy emphasizes self-determination and self-government, that policy could shift at any given moment as the need for natural resources increases. *See id.*

284. *See* Getches, *supra* note 158, at 342–43 (discussing how land and nature are at the core of Indian life). *See also* Douglas Luckerman, *Sovereignty, Jurisdiction, and Environmental Primacy on Tribal Lands*, 37 NEW ENG. L. REV. 635 (2003) (describing the protection of the environment as "a matter of cultural survival" for Indian tribes).

285. Newton, *supra* note 42, at 473.

286. *See* WILKINS & LOMAWAIMA, *supra* note 19, at 280 (discussing what it means to be sovereign).

287. *See supra* notes 68–71 and accompanying text. *See also* Duthu & Suagee, *supra* note 149, at 118. "[T]he Court shows no concern whatsoever for adherence to this nation's historic promises to secure and protect the territorial and political integrity of tribal systems of self-government." *Id.*

288. *See* Getches, *supra* note 158, at 360.

and that their recent decisions are at odds with that policy goal.[289]

History illustrates that the courts are required to give deference to the other branches of government,[290] yet the current Rehnquist Court[291] has not done so, and the lower courts follow its lead. As a result, two scholars have proposed that a separate court be formed to deal solely with Indian issues.[292] While this suggestion is intriguing, especially in light of *Karuk Tribe*, such a drastic step need not be taken. If the Supreme Court would return to the established canons of construction[293] and take the time to educate themselves on the current state of Indian affairs in this country, they actually might formulate a policy of adjudication that would clarify the law the lower courts are mandated to follow.

Unless the courts reinvent their Indian policies in this fashion, it would take only an Act of Congress to save Indian rights from being completely annihilated.[294] However, it is unknown whether or not the courts would even acknowledge such an act by Congress, considering how the courts handled *Karuk Tribe*. Despite the fact that precedent, legislation, and the current policy of Congress all pointed toward recognition of a Fifth Amendment right to just compensation, the Court of Appeals for the Federal Circuit closed its eyes and once again determined that Indians were not entitled to the protections afforded under the Constitution.

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289. *See id. See also* Duthu & Suagee, *supra* note 149, at 118.

290. *See* Getches, *supra* note 154, at 1655.

291. "It would be difficult to find a field of law or a type of litigant that fares worse than Indians do in the Rehnquist Court." Getches, *supra* note 158, at 281. From 1991 to 2000, Indians lost 82% of the cases they brought to the Supreme Court. *See id.* at 280.

292. *See* Michael C. Blumm & Michael Cadigan, *The Indian Court of Appeals: A Modest Proposal to Eliminate Supreme Court Jurisdiction Over Indian Cases*, 46 ARK. L. REV. 203, 207 (1993).

293. *See* Getches, *supra* note 154, at 1620. The Court has strayed from these established canons over the years to the detriment of Indian rights. *See id.*

294. *See* Getches, *supra* note 158, at 269.

NOTES

Palazzolo's One-Two Punch to the Wetlands Takings Doctrine: Are Massachusetts Wetlands at Risk?

I. INTRODUCTION

The recent Supreme Court case of *Palazzolo v. Rhode Island*[1] resulted in a two-part holding that may have a significant impact on regulatory takings claims, specifically affecting those arising from wetlands restrictions.[2] The two-part holding of *Palazzolo* concerns both the ripening of regulatory takings claims and the investment-backed expectations prong of the *Penn Central Transportation Co. v. New York City*[3] regulatory takings test.[4] The *Palazzolo* Court ruled in favor of the property owner on both of these issues[5] With respect to the investment-backed expectations prong, the Court held that a landowner who purchased land with notice that the use of the land was limited by wetlands restrictions prior to his purchase was not barred from seeking compensation for a regulatory taking.[6] As for the ripeness issue, the Court held that a petitioner's wetlands regulatory takings claim is ripe for judicial review once the "permissible uses of the property are known to a reasonable degree of certainty."[7]

This Note discusses the background of the investment-backed expectations and ripeness doctrines and the possible future of Massachusetts wetlands in light of the two-part holding of *Palazzolo*.

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1. 533 U.S. 606 (2001).
2. *See id.* at 618-32.
3. 438 U.S. 104, 124 (1978) (stating that one factor for courts to consider in a regulatory takings claim is extent to which regulation has interfered with distinct investment-backed expectations).
4. *See Palazzolo*, 533 U.S. at 616.
5. *See id.* at 630.
6. *See id.*
7. *Id.* at 620.

Further, this Note addresses situations in which a portion of the landowner's property is subject to regulation, as opposed to situations in which the landowner is deprived of all economically beneficial use of her land.[8] Part II outlines the investment-backed expectations and ripeness doctrines in the context of wetlands cases prior to the *Palazzolo* decision.[9] Part III discusses the *Palazzolo* case and its holding.[10] Part IV analyzes how the *Palazzolo* holding contradicts Massachusetts laws and prior court rulings.[11] Parts V and VI look to the possible future of Massachusetts wetlands after the *Palazzolo* decision.[12]

II. BACKGROUND

A. The Origin of Regulatory Takings

The United States Constitution guarantees that an individual's property will not be "taken" by the state or federal governments without compensation or due process of law.[13] These provisions of the U.S. Constitution do not prohibit the government from taking land; they merely state that to do so, the government must adhere to due process of law and provide adequate compensation.[14] The Takings Clause literally applies to instances in which an individual is per se entitled to compensation for the government's physical invasion of her property.[15] However, the Takings Clause has been interpreted to require that an individual must be compensated where the government has infringed upon a landowner's

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8. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 n.8 (1992) (holding that landowners' investment-backed expectations need not be addressed where owners have been deprived of all economically beneficial uses of land).

9. *See infra* notes 13-105 and accompanying text.

10. *See infra* notes 107-86 and accompanying text.

11. *See infra* notes 187-235 and accompanying text.

12. *See infra* notes 236-52 and accompanying text.

13. *See* U.S. CONST. amend. XIV, § 1. This amendment prohibits states from "depriv[ing] any person of life, liberty, or *property*, without due process of law." *Id.* (emphasis added). According to the Fifth Amendment, "nor shall private property be taken [by the federal government] for public use without just compensation." U.S. CONST., amend. V.

14. *See* NORMAN REDLICH ET AL., UNDERSTANDING CONSTITUTIONAL LAW 199 (2d ed. 1999). *See also* Steven J. Eagle, *Just Compensation for Permanent Takings of Temporal Interests*, 10 FED. CIRCUIT B.J. 485, 486 (2001) (recognizing that eminent domain is an implicit right delegated to state and federal governments through the U.S. Constitution).

15. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 421 (1982). The Court in this case showed just how literally the Takings Clause could be interpreted. *See id.* (finding that an invasion by a one-half inch cable installed on a rental property constituted a per se taking).

property *rights*, even without conducting a *physical* invasion of the property.[16]

B. The Birth of Investment-Backed Expectations in Regulatory Takings

The early defining case recognizing that a land regulation could be so extensive as to constitute a taking was *Pennsylvania Coal Co. v. Mahon.*[17] Since *Penn. Coal*, the courts and scholars have grappled with the task of defining a test[18] that would determine when a regulatory taking has occurred.[19] In deciding whether a regulatory taking has occurred, courts have consistently deemed it necessary to address the economic impact of the regulation on the private landowner.[20]

The notion of a property owner's investment-backed expectations as a factor in a takings analysis was first brought to light in a 1967 Harvard Law Review article by Professor Frank I. Michelman.[21] In 1978, the Supreme

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16. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1992). "The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id. See also* REDLICH ET AL., *supra* note 14, at 200.

17. *See Penn. Coal*, 260 U.S. at 415.

18. The Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 n.8 (1992), stated that the investment-backed expectations factors from *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), need only be discussed where a petitioner is asserting a takings claim due to a regulation that does not deprive the landowner of *all* economically beneficial use.

19. *See* Abraham Bell & Gideon Parchomovsky, *Takings Reassessed*, 87 VA. L. REV. 277, 278 (2001). "Takings jurisprudence is replete with inconsistent distinctions that provide scant guidance for courts and policymakers." *Id.*

20. *See generally* DANIEL R. MANDELKER, LAND USE LAW, 18-39 (4th ed.1997 & Supp. 2000) (noting that even though land may not be physically taken, the economic viability of the land due to a government-imposed restriction is an important factor in a takings analysis)

21. *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1233 (1967). In referring to investment-backed expectations, Michelman states:

> [T]he test poses not nearly so loose a question of degree; it does not ask "how much," but rather ... it asks "whether or not": whether or not the measure in question can easily be seen to have practically deprived the claimant of some *distinctly perceived, sharply crystallized, investment-backed expectation.*

Id. (emphasis added). In writing his article, Michelman was not seen as an overzealous private property rights advocate; rather, he viewed as being more concerned with protecting individuals who felt they were "victims of unprincipled exploitation." *See* R. S. Radford & J. David Breemer, *Great Expectations: Will* Palazzolo v. Rhode Island *Clarify the Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. ENVTL. L.J. 449, 453-54 (2001) (citing Michelman, *supra* at 1230).

Court specifically addressed the issue of investment-backed expectations in *Penn Central Transportation Co. v. New York City*, as one of the distinct prongs in the regulatory takings analysis.[22] In *Penn Central*, the Court upheld an historic landmark regulation preventing Grand Central Station from constructing a tower on top of the structure.[23] Justice Brennan specifically stated that a private landowner is not able to claim that regulations on "particular segments" of the property are so egregious as to justify a taking, but that the property owner's regulated interest should be examined in reference to the entire property.[24] Later in the opinion, Justice Brennan noted that the owners of Grand Central Station were not being deprived of their "primary expectation" and stressed that the landmark regulation still allowed Grand Central to fully function as a railroad station.[25] Connecting Justice Brennan's argument that the regulated property interest should be looked at as a whole[26] with the conclusion that Grand Central was not being deprived of its primary function, allowed Justice Brennan to "neatly" conclude that Grand Central's *primary* investment-backed expectation was not frustrated by the New York statute.[27]

Although Justice Brennan did not specifically define investment-backed expectation in *Penn Central*, he did find it necessary to ground the doctrine

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22. *See Penn Cent.*, 438 U.S. at 124. Justice Brennan designed a three prong test to be applied in a regulatory takings analysis: "[t]he [1] economic impact of the regulation on the claimant and, particularly, [2] the extent to which the regulation has interfered with the *distinct investment-backed expectations* are, of course, relevant considerations ... [s]o too, is the [3] character of the governmental action." *Id.* (emphasis added).

23. *See id.* at 138.

24. *See id.* at 130-31. The Court found that:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this court focuses rather both on the character of the action and on the nature and extent of the interference with *rights* in the parcel as a *whole.*

Id. (emphasis added).

25. *See Penn Cent.*, 438 U.S. at 136.

> [Grand Central's] designation as a landmark not only permits but contemplates that the appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's *primary expectation* concerning the use of the parcel.

Id. (emphasis added).

26. *See id.* at 131.

27. *See* Steven J. Eagle, *The Rise and Rise of "Investment-Backed Expectations,"* 32 URB. LAW. 437, 441 (2000).

in existing precedent.[28] At the same time that Justice Brennan applied the theory of investment-backed expectations to the earlier takings case of *Penn. Coal*, he also limited the context in which a petitioner could assert investment-backed expectations by applying the theory to *Penn Central*.[29] Justice Brennan noted that the *Pennsylvania Coal* case was a taking without just compensation because the statute negated the very objective that the prior landowners had attempted to achieve by retaining the mining rights under the property that they conveyed.[30] In *Penn Central*, however, Justice Brennan denied Grand Central's claim that confiscation of the interest in airspace property above the station constituted a taking, and in reference to Grand Central's investment-backed expectations claim, stated that "the submission that appellants may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable."[31]

In Justice Brennan's discussion of investment-backed expectations in *Penn Central*, he never discussed what role investment-backed expectations would play in a situation in which the landowner acquired land with notice of a presently active regulation on the land. In essence, Justice Brennan was leaving open the question of whether or not the theory of a purchaser's investment-backed expectations could be used as a weapon to supercede such firmly rooted theories as estoppel or vested rights.[32]

A year after the *Penn Central* decision, the theory of investment-backed expectations was substantially transformed simply by the restatement of the name of the theory itself.[33] In *Kaiser Aetna v. United States*,[34] Justice Rehnquist restated the theory as "*reasonable* investment-backed

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28. *See* Radford & Breemer, *supra* note 21, at 455-57.

29. *See id. See also* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (finding taking without just compensation). In *Penn Coal*, the coal company sold their surface rights but reserved the right to mine coal under the property. *See id.* at 412. After the transaction, Pennsylvania enacted the Kholer Act which forbade "the mining of anthracite coal in such a way as to cause the subsidence of, among other things, any structure used as a human habitation." *See id.* at 412-13.

30. *See* Radford & Breemer, *supra* note 21, at 455-56.

31. *Penn Cent.*, 438 U.S. at 130. Grand Central actually anticipated a 20-story office tower to be built at the time of the station's construction. *See id.* at 115 n.15. "The Terminal's present foundation included columns, which were built into it for the express purpose of supporting the proposed 20-story tower." *Id.*

32. *See* Eagle, *supra* note 27, at 441-42.

33. *See* Steven J. Eagle, *The Regulatory Takings "Notice Rule": Sources and Implications*, SF64 ALI-ABA 365, 375-76 (2001); Radford & Breemer, *supra* note 21, at 460-61; Eagle, *supra* note 27, at 442.

34. 444 U.S. 164 (1979).

expectations."[35] Over a period of merely twelve years, the name of investment-backed expectations had changed dramatically from Professor Frank I. Michelman's nominal designation of a "distinctly perceived, sharply crystallized, investment-backed expectation."[36] The simple addition of the word "reasonable" to the name of the theory made it more difficult for a property owner to assert that his investment-backed expectations had been frustrated.[37] The modification changed investment-backed expectations from an inquiry into the private property owner's *subjective* plans for the use of her land to a judicial determination of the "validity of a claimant's expectations."[38]

The Supreme Court next addressed investment-backed expectations in the context of an exaction for land use in the case of *Nollan v. California Coastal Commission*.[39] In this case, beach front property owners were on *constructive* notice that a proposal to rebuild their houses would require them to forfeit an easement across their property for public use.[40] The Court rejected Justice Brennan's notion that the petitioner's investment-backed expectations could not have been reasonable given their constructive notice,[41] and ruled that the statute was in violation of the Takings Clause because the condition did not protect a valuable governmental benefit.[42] The lower courts have not readily followed the proposition that a purchaser who takes land with *constructive* notice of a government's limiting regulations still has reasonable investment-backed expectations to bring a takings claim.[43]

In the seminal case of *Lucas v. South Carolina Coastal Council*,[44] the

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35. *Id.* at 175.

36. Michelman, *supra* note 21, at 1233.

37. *See* Radford & Breemer, *supra* note 21, at 460-61.

38. *See id.*

39. 483 U.S. 825 (1987).

40. *See id.* at 829.

> The Commission ... had similarly conditioned 43 out of 60 coastal development permits along the same tract of land, and that of the 17 not so conditioned, 14 had been approved when the Commission did not have administrative regulations in place allowing imposition of the condition, and the remaining 3 had not involved shorefront property.

Id.

41. *See id.* at 857-58.

42. *See id.* at 834, 841.

43. For a list of cases rejecting the *Nollan* decision see Eagle, *supra* note 27, at 444 n.47 and Radford & Breemer, *supra* note 21, at 469-70 n.128.

44. 505 U.S. 1003 (1992) (agreeing with landowner that he was deprived of all economically beneficial use of his land). Most scholars find this case relevant because of its discussion of deprivation of all economically beneficial use of land in the context of what

Court stated that a landowner who acquired land with restrictive regulations already in place—that deprived the landowner of *all* economically beneficial use of the land—was not entitled to compensation under the Takings Clause unless the regulation went "beyond what the relevant background principles [of property and nuisance] would dictate."[45] In relation to *categorical* takings, the Court stated:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think [the state] may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were *not part of his title to begin with*. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire when they obtain title to property.[46]

The majority in *Lucas* saw pre-enacted statutes as limiting a post-enactment purchaser's "legal" property rights included in his title.[47] Thus, if the use was not included in the property owner's title before he took the land, the "logical" result would be that he would be unable to seek compensation for confiscation of this use after he had acquired title.[48] The *Lucas* Court asserted that states have the ability to impose restrictions upon the property owner's bundle of property rights through "restrictions that background principles of the [s]tate's law of property and nuisance already place upon land ownership."[49]

Although the theory that state background principles restricting parts of the owner's bundle of property rights differs from the investment-backed expectations theory—the former relies upon legal principles while the latter relies on equitable principles—many courts have used the two theories interchangeably when evaluating the reasonableness of the "investment-backed expectations" prong of the *Penn Central* analysis for a post-enactment landowner seeking compensation under the Takings Clause.[50]

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constitutes a *categorical* taking, as opposed to its implications of investment-backed expectations. *See* REDLICH ET AL., *supra* note 14, at 209.

45. *Lucas*, 505 U.S. at 1030.

46. *Id.* at 1027 (emphasis added).

47. *See id.*

48. *See id.*

49. *Id.* at 1029. The Court has stated before that "[p]roperty interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972). *See also* Eagle, *supra* note 33, at 372 (discussing sources of property rights).

50. *See* Eagle, *supra* note 33, at 367-69.

The reason for this is that the application of either theory yielded the same result, since either theory was effective in preventing post-enactment purchasers from seeking compensation for the loss of a use due to pre-existing regulations. [51] Although the concepts are different, they tend to work together because a post-enactment purchaser who has knowledge that his *bundle of property rights* is constitutionally subject to restriction by statute could not *reasonably expect* to obtain compensation for the impacts resulting from the statute.[52]

C. Wetlands and the Investment-Backed Expectations Prong

Courts have recognized that the protection of wetlands constitutes a legitimate state interest.[53] Restrictions upon the development of wetlands have been imposed to serve numerous vital environmental functions.[54] The regulation of wetlands has time and again been established as within the state's police power to regulate health and safety.[55]

As courts have recognized that the protection of wetlands constitutes a legitimate public objective, they have also held that such regulations are "inherent limitations on [a landowner's] property not subject to attack under the Takings Clause."[56] In the case of *Algeria v. Keeney*,[57] the post-enactment purchaser's *expectations* to develop his wetlands were deemed

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51. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 626 (2001). When criticizing the "injustice" that would occur if post enactment purchasers were barred from seeking compensation under a takings cause of action, the Court stated that the two theories (state background principles restricting an owners bundle of property rights, and investment-backed expectations) "amount to a single sweeping rule: A purchaser or a successive title holder like petitioner [post-enactment purchaser] is deemed to have notice of an earlier-enacted restriction and is barred from claiming that it effects a taking." *Id.*

52. *See id.*

53. The court in *Lopes v. City of Peabody* stated "[t]here is no doubt that flood control and the prevention of pollution of surface and ground water (and great ponds) are legitimate State interests." 629 N.E.2d 1312, 1316 (Mass. 1994).

54. *See* MANDELKER, *supra* note 20, at 480.

> As transitional "marshy" areas between land and bodies of water, wetlands help preserve water quality by slowing water flow and allowing sediment to settle. They also stabilize water tables by retaining water during dry periods and holding it back during floods. Wetlands are important resources for environmental diversity and provide an important habitat for many forms of wildlife.

Id.

55. *See id.* at 479.

56. *See id.* at 485 n.32 (citing FIC Homes of Blackstone, Inc. v. Conservation Comm'n, 673 N.E.2d 61 (Mass. App. Ct. 1996); Gazza v. N.Y. Dep't of Envtl. Conservation, 679 N.E.2d 1035 (N.Y. 1997)). *See also* Kim v. City of New York, 681 N.E.2d 312 (N.Y. 1997) (noting that inherent limitations include statutory restriction).

57. 687 A.2d 1249 (R.I. 1997).

unreasonable in light of the state's "pervasive wetlands regulations."[58] Courts have held that, in the realm of wetlands regulation, a landowner who purchases land subject to such regulation is *knowingly* taking on the risk that an application to develop the wetlands will most likely be denied.[59] Hence, such a post-enactment purchaser of wetlands could hardly assert that her investment-backed expectations to develop the wetlands were *reasonable* in light of the existing regulations.

D. Ripeness/Exhaustion

In order for a takings claim to be heard in court, the case must be *ripe* for judicial review.[60] A challenge to a regulation is not ripe for judicial review until "the government entity charged with implementing the regulations has reached a *final decision* regarding the application of the regulation to the property at issue."[61] A plaintiff's challenge to a land use restriction cannot ripen until all administrative opportunities to obtain the desired result have been exhausted.[62] Although the exhaustion doctrine is closely related to the ripeness doctrine, they are theoretically different.[63] A takings claim is not necessarily ripe—meaning that a final decision has been rendered—simply because the petitioner has "exhausted all available administrative remedies."[64]

The purpose for these judicially created doctrines is to maintain an appropriate separation of governmental powers and to give the administrative agencies the opportunity to remedy the situation and prevent overburdening the court system.[65] Although ripeness issues are usually addressed in the federal court system, many state courts have adopted the federal courts' insistence on a "final decision" by the administrative

58. *Id.* at 1254.

59. *See id.* at 1253-54. "In this case, plaintiff purchased the property knowing that its wetlands were subject to regulations. Therefore, we are led to conclude that plaintiff accepted the risk that the development plans he preferred would be disapproved." *Id.*

60. *See* MANDELKER, *supra* note 20, at 342. Although the issue of ripeness touches many different areas of the law, this Note focuses only on ripeness in the context of land use restrictions.

61. Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 186 (1985).

62. *See* MANDELKER, *supra* note 20, at 342.

63. *See id. See also* Douglas T. Kendall et al., *Choice of Forum and Finality Ripeness: The Unappreciated Hot Topics in Regulatory Takings Cases*, 33 URB. LAW. 405, 430 (2001). "[T]he ripeness doctrine is concerned with finality, while the exhaustion doctrine is remedial." *Id.*

64. William R. Quinlan et al., *Defending Against the Takings Claim: A Practical Guide for Municipalities*, 29 STETSON L. REV. 659, 666 (Winter 2000).

65. *See* MANDELKER, *supra* note 20, at 342.

agency, in order for the challenge to be "ripe."[66]

In 1985, the Supreme Court attempted to clarify the ripeness doctrine with the case of *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*.[67] In *Williamson*, the landowner, Hamilton Bank, challenged a zoning ordinance that restricted the amount of lots that it could create within its acreage.[68] Hamilton Bank filed the suit in the United States District Court for the Middle District of Tennessee after its lot proposal was rejected by the Williamson County Regional Planning Commission.[69] The plaintiff alleged that the Commission had taken its property without providing just compensation because the denial of its proposal resulted in a loss of over one million dollars.[70] The plaintiff also alleged that it had suffered economic loss from a temporary taking that occurred between the time of the Commission's initial rejection of its plan and the time the plaintiff filed the complaint.[71] However, the expert witnesses for both parties indicated that the Commission's objections to the plaintiff's plan could be overcome by a planning design that reduced the amount of units to be developed.[72] After a partial victory by the plaintiff at trial, and a complete victory on appeal, the case was granted certiorari in order to address the issue of the existence or nonexistence of a temporary taking.[73]

The Supreme Court declined to resolve the issue concerning temporary taking since it found the case was not ripe for review.[74] Although the Commission had rejected the plaintiff's initial proposal, the plaintiff could have sought a variance from the Board of Zoning Appeals that would have resolved five of the Commission's eight objections.[75] Thus, the Court

66. *See* Robert Meltz, *Wetland Regulation and the Takings Issue*, SC80 ALI-ABA 183, 188 n.15 (1998). *See also Williamson County*, 473 U.S. at 194 n.13 (holding that "because the Fifth Amendment proscribes takings *without just compensation*, no constitutional violation occurs until just compensation has been denied").

67. 473 U.S. 172, 186 (1985).

68. *See id.* at 182.

69. *See id.*

70. *See id.*

71. *See id.* at 183.

72. *See id.* at 182. *See also* MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 353 n.9 (1986). The Court held that a rejection of a "grandiose" plan is not ripe for judicial review if a "less ambitious" plan would be accepted by the local government entity. *See id.*

73. *See Williamson*, 473 U.S. at 182-85.

74. *See id.* at 185. *See generally* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002). The Court has very recently decided that a temporary taking of a segment of an individual's property will not result in a *categorical* taking. *See id.* at 1483-86.

75. *See Williamson*, 473 U.S. at 188.

found that since plaintiff had not applied for any variances, it could not claim that the "Commission's disapproval of the preliminary plat[76] was equivalent to a *final decision* [required for ripeness] that no variances would be granted."[77]

The Supreme Court again addressed the ripeness issue in the context of regulatory takings in 1986 with *MacDonald, Sommer & Frates v. County of Yolo*.[78] In *MacDonald*, the petitioner developer was denied an application for a 159-lot subdivision.[79] Without applying for a subdivision that was less offensive to the county planning commission, the developer immediately sued for a taking.[80] The Court ruled that the developer's case was not ripe.[81] The Court made their intentions perfectly clear when they stated that a "[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable review."[82]

The *MacDonald* case was the first time the Supreme Court recognized the futility exception.[83] In order for a petitioner to obtain the futility exemption, he has the burden of proving the local government agency does not have the discretion to allow the requested development, or it is clear that they will not allow it.[84] In this situation, the petitioner is not required to prove that she has exhausted all administrative remedies, and her case is deemed ripe for judicial review.[85]

E. Ripeness: An Administrative Tool to Protect Wetlands

Ripeness is one of the most well known procedural tools used against private landowners seeking compensation for a regulatory taking.[86] Hence,

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76. A plat is defined as "a map or plan, esp[ecially] of a piece of land divided into building lots." WEBSTER'S NEW WORLD DICTIONARY 1090 (2d ed. 1980).

77. *Williamson*, 473 U.S. at 190 (emphasis added).

78. 477 U.S. 340 (1986).

79. *See id.* at 342.

80. *See id.* at 351-52.

81. *See id.*

82. *Id.* at 353 n.9. *See generally* Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 920 F.2d 1496 (9th Cir. 1990). A municipality's discretion to require a developer to seek approval of an additional less offensive plan in order to ripen his claim is limited to avoid a municipality's abuse of their discretion. *See id.* at 1506.

83. *See* Kendall et al., *supra* note 63, at 425 (quoting MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 350 n.7 (1986) (stating that "[a] property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain [a final] determination").

84. *See id.*

85. *See* MANDELKER, *supra* note 20, at 344.

86. *See* Quinlan et al., *supra* note 64, at 660. "Generally one of the most difficult tasks

it is not surprising that the ripeness argument is often raised by municipalities who do not wish to have their wetlands regulations challenged in court.[87] The fact that some states require a reapplication from the initial denial of a plan in order for a claim to become ripe gives municipalities a loophole in which they are able to make the application process for a regulation challenger extremely aggravating and expensive.[88] Since planning boards rarely conclude that no development of any kind would ever be allowed on a petitioner's lot, the board can usually argue that the petitioner can reapply—taking more time and money—for a less intrusive plan, and failure to do so will render the claim unripe.[89]

In the past eleven years, the Supreme Court and the lower courts have limited municipalities' ability to defeat wetlands takings claims using the ripeness doctrine.[90] The absurd behavior of the municipality in the case of *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*[91] prompted the Supreme Court to affirm the Ninth Circuit's decision to take away some of a municipality's power in rendering a "final decision" for ripeness purposes.[92] In *Del Monte Dunes*,[93] the developer had applied for development of ocean front property five separate times and each subsequent plan was substantially scaled down (or modified consistent with the planning commission's suggestions) from the previous proposal.[94] After the developer brought suit, the municipality argued that it had not rendered a "final" decision concerning the development of the property since the municipality only "identified one level of development the City [would] not permit without establishing the type and intensity of the development the City [would] permit."[95] The Ninth Circuit ruled that the

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for plaintiffs in a takings case is proving to a court that the case is 'ripe' for adjudication." *Id.*

87. *See id.* at 660-61.

88. *See* MANDELKER, *supra* note 20, at 343 (citing Tiogo v. Town of Ross, 82 Cal. Rptr. 2d 649 (Cal. Ct. App. 1998); Port Clinton Assocs. v. Bd. of Selectmen, 587 A.2d 126 (Conn. 1991); Daddario v. Cape Cod Comm'n, 681 N.E.2d 833 (Mass. 1997); Joyce v. Multnomah County, 835 P.2d 127 (Or. Ct. App. 1992); Killington, Ltd. v. State, 668 A.2d 1278 (Vt. 1995)).

89. *See* Quinlan et al., *supra* note 64, at 662.

90. *See* Palazzolo v. Rhode Island, 533 U.S. 606, 618-26 (2001); Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 920 F.2d 1496, 1501-07 (9th Cir. 1990), *aff'd* 526 U.S. 687, 694 (1999).

91. 526 U.S. 687 (1999).

92. *See id.* at 694-99; *Del Monte Dunes*, 920 F.2d at 1499. Before the developer brought suit, he proposed plans for the development of 344, 264, 224, 190 and again for 190 residential units. *See id.* at 1499.

93. *Del Monte Dunes*, 920 F.2d at 1496.

94. *See id.* at 1499.

95. *Id.* at 1502.

municipality had rendered a final decision through the conditions that were included in the municipality's previous denials, and stated that to force "appellants to persist with this protracted application process to meet the final decision requirement would implicate ... concerns about disjointed, repetitive and unfair procedures."[96] Hence, it is evident from the strong language in the Ninth Circuit's opinion that abuse of the ripeness doctrine by municipalities will not be tolerated.[97]

Lower courts have also put limits on the finality requirement of the Takings Clause by requiring that a landowner must merely obtain one rejection from one meaningful application for a development project and a variance in order to ripen their takings claim.[98] In *Southern Pacific Transportation Co. v. City of Los Angeles*, the court used the language from *MacDonald* to define a "meaningful" application as one that is not "exceedingly grandiose."[99] The court's reasoning for requiring denial of a "meaningful" application to ripen a claim was to show that the municipality does not intend to allow "reasonable development."[100] Although the "one meaningful application" doctrine was originally used to aid petitioners in ripening their claims, it could also be used by municipalities in preventing a claim from ripening.[101] The reasoning behind this is that the "one meaningful application" doctrine protects municipalities from landowners seeking compensation under the Takings Clause for "grandiose" developments that "could not have been constructed under other, valid zoning restrictions quite apart from the [allegedly unconstitutional] regulation being challenged."[102]

F. Ripeness and the Investment-Backed Expectations Prong as One: The Interrelation

At first glance the doctrines of ripeness and investment-backed expectations seem to be separate and distinct, yet they are actually

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96. *Id.* at 1506.

97. *See Del Monte Dunes*, 526 U.S. at 694; *Del Monte Dunes*, 920 F.2d at 1506.

98. *See* S. Pac. Transp. Co. v. City of Los Angeles, 922 F.2d 498, 503 (9th Cir. 1990), *cert. denied* 502 U.S. 943 (1991).

99. *Id.* (citing MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 353 n.9 (1986)).

100. *Id.*

101. *See generally* East Cape May Associates v. New Jersey, 693 A.2d 114, 121-22 (N.J. Super. Ct. App. Div. 1997). Since the developer in *East Cape May* had not conversed with the Department of Environmental Protection concerning the possible alternatives for his plan, meaningful applications were not thoroughly discussed and his takings claim had not ripened. *See id.*

102. Palazzolo v. Rhode Island, 533 U.S. 606, 624-25 (2001).

interrelated in the context of takings issues.[103] The fact of the matter is that one's investment-backed expectations cannot be evaluated if an administrative agency has not yet "arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question."[104] The weakening of the ripeness doctrine alone could have severe environmental impacts, but when a court takes the teeth out of both doctrines, the environmental consequences of developers seeking application approvals may be disastrous.[105]

III. THE *PALAZZOLO* CASE

A. Background

In *Palazzolo v. Rhode Island*,[106] the land at issue consisted of three adjoining coastal parcels in the town of Westerly, Rhode Island.[107] At the time of purchase, the portions of the parcels bordering on Winnapaug Pond were salt marsh subject to tidal flooding.[108] In 1959, Anthony Palazzolo, a lifelong Westerly resident, decided to invest in the three undeveloped parcels through a corporation named Shore Garden's Inc. (SGI).[109] Subsequent to SGI's purchase, Mr. Palazzolo bought out the other shareholders and became its sole owner.[110]

During the first decade of SGI's ownership, the corporation made multiple unsuccessful requests to state agencies to permit development of the land, which required filling a substantial part of the parcels.[111] In 1962, the Rhode Island Division of Harbors and Rivers denied SGI's request to dredge from Winnapaug Pond and fill the entire property due to lack of "essential information," which was required as a matter of procedure.[112] A year later, SGI proposed an amendment to the 1962 proposal, and in 1966

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103. *See* Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 191 (1985).

104. *Id.*

105. *See infra* notes 144-86 and accompanying text.

106. 533 U.S. 606 (2001).

107. *See id.* at 613.

108. *See id.*

109. *See id.*

110. *See id.* at 613.

111. *See Palazolo*, 533 U.S. at 613-14. Approximately six feet of fill needed to be installed in some areas before any substantial development could be initiated. *See id.*

112. *Id.* at 614. *See generally* R.I. GEN. LAWS § 46-6.1-4 (2001). "'Dredged material' shall mean material excavated from the waters of the state, including rock, gravel, sand, clay, silt, mud, organic material, and material discarded by humans." *Id.*

SGI proposed a limited filling of the land for use as a private beach club.[113] Both proposals were referred to the Rhode Island Department of Natural Resources and were initially approved.[114] However, the Department later rescinded that approval, stating that the proposals would have detrimental impacts on the environment.[115] In 1971, Rhode Island passed legislation creating the Coastal Resources Management Council (CRMC),[116] which was charged with protecting the properties of the state's coast.[117] The CRMC designated salt marshes similar to the land bordering Winnapaug Pond on Mr. Palazzolo's property as "protected coastal wetlands."[118] In 1978, SGI's corporate charter was revoked and title to the property passed to Mr. Palazzolo.[119]

In 1983, Mr. Palazzolo tried, for the first time in his individual capacity, to develop the wetlands portion of his property, and brought a request to the CRMC for permission to "construct a wooden bulkhead along the shore of Winnapaug Pond and to fill the entire marshland area."[120] The CRMC rejected his application on *both* procedural[121] and substantive[122] grounds. Mr. Palazzolo applied to the CRMC for a second time in 1985, requesting to fill eleven acres of his wetlands in order to accommodate a private beach club.[123] The CRMC rejected the request, stating that Mr. Palazzolo did not meet the "special exception" required for the type of private endeavor he proposed.[124]

After Mr. Palazzolo's final application to the CRMC, he brought an inverse condemnation action in the Rhode Island Superior Court of Washington County alleging that the CRMC's application of the wetlands statute constituted a regulatory taking in "violation of the Fifth and

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113. *See Palazzolo*, 533 U.S. at 614.

114. *See id.*

115. *See id.*

116. *See generally* R.I. GEN. LAWS § 46-23-2 (1996).

117. *See Palazzolo*, 533 U.S. at 614.

118. *Id.* The permissible amount of development on protected property designated as wetlands is extremely limited. *See id.*

119. *See id.*

120. *Id.*

121. The CRMC stated that the application was "vague and inadequate for a project of this size and nature." *Id.*

122. The CRMC stated that Mr. Palazzolo's project would have detrimental effects on the "waters and wetlands of Winnapaug Pond." Palazzolo v. Rhode Island, 533 U.S. 606, 614-15 (2001).

123. *See id.* at 615. The proposal was to fill the eleven acres with gravel in order to accommodate such things as cars, trash receptacles, and concrete barbeque pits. *See id.*

124. *Id.*

Fourteenth Amendments" to the United States Constitution.[125] Although he was still able to build on a substantial upland portion of his property, Mr. Palazzolo asserted that the regulation deprived him of all "economically beneficial use"[126] of his property, and he sought $3,150,000 in compensation.[127] The superior court ruled against Mr. Palazzolo and he subsequently appealed to the Rhode Island Supreme Court.[128] The Rhode Island Supreme Court affirmed the superior court's decision, holding that Mr. Palazzolo's claim was: (1) not ripe for review,[129] (2) not per se entitled to compensation for a regulatory taking,[130] and (3) not entitled to compensation, since he took the land with knowledge of the regulations and could not have had any reasonable investment-backed expectations.[131]

In examining Mr. Palazzolo's appeal on the ripeness issue de novo, the Rhode Island Supreme Court found that his claim was unripe for two different reasons.[132] First, although he asserted a taking for the denial of a plan to fill wetlands in order to develop a seventy-four lot subdivision, Mr. Palazzolo had never submitted such a plan for an administrative decision.[133] In his previous applications he sought to fill his wetlands in

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125. *Id.* at 615.

126. The notion of a per se taking for a deprivation of "all economically viable use" came from the Supreme Court case of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1020-26 (1992). In order to build two beachfront homes, Mr. Lucas bought two lots on an island that did not require application for the state's coastal building permit at the time of purchase. *See id.* at 1006-07. Subsequent to his purchase, the State enacted regulations that prevented any building on his lot. *See id.* at 1007. The Supreme Court ruled that where all economically beneficial use has been taken from a landowner, compensation is per se required. *See id.* at 1020-26.

127. *See Palazzolo*, 533 U.S. at 615-16. The figure of $3,150,000 was based on the profits that Mr. Palazzolo claimed he would receive from filling the entire wetlands and dividing the land into seventy-four lots for the construction of a single family home subdivision. *See* Palazzolo v. Rhode Island, 746 A.2d 707, 711 (R.I. 2000).

128. *See Palazzolo*, 533 U.S. at 616.

129. *See Palazzolo*, 746 A.2d at 714. Mr. Palazzolo claimed that his property was taken when he applied for a seventy-four lot subdivision. *See id.* However, he never actually specifically applied for a *seventy-four lot subdivision*. *See id.*

130. *See id.* at 715. Mr. Palazzolo still had $200,000 development value in the remaining upland portion of his property. *See id.*

131. *See id.* at 715-17. The court clarified that although Mr. Palazzolo was the sole shareholder of SGI until 1978, he did not own the corporation's property until the corporation's charter was revoked in 1978 and the land passed to him. *See* Palazzolo v. Rhode Island, 746 A.2d 707, 715 (R.I. 2000) (citing R.I. Hosp. Trust Co. v. Doughton, 270 U.S. 69 (1926) ("[t]he owner of the shares of stock in a company is not the owner of the corporation's property")). Therefore, in 1978, Mr. Palazzolo acquired the land with notice of the CRMC's wetlands regulations enacted in 1971. *See Palazzolo*, 533 U.S. at 614.

132. *See Palazzolo*, 746 A.2d at 713-14.

133. *See id.* at 714.

order to construct a beach club, and in his other applications he sought to fill his wetlands without giving any information about what he intended to do with the filled lands.[134] Second, in reference to Mr. Palazzolo's previously denied applications, he never sought to obtain a permit for a less ambitious development of his property.[135] The Rhode Island Supreme Court reasoned that all of Mr. Palazzolo's proposals to fill his wetlands were virtually identical, and that in order to satisfy the application for the "less ambitious development" requirement, the subsequent applications must be "substantially different from the original application."[136]

In its de novo review of Mr. Palazzolo's "reasonable investment-backed expectations," the Rhode Island Supreme Court agreed with the superior court's ruling that, since the wetlands regulations were in place before Mr. Palazzolo took the land, he never owned the right to fill his wetlands.[137] The court further agreed that since Mr. Palazzolo did not have the right to fill his wetlands, and knew of this fact prior to his acquisition of the property, he could not have had any "reasonable investment-backed expectations" that he could fill his wetlands after taking possession.[138] The court ruled that without any "reasonable investment-backed expectations" Mr. Palazzolo could not sustain a regulatory takings claim, and the *Penn Central* analysis did apply.[139]

The United States Supreme Court, after granting certiorari in late 2000, reversed in part, affirmed in part, and remanded the case.[140] The Court ruled that: (1) Mr. Palazzolo was not deprived of all economically beneficial use;[141] (2) the case was ripe for review;[142] and (3) Mr. Palazzolo's notice of the wetlands restrictions prior to his acquisition of the property did not bar his regulatory takings claim.[143]

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134. *See id.*

135. *See id.*

136. *Id.* at 714 n.6.

137. *Id.* at 717.

138. *Palazzolo*, 746 A.2d at 717.

139. *See id. See also* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

140. *See* Palazzolo v. Rhode Island, 533 U.S. 606, at 632 (2001).

141. *See id.* at 631-32.

142. *See id.* at 625-26. The Court ruled that when similar developmental proposals have been rejected and it is clear that the present proposal would also be denied, "federal ripeness rules do not require the submission of further and futile applications with other agencies." *Id.* at 626.

143. *See id.* at 626-30.

B. Analysis of the Investment-Backed Expectations Holding in *Palazzolo*

When analyzing the issue of Mr. Palazzolo's knowledge of the wetlands regulations prior to his acquisition of the property, the Court focused solely on the dangers of allowing a municipality to "put an expiration date on the Takings Clause."[144] The Court's main concern was for the property rights of private landowners such as Mr. Palazzolo.[145] After briefly addressing the proposition from *Phillips v. Washington Legal Foundation*[146] that the state, in fact, does define an individual's property rights, the Court discussed the retroactive application of restrictive regulations precluding property owners from seeking compensation under a regulatory takings theory.[147]

The Court justified its holding concerning the prior notice of regulations by focusing on the ripeness issue.[148] The Court referred to rare situations in which a prior landowner would not be able to fulfill the ripeness requirements for a challenge to an unconstitutional wetlands regulation, and a subsequent owner would be burdened with the regulations that were in place at the time he acquired the land.[149] Yet, in discussing the "injustice" that could occur if a prior owner of land was unable to fulfill the ripeness requirement prior to a conveyance, the Court gave no credence to the fact that earlier in its opinion the requirements for ripeness in such land-use regulation cases had been softened.[150]

The Court further reasoned that its decision concerning Mr. Palazzolo's investment-backed expectations was derived from controlling precedent in *Nollan v. California Coastal Commission*.[151] However, the Court did not

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144. *Id.* at 627.

145. *See Palazzolo*, 533 U.S. at 626-30.

146. 524 U.S. 156 (1998). When analyzing takings jurisprudence, the Court stated that "the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as *state law*.'" *Id.* at 164. (citing Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972) (emphasis added)).

147. *See Palazzolo*, 533 U.S. at 626-30.

148. *See id.* at 627-28.

149. *See id.* at 628. The Court stated that a "challenge to the application of a land-use regulation, by contrast, does not mature until ripeness requirements have been satisfied ... until this point an inverse condemnation claim alleging a regulatory taking cannot be maintained." *Id.*

150. *Id.* at 625-26. The Court stated that in situations where past similar proposals have been rejected, and it has become "clear" that the petitioner's present proposal will be rejected, the petitioner does not have to submit "further and futile applications" in order to ripen his claim. *Id.*

151. 483 U.S. 825 (1987). *Nollan* involved a situation where the beach-front property owners challenged a commission's decision that made it a condition that they provide a public easement across their property in order to obtain a rebuilding permit. *See id.* at 828-

address the fact that the *Nollan* decision concerning investment-backed expectations has been widely rejected by lower courts.[152] Furthermore, as Justice Stevens discusses in his dissenting opinion, the situation in *Nollan* was easily distinguishable from Mr. Palazzolo's situation.[153] In *Nollan*, the regulation the Nollans had notice of prior to purchasing their property required them to provide a public easement across their property as a condition for a development permit.[154] Hence, "[t]hat event—a compelled transfer of an interest in property [as a condition for a development permit]—occurred *after* the petitioners had become the owner[s] of the property and unquestionably diminished the value of petitioners' property."[155] In *Palazzolo*, the triggering event for economic injury was the enactment of the wetlands regulation while the property was in the possession of SGI.[156] Hence, Mr. Palazzolo never experienced a taking because "[t]he matter of standing to assert a claim for just compensation is determined by the *impact* of the event that is alleged to have amounted to a taking."[157]

C. The Criticism of the Investment-Backed Expectations Ruling in *Palazzolo*

Contrary to the majority's assertion in *Palazzolo*, Justice Stevens argued that a municipality would not be putting an expiration date on a takings claim by refusing to give compensation to a person who acquires the land after the regulatory statute had been enacted.[158] The landowner who was in possession of the land at the time the legislation was put into place is the actual party who has suffered injury, and is the individual who deserves compensation.[159] Hence, a subsequent purchaser never gets a takings claim

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29. The Court stated that "[s]o long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot." *Id.* at 834 n.2.

152. *See supra* note 43.

153. *See Palazzolo*, 533 U.S. at 642-43 (Stevens, J., dissenting).

154. *See Nollan*, 483 U.S. at 829.

155. *Palazzolo*, 533 U.S. at 642-43 (Stevens, J., dissenting).

156. *See id.* (Stevens, J., dissenting).

157. *Id.* at 643 (Stevens, J., dissenting) (emphasis added).

158. *See id.* at 641 (Stevens, J., dissenting).

159. *See* Gregory M. Stein, *Who Gets the Takings Claim? Changes in Land Use Law, Pre-Enactment Owners, and Post-Enactment Buyers*, 61 OHIO ST. L.J. 89, 89 (2001). Stein addresses the issue of who owns the takings claim (seller or buyer) in the following illustration: "Anton [pre-enactment owner] suffered a loss when he attempted to sell the property and discovered that buyers were reducing their offers to reflect the state's recently enacted restrictions on the use of the land." *Id.*

that could expire.[160]

Justice Stevens explained in his dissent that a subsequent purchaser's right to *challenge* the constitutionality of a wetlands regulation is never put aside simply because of a conveyance, but the right to *damages* still belongs to the person who was subject to the injury.[161] Therefore, the majority's contention that barring a post-enactment purchaser from seeking *compensation* for an unconstitutional wetlands regulation by putting an "expiration date on the Takings Clause"[162] was extreme, if not incorrect. By allowing the subsequent purchaser to seek compensation through a takings claim, Justice Stevens argued, the Court is in fact *creating* standing for a subsequent purchaser and giving him the ability to collect damages for injuries that were actually suffered by the prior owner.[163] The subsequent purchaser has technically already been compensated for the land regulations due to the fact that his purchase price would have been adjusted at the time of purchase to reflect the presence of the regulations, regardless of the constitutionality of the regulations.[164]

Although *Palazzolo* on its face looks like a win-win situation for private property owners, it could actually result in multiple windfalls to the detriment of unknowing sellers who do not know their legal options.[165] *Palazzolo* gives real estate purchasers the ability to purchase regulated wetlands, challenge the regulation, and actually receive profit for successfully litigating a regulatory takings claim that did not belong to them in the first place.[166] The decision may result in situations where an unknowing landowner sells land at a discounted price to a real estate savvy purchaser who is "gambling that the newly restricted property" will eventually be worth much more.[167]

The alternative to this potential gamble is to bar compensation for post-

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160. *See id.* at 120-22.

161. *See Palazzolo*, 533 U.S. at 638-39 (Stevens, J., dissenting).

162. *Palazzolo*, 533 U.S. at 627.

163. *See generally id.* at 638-45 (Stevens, J., dissenting) (discussing a subsequent purchaser's ability to collect damages).

164. *See* Stein, *supra* note 159, at 120-22.

165. *See* Marcia Coyle, *Landowners Win Right to Attack Rules: Decision is a Blow to Environmental Organizations*, 23 No. 47 NAT'L L. J. A10 (July 16, 2001). Environmental scholar John Echeverria of Georgetown University Law Center stated that "[i]t would be unreasonable to grant full market compensation to investors who bought swampland and other restricted properties for a song. The idea was knowledgeable investors would have discounted the value of the property based on the restrictions." *Id.*

166. Justice O'Connor briefly touched on this point in her concurring opinion. *Palazzolo*, 533 U.S. at 635 (O'Connor, J., concurring). *See also* Coyle, *supra* note 165, at A10.

167. *See* Stein, *supra* note 159, at 99-100.

enactment purchasers who take wetlands with notice of restrictions. Some believe that this conclusion is the fair approach since the buyer went into the purchase and sales agreement with "eyes wide open and can hardly claim to be surprised about the restrictions."[168] Others believe that barring compensation to post-enactment purchasers is too drastic and would create an unfair windfall to the state.[169] However, most would agree that the selfless motivations of a state in promoting the environment by restricting wetlands is much more meritorious than a private property owner's pecuniary motivation to maximize the value of his land at the expense of the environment.

D. Analysis and Criticism of the Ripeness Decision in *Palazzolo*

The Court refined the "final decision" requirement of ripeness claims by refusing to require that a petitioner seek multiple applications in order to ripen a claim.[170] The Court used the language from *Del Monte Dunes* in stating that "[g]overnment authorities ... may not burden property by imposition of repetitive or *unfair* land-use procedures in order to avoid a final decision."[171] However, the actual party that was playing unfairly in this instance was Mr. Palazzolo himself, who attempted to "hide the ball" from the Court by first claiming that he had ripened his claim by applying for less drastic—and less costly—construction, and later claiming that he was entitled to compensation that was monetarily consistent with his subsequent claim that he was the victim of an unconstitutional taking for denial of a massive 74-lot subdivision plan.[172]

The Court could have easily dismissed Mr. Palazzolo's claim as unripe, since he had never actually petitioned the CRMC to fill his wetlands for use as a 74-lot subdivision.[173] Nevertheless, the Court fashioned a new rule,

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168. Coyle, *supra* note 165, at A10.

169. *See id.* In the Coyle article, William H. Mellor of the Institute for Justice states that if the Court ruled against Palazzolo on the investment backed expectations question, "[t]he result would have been a windfall for the state and a chilling effect on legitimate land transactions." *Id.*

170. *See* Dwight H. Merriam & Bryan W. Wenter, *Palazzolo Promotes Property Rights*, 24 ZONING AND PLAN. L. REP. 45, 49 (2001).

171. *Palazzolo*, 533 U.S. at 621 (citing City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 698 (1999) (emphasis added).

172. *See Palazzolo*, 533 U.S. at 624 (citing Brief of Amici Curiae National Wildlife Federation et al. at 9, Palazzolo v. Rhode Island, 533 U.S. 606 (2001)). *See generally* MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340, 353 n.9 (1986). "Rejection of exceedingly grandiose development plan does not logically imply that less ambitions plans will receive similarly unfavorable review." *Id.*

173. *See* Palazzolo v. Rhode Island, 746 A.2d 707, 713 (R.I. 2000) (citing Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (denying ripeness when owners alleged that

stating that "once ... the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened."[174] Although most commentators say that the final decision requirement was "refined" by the *Palazzolo* decision,[175] it appears that the Court simply disregarded the requirement completely.

The standard of a "reasonable degree of certainty" appears to further mystify the ripeness doctrine.[176] Who is to determine when the "permissible use of the property" is determined to a "reasonable degree of certainty?"[177] Undoubtedly, a municipality and a petitioner would rarely agree on when permissible use is determined to a "reasonable degree of certainty;" however, there is much less room for argument concerning when a final decision has been rendered. Hence, the ripeness decision of *Palazzolo* appears to create more problems than it solves.

E. *Palazzolo's* Investment-Backed Expectations Decision; The Effect on the Common Law and the Legislature in Reference to Wetlands

Prior to *Palazzolo*, the property owner's notice of the wetlands regulations prior to purchase was the main deterrent against a landowner deciding whether to bring a takings claim in the first instance.[178] Given that fewer and fewer landowners will be deterred from bringing regulatory takings claims for wetlands regulations that they knew were in place when they purchased their land, more and more wetlands regulations could be invalidated or subject the state to compensation claims.[179] Therefore, municipalities and courts will be put in more situations where they will be forced to second-guess legislation that, in the clear majority of cases, has been put in place for the benefit of the community and environment.[180]

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zoning change was a taking but had not sought permission to develop the land)).

174. *Palazzolo*, 533 U.S. at 620.

175. *See, e.g.*, Merriam & Wenter, *supra* note 170, at 53-54 (stating that "[o]n the ripeness issue, the Court fashioned a refinement of the 'final decision' ripeness requirement").

176. *See Palazzolo*, 533 U.S. at 620.

177. *Id.*

178. *See* Merriam & Wenter., *supra* note 170, at 53.

179. *See* Coyle, *supra* note 165, at A1-A10. William H. Mellor of the Institute for Justice states that there may be "an increase in lawsuits from the people already owning properties who now realize they can challenge constraints." *Id.* at A10.

180. For competing opinions on this result of the *Palazzolo* decision, see Merriam & Wenter, *supra* note 170, at 53-54. For example, James S. Burling of the Pacific Legal Foundation writes, "[t]oday's ruling by the U.S. Supreme Court sends a clear message to state and federal regulators across the country that, no matter how well-intentioned their environmental goals, they cannot simply put a freeze on the use of private property without

This is not necessarily a bad result. However, it could tend to overly burden the decision processes of legislatures since they will be less willing to enact wetlands protection statutes that they may see as necessary but possibly controversial.[181]

The hidden danger of *Palazzolo* is the effect it will have on the enforcement of land regulations that are already in place.[182] A municipality is less likely to enforce wetlands regulations with the same vigor that it has done in the past due to the fear that such enforcement could result in costly litigation.[183] Hence, private property owners will be able to push the development envelope further with the assurance that the municipality will be hesitant to step in due to its fear of litigation.

F. *Palazzolo*'s Ripeness Decision: The Effect on a Municipality's Wetlands Regulations in General

Legislatures are faced with a lose-lose situation when it comes to the ripeness decision of *Palazzolo*. On the one hand, a municipality could leave its statutes as they are, but if the "regulations are unequivocal, and the application of those regulations is such that an invitation to apply for development is disingenuous, further application need not be pursued for the claim to be ripe."[184] Or the municipality could weaken its statutes and not foreclose the chance of getting a lesser offensive plan approved.[185] Of course, the obvious risk that a local legislature would encounter by weakening their wetlands regulations would be an increase of applications to build in wetlands areas that should be preserved for the good of the

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giving the owner a fair price for it." *Id.* at 51-52. The Director of the Environmental Policy Project at Georgetown University Law Center, John D. Echeverria, writes, "[t]he most disturbing aspect of the *Palazzolo* decision is the majority's apparent endorsement of free-wheeling 'partial' taking tests that could lead the courts into constant second guessing of legislative judgments." *Id.* at 52. *See also* Coyle, *supra* note 165, at A10. William H. Mellor of the Institute for Justice states that "the more important point is that for future transactions, the restrictions won't create unreasonable impediments to transfers of land." *Id.*

181. *See* Erwin Chemerinski, *Expanding the Protection of the Takings Clause*, 37 TRIAL 70, 72 (2001). Chemerinski predicts that it will soon be known "whether *Palazzolo* is the start of a major revival of judicial protection of economic liberties. But even by itself, the decision is an important victory for plaintiffs bringing takings claims, and it will make it easier to challenge zoning laws and environmental regulations." *Id.*

182. *See* Frank J. Murray, *Court Gives Landowner a Partial Win*, WASH. TIMES, June 29, 2001, at A3.

183. *See* Coyle, *supra* note 165, at A10. Vicki Been of New York University School of Law states that the increased litigation will result in the "risk that those governments [whose land regulations are being challenged] will seek to avoid the cost of litigation by weakening environmental regulations and allowing development that shouldn't proceed." *Id.*

184. Merriam & Wenter, *supra* note 170, at 49.

185. *See id.*

environment.[186]

IV. *PALAZZOLO*'S IMPACT IN MASSACHUSETTS

A. Massachusetts Wetlands Legislation in Light of *Palazzolo*'s Ripeness Holding

Due to the high regard in which Massachusetts holds its wetlands,[187] many procedural safeguards have been put into place in order to ensure that its wetlands are preserved. Massachusetts' application process for permits to build in designated wetlands is known for its opposition to permit seekers.[188] The most notable procedural obstacle that an applicant faces is the two-track appeal process, which could take many years to complete at great financial cost to the applicant.[189] Concerning the two-track appeal process, the Massachusetts Wetlands Protection Act (WPA) specifies that municipal conservation commissions are given the task of approving or disapproving all development projects on or near areas that are designated as wetlands.[190] An appeal from a decision of a municipality's conservation commission must be filed in the superior court *and* be heard at an administrative proceeding with the Department of Environmental Protection (DEP).[191] In cases where an applicant is forced to proceed through all the judicial and administrative appeal procedures, a wetlands development proponent would face:

> 1) a Commission proceeding; 2) judicial review in Superior Court[192] of the bylaw decision; 3) appeal to the Appeals Court (possibly followed by further appellate review by the Supreme Judicial Court); 4) a DEP

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186. *See id.*

187. *See generally* MASS. REGS. CODE tit. 310, § 10.55(1) (2001).

188. *See generally* H. Hamilton Hackney & Alexander C.B. Barnard, *Bogged Down in Wetlands Appeals: Proposal for Reform*, 45 BOSTON B. J. 6 (2001) (noting that overlapping appeal procedures make development of wetlands an extremely cumbersome task for a petitioner); MASS. GEN. LAWS ch. 131, § 40 (2001) (outlining the extensive procedural steps involved in developing on or near wetlands).

189. *See* Hackney & Barnard, *supra* note 188, at 6.

190. *See id.*

191. *See id.*

192. In superior court, a petitioner also bears the burden of showing that the commission's decision is not supported by "substantial evidence" and is, therefore, "arbitrary and capricious." *See id.* at 18. In *Lovequist v. Conservation Commission of Dennis*, the Supreme Judicial Court found more than ample reasoning to deny the petitioner's plan to build a bridge across a bog. 393 N.E.2d 858, 865 (Mass. 1979). The court found "substantial evidence" on the effects that dredging for the bridge would have on the ground water supply, thus justifying the commission's denial of the petitioner's claim. *Id.*

> administrative proceeding on the WPA decision; 5) review by a DEP administrative law judge (and subsequent approval of that decision by the Commissioner); 6) judicial review of the WPA decision in Superior Court; and 7) appeal of that decision to the Appeals Court (possibly followed by further appellate review by the Supreme Judicial Court).[193]

This two-track appeal process has been subject to much ridicule by many property rights advocates.[194]

The *Palazzolo* ripeness decision could possibly affect the Massachusetts legislative system concerning the appeal of a conservation commission's decisions. One section of the majority opinion in the *Palazzolo* case, addressing the ripeness issue, reiterates the *Del Monte Dunes* holding by stating, "[g]overnment authorities ... may not burden property by imposition of repetitive or unfair land-use procedures in order to avoid a final decision."[195] However, the majority in *Palazzolo* takes the argument for property rights advocates a step further when it states that the "[r]ipeness doctrine does not require a landowner to submit applications for their own sake."[196]

Thus far, the *Del Monte Dunes* decision does not seem to have substantially impacted the Massachusetts legislature in reference to the appeal process of conservation commission decisions.[197] However, since it has only been three years since the Supreme Court decided *Del Monte Dunes*, it may be too early to determine if that decision will serve to whittle away at Massachusetts' appellate procedure. Nevertheless, the fact that the Supreme Court referred to the *Del Monte Dunes* decision again in the past year does not bode well for environmental advocates in Massachusetts.

If the Massachusetts wetlands appellate process is adversely faced with the *Palazzolo* ripeness decision, that process could face the risk of being watered down to be more favorable to landowners seeking appellate review

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193. Hackney & Barnard, *supra* note 188, at 18-19.

194. *See id.* at 6.

Because local wetlands bylaws and the WPA typically protect similar (if not identical) interests, little is gained from overlapping state and local regulatory programs, and indeed this dual-track appeal process creates opportunities for project opponents to use procedural delays to defeat (or force the imposition of draconian conditions on) otherwise appropriate development projects.

Id. at 6.

195. Palazzolo v. Rhode Island, 533 U.S. 606, 621 (2001) (citing City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 698 (1999)).

196. *Id.* at 622.

197. *But see* Commonwealth v. Blair, No. Civ. A. 98-27586, WL 2000 875903 at *6 (Mass. Super. Ct. June 6, 2000) (adopting the *Del Monte Dunes* decision in a limited sense by stating that "[t]he [wetlands] regulatory means must be 'roughly proportional' to furthering the state interest).

of local conservation commission decisions. In particular, the Massachusetts dual appellate track for wetlands appeals may face destruction in light of *Palazzolo*'s ripeness decision. A landowner could argue that requiring a petitioner to seek appellate review through both a superior court and an administrative hearing in front of the DEP is "repetitive and unfair."[198] Due to the extended amount of time in which this dual track appellate process takes, property rights advocates are likely to claim that the municipality is merely requiring such an appellate system simply to "avoid a final decision."[199] Furthermore, since both the superior courts and the DEP appear to be equally competent governmental entities, a court may find that requiring a petitioner to appeal to both could be seen as requiring a "landowner to submit applications for their own sake."[200]

B. *Palazzolo*'s Contradiction to Massachusetts Rulings on Post-enactment Purchaser's Takings Claims

Palazzolo's investment-backed expectations ruling is completely contradictory to past Massachusetts rulings on wetlands regulations that were in place prior to the present landowner's acquisition.[201] This could potentially result in significant changes for Massachusetts' private property owners and courts.

In all of the Massachusetts cases concerning takings compensation owed to post-enactment wetlands property owners, the courts have consistently held that the owners' property interests are limited by the *background principles* of state law—as it was stated in the landmark takings case of *Lucas*.[202] If one of these rights had been restricted by the institution of a regulation, a subsequent property owner never acquired ownership of that right at the time of purchase and thus could not have sought compensation from the government for a property right that he had never possessed.[203] Although none of the Massachusetts investment-backed expectations cases declare that the post-enactment landowner's knowledge of the wetlands

198. Hackney & Barnard, *supra* note 188, at 6. *See also* MASS. GEN. LAWS ch. 131, § 40 (2001); *Palazzolo*, 533 U.S. at 621 (citing *Del Monte Dunes*, 526 U.S. at 698).

199. *Palazzolo*, 533 U.S. at 621 (citing *Del Monte Dunes*, 526 U.S. at 698).

200. *Palazzolo*, 533 U.S. at 622.

201. *See, e.g.*, Leonard v. Town of Brimfield, 666 N.E.2d 1300 (Mass. 1996) (holding that post-enactment purchaser could not have had reasonable investment-back expectations despite fact that landowner did not have *actual* notice of wetlands regulation); FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone, 673 N.E.2d 61 (Mass. App. Ct. 1996), *cert. denied* 676 N.E.2d 55 (Mass. 1997) (finding that porpoerty owners could not have reasonably expected to build on regulated portion of property since they knew it was subject to regulations at time of purchase).

202. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1027-28 (1992).

203. *See FIC Homes*, 673 N.E.2d at 70; *Leonard*, 666 N.E.2d at 1303.

regulations is dispositive of their right to compensation,[204] there are also no cases that allow compensation for a situation in which a landowner purchases property with knowledge of the regulations. Thus, notice of a wetlands regulation prior to purchase should be considered more than just a mere *factor* in determining a property owners investment-backed expectations.[205]

Massachusetts addressed the issue of a post-enactment buyer who seeks damages for wetlands regulations in 1996 with *Leonard v. Town of Brimfield*[206] and *FIC Homes of Blackstone, Inc. v. Conservation Commission of Blackstone*.[207] In the first of these cases, *Leonard*, the Supreme Judicial Court determined that the post-enactment purchaser could not have had reasonable investment-backed expectations despite the fact that the landowner did not have *actual* notice of the wetlands regulation.[208] The landowner in *Leonard* purchased land located in a flood plain zone, which required an application for a special permit for construction of her lots.[209] The court determined that since the zoning map was available for viewing at the building inspector's office prior to her purchase, the property owner had constructive knowledge that the majority of her land was located within a flood plain district.[210] Thus the property owner never acquired the right to develop in the flood plain without a special permit, and the government was not required to compensate her for a right she never owned.[211]

Later in 1996, the Appeals Court of Massachusetts decided *FIC Homes of Blackstone,* and again rejected a wetlands property owner's regulatory takings claim.[212] In that case, it was an undisputed fact that the property owners actually knew that the lots in question were unbuildable because of the pre-enacted wetlands regulations.[213] FIC Homes of Blackstone

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204. *See FIC Homes*, 673 N.E.2d at 70; *Leonard*, 666 N.E.2d at 1303.

205. *See contra* Palazzolo v. Rhode Island, 533 U.S. 606, 617, 630 (2001) (holding that a post-enactment purchaser's notice of the wetlands regulation is not dispositive of his regulatory takings claim and should be considered as a *factor* in analyzing his investment-backed expectations).

206. 666 N.E.2d 1300 (Mass. 1996).

207. 673 N.E.2d 61 (Mass. App. Ct. 1996).

208. *See Leonard*, 666 N.E.2d at 1303.

209. *See id.* at 1302.

210. *See id.* at 1303.

211. *See id.* "[T]he government is not required to compensate an individual for denying him the right to use that which he has never owned." *Id.* (quoting Flynn v. Cambridge, 418 N.E.2d 335 (1981)).

212. *See FIC Homes*, 673 N.E.2d at 71.

213. *See id.* at 70 (stating that "[t]he price FIC paid for the entire thirty-eight-lot parcel should have reflected the limitations imposed by the wetlands by-law").

purchased the land in 1992 when it was already subject to a wetlands by-law that required a set-back of 100 feet from a wetlands resource.[214] FIC Homes of Blackstone filed a notice of intent to build a house and driveway that would be located within the 100-foot buffer zone.[215] The court stated that the property owners could not have reasonably expected to build on this portion of their property since they knew that it was subject to regulations at the time they purchased it.[216]

Using the same reasoning as *Leonard*, the *FIC Homes of Blackstone* court wrote that "[i]n order to rise to the level of an unconstitutional regulatory taking, the investment-backed expectations frustrated by government regulation must be 'reasonable and predicated on *existing* conditions' ... not merely a 'unilateral expectation or an abstract need.'"[217] Since it was undisputed that the landowners had notice of the wetlands regulations, the court put more emphasis on the property owners' unreasonable "expectations" as opposed to focusing on the argument that they should not be able to seek compensation for a lost right that they never acquired.[218]

C. *Palazzolo*'s Ripeness Ruling as Compared to Previous Massachusetts Wetlands Ripeness Rulings

The *Palazzolo* decision's most drastic language pertaining to the ripeness doctrine is the Court's statement that "[o]nce it becomes clear that ... the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened."[219] Unfortunately, this holding appears to directly clash with previous holdings in Massachusetts.

In the case of *Daddario v. Cape Cod Commission*,[220] the Massachusetts Supreme Judicial Court set forth a rule that could be seen as directly contradictory to the ripeness ruling in *Palazzolo*.[221] Although the case did not involve wetlands, the ripeness principles derived from it can be easily

214. *See id.* at 64.

215. *See id.*

216. *See id.* at 70.

217. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984) (quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 161 (1980)). *See also* FIC Homes of Blackstone, Inc. v. Conservation Comm'n of Blackstone, 673 N.E.2d 61, 70 (Mass. App. Ct. 1996) (quoting Leonard v. Brimfield, 666 N.E.2d 1300 (Mass. 1996).

218. *FIC Homes*, 673 N.E.2d at 70. The court put more emphasis on the "investment-backed expectations" prong from *Penn Central*, 438 U.S. at 124, than the "background principles restricting private property owners interests" theory from *Lucas*, 505 U.S. at 1029. *FIC Homes*, 673 N.E.2d at 70.

219. Palazzolo v. Rhode Island, 533 U.S. 606, 620 (2001).

220. 681 N.E.2d 833 (Mass. 1997).

221. *See id.* at 836-37.

related to wetlands cases since both agricultural districts[222] and wetlands districts are mainly regulated to protect the environment.[223] In *Daddario*, the landowner sought a special permit from the Cape Cod Commission to develop his land, which required removing gravel and sand in an area that was calculated at approximately thirty-two acres.[224] The Commission denied the developer's request; however, they indicated that they would approve a modified plan that only required the removal of sand and gravel from twenty-five acres.[225] After the Commission denied the developer's plan, he did not attempt to revise his plan, but instead immediately appealed to the land court, which granted him the ability to develop subject to certain conditions.[226] On appeal, the SJC reversed and remanded the case, stating that, since the developer refused to seek out less extensive development, his claim was not ripe for review.[227] The court reasoned that the developer could not assert a takings claim on a "final" decision where he does not know the "nature and extent of development that the [C]ommission will permit."[228] In effect, the SJC fashioned a rule requiring that, in order to ripen a claim, a permit applicant must reapply after he receives an initial denial from a commission.[229]

Given the fact that Massachusetts courts require reapplication in order to ripen a takings claim, and *Palazzolo* simply requires that the permissible use of the property must be known to a "reasonable degree of certainty," the Massachusetts ripeness doctrine favoring municipalities may face some difficulties in the future.[230] As stated above, Mr. Palazzolo had never applied to build a *seventy-four lot subdivision.*[231] Therefore, in the eyes of the Supreme Court, not only is reapplication not necessary to ripen a wetlands takings claim, but apparently an initial application is unnecessary

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222. *See id.* at 838. Under Falmouth's local by-laws, land within an agricultural district "allows for community service, agriculture and community uses." *Id.*

223. *See id.* at 835. The Commission initially denied the project because it "would not enhance or protect open space on the site in a way that respects the importance of [the] sensitive and natural resources of Cape Cod." *Id.*

224. *See Daddario*, 681 N.E.2d at 835, 837.

225. *See id.* at 837.

226. *See id.* at 835.

227. *See id.* at 836.

228. *Id.*

229. *See* MANDELKER, *supra* note 20, § 38.3 (Supp. 2000).

230. Palazzolo v. Rhode Island, 533 U.S. 606, 620 (2001). *Contra* Daddario v. Cape Cod Comm'n, 780 N.E.2d 124, 128-29 (Mass. App. Ct. 2002). After the SJC remanded *Daddario*, it was appealed again to the Massachusetts Appeals Court, which concurred with the SJC that the petitioner's case was not ripe despite the new ripeness holding in *Palazzolo*. *See id.*

231. *See supra* notes 170-77 and accompanying text.

as well.[232] Massachusetts' superior courts could see an influx of wetlands owners seeking compensation under a takings claim where the landowner has not applied for a specific development; yet under *Palazzolo*, the developer could claim that she knows the amount of development permissible on her land to a "reasonable degree of certainty."[233] However, in order to really know the permissible extent of development to a *reasonable* degree of certainty, one must at least reapply for a scaled down version of an initially denied proposal instead of going to the courts and claiming compensation for a proposal that the town conservation commission has never even seen.[234] The *Palazzolo* ripeness doctrine may not seem radical on its face, but when the Supreme Court applied it to the specific facts of Mr. Palazzolo's case, it demonstrated the extent of how extreme the doctrine could be taken.[235]

V. LOOKING FORWARD

A. The Future of Massachusetts Wetlands Due to *Palazzolo*'s Weakening of the Ripeness Doctrine

Any changes that may occur concerning ripening claims and Massachusetts wetlands will most likely appear in the legislature before they appear in the court system.[236] Since the dual-track appeal process for Massachusetts wetlands claims has already created controversy for being too biased in favor of municipalities, the *Palazzolo* decision intensifies the controversy by strengthening the position of property rights advocates.[237] In the future, due to the *Palazzolo* decision, the Massachusetts wetlands appeal process may be condensed into a process that is less time consuming and less expensive than the present form.

The advantages that Massachusetts may lose from the legislatively created appeal process may ultimately be protected through the judicial process. The *Palazzolo* Court set forth a rule that a wetlands takings claim is ripe once the extent of permissible development is known to a

232. *See* Palazzolo v. Rhode Island, 746 A.2d 707, 714 (R.I. 2000). On remand, no instruction was given to the Rhode Island Superior Court in order to evaluate the ripeness of Mr. Palazzolo's case. *See* Palazzolo v. Rhode Island, 785 A.2d 561 (R.I. 2001).

233. *Palazzolo*, 533 U.S. at 620.

234. *See generally id. See also* Daddario v. Cape Cod Comm'n, 681 N.E.2d 833, 836 (Mass. 1997).

235. *See Palazzolo*,746 A.2d at 714.

236. *See generally* Hackney & Barnard, *supra* note 188, at 6, 9 (noting that dual-track appeal process has been criticized for its repetitive and unfair nature).

237. *See id.*; MASS. GEN. LAWS ch. 131 § 40 (2001).

"reasonable degree of certainty."[238] Given that reasonableness is an objective standard, it is up to the court to decide what is in fact reasonable. Thus, given the high regard in which Massachusetts holds its wetlands,[239] it is quite possible that Massachusetts courts will conclude that reapplication is, in fact, required for the petitioner to know the extent of permissible development to a reasonable degree of certainty. A Massachusetts court may use the *Palazzolo* decision against itself to find that a petitioner is required to reapply after an initial denial—not to "submit applications for their own sake"—but to flesh out the permissible use of the property to a "reasonable degree of certainty."[240]

B. The Future of Massachusetts Wetlands Due to *Palazzolo*'s Weakening of the Investment-Backed Expectations Prong

Since Massachusetts was the first state in the nation to protect wetlands through a specific statutory provision, it is obvious that Massachusetts holds the preservation of wetlands as a serious priority.[241] Hence, it is unlikely that the Massachusetts legislature or courts will allow themselves to be bullied by post-enactment purchasers who claim that their investment-backed expectations are reasonable because of the recent *Palazzolo* decision.[242] One way in which Massachusetts may attempt to preserve its valuable wetlands in light of the recent *Palazzolo* decision is to transfer the development rights (TDR) of post-enactment purchasers who assert *reasonable* investment-backed expectations under *Palazzolo* to non-wetlands areas.[243] The majority opinion in *Penn Central* found that TDRs were valuable tools that could be utilized to both "mitigate whatever financial burdens the law has imposed" on the applicant, and preserve

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238. *Palazzolo*, 533 U.S. at 620.

239. *See generally* MASS. REGS. CODE tit. 310, § 10.55 (1)(2001).

240. *Palazzolo*, 533 U.S. at 620, 622.

241. The Jones Act of 1963 was the first statutory provision protecting wetlands in the nation. *See* Alexandra D. Dawson, *Massachusetts Wetlands and Floodplains Revisited*, 4 W. NEW ENG. L. REV. 623, 623 n.1 (1983). *See generally* MASS. REGS. CODE tit. 310, § 10.55 (1)(2001).

242. Since Massachusetts has always considered wetlands to be an extremely important resource, Massachusetts courts may utilize the background principles reasoning from the Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992), as opposed to the notice-focused "investment-backed expectations" theory from *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). By using the justification of Massachusetts's unfettered interest in protecting wetlands, the courts may claim that the post-enactment purchaser's takings claim—even though it is ripe—is restricted by the state's firmly rooted background principles concerning the protection of its wetlands. *See Lucas*, 505 U.S. at 1030.

243. *See* MANDELKER, *supra* note 20, at 494.

valuable landmark structures.[244] Massachusetts could use TDRs to protect its wetlands as New York used them to protect their historical landmarks.[245]

VI. CONCLUSION

Massachusetts has not yet directly addressed the situation where post-enactment purchasers of wetlands assert that they have reasonable investment-backed expectations under *Palazzolo*.[246] Massachusetts has addressed *Palazzolo*'s landowner-biased ripeness holding, but has thus far declined to follow it in favor of the petitioner.[247] Since "approximately 46,000 acres of coastal and 8,000 acres of inland wetlands have been registered [as of 2002] in 42 coastal[248] and 11 inland[249] communities,"[250] the threat that the *Palazzolo* decision may impose on the conservation of wetlands in Massachusetts could severely affect multiple communities.

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244. *See Penn Cent.*, 438 U.S. at 137 (holding that plaintiff could not claim that they were completely denied the ability to build within their air rights, since the rights were transferable to at least eight parcels within the vicinity of Grand Central Station).

245. *See* MANDELKER, *supra* note 20, at 494. "[S]tate legislation authorized a TDR program to implement land use regulations for the preservation of land in New Jersey Pinelands." *Id.*

246. *See* Rith Energy, Inc. v. United States, 270 F.3d 1347, 1350-51 (Fed. Cir. 2001) (refusing to interpret *Palazzolo* as holding that a pre-enacted restrictive statute was irrelevant to a petitioner's investment-backed expectations). In rejecting the petitioner's takings claim, the Court of Appeals for the Federal Circuit held that although *Palazzolo* did say that a pre-enacted statute does not bar a post-enactment purchasers takings claim, a pre-enacted statute is a very important factor to consider in evaluating a petitioners investment-backed expectations. *See id.*

247. *See* Daddario v. Cape Cod Comm'n, 780 N.E.2d 124, 128-29 (Mass. App. Ct. 2002) (sustaining the SJC's prior lack of ripeness ruling after a remand and subsequent appeal, despite the interceding *Palazzolo* ripeness holding).

248. The Massachusetts DEP's Bureau of Resource Protection lists the following cities and towns as having registered coastal wetlands:

> Barnstable, Bourne, Brewster, Chatham, Chilmark, Cohasset, Dennis, Duxbury, Eastham, Edgartown, Essex, Falmouth, Gay Head, Gloucester, Hanover, Harwich, Hingham, Ipswich, Marion, Marshfield, Mashpee, Nantucket, Newbury, Newburyport, Norwell Oak Bluffs, Orleans, Pembroke, Plymouth, Provincetown, Quincy, Rowley, Salisbury, Sandwich, Tisbury, Truro, Wareham, Wellfleet, Westport, West Tisbury, Weymouth [and] Yarmouth.

Bureau of Resource Protection, *Wetlands and Waterways Program*, *at* http://www.state.ma.us/dep/brp/ww/files/commlist.htm (last visited Mar. 18, 2003) [hereinafter BRP Wetlands & Waterways].

249. The inland communities consist of "Dedham, Dover, Marlborough, Millis, Needham, Newton, Norfolk, Walpole, Waltham, Wellesley [and] Westwood." *Id.*

250. "Eastham, Hingham, Orleans, Sandwich [and] Truro" are subject to both inland and coastal regulations. *Id.*

However, given the Massachusetts courts' previous ill treatment of post-enactment purchasers of wetlands attempting to claim that they have reasonable investment-backed expectations, and the high regard in which Massachusetts holds its wetlands,[251] it is most likely that the Massachusetts courts and legislature will not give up without a fight. A reasonable prediction is that Massachusetts will most likely use such devices as TDRs or find some other way[252] to distinguish the *Palazzolo* decision out of existence in order to preserve its precious wetlands.

David M. Bae

251. The preamble to the Massachusetts's regulations of bordering vegetated wetlands states that "[b]ordering vegetated wetlands are likely to be significant to public or private water supply, to ground water supply, to flood control, to storm damage prevention, to prevention of pollution, to the protection of fisheries and wildlife habitat." MASS. REGS. CODE tit. 310, § 10.55 (1) (2001).

252. Representatives from the Massachusetts DEP for the Boston area (who asked to remain anonymous) have stated that, if faced with the situation, they would distinguish *Palazzolo*'s unique facts from a post-enactment purchaser of wetlands who seeks compensation under a regulatory takings claim. The DEP would claim that *Palazzolo*'s facts are unique since the wetlands regulations were enacted when he was the sole shareholder of the corporation that owned the restricted land. Hence, he did own the land before the regulations were in place even though he technically acquired the land after SGI's corporate charter was revoked and after the wetlands regulations were enacted.

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Baby Teeth: An Argument in Defense of the Commission for Environmental Cooperation

> The world environment is changing so fast that there is a window of opportunity that will close in as little time as the next two or three decades.[1]
>
> Earth's biodiversity has not been saved—not yet. Uncounted species are endangered, flickering out of existence in large numbers before they can even be named.[2]
>
> By the year 2050 ... the global temperature could be 3 degrees Fahrenheit warmer than it is now. It has not been that hot for 200,000 years, a time well before modern humans evolved.[3]

These predictions sound like the stuff of futuristic horror movies. In fact, they were part a feature in Audubon Magazine called *Resolutions for a New Millennium*.[4] Unlike other fin-de-siècle type concerns that emerged prior to Y2K, fears about the alarming state of the environment have yet to be allayed. It may be the single greatest challenge the human race has ever faced, and no one nation can meet it alone.

I. INTRODUCTION

This Note contributes to the ongoing debate over whether or not supranational institutions are an effective means of coping with the continued destruction of the environment.[5] The ability of the North

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1. Boyce Rensberger, *The Final Countdown*, AUDUBON MAGAZINE, Nov.-Dec. 1999, at 65 (quoting Edward O. Wilson, Ph.D.).

2. *Id.*

3. Robert H. Boyle, *You're Getting Warmer*, AUDUBON MAGAZINE, Nov.-Dec. 1999, at 82.

4. *See id.* at 63-118.

5. *See* Laurence R. Helfer & Anne-Marie Slaughter, *Toward A Theory Of Effective Supranational Adjudication*, 107 YALE L.J. 273, 276 (1997); Alberto Székely, *International Environmental Law in North America: Beyond NAFTA*, *in* GREENING INTERNATIONAL LAW

American Commission for Environmental Cooperation (CEC)[6] to promote compliance with international environmental law for a cleaner planet has been the subject of criticism.[7] This criticism is undue. First, this Note evaluates the submissions process[8] of bringing forth claims to the CEC as an international forum, and suggests methods to overcome the obstacles that can disqualify a complaint.[9] Second, it suggests that the supranational agency's managerial function is vastly superior to its role as a tribunal,[10] and provides numerous peripheral benefits that have yet to be fairly evaluated.[11] In short, the success of the North American Free Trade Agreement's (NAFTA's)[12] environmental commission, as a trailblazing institution of international environmental cooperation, outweighs its shortcomings, and it extends unprecedented opportunities to environmentalists, both now and in the future.

In light of the comparative success of supranational institutions, such as the European Court of Justice and the European Court of Human Rights in resolving disputes over international crimes and human rights,[13] enthusiasts have called for a similar institution—an International Environmental Court.[14] This proposal stems from disapproval of currently existing forums for international environmental dispute resolution, which have "inadequate" mechanisms and "negligible" significance.[15] While the

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250, 259 (Philippe Sands, ed., 1994). *See also* Stephen P. Mumme, *NAFTA and North American Transboundary Environmental Management*, *in* INTERNATIONAL BOUNDARIES AND ENVIRONMENTAL SECURITY: FRAMEWORKS FOR REGIONAL COOPERATION 249, 251 (Gerald Blake et al. eds., 1997).

6. *See* North American Agreement on Environmental Cooperation (NAAEC), Sept. 14, 1993, Can.-Mex.-U.S. 32 I.L.M. 1480 [hereinafter NAAEC Treaty].

7. *See* Székely, *supra* note 5, at 259. *See also* Peggy Rodgers Kalas, *International Environmental Dispute Resolution and the Need for Access by Non-State Entities*, 12 COLO. J. INT'L ENVTL. L. & POL'Y 191, 191-92 (2001).

8. *See* NAAEC Treaty, *supra* note 6, art. 14 (Submissions on Enforcement Matters).

9. *See* discussion *infra* Part III.

10. *See* discussion *infra* Part IV.

11. *See id.*

12. *See* North American Free Trade Agreement (NAFTA), Dec. 17, 1992, Can.-Mex.-U.S. 32 I.L.M. 289 (parts one through three, pertinent notes and Annex 401) and 32 I.L.M. 605 (parts four through eight, notes 37-46 which concern this text, Annexes I through VII, and Errata for the entire Agreement) (entered into force Jan. 1, 1994) [hereinafter NAFTA Treaty].

13. *See* Helfer & Slaughter, *supra* note 5, at 276 (supranational adjudications "have convinced national governments, individual litigants, and the European public to endorse and participate in frequent and often high-stakes adjudication at a level above the nation-state.").

14. *See* Kalas, *supra* note 7, at 229.

15. *Id.* at 192, 209. *See also* Alicia A. Samios, *NAFTA's Supplemental Agreement: In*

CEC's utility as an international tribunal is limited,[16] and it provides "little opportunity to obtain redress for harms suffered,"[17] this Note suggests that its role as a North American agency of environmental enforcement is not the greatest contribution that it has to make.[18] To be true to its mandate to foster environmental compliance and improvement throughout North America,[19] the CEC will better achieve these ends by using the carrot and not the stick.

II. BACKGROUND TO THE CEC

A. The Need to Save NAFTA

The existence of the CEC is remarkable given the political struggle—both international and intra-national—that preceded it.[20] The controversy centered on NAFTA[21] and its environmental consequences.[22] The increase in trade and corresponding environmental destruction NAFTA portended[23] bolstered the demands of environmentalists for a statement on continental environmental policy.[24] While a need for such an agreement existed prior to the proposal of NAFTA, the CEC resulted less from a shift in public policy than from necessity.[25] On the eve of NAFTA's signing in 1992, both trade and environmental protection had become pressing issues in the public mind[26] as well as in the North American scientific community.[27] In

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Need of Reform, 9 N.Y. INT'L L. REV. 49 (1996).

16. *See* Kalas, *supra* note 7, at 191-92.

17. *Id.*

18. *See* discussion *infra*, Part IV.

19. *See* NAAEC Treaty, *supra* note 6, pmbl.

20. *See generally* ALAN RUGMAN ET AL., ENVIRONMENTAL REGULATIONS AND CORPORATE STRATEGY: A NAFTA PERSPECTIVE ch. 5 (1999) (focusing on environmental politics, discussing the political landscape in Canada, the United States, and Mexico prior to and during the passage of NAFTA). *See also* PIERRE MARC JOHNSON & ANDRÉ BEAULIEU, THE ENVIRONMENT AND NAFTA: UNDERSTANDING AND IMPLEMENTING THE NEW CONTINENTAL LAW chs. 1 & 2 (1996) (discussing background and context of NAFTA and NAAEC and trade and environmental issues in the 1990s).

21. *See* NAFTA Treaty, *supra* note 12.

22. *See* Székely, *supra* note 5, at 259. *See also* Mumme, *supra* note 5, at 251; Kluwer Law International, *Implementation: Labor and Environmental*, 1 NAFTA: L. & BUS. REV. AM. 103 (1995).

23. *See* Székely, *supra* note 5, at 259. *See also* Mumme, *supra* note 5, at 251.

24. *See* JOHNSON & BEAULIEU, *supra* note 20, at 30-34. *See also* Mumme, *supra* note 5, at 249-51.

25. *See* JOHNSON & BEAULIEU, *supra* note 20, at 23-24. *See also* Mumme, *supra* note 5, at 251-52.

26. *See* JOHNSON & BEAULIEU, *supra* note 20, at 17.

addition to noting the correlation between trade and the environment,[28] the growing conclusion among specialists was that the entire region should be treated as one ecological unit.[29] It became clear during the negotiating period that without some express commitment to preserve the environment of North America, the first trilateral North American agreement would never have the necessary public approval or political endorsement to be signed.[30]

Given the economic investment, political investment, and potential of NAFTA, the treaty would not be abandoned lightly.[31] If passed, NAFTA would create the world's largest single economic zone: extending over roughly one-third of the Earth,[32] including 360 million consumers,[33] and forging a three-way trade partnership worth $300 billion.[34] Its significance to the continent as well as the global community was too great to allow it to fail.[35] A legislative commitment to the environment was necessary to bolster the treaty, and ensure its passage.[36]

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27. *See* RUGMAN ET AL., *supra* note 20, at 77. *See also* JOHNSON & BEAULIEU, *supra* note 20, at 31-34.

28. *See generally* RUGMAN ET AL., *supra* note 20, ch. 6 (providing analysis of the proportional relationship between increased trade and environmental destruction in the North American context, and calling the U.S.-Mexican border the best example of dramatic economic growth that strains environmental infrastructure). *See also* Székely, *supra* note 5, at 252 (quoting several disquieting figures and statistics representing extent to which exploitation of natural resources, arguably the cornerstone of the three North American nations' economies, has taken place). The United States, for example, despite having enjoyed a more vast quantity and quality of natural resources than Canada or Mexico, had already destroyed about four-fifths of its wildlife, cut over half of its timber, and used up two-thirds of its iron ore by the mid-twentieth century. *See id.*

29. *See* JOHNSON & BEAULIEU, *supra* note 20, at 12. *See also* Mumme, *supra* note 5, at 249-51.

30. *See* JOHNSON & BEAULIEU, *supra* note 20, at 122-23. While NAFTA had been signed by the heads of all three countries, a timetable for ratification imposed a certain amount of urgency on the negotiators of the supplemental agreement addressing environmental issues. Also, while still a presidential candidate, Bill Clinton announced that he would only support NAFTA if additional agreements addressing concerns about labor and the environment were reached. *Id. See also* Bradly J. Condon, *The Impact of NAFTA, the NAAEC, and Constitutional Law on Environmental Policy in Canada and Mexico, in* NAFTA IN TRANSITION 284 (Stephen J. Randall & Herman W. Konrad, eds., 1995). *See also* Mumme, *supra* note 5, at 249-51.

31. *See* JOHNSON & BEAULIEU, *supra* note 20, at 122-23.

32. *See* Székely, *supra* note 5, at 251.

33. *See* JOHNSON & BEAULIEU, *supra* note 20, at 12

34. *See id.*

35. *See id.* at 122-23.

36. *See* GARY CLYDE HUFBAUER ET AL., NAFTA AND THE ENVIRONMENT: SEVEN YEARS LATER 17 (1999).

This commitment could not come in the form of a policy preamble or a subsection of NAFTA either.[37] Because NAFTA is a regional trade agreement, with a focus that is economic rather than environmental, it "erects a framework for commerce, not for environmental cooperation."[38] NAFTA, like other commercial treaties, could only display "adequate sensitivity" towards environmental concerns, and not address them directly.[39] In itself, the trade agreement was incapable of addressing environmental concerns as equal in importance to economic considerations,[40] and while the goal of "making trade disciplines more environmentally sensitive was at least intelligible to trade negotiators, such goals were often greeted with hostility."[41] Another treaty, one addressing the high-profile environmental concerns that had become integral to public policy and private sector decision-making, was needed.[42] The North American Agreement on Environmental Cooperation (NAAEC) met this need.[43]

B. Another Treaty: The NAAEC

Negotiated alongside of NAFTA, the NAAEC was intended to revive the floundering NAFTA agreement[44] by obligating Canada, Mexico and the United States to "promote sustainable development based on cooperation and mutually supportive environmental and economic policies."[45] To achieve this laudable goal, the NAAEC created a supranational institution, the CEC.[46] It was to be a meeting of three nations' environmental minds:[47] experts from both the public and the private sector mandated to address environmental issues affecting the North American region.[48]

The time for the NAAEC had come for several reasons. Throughout the Twentieth Century there had been several bilateral environmental

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37. *See id.*

38. JOHNSON & BEAULIEU, *supra* note 20, at 12.

39. *See id. See also* HUFBAUER ET AL., *supra* note 36, at 17.

40. *See* Székely, *supra* note 5, at 264. *See also* JOHNSON & BEAULIEU, *supra* note 20, at 12.

41. JOHNSON & BEAULIEU, *supra* note 20, at 124.

42. *See id.* at 27.

43. *See generally* NAAEC Treaty, *supra* note 6.

44. *See* HUFBAUER ET AL., *supra* note 36, at 2. *See also* JOHNSON & BEAULIEU, *supra* note 20, at 31.

45. *See* NAAEC Treaty, *supra* note 6, art. 1(b).

46. *See id.* art. 8.

47. *See* Stephen L. Kass & Jean M. McCarroll, *NAFTA's CEC: First Lessons for the Americas*, 22 N.Y.L.J., Oct. 22, 1999, at 3.

48. *See* NAAEC Treaty, *supra* note 6, art. 1(b).

agreements—both between the United States and Canada and the United States and Mexico—addressing a single natural resource or source of pollution, but there had never been a multilateral treaty, much less an all-inclusive tripartite agreement[49] to "foster the protection and improvement of the environment in the territories of the Parties for the well-being of present and future generations."[50] Popularity for the treaty grew out of "deepening integration" in North America.[51] The North American countries all faced similar socio-economic problems generated from domestic urban and industrial growth.[52] In addition to the environmental problems created by their domestic economies,[53] North Americans faced the additional problem of trans-border pollution, or as the NAAEC would eventually refer to it, "the interrelationship of their environments."[54] The futility of any one country coping with this problem alone fostered the public's growing belief in the need for continental solutions.[55] Realizing the limitations of localized environmental policies, environmentalists had long been pressing for a continental treaty.[56] As a matter of course, "environmental policies and practices of each country are felt in its neighbors."[57] The breadth of pollution and its effects required broad agreements to eliminate excessive sources.[58] NAAEC would also serve the interests of fairness by creating a protocol to determine which country takes responsibility for corrective action such as a "clean-up."[59]

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49. *See* Székely, *supra* note 5, at 252-59 (providing a history of bilateral treaties between NAFTA countries). *See also* JOHNSON & BEAULIEU, *supra* note 20, at 10; Mumme, *supra* note 5, at 249-51.

50. NAAEC Treaty, *supra* note 6, art. 1.

51. RUGMAN ET AL., *supra* note 20, at 80-81.

52. *See* HUFBAUER ET AL., *supra* note 36, at 3.

> Communities on both sides of the border have problems related to air pollution, water supply, wastewater treatment, and hazardous and solid waste disposal. In Mexican border cities 12 percent of the population does not have access to drinking water, and wastewater plants treat only 34 percent of the wastewater. On the U.S. side of the border, most municipalities have adequate sewage treatment but many are near capacity. Moreover, the colonias located in Texas and New Mexico lack water supply and wastewater disposal facilities.

Id. (citing *U.S.-Mexico Border: Issues and Challenges Confronting the United States and Mexico*. Washington, U.S. General Accounting Office, 1999.)

53. *See* Gustavo Alanis-Ortega, *What We Can Learn from NAFTA*, *in* ASIAN DRAGONS AND GREEN TRADE 75 (Simon S.C. Tay & Daniel C. Esty, eds., 1996).

54. NAAEC Treaty, *supra* note 6, pmbl.

55. *See* JOHNSON & BEAULIEU, *supra* note 20, at 124-25.

56. *See* Székely, *supra* note 5, at 251-57.

57. *See* HUFBAUER ET AL., *supra* note 36, at 1.

58. *See* Székely, *supra* note 5, at 257-58.

59. RUGMAN ET AL., *supra* note 20, at 75-76.

Additionally, the treaty came into existence because the majority of environmental groups in North America insisted on it.[60] These groups "agreed to support North American free trade in exchange for a vigorous oversight and, in some circumstances, enforcement role for the CEC ...."[61] Environmental non-governmental organizations (NGOs) from the United States "demanded [the CEC's] creation as a condition to providing the environmental support necessary for NAFTA's congressional approval."[62]

Building on the historical foundations of bilateral environmental cooperation,[63] the NAAEC signatories made several commitments in 1992.[64] Each country agreed to several general obligations to evaluate the quality of its environment, review or develop protocols for environmental emergencies, promote education about the environment and its scientific and legal applications, and generally advance environmental goals.[65]

It was hoped that the CEC would prove to be worth the initial political struggle[66] and become an agency representing a new importance of environmental values in an international forum.[67] The language employed in the preamble of the first-ever multilateral environmental agreement[68] in North America reflects the ambitious nature of its goals:[69]

> *Convinced* of the importance of the conservation, protection and enhancement of the environment in their territories and the essential role of cooperation in these areas in achieving sustainable development for the well-being of present and future generations;[70]

However, many hopes were not realized.[71] Instead of a pure, unapologetic commitment to an agenda of environmentalism, the member countries had merely announced their intention to "promote" environmental goals[72]—and

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60. *See* JOHNSON & BEAULIEU, *supra* note 20, at 124-25.

61. Stephen L. Kass, *First Cases Before New NAFTA Forum Suggest Its Power Will Increase*, NAT'L L.J., June 10, 1996, at C5.

62. *See* Kass & McCarroll, *supra* note 47, at 3. *But see* HUFBAUER ET AL., *supra* note 36, at 2. "Most environmental groups initially supported NAFTA, but became increasingly less satisfied with government efforts to deal with environmental problems in the region and have since opposed new trade initiatives." *Id.*

63. *See* RUGMAN ET AL., *supra* note 20, at 77.

64. *See* JOHNSON & BEAULIEU, *supra* note 20, at 30.

65. *See* NAAEC Treaty, *supra* note 6, pmbl.

66. *See* JOHNSON & BEAULIEU, *supra* note 20, at 30-34.

67. *See* Székely, *supra* note 5, at 252.

68. *See* RUGMAN ET AL., *supra* note 20, at 77.

69. *See id.* at 80-81.

70. NAAEC Treaty, *supra* note 6, pmbl.

71. *See* Székely, *supra* note 5, at 252.

72. *See* NAAEC Treaty, *supra* note 6, art. 1(b).

even then, only insofar as it advanced the economic growth initiated by NAFTA itself.[73] Instead of creating an international treaty that obligated the signatory countries to protect the environment, environmentalists feared that the opposite had been produced.[74] A treaty that protects the environment by "sustaining development" can have tremendous environmental impact,[75] and thwart the very intent that created the NAAEC.[76]

Unfortunately, some have interpreted the NAAEC to protect the continental environment only to the extent that it is a marketable commodity.[77] As expressed in Article 1(b), the intent of the statute is to make economic and environmental policies that promote sustainable development.[78] A narrow reading of the statute fails to position these two concerns as equal in importance.[79] Rather, it makes of the environment a commodity; "development" which must be sustained to ensure future economic prosperity, and not an end in itself. Since its creation, the NAAEC has received mixed reviews.[80] Because of its environmental provisions, it has been called "the greenest trade accord."[81] It has also been called a "compromise"[82] and a "concession."[83] Nonetheless, the enactment of the NAAEC was not an environmental defeat.

C. The NAAEC's Legacy: The Commission on Environmental Cooperation

As the first statement on continental environmental policy,[84] the NAAEC bitterly disappointed many environmentalists.[85] The Agreement

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73. *See id.*

74. *See* Székely, *supra* note 5, at 252.

75. *Id.* (citing effects such as mercury-tainted water caused by hydroelectricity, and the loss of topsoil resulting from clear-cutting forests, despite reforestation and tree-planting efforts). *See also* Mumme, *supra* note 5, at 251.

76. *See* HUFBAUER ET AL., *supra* note 36, at 17.

77. *See* NAAEC Treaty, *supra* note 6, pmbl.

78. *See id.*, art. 1 & Annex.

79. *See id.*, pmbl.

80. *See* HUFBAUER ET AL., *supra* note 36, at 42-44.

81. *Id.* at 2.

82. Kass, *supra* note 61, at 41.

83. Kass & McCarroll, *supra* note 47, at 3.

84. *See* HUFBAUER ET AL., *supra* note 36, at 2. *See also* JOHNSON & BEAULIEU, *supra* note 20, at 32-33.

85. *See* Kalas, *supra* note 7, at 191. "[T]he CEC only deals with issues that concern the lack of enforcement of laws. There is no jurisdiction for issues arising from lack of effective domestic environmental laws." *Id.* at 228 n.159. *See also* JOHNSON & BEAULIEU, *supra* note 20, at 31-34; Székely, *supra* note 5, at 266-67.

and its progeny, the CEC, represented a compromise, at best.[86] Initial disappointment with the final draft of the NAAEC, however, was unwarranted.[87] Despite the conciliatory spirit in which the Act was drafted, the text nonetheless portends real victories to environmentalists. Besides the trilateral obligations it imposes on the member countries to effectively enforce their environmental laws,[88] the drafting of the NAAEC and the creation of the CEC had a wider significance for environmental law in all three signatory countries.[89]

As the incarnation of the provisions of the NAAEC, the CEC marked a validation of the environmental cause.[90] First, not only are the goals and policies voiced in the treaty of practical importance to environmentalists, but they also represent a formal shift in the treatment of environmental issues.[91] By bolstering NAFTA's commitment to the North American environment,[92] the NAAEC—and the commission it created[93]—effectively elevated environmental concerns to the same level of importance in international agreements as economic and trade issues.[94]

Second, the provision for the CEC[95] was a victory in itself. The NAAEC created an international agency with the specific mandate to review the impact on the environment of increased trade between member countries,[96] which has been characterized as "an environmental agreement with some trade implications as opposed to a trade agreement with some environmental provisions (as NAFTA is considered)."[97] Such an institution was unprecedented and long overdue,[98] extending real benefits to environmentalists.

Less than a decade has passed since the CEC held its first session in June, 1995.[99] The CEC, enacted by Article 8 of the NAAEC,[100] is

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86. *See* HUFBAUER ET AL., *supra* note 36, at 1-3.

87. *See* RUGMAN ET AL., *supra* note 20, at 80-81.

88. *See* Kluwer Law International, *supra* note 22, at 107.

89. *See id.*

90. *See* Kass, *supra* note 61, at C5. *See also* Kass & McCarroll, *supra* note 47, at 3.

91. *See* Alanis-Ortega, *supra* note 53, at 75.

92. *See* JOHNSON & BEAULIEU, *supra* note 20, at 124-25.

93. *See* NAAEC Treaty, *supra* note 6, art. 8.

94. *See id.*, pmbl. "*Reconfirming* the importance of the environmental goals and objectives of the NAFTA, including enhanced levels of environmental protection." *Id.*

95. *See id.*, art. 8 (The Commission). "1. The Parties hereby establish the Commission for Environmental Cooperation. 2. The Commission shall comprise a Council, a Secretariat and a Joint Public Advisory Committee." *Id.*

96. *See id. See also* RUGMAN ET AL., *supra* note 20, at 75-76.

97. Kluwer Law International, *supra* note 22, at 107.

98. *See* Székely, *supra* note 5, at 250.

99. *See* JOHNSON & BEAULIEU, *supra* note 20, at 166.

mandated to execute the three "operational goals of the NAAEC ... to improve environmental conditions through cooperative initiatives, to ensure appropriate implementation of environmental legislation, and to mediate environmental disputes."[101] The CEC is also assigned the specific task of analyzing NAFTA's effect on the environment; monitoring the correlation between increased trade and corresponding environmental damage.[102] Beyond simple monitoring of trade and the environment, the CEC has the responsibility to conduct environmental management, develop strategies and programs to counteract inevitable damage, and enforce the standards of all three member countries.[103]

The most widely criticized aspect of the CEC is its lack of binding obligations and enforcement power.[104] While the NAAEC can be said to have drawn the CEC's powers very narrowly,[105] it is nonetheless responsible for effectuating substantial changes both on a practical and a symbolic level. If analyzed solely as a continental environmental enforcement agency, the CEC appears to be little more than a nominal organization.[106] Despite the CEC's lack of enforcement powers,[107] though, its importance to the environmental cause extends beyond the function of a mere issuer of citations.

III. MAKING EFFECTIVE USE OF THE CEC

Despite its humble beginnings and mixed reviews,[108] the CEC fulfills a role of increasing significance in North America;[109] significance which has been underestimated. In order to make effective use of the CEC and generally advance the environmental cause, environmentalists must keep the policies of the NAAEC in mind. Though the CEC may have failed to

100. *See* NAAEC Treaty, *supra* note 6, art. 8.

101. HUFBAUER ET AL., *supra* note 36, at 20.

102. *See* NAAEC Treaty, *supra* note 6, art. 1(b).

103. *See id.* art. 1(c).

104. *See* Székely, *supra* note 5, at 266-67. *See also* Samios, *supra* note 15, at 69-76.

105. *See* Székely, *supra* note 5, at 266-67.

106. *See id.* at 267.

107. *See id.*

108. *See* HUFBAUER ET AL., *supra* note 36, at 42-44. Critics of the CEC count among its failures the ever-worsening environmental and sanitation conditions on the border area between Mexico and the United States. Concern over the state of this border area and the difficulties of resolving it were also instrumental in the passage of the NAAEC. *See id. See also* Samios, *supra* note 15, at 76. Whether the CEC's programs in this highly-polluted area of North America are succeeding is disputed. *See id.* For a thorough discussion, see Alan Sweedler, *Energy and Environment in the United States-Mexico Border Region*, *in* NAFTA IN TRANSITION (Stephen J. Randall & Herman W. Konrad eds., 1995).

109. *See* Alanis-Ortega, *supra* note 53, at 73-75.

become the aggressive international tribunal that some had hoped for,[110] it has not given up hope of being a forum of supranational adjudication that ensures enforcement of environmental laws, and a mediator of environmental disputes. Neither has it allowed environmental concerns to disappear from the North American public forum.[111] Through its adjudicatory process, the CEC provides unprecedented opportunities and benefits to North American environmentalists.

A. Bringing Claims to the Tribunal

Among the benefits the CEC has conferred upon environmentalists, none is greater than Article 14 of the NAAEC,[112] which provides for the submission of complaints to the CEC Council from any person or NGO (including businesses) against a signatory country for failing to effectively enforce its environmental law.[113] These complaints, or Citizen Submissions on Enforcement Matters (SEM), offer much to the dedicated environmentalist.[114]

1. Notice: The First Step

The first step of the SEM procedure is a notice requirement to inform the member country, in writing, of the existing environmental problem.[115] After serving notice, a person or NGO can prepare a formal Submission,[116] which must meet the standards outlined in Article 14 of the NAAEC[117]

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110. *See* Kass & McCarroll, *supra* note 47, at 3.

111. *See* HUFBAUER ET AL., *supra* note 36, at 49-52. *See also* JOHNSON & BEAULIEU, *supra* note 20, at 17.

112. *See* Alanis-Ortega, *supra* note 53, at 73. *See also* NAAEC Treaty, *supra* note 6, art. 14.

113. *See* NAAEC Treaty, *supra* note 6, art. 14(1). "1. The Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law ...." *Id.*

114. *See id.* arts. 13, 14.

115. *See id.* art. 14(1)(e). "The Secretariat may consider a submission ... if [it] finds that the submission ... indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any." *Id. See also* NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION, *Guidelines for Submissions on Enforcement Matters under Articles 14 and 15 of the North American Agreement on Environmental Cooperation*, *in* BRINGING THE FACTS TO LIGHT 11 (2000), *at* http://www/cec.org (last visited Apr. 22, 2003) [hereinafter COMMISSION FOR ENVIRONMENTAL COOPERATION]. By informing the government agency that is responsible for the enforcement of environmental laws in the member-country, a Submitter is considered to have sufficiently informed the member-country. *See id.*

116. *See* COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 115, at 9.

117. *See* NAAEC Treaty, *supra* note 6, art. 14. Article 14 states, in part:

before being submitted to the CEC's headquarters in Montreal, Canada.[118] Most importantly, "[a] submission must appear to be aimed at promoting enforcement rather than at harassing industry."[119]

This procedure is consistent with the NAAEC's articulated policies: to address a broad range of continental concerns, and to encourage public participation in environmental stewardship.[120] Among its other responsibilities,[121] the CEC is mandated to analyze the effect of NAFTA on the environment, and monitor the correlation between increases in trade

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> The Secretariat may consider a submission from any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law, if the Secretariat finds that the submission: (a) is in writing in a language designated by that Party in a notification to the Secretariat; (b) clearly identifies the person or organization making the submission; (c) provides sufficient information to allow the Secretariat to review the submission, including any documentary evidence on which the submission may be based; (d) appears to be aimed at promoting enforcement rather than at harassing industry; (e) indicates that the matter has been communicated in writing to the relevant authorities of the Party and indicates the Party's response, if any; and (f) is filed by a person or organization residing or established in the territory of a Party.

Id. art. 14(1)(a)-(f). For the CEC's guidelines, see COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 115, at 9-12. To be considered complete, the SEM must, in less than fifteen pages, written in any of the official NAFTA languages, identify the Submitter, the failure alleged, and the Party named as remiss in enforcing its environmental laws. *See id.* at 10-11. The SEM should "contain a succinct account of the facts on which such an assertion is based," focusing on the "acts or omissions of the Party asserted to demonstrate such failure," as well as "identify[ing] the applicable statute or regulation, or provision thereof" being violated. *Id.* at 11.

118. *See* COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 115, at 9.

119. NAAEC Treaty, *supra* note 6, art. 14(1)(d). *See also* COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 115, at 11.

120. *See* NAAEC Treaty, *supra* note 6, pmbl.

> "The Government of the United States of America, the Government of Canada and the Government of the United Mexican States: *CONVINCED* of the importance of the conservation, protection and enhancement of the environment in their territories and the essential role of cooperation in these areas in achieving sustainable development for the well-being of present and future generations; ... *RECOGNIZING* the interrelationship of their environments; *ACKNOWLEDGING* the growing economic and social links between them, including the North American Free Trade Agreement (NAFTA); ... *EMPHASIZING* the importance of public participation in conserving, protecting and enhancing the environment; *NOTING* the existence of differences in their respective natural endowments, climatic and geographical conditions, and economic, technological and infrastructural capabilities ....

Id.

121. *See generally id.* art. 10 (Council Functions).

and environmental damage.[122] SEMs provide citizens of NAFTA countries with an effective means of participating in that process[123] at virtually no cost. In fact, commentators have approvingly noted that "[t]here is hardly an environmental issue that is not included in the mandate of the Council."[124]

By extension then, citizens can bring virtually any environmental issue in North America to the CEC's attention.[125] The CEC is also given the broad mandate to manage the regional environment, develop strategies and programs to counteract environmental damage, and present resolutions to all three member countries.[126] Ostensibly, the public can also contribute to these efforts by making its concerns known to the CEC, whether by SEM or some other means.[127] These statutory mechanisms impose a responsibility on the CEC to respond to the full spectrum of environmental issues, and also make them accountable to the North American public for their activities.[128]

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122. *See id.* pmbl. "*CONVINCED* of the benefits to be derived from a framework, including a Commission, to facilitate effective cooperation on the conservation, protection and enhancement of the environment in their territories ...." *Id. See also id.* art. 10(6). "The Council shall cooperate with the NAFTA Free Trade Commission to achieve the environmental goals and objectives of the NAFTA by: ... (d) considering on an ongoing basis the environmental effects of the NAFTA." *Id.*

123. *See* Kluwer Law International, *supra* note 22, at 108.

124. JOHNSON & BEAULIEU, *supra* note 20, at 144.

125. *See* Kluwer Law International, *supra* note 22, at 108.

126. *See* NAAEC Treaty, *supra* note 6, art. 10(2). Under Article 10, the Council:

> may consider, and develop recommendations regarding: (a) comparability of techniques and methodologies for data gathering and analysis, data management and electronic data communications on matters covered by this Agreement; (b) pollution prevention techniques and strategies; (c) approaches and common indicators for reporting on the state of the environment; (d) the use of economic instruments for the pursuit of domestic and internationally agreed environmental objectives; (e) scientific research and technology development in respect of environmental matters; (f) promotion of public awareness regarding the environment; (g) transboundary and border environmental issues, such as the long-range transport of air and marine pollutants ....

Id.

127. *See* Kluwer Law International, *supra* note 22, at 108.

128. *See* Dixon Thompson, *The NAFTA Parallel Accord on the Environment*, *in* NAFTA IN TRANSITION 318 (Stephen J. Randall & Herman W. Konrad eds., 1995) (stating that the success of environmental management systems should be measured by accountability and accounting, which direct us toward sustainable development and which measure progress).

2. Drafting a Successful SEM

Despite the CEC's broad responsibilities,[129] there are limits to its jurisdiction, and a SEM must satisfy certain minimum requirements to be reviewed.[130] First, in response to the SEM, the CEC must make a threshold determination about its legitimacy.[131] The goal is to ensure that only submissions which are "aimed at promoting enforcement rather than at harassing industry" are given consideration.[132] To satisfy the requirements, the SEM must present a member country's own statute and sustain a claim for the member country's failure to enforce its environmental laws through some act or omission,[133] which forms the basis of the submission.[134] Specifically, Article 14(1) mandates that a SEM may not attack the individual or corporate polluter directly, but must instead allege that the member country is failing to enforce its environmental laws against the polluter.[135] Clearly, this is the influence free-traders exerted upon the NAAEC.[136] Making governments accountable to the CEC shields corporations from the expense of litigation or possible sanctions, at least long enough to achieve compliance.[137] Further, it preserves the CEC's

129. *See* NAAEC Treaty, *supra* note 6, art. 10.

130. *See id.* art. 14(1).

131. *See id.* art. 14(2).

132. *Id.* art. 14(1)(d). *See also* COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 115, at 11.

133. *See* NAAEC Treaty, *supra* note 6, art. 5 (Government Enforcement Action). "With the aim of achieving high levels of environmental protection and compliance with its environmental laws and regulations, each Party shall effectively enforce its environmental laws and regulations through appropriate governmental action ...." *Id. See also* COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 115, at 11.

134. *See* COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 115, at 11.

135. *See* NAAEC Treaty, *supra* note 6, art. 14(1).

136. *See id.* art. 10(3). Article 10 states, in part:

> The Council shall strengthen cooperation on the development and continuing improvement of environmental laws and regulations, including by: (a) promoting the exchange of information on criteria and methodologies used in establishing domestic environmental standards; and (b) without reducing levels of environmental protection, establishing a process for developing recommendations on greater compatibility of environmental technical regulations, standards and conformity assessment procedures in a manner consistent with the NAFTA.

Id. One of NAFTA's chief concerns was that once the liberalization of trade was in place, the member countries could manipulate their environmental standards to raise or lower trade barriers; thus, effectively replacing the tariffs that free trade aimed to remove. *See* Alanis-Ortega, *supra* note 53, at 72-73 (discussing this undercurrent to both NAFTA and NAAEC negotiations).

137. While this provision may appear to frustrate the efforts of the environmentalist, overall, it yields a preferable end result. *See infra* Part IV.

integrity by preventing it from becoming a battleground for corporate wars, "especially if the Submitter is a competitor that may stand to benefit economically from the submission."[138] Other grounds for rejection include "frivolous" submissions.[139] Only SEMs that satisfy the minimum requirements of being statute-based claims, with legitimate environmental concerns against a member country, are eligible for the Secretariat's consideration.[140]

To determine whether or not to pursue the SEM, the Secretariat weighs numerous factors, including the extent of the environmental harm at stake and the corresponding remedial cost.[141] The degree of present detriment, the risk of future detriment, and the size of the commitment—in terms of time and financial resources—are all considered.[142] The Secretariat also considers whether addressing the issue advances the goals articulated in the NAAEC and by the CEC.[143] Once the Secretariat establishes the issue's importance and concludes that resolving the problem would further the CEC's goals, it assess whether any action, governmental or private, has been taken yet.[144] Current evidence of the problem and the extent to which the SEM is drawn solely from media reports are both considered when the CEC reviews a SEM.[145] A final consideration is any correspondence the Submitter has had with the Party who is failing to enforce its environmental laws.[146] The only submissions eligible for formal agency review are those which allege sufficient environmental harm, are consistent with the CEC's goals, can be substantiated by some evidence, and demonstrate insufficient action on the part of the member country.

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138. COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 115, at 11.

139. *Id.*

140. *See* NAAEC Treaty, *supra* note 6, art. 14(2).

141. *See* COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 115, at 11.

142. *See id.*

143. *See* NAAEC Treaty, *supra* note 6, art. 14(2). "Where the Secretariat determines that a submission meets the criteria set out in paragraph 1, the Secretariat shall determine whether the submission merits requesting a response from the Party." *Id.*

144. *See id.*

> In deciding whether to request a response, the Secretariat shall be guided by whether: (a) the submission alleges harm to the person or organization making the submission; (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement; (c) private remedies available under the Party's law have been pursued; and (d) the submission is drawn exclusively from mass media reports.

Id.

145. *See id. See also* COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 115, at 11.

146. *See* COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 115, at 11.

3. SEM Reviewers: The Council, the Secretariat and the JPAC

The CEC has been called "an innovative institutional structure."[147] Composed of three branches—executive, administrative, and advisory[148]—it is another way the CEC upholds the policies articulated in the NAAEC and symbolizes its commitment to the environment and to public participation.[149] Article 9 requires that the CEC be headed by a three-member Council of Ministers, each of whom must be a "cabinet-level or equivalent representative" of the member countries.[150] To date, the three representatives to the CEC Council have simultaneously held the highest-ranking environmental position in their national governments: the United States Environmental Protection Agency Administrator, the Canadian Environment Minister, and the Mexican Secretary of State for the Environment.[151] The Ministers have final authority on CEC decisions and initiatives, but their main function is to lead an exchange of information on domestic environmental standards and methodology, with the aim of achieving "the highest level of compatibility."[152] Beneath them is the Secretariat, which provides the Council with scientific and technical support, as well as implementation and enforcement assistance.[153] In addition to the Secretariat is the Joint Public Advisory Committee (JPAC),[154] which, it has been speculated, is the branch of the CEC that provides the most hope for environmentalists.[155]

The JPAC is a fifteen-member non-governmental advisory group,[156]

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147. RUGMAN ET AL., *supra* note 20, at 91.

148. *See id.* at 99.

149. *See* NAAEC Treaty, *supra* note 6, pmbl.

150. *Id.* art. 9(1) (Council Structures and Procedures). "The Council shall comprise cabinet-level or equivalent representatives of the Parties, or their designees." *Id.*

151. *See* JOHNSON & BEAULIEU, *supra* note 20, at 132.

152. NAAEC Treaty, *supra* note 6, art. 9. *See also* Kluwer Law International, *supra* note 22, at 108.

153. *See* NAAEC Treaty, *supra* note 6, art. 11(5) (Secretariat Structure and Procedures). "The Secretariat shall provide technical, administrative and operational support to the Council and to committees and groups established by the Council, and other such support as the Council may direct." *Id.*

154. *See id.* art. 16.

155. *See* JOHNSON & BEAULIEU, *supra* note 20, 138-40. *See also* Kass & McCarroll, *supra* note 47, at 3.

156. *See* NAAEC Treaty, *supra* note 6, art. 16. Article 16 provides, in part:

> 1. The Joint Public Advisory Committee shall comprise 15 members, unless the Council otherwise decides. Each Party or, if the Party so decides, its National Advisory Committee convened under Article 17, shall appoint an equal number of members.
>
> 2. The Council shall establish the rules of procedure for the Joint Public Advisory

unique in that its members are neither politicians nor civil servants.[157] Instead, they are professionals from the private sector, with backgrounds in the sciences and humanities.[158] As a kind of think-tank for the CEC, JPAC's function is to advise the ministers of the Council on any scientific or technical matter, including SEMs[159] and provide them with an additional perspective on environmental issues.[160] The NAAEC also obligates the CEC to foster the development of scientific research and technology, and educate the public about itself and environmental matters.[161] The JPAC upholds this role by hosting public meetings every year to address CEC topics.[162] With this dynamic institutional structure in place—the visibility and prestige of the Council and the diverse expertise of the Secretariat and the JPAC—the CEC provides environmentalists with a supranational institution to address environmental concerns through the methodology of consensus-building; bridging the gaps between nations, as well as between the public and private sectors.[163]

B. Clearing the Hurdles

The visibility, prestige, and diversity of expertise of the CEC make environmentalists eager to use it as an international tribunal.[164] Additionally, its broad, continental scope of concerns would seem to make the CEC's jurisdiction over plaintiffs and claims a matter of its own discretion.[165] To some extent, this is true: the CEC provides an additional

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Committee, which shall choose its own chair.

Id.

157. *See* Kass & McCarroll, *supra* note 47, at 3. *See also* JOHNSON & BEAULIEU, *supra* note 20, at 138-39.

158. *See* NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION, *Joint Public Advisory Committee Public Consultation Guidelines*, *at* http://www.cec.org (last visited Apr. 22, 2003) [hereinafter JPAC Guidelines].

159. *See* NAAEC Treaty, *supra* note 6, art. 16(4).

160. *See* JOHNSON & BEAULIEU, *supra* note 20, at 139.

161. *See* NAAEC Treaty, *supra* note 6, art. 2(1).

162. *See* JPAC Guidelines, *supra* note 158. Their broad list of topics includes: "Environment, Economy and Trade," "Conservation of Biodiversity," "Pollutants and Health," and "Law and Policy." *Id.*

163. *See* John H. Knox, *A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission*, 28 ECOLOGY L.Q. 1, 56-57 (2001).

164. *See* Kass, *supra* note 61, at C5. *See also* Jonathan H. Adler, *Stand or Deliver: Citizen Suits, Standing, and Environmental Protection*, 12 DUKE ENVTL. L. & POL'Y F. 39 (2001) (discussing the trend among environmentalists and NGOs to bring suit for environmental protection, and questioning the benefits of such suits).

165. *See* NAAEC Treaty, *supra* note 6, pmbl.

avenue of suit previously unavailable to would-be environmental plaintiffs in North America.[166] This opportunity is not without limitations, however, both practical and theoretical. Not only are there minimum requirements to satisfy in bringing a claim to the CEC, but the would-be environmental plaintiff should know what limits are imposed on a supranational forum's ability to adjudicate.[167]

1. Establishing CEC Standing: The Minimum Requirements of a SEM

Despite the mandatory minimum requirements of SEMs, they are nonetheless an expansion of the necessary standing for litigating environmental claims in North America. SEMs are of particular value to the continent's "green" advocates because of the persistent difficulties in establishing standing to litigate claims of environmental damage in domestic courts.[168] For example, the United States Supreme Court has time and again refused to grant standing to NGOs or individuals to pursue cases involving environmental impact.[169] The opportunity offered by Article 14,[170] allowing citizens or groups of each NAFTA country to file a complaint of environmental infraction, is unprecedented.[171]

In reviewing a SEM, the Secretariat must decide whether the preparation of "a factual record" is necessary.[172] First, the person or group making the SEM must be a citizen or domiciliary of the member country against whom the complaint is filed.[173] A side issue the Secretariat considers is whether the harm alleged in the SEM directly impacts the person or group making the allegation.[174] The SEM must also meet two content requirements: (1) the alleged harm must be due to a consistent failure on the part of the member country to enforce its environmental law; and (2) the allegations

166. *See* Kass, *supra* note 61, at C5.

167. *See* Knox, *supra* note 163, at 7-22.

168. *See, e.g.*, Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992); Sierra Club v. Morton, 405 U.S. 727 (1972). *See also* Bennet v. Spear, 520 U.S. 154 (1997) (describing the difficulties in establishing standing through the "injury in fact" requirement for environmental cases, despite even the inclusion of citizen-suit provisions in the federal statute alleged).

169. *See Lujan*, 504 U.S. at 555; *Sierra Club*, 405 U.S. at 727. *See also Bennet*, 520 U.S. at 158. *See also* Adler, *supra* note 164, at 39 (discussing the persistent difficulties until 2000 in establishing standing of plaintiffs in citizen-suits alleging environmental injury).

170. *See* NAAEC Treaty, *supra* note 6, art. 14.

171. *See* Kass, *supra* note 47, at 3.

172. *See* NAAEC Treaty, *supra* note 6, art. 15(1).

173. *See* COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 115, at 9.

174. *See* NAAEC Treaty, *supra* note 6, art. 2(a).

must relate to the protection of the environment or human health.[175] Another procedural requirement is that some domestic remedy, such as judicial and administrative proceedings, must have previously been pursued—not necessarily exhausted, but pursued.[176] A final requirement of CEC standing is the legal and informational basis for the submission.[177] Once all minimum requirements of standing have been met, the Secretariat may order the preparation of a factual record.[178]

There are several policies underlying the standing analysis, mostly concerned with preserving sovereignty and making effective use of limited resources. First, the member countries, by signing NAFTA and the NAAEC, agreed to lower barriers to trade and cooperate on environmental issues;[179] they did not extend the rights of citizenship to every individual North American.[180] Canada, Mexico and the United States have an obligation to the other member countries to enforce their environmental laws and improve their standards, but should they fail to uphold these commitments, only their own citizens and environmental groups have a claim against them.[181] Similarly, the treaties did not intend to impose new or foreign law on the member countries.[182] The NAAEC explicitly states that the sovereignty of each member country to establish its own environmental law must be respected.[183] Further evidence of the CEC's deference to sovereignty is its consideration of which private remedies were or are currently being pursued by the Submitter.[184] Supplanting rather than superseding the domestic law of each NAFTA member country, the CEC's goal is to avoid preparing a factual record that duplicates or interferes with private remedies.[185] The final requirement, the necessary

175. *See id.* art. 45(1)-(2).

176. *See id.* art. 14(1).

177. *See id.*

178. *See id.* art. 15.

179. *See id.* pmbl. "*ACKNOWLEDGING* the growing economic and social links between them, including the North American Free Trade Agreement (NAFTA) ...." *Id.*

180. *See* Samios, *supra* note 15, at 69-70.

181. *See id. See also* NAAEC Treaty, *supra* note 6, art. 5-7.

182. *See* NAAEC Treaty, *supra* note 6, art. 3. "*Recognizing* the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify its environmental laws and regulations ...." *Id.*

183. *See id.* art. 5-7.

184. *See id. See also* COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 115, at 11.

185. *See* COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 115, at 11. The Secretariat is also interested in whether, prior to the submission, reasonable actions could have been taken to pursue these remedies, and if any were taken. *See* NAAEC Treaty, *supra* note 6, art. 14(2)(c).

legal or informational basis for the SEM,[186] is imposed because of a concern for resources. The CEC has limited time, money and staff to address environmental issues in North America.[187] Although the terms of the NAAEC require that the only source of information for a SEM be a media report, the CEC prefers to have additional evidence of environmental detriment upon which to base its decisions and allocate its resources.[188] Before taking the final step of developing a factual record, the Secretariat may wish to solicit a response from the Party.[189] If so, it forwards a copy of the SEM and any supporting documents to the member country concerned.[190] In short, the requirements of standing are designed to reflect and reinforce the policy concerns of the member countries by preserving sovereignty through due process while making effective use of limited resources.

2. Submissions Must Survive Dismissal

As with standing, the content requirements of SEMs pursuant to Article 14(1) are not an attempt by the CEC to whittle the breadth of standing down to meaninglessness and allow it "to be an insurmountable procedural screening device"[191] as some have suggested.[192] Instead, the purpose of the minimum requirements is to create an adjudicatory forum that is consistent

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186. *See* NAAEC Treaty, *supra* note 6, arts. 5-7. *See also* COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 115, at 13.

187. *See* COMMISSION FOR ENVIRONMENTAL COOPERATION, *Proposed Program Plan and Budget 2002-2004: 2002 Graphic Overview*, *at* http://www.cec.org/files/PDF//3YP02-E3r_EN.pdf (last visited Mar. 4, 2003).

188. *See* NAAEC Treaty, *supra* note 6, arts. 5-7. *See also* COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 115, at 13.

189. *See* NAAEC Treaty, *supra* note 6, art. 14(1). *See also* COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 115, at 15.

190. *See* COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 115, at 16. When the Secretariat decides to develop a factual record, it informs the Council, making sure to provide it with enough information to review the decision. *See id.* The three-member Council then votes its approval. *See id.* A two-thirds vote is required for the factual record to be approved. *See id.* Once approved, the Secretariat begins researching the case. *See id.* It may draw from, for its technical and scientific research, any relevant source of information; this includes information that is publicly available, submitted by interested NGOs or the JPAC, or that has been developed by either the Secretariat or independent experts. *See id.* Once a draft of the factual record is completed, the Secretariat then submits it to both the Council and the Party for comments on its accuracy. *See id.*

191. Secretariat's Determination, AAA Packaging, No. SEM-01-002 (Apr. 24, 2001), *at* http://www.cec.org/files/pdf/sem/ACF155.pdf (last visited Apr. 22, 2003).

192. *See* Kalas, *supra* note 7, at 192, 195 (stating that there is a general lack of individual standing before international tribunals, and that environmental plaintiffs have a growing need and little opportunity to obtain redress for harms suffered).

with the policies of NAFTA and the NAAEC.[193] The CEC is mandated by the NAAEC to: work towards the goal of a cleaner continent; respect the sovereignty of NAFTA countries to administer and enforce their own environmental policies (as long as they do so); and to encourage public participation in environmental matters.[194] The CEC has taken pains to delineate the jurisdictional boundary between supranational and domestic concerns, and only those claims that meet the minimum requirements—while being consistent with the NAAEC's policies and goals—are eligible for CEC review.[195] The credibility of this young agency depends on its fulfillment of this mandate.

For an environmentalist to bring a complaint through the process to a favorable outcome—or as some have described it, "the four-hurdle obstacle course"[196]—the SEM itself must meet all requirements.[197] Since 1995, a total of thirty-six submissions have been received, and twenty-five have since been closed either by dismissal, withdrawal, or termination.[198] The nine SEMs that have been dismissed for a facial deficiency offer clues as to how the CEC's jurisprudence in the area of CEC standing is developing.[199]

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193. *See generally* NAAEC Treaty, *supra* note 6; NAFTA Treaty, *supra* note 12.

194. *See* NAAEC Treaty, *supra* note 6, art. 14. *See also* COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 115, at 13-15.

195. *See* COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 115, at 13-15. *See also infra* notes 199-212 and accompanying text (discussing CEC's standing jurisprudence).

196. Knox, *supra* note 163, at 60.

197. *See id.*

198. *See* NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION, *Citizen Submissions on Enforcement Matters: Current Status of Filed Submissions*, *at* http://www.cec.org/citizen/status/index.cfm?varlan=english (last visited Apr. 22, 2003) [hereinafter *Current Status of Filed Submissions*].

199. Nine SEMs were dismissed under Article 14(1) for failing to meet at least one of its requirements. *See* Secretariat's Determination, Canadian Environmental Defence Fund, No. SEM-97-004 (Aug. 25, 1997) *at* http://www.cec.org/files/pdf/sem/97-4-DET-E.pdf (last visited Apr. 22, 2003); Secretariat's Determination, Biodiversity, No. SEM-97-005 (May 26, 1998) *at* http://www.cec.org/files/pdf/sem/97-5-DET-E.pdf (last visited Apr. 22, 2003); Secretariat's Determination, Ortiz Martinez, No. SEM-98-002 (Mar. 18, 1999) *at* http://www.cec.org/files/pdf/sem/98-2-DET-S1.pdf (last visited Apr. 22, 2003); Secretariat's Determination, Guadalajara, No. SEM-98-001 (Jan. 11, 2000) *at* http://www.cec.org/files/pdf/sem/ACF1982.PDF (last visited Apr. 23, 2003); Secretariat's Determination, Jamaica Bay, No. SEM-00-003 (Apr. 12, 2000) *at* http://www.cec.org/files/ pdf/sem/00-3-DET-E.pdf (last visited Apr.22, 2003); Secretariat's Determination, Molymex I, No. SEM-00-001 (Apr. 25, 2000) *at* http://www.cec.org/files/pdf/sem/00-1-DET-S.pdf (last visited Apr. 22, 2003); Secretariat's Determination, B.C. Logging, No. SEM-00-004 (May 8, 2000) *at* http://www.cec.org/files/pdf/sem/ACF18F2.pdf (last visited Apr. 22, 2003); Secretariat's Determination, AAA Packaging, No. SEM-01-002 (Apr. 24, 2001) *at* http://www.cec.org/files/pdf/sem/ACF14F.pdf (last visited Apr. 23, 2003); Secretariat's Determination, Alca-

When dismissing SEMs in the past, the CEC has stated that, "Article 14(1) should be given a large and liberal interpretation, consistent with the objectives of the *NAAEC*."[200] This statement presumes, however, that certain minimum requirements have been met. While SEMs have largely become a mechanism for North American environmental groups to gain supranational review of environmental enforcement, they were never intended to become such.[201] To date, the SEMs that that CEC has received have been almost exclusively submitted by environmental organizations.[202] Due to the ever-present potential for improper use of its forum, the CEC

Itzapalapa, No. SEM-02-005 (Dec. 17, 2002) *at* http://www.cec.org/ files/pdf/sem/02-5-DET-S.pdf (last visited Apr. 22, 2003);. *See also supra* note 117 and accompanying text (discussing requirements for standing). Three more SEMs have been dismissed for failing to meet the requirements of Article 14(2). *See* Secretariat's Determination, Spotted Owl, No. SEM 95-001 (Dec. 11, 1995) *at* http://www.cec.org/ files/pdf/sem/95-1-DET-E2.PDF (last visited Apr. 22, 2003); Secretariat's Determination, Logging Rider, No. SEM 95-002 (Dec. 8, 1995) *at* http://www.cec.org/ files/pdf/sem/95-2-DET-OE.pdf (last visited Apr. 22, 2003); Secretariat's Determination, Aage Tottrup, No. SEM 96-002 (May 28, 1996) *at* http://www.cec.org/files/pdf/sem/96-2-DET-OE1.pdf. While the Secretariat determined that the submissions met the requirements of Article 14(1), they did not merit "requesting a response" from the party named. *Aage Tottrup*, No. SEM-96-002 at 3. In contrast, two SEMs were dismissed under Article 14(3) because the matter asserted was being or had been addressed by the party's domestic judicial or administrative remedies. *See* Secretariat's Determination, Methanex, No. SEM-99-001 (June 30, 2000) *at* http://www.cec.org/files/pdf/sem/99-1-DET-E1.pdf (last visited Apr. 22, 2003); Secretariat's Determination, Neste Canada, No. SEM-00-002 (Apr. 14, 2000) *at* http://www. cec.org/files/pdf/sem/00-2-DET-E.pdf (last visited Apr. 22, 2003). Three more SEMs were dismissed under Article 15(2) for failing to achieve a two-thirds vote of approval from the Secretariat. *See* Secretariat's Determination, Oldman River I, No. SEM-96-003 (Apr. 2, 1997) *at* http://www.cec.org/ files/pdf/sem/96-3-DET-OE3.pdf (last visited Apr. 22, 2003); Secretariat's Determination, Lake Chapala, No. SEM-97-007 (July 14, 2000) *at* http://www. cec.org/files/pdf/sem/96-3-DET-OE3.pdf (last visited Apr. 22, 2003); Secretariat's Determination, Cytrar I, No. SEM-98-005 (Oct. 26, 2000) *at* http://www.cec.org/files/pdf/ sem/ACFBDF.pdf (last visited Mar. 5, 2003). One SEM failed to achieve a two-thirds vote of approval from the Council. *See* Council Resolution 00-01, Quebec Hog Farms, No. SEM-97-003 (May 16, 2000) *at* http://www.cec.org/files/pdf/sem/ 97-3-res-e.pdf (last visited Apr. 22, 2003). One submission has been withdrawn. *See* Letter from Earthlaw to Secretariat of June 5, 1997 *ex rel* Fort Huachuca, No. SEM-96-004, *at* http://www.cec.org/files/pdf/sem/ 96-4-wit-e.pdf (last visited Apr. 22, 2003).

200. *AAA Packaging*, No. SEM-01-002, at 2 (SEM-01-002 (citing *Biodiversity*, No. SEM-97-005 at 2 (this determination is also referred to as the Animal Alliance SEM)).

201. *See* Kass & McCarroll, *supra* note 47, at 3. When drafted, the process of Article 14 was initially "intended to be a mechanism for industry groups and individual competitors to challenge perceived regulatory inequality and unfair trade practices by another NAFTA nation." *Id.*

202. *See* Pierre Marc Johnson, *Five Windows for the Future of NAFTA's Environment Commission*, *in* FREE TRADE: RISKS AND REWARDS 213, 231-32 (L. Ian MacDonald, ed., 2000).

reads its powers very narrowly.[203] If it exceeded its authority, it would not only make a non-binding adjudication but would also violate the terms of the NAAEC, thereby calling its legitimacy into question. Thus, to remain true to the letter of the Agreement, the CEC has insisted that certain minimum requirements be met.[204]

Some examples of grounds for dismissal include issues of timing, availability of alternative relief, and the lack of a basis in domestic law for the claim.[205] First, there is a temporal requirement in Article 14(1) that a country must be "failing to effectively enforce its domestic environmental laws."[206] Thus, a party must be *presently* failing to meet a statute or provision.[207] If alternative remedies are being sought and the SEM is the subject of a pending judicial or administrative proceeding, the CEC "shall proceed no further."[208] A SEM must focus on an asserted failure of a member country to enforce its environmental law.[209] It must also be based on a statute, a violation, or a nation's provision of law in which the activity complained of occurs.[210] Without a domestic law upon which to base a SEM, allegations of non-compliance fall short of the minimum requirements.[211] Only SEMs that fulfill all the minimum requirements constitute a subject appropriate to the CEC's jurisdiction.[212]

The dismissal of claims for procedural deficiencies rather than on their merits, however, provokes uneasiness in the lawyer and the layman alike—especially because there may still be an environmental harm at issue.[213] There are, however, justifications for these dismissals.[214] First, as will be discussed in more detail in Part IV, there is great potential for improper use

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203. *See* Adler, *supra* note 164, at 50-51 (listing motivations other than environmental concerns for the bringing of suit by environmental organizations). *See also infra* Part VI.

204. *See* COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 115, at 10-12.

205. *See generally* NAAEC Treaty, *supra* note 6, art. 14. *See also* COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 115, at 13-15.

206. NAAEC Treaty, *supra* note 6, art. 14.

207. *See id.*

208. Secretariat's Determination, Methanex, No. SEM-99-001 (June 30, 2000) *at* http://www.cec.org/files/pdf/sem/99-1-DET-E1.pdf (last visited Mar. 5, 2003); SEM-99-001 (Methanex); Secretariat's Determination, Neste Canada, No. SEM-00-002 (Apr. 14, 2000) *at* http://www.cec.org/files/pdf/sem/00-2-DET-E.pdf (last visited Mar. 5, 2003).

209. *See* Secretariat's Determination, AAA Packaging, No. SEM-01-002 (Apr. 24, 2001) *at* http://www.cec.org/files/pdf/sem/ACF155.pdf (last visited Mar. 4, 2003).

210. *See AAA Packaging*, No. SEM-01-002 at 3 (citing Secretariat's Determination, B.C. Logging, No. SEM-00-004 (May 8, 2000) at 8.

211. *See id.* at 3.

212. *See id.*

213. *See* Kalas, *supra* note 7, at 195.

214. *See id.*

of the CEC's forum.[215] Also, the limited resources of the CEC to investigate and address every claim of environmental harm make the dismissal of some submissions inevitable and necessary.[216] The CEC must focus its attention and resources on claims that are the most urgent and that are clearly within its jurisdiction and capacity to address—claims that would benefit most from the preparation of a factual record.[217]

3. Preparing the Factual Record

If the particular SEM meets NAAEC criteria and two of the three Council members agree that the submission should proceed, the Secretariat gathers information and prepares a factual record.[218] Both the draft and the final record should include summaries of the SEM that initiated the CEC's review, the member country's response (if any), the facts presented by the Secretariat, and any other relevant information.[219] Interestingly, the final factual record, once completed, is not always made public.[220] Again, the decision whether to make it public requires a two-thirds vote.[221] If approved, the final record must be published in all three NAFTA languages.[222] If not, the Council may decide independently whether to make a factual record available to the JPAC.[223] Additionally, if the Council decides not to make a record public, the Secretariat must inform the Submitter.[224]

If review is deemed appropriate:

> The Panel hears arguments and issues a report determining whether there has been a persistent pattern of failure to enforce the environmental law. If such is the case, the Panel recommends an action-plan sufficient to remedy the pattern of non-enforcement. If the Party fails to fully implement the action plan, or another plan that is agreed to by the NAFTA Parties, the Panel may impose [under Article 34] a fine of up to $20 million (U.S.) .... Fines are paid into a fund that is then

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215. *See* Adler, *supra* note 164, at 50-51 (listing motivations other than environmental concerns for the bringing of suit by environmental organizations). *See also infra* Part IV.

216. *See supra* note 187 and accompanying text.

217. *See* NAAEC Treaty, *supra* note 6, art. 15. *See also* COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 115, at 16-18.

218. *See* COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 115, at 16-18.

219. *See* NAAEC Treaty, *supra* note 6, art. 15. *See also* COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 115, at 16-18.

220. *See* COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 115, at 18.

221. *See* NAAEC Treaty, *supra* note 6, art. 15(7).

222. *See* COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 115, at 18.

223. *See* NAAEC Treaty, *supra* note 6, art. 16(7).

224. *See* COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 115, at 18.

> used to enhance the environment or environmental law enforcement in the Party complained against, in a manner consistent with its domestic law.[225]

The question then becomes whether the Submitter will achieve the result he has been steadily pursuing.

C. Dispelling the Myths of the Tribunal

While there may be several reasons for environmentalists to seek supranational review of an environmental claim,[226] too often the desire is motivated by false assumptions about the result.[227] The CEC is not an agency with its own code of regulations,[228] but an agreement by the three NAFTA countries to actively respond when the CEC points out instances of anti-environmental activity that are proscribed by their domestic law.[229] Also, as an institution with its foundations in cooperation and consensus, the CEC should not seek to expand the member countries' liability to suit.[230] On a practical level, the CEC must balance three pairs of competing interests: environmental protection with economic growth, independent watchdog status with limited power, and encouraging cooperation between NAFTA countries while respecting national sovereignty.[231] Additionally, on a theoretical level, the CEC's policy is to foster environmental compliance and the improvement of standards.[232] Neither of these goals is consistent with opening the member countries up to potentially unlimited litigation, especially because environmentalists may be mistaken about the practical effect such adjudications would actually have.[233] The following paragraphs explore and clarify some of the myths surrounding the concept of adjudications from a supranational environmental forum.

1. Myth 1: The Judgment Will Be Against the Polluter

By its terms, the NAAEC holds each signatory accountable for any failure to effectively enforce its domestic environmental laws.[234] Contrary

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225. Condon, *supra* note 30, at 285.

226. *See generally* Kalas, *supra* note 7.

227. *See generally* Samios, *supra* note 15.

228. *See* JOHNSON & BEAULIEU, *supra* note 20, at 146. *See also* Mumme, *supra* note 5, at 253.

229. *See* NAAEC Treaty, *supra* note 6, pmbl. *See also* JOHNSON & BEAULIEU, *supra* note 20, at 146; Mumme, *supra* note 5, at 253-54.

230. *See* NAAEC Treaty, *supra* note 6, pmbl., art. 3.

231. *See* COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 115, at 11.

232. *See* NAAEC Treaty, *supra* note 6, pmbl., art. 1.

233. *See generally* Knox, *supra* note 163.

234. *See* NAAEC Treaty, *supra* note 6, pmbl., art. 1. *See also* JOHNSON & BEAULIEU,

to some wishes, there is no provision in the agreement for the CEC "going after" the individual or corporate polluter for injunctive or any other relief.[235] While any citizen of a NAFTA country can submit a complaint against his or her country, the supranational forum does not provide a mechanism through which the citizen can obtain relief directly from the polluter.[236] The provisions of NAFTA and the NAAEC deliberately avoid expanding the liability of free-traders to environmental litigation.[237]

The effect of this structure is that businesses are shielded from environmental complaints and costly governmental action[238]—at least temporarily.[239] After a citizen submits a SEM to the supranational forum, the subject of the complaint shifts from the polluter's illegal activity to the host nation's failure to enforce.[240] The individual or corporate polluter cannot be "harassed" through the process of the CEC.[241] Instead, the national government that is failing to enforce its environmental laws is held accountable.[242] This imposes limits on the potential powers of the CEC.[243] Rather than directly reaching out to the individual North American business that is not complying with environmental law,[244] the CEC pressures the signatory country to address the offending activity that was previously tolerated or ignored, and bring the polluter into compliance with its domestic laws.[245]

2. Myth 2: The Supranational Result Will Be Better than the Domestic Result

There is obvious merit to the argument that a private party who claims injury from a breach of environmental regulations should, "as a matter of basic justice,"[246] have the opportunity to pursue a claim in some forum,

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supra note 20, at 147.

235. *See* Kalas, *supra* note 7, at 197 (advocating different ways to pursue private actors for redress under international laws). *See also* JOHNSON & BEAULIEU, *supra* note 20, at 147.

236. *See* NAAEC Treaty, *supra* note 6, art. 14. *See also* JOHNSON & BEAULIEU, *supra* note 20, at 147.

237. *See* NAAEC Treaty, *supra* note 6, art. 3.

238. *See* Knox, *supra* note 163, at 15.

239. *See* RUGMAN ET AL., *supra* note 20, at 75.

240. *See* COMMISSION FOR ENVIRONMENTAL COOPERATION, *supra* note 115, at 11.

241. *See id.*

242. *See id.*

243. *See* JOHNSON & BEAULIEU, *supra* note 20, at 160.

244. *See* RUGMAN ET AL., *supra* note 20, at 75.

245. *See* NAAEC Treaty, *supra* note 6, art. 14(2). *See also* RUGMAN ET AL., *supra* note 20, at 75.

246. Knox, *supra* note 163, at 15.

even if the state or nation is not interested in pursuing the claim.[247] To have standing before the CEC, a citizen must first have pursued a domestic measure in his own country to remedy the environmental harm.[248] By implication, the member country must have received notice of the problem and refused to act.[249] If the citizen has sought and failed to obtain relief from his own government, it may be because, in the government's opinion, there are broader considerations at stake.[250] Balancing policy considerations is a role the governments of NAFTA have reserved for themselves, and have not delegated to the international forums.[251] In fact, the NAAEC mandates the CEC, in no uncertain terms, to respect the sovereignty of NAFTA countries to determine their own environmental policy:[252]

> *Reaffirming* the sovereign right of States to exploit their own resources pursuant to their own environmental and development policies and their responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction[.][253]

Thus, while the CEC's role as a supranational adjudicatory institution can provide the individual environmentalist with an added forum and opportunity to pursue his claim of injury, if his nation had notice of the issue but refused to act, he is even less likely to prevail in an international forum than in a domestic one.[254] Additionally,

> [a]llowing one interested individual or group to bypass or revisit the issue by referring it to supranational adjudication seems unfair to the others concerned ... [and] would simply reproduce the national debate at a supranational level with no obvious reason to believe that the result

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247. *Id.*

248. *See id.* at 63.

> The NAAEC softens the traditional rule that remedies be exhausted in two ways. First, it changes the rule from a requirement that must be met to a factor to be taken into account by the Secretariat. Second, it asks not whether remedies have been *exhausted*, but only whether they have been *pursued*. This provision has the potential to remove the great delay often associated with exhaustion-of-remedies rule, since a claim may be exhausted only after all conceivable appellate review is completed, but is arguably pursued as soon as it is filed.

Id.

249. *See id.*

250. *See id.* at 15.

251. *See* NAAEC Treaty, *supra* note 6, pmbl. *See also* Condon, *supra* note 30, at 283.

252. *See* NAAEC Treaty, *supra* note 6, pmbl.

253. *Id.*

254. *See* Knox, *supra* note 163, at 15.

would be any different, or if different, any fairer.[255]

Thus, while the supranational forum can provide the environmentalist with an additional opportunity to litigate his claim, the result will not necessarily be better.

3. Myth 3: The Supranational Forum Will Solve the Problem

The environmentalist also takes an enormous risk by taking his claim to a supranational forum for adjudication. Taking a high-profile, adversarial stance on an environmental issue and pointing out a violation of law or ambiguous standard, may result in the member-countries protecting each other.[256] It may also discourage governments from introducing more stringent environmental laws, because of uncertainty surrounding their enforcement.[257] If a member country takes such action, these circumstances render the CEC powerless.[258] "[F]rom a legal perspective, NAFTA does not limit a country's freedom to determine its own environmental policies."[259]

This is not meant to be inducement to abandon standards and policies. Although environmental goals are better reached by imposing identifiable standards than by relying on an individual or corporate polluter's sense of what constitutes an acceptable detriment to the environment, NAFTA requires less restrictive means of determining standards.[260] To illustrate this principle, consider the establishment of ambient air quality standards. The difficulty of setting ambient air standards is that they are "based on scientific uncertainty but also lead to the allocation of time and money for quantifying the risk and setting an acceptable level of risk."[261] As the science surrounding the issue continues to improve, and the measures of polluters and pollutants fluctuate, the level of risk fluctuates—usually rising—but the standard is frozen until the legislature amends it.[262] "After all, once it becomes clear that for most contaminants any level of emissions

255. *Id.* at 16.

256. *See* Condon, *supra* note 30, at 283. *See also* Victor Lichtinger, *NAFTA and the Environment: Five Year Later*, *in* FREE TRADE: RISKS AND REWARDS 222, at 223-24 (L. Ian MacDonald, ed., 2000).

257. David J. Blair, *Free Trade Versus the Environment in NAFTA*, *in* SURVIVING GLOBALISM: THE SOCIAL AND ENVIRONMENTAL CHALLENGES 158, 166 (Ted Schrecker ed., 1997).

258. *See* Knox, *supra* note 163, at 23.

259. *See* Condon, *supra* note 30, at 283.

260. *See id.*

261. John A. Barrett, Jr. *The Global Environment and Free Trade: A Vexing Problem and a Taxing Solution*, 76 IND. L.J. 829, 836 (2001).

262. *See* Condon, *supra* note 30, at 283.

poses a danger, the ultimate goal of environmental law should be, in a broad sense, the reduction of all emissions to a level as close to zero as possible."[263] Without any flexibility on standards of cleanliness, the end result becomes absurd: a standard designed to slow the rate of pollution instead keeps it steady despite the rising environmental risk.[264] The ambient standard does not represent a healthy environment, as intended by its initial imposition, "but rather represents the level of risk that the government will tolerate."[265]

The obligations imposed on NAFTA countries in Article 3 of the NAAEC form a stark contrast to such a result:

> Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws and regulations, each Party shall ensure that its laws and regulations provide for high-levels of environmental protection and shall strive to continue to improve those laws and regulations.[266]

The NAAEC, usually conciliatory in the terms it imposes on the member countries,[267] and consistent in its support for the sovereignty of each individual nation to adopt policies appropriate to its needs,[268] binds them to a "good faith" standard of imposing and improving environmental cleanliness domestically.[269] Article 3 is a trilateral, binding obligation to push towards cleaner standards.[270]

4. Myth 4: A Tough Stance Strengthens the Agency

In a very real sense, imposing sanctions puts the CEC and even the NAAEC itself at risk. The Agreement exists because a delicate balance has been struck between parties with vastly diverging interests.[271] NAFTA and the NAAEC, like all treaties, are also predicated on the signatory parties' interest in cooperating.[272] If the cooperation disappears, the agency may

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263. Barrett, *supra* note 261, at 836.

264. *See id.*

265. *Id.*

266. NAAEC Treaty, *supra* note 6, art. 3.

267. *See generally* Johnson, *supra* note 202.

268. *See id.*

269. *See id.*

270. *See id.*

271. *See* Johnson, *supra* note 2022, at 213. "Differences between the countries created challenging conditions ... [d]ifferences in language, culture, government systems, democratic sensitivities, public service interests and administrative practices all created a series of hurdles ...." *Id.*

272. *See id.*

become ineffective.

Member countries preserve this consensus by balancing deference to one another's judgment with a reluctance to substitute the judgment of the CEC.[273] The definition of "effective enforcement" in Article 45 of the NAAEC reflects this deference and reluctance:

> 1. For the purposes of this Agreement:
>
> A Party has not failed to "effectively enforce its environmental law" or to comply with Article 5(1) in a particular case where the action or inaction in question by agencies or officials of that Party:
>
> (a) reflects a reasonable exercise of their discretion in respect of investigatory, prosecutorial, regulatory or compliance matters; or
>
> (b) results from bona fide decisions to allocate resources to enforcement in respect of other environmental matters determined to have higher priorities;[274]

The essence of the NAAEC and the CEC is that their agendas are in fundamental conflict: environmental protection with economic growth, and cooperation and integration with national sovereignty.[275] The importance of NAAEC is that it actually succeeds in placing the two values of environmental protection and international cooperation on the same footing as economic growth and a nationalist agenda.[276] Unfortunately, because its foundations are consensus and cooperation, it almost removes enforcement as a feasible method of ensuring compliance.[277]

Frustrations that arise from this dichotomy are the bases for why some environmentalists have abandoned efforts pressing for increased enforcement power; moreover, some environmentalists have even lost interest in international environmental adjudication altogether.[278] This may be a change for the better. Adjudication and enforcement may be inadequate and ill-suited to deal with the challenge of promoting a cleaner Earth.[279] "[I]nternational adjudication has played a very limited role in promoting compliance in international environmental law."[280] The question then becomes: what alternatives are there to enforcement?

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273. *See id.*

274. NAAEC Treaty, *supra* note 6, art. 45(1).

275. *See* JOHNSON & BEAULIEU, *supra* note 20, at 35-37.

276. *See id.* at ch. 2.

277. *See id.* at 149.

278. *See* Knox, *supra* note 163, at 5-6.

279. *See id.* at 5.

280. *Id.*

IV. BEYOND THE COMPLAINTS: HIGHER PURPOSES OF THE CEC

While critics have made much of the limitations and difficulties facing this young agency, [281] they have yet to fairly assess its successes and long-term importance. The CEC is "an important experiment"[282] with a mandate that is "innovative, unprecedented and represents an important step towards more cooperative and integrated forms of transboundary environmental management."[283] The NAAEC created an independent agency[284] to address environmental detriment resulting from increased continental trade, without placing excessive restraints on trade.[285] It gave the CEC broad continental jurisdiction over environmental problems,[286] but gave it more power to manage than to enforce compliance.[287] Nonetheless, the most important feature of the "new approach to transboundary environmental management" is that it is trilateral.[288] As the embodiment of this approach, the CEC has a greater role to play in the environmental future of the continent; greater than that of a mere forum for dispute-resolution.[289] The CEC is also where NAFTA signatory nations build a consensus on minimum environmental standards, share science, technology, and resources to identify and treat environmental problems, and devise programs to educate the public about the environment in North America.[290] As a consequence of its diverse agenda, it has also become the emblem of a growing debate over whether the North American environment's purposes are better served, and problems better solved, by managerial methods or by stricter enforcement.

A. The Failings of Enforcement

While increased enforcement connotes a more enthusiastic commitment

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281. *See* Kass & McCarroll, *supra* note 47, at 3.

282. *Id.*

283. Mumme, *supra* note 5, at 253.

284. Because both Canada and Mexico are less powerful, prosperous, and influential than the United States, a major concern was that any North American Commission would be overrepresented by U.S. nationals. The text of the NAAEC prevents this by providing for an equal number of representatives from each of the NAFTA countries, serving on each of the branches of the CEC. *See* JOHNSON & BEAULIEU, *supra* note 20, at 9.

285. *See* RUGMAN ET AL., *supra* note 20, at 75.

286. *See* NAAEC Treaty, *supra* note 6, art. 14(2). *See also* Mumme, *supra* note 5, at 253.

287. *See* JOHNSON & BEAULIEU, *supra* note 20, at 149. *See also* Mumme, *supra* note 5, at 253.

288. Mumme, *supra* note 5, at 253.

289. *See id.* at 252-53.

290. *See* NAAEC Treaty, *supra* note 6.

to environmental issues, "even if it modifies the behavior of regulated entities, [it] is not always a good thing."[291] It may, in itself, be a less successful and less efficient approach to take.[292] First, there is the deceptive nature of statistics: while more enforcement activity may reflect that a tougher stance is yielding better results, it may equally reflect that the number of violations is on the rise.[293] Second, there is the issue of cost: enforcement may not be the most effective use of the limited resources available.[294] It may even cause some environmental detriment of its own.[295] Additionally, the limits to the effectiveness of adjudications and comparative advantages of a managerial approach, through flexibility and consensus-building, have longer lasting and more positive effects on environmental problems.[296] By concentrating on its function as an institution of environmental management rather than an enforcement agency, the CEC will better meet its goals of promoting a cleaner North American region, as mandated by the NAAEC.[297]

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291. Adler, *supra* note 164, at 61. While Adler was referring to American environmental enforcement, his arguments on the ineffectiveness and even collateral detriment of more stringent enforcement are equally applicable in the international context of the NAAEC and the CEC.

> It is possible to heighten the stringency of environmental enforcement, increase prosecutions, fines, and even jail terms under environmental laws, without significantly improving environmental quality. The amount of enforcement activity may indicate that more good is being done. It may also mean that there are more violations to punish. Enforcement statistics by themselves say very little about whether enforcement resources—public and private—are allocated in such a way as to maximize environmental protection.

Id. at 61-62.

292. *See id.*

293. *See id.*

294. *See id.* at 63.

295. *See id.* at 58-61. Some examples of this damage include the facilitation and encouragement of litigation over paperwork violations and permit excesses, without providing any incentive to investigate and detect new, unknown violations. This creates an incentive to build simple, inexpensive lawsuits for quick recoveries. Also, citizen-suit provisions create incentives for environmental plaintiffs to pursue their own interests, in the form of settlements, remediation projects, and attorneys' fees, or to pursue symbolic victories with value to the particular plaintiff. These are just a few of Adler's reasons to assert that the priorities of environmental litigation outfits and individual citizen-suit plaintiffs will not always align with the public's interest in greater environmental protection, and could impact overall goals of environmental quality.

296. *See id.* at 63.

297. *See* NAAEC Treaty, *supra* note 6, art. 1.

1. Limits to Adjudication

While one of the CEC's functions is to resolve transboundary environmental issues and to "adjudicat[e] claims of the systematic non-enforcement of domestic environmental laws by NAFTA states,"[298] if its sole purpose becomes adjudication of international environmental disputes, the North American environment is more likely to suffer.

Two schools of thought have arisen speculating why international adjudication is fundamentally unsuited for promoting compliance with international environmental law.[299] First, states are unlikely to employ such a tribunal.[300] Nations cannot be trusted to bring environmental causes of action against each other "for fear of jeopardizing other strategic or economic bilateral relationships."[301] Besides the possible strain on inter-nation relationships, bringing a formal complaint against another nation is also likely to invite unwanted attention to the complaining state and its own environmental record.[302] It could also result in the establishment of undesirable, binding international precedents.[303] The second school of thought is that traditional adjudication itself is limited in its ability to resolve international disputes.[304] It may be "too inflexible, backward-looking, and bilateral in its focus to successfully resolve disputes over interpretation and application of regulatory agreements"[305] and compliance can "best be promoted by non-confrontational, non-binding mechanisms that manage compliance rather than enforce it."[306]

While environmental NGOs and private parties do not have the same hesitations as nation-states towards filing formal complaints about non-compliance, there are nonetheless limitations to the effectiveness of adjudicating environmental claims.[307] Examining the issue of employing

298. Kass & McCarroll, *supra* note 47, at 3.

299. *See* Knox, *supra* note 163, at 7.

300. *See id.* at 7-8.

301. *See id.* at 8 (quoting David Wirth, *Reexamining Decision-Making in International Environmental Law*, 79 IOWA L. REV. 769, 779 (1994)).

302. *See id. See also* David K. Schorr, *NAFTA and the Environment: A Review of the Basic Issues*, *in* FREE TRADE: RISKS AND REWARDS 231 (L. Ian MacDonald ed., 2000).

303. *See* Knox, *supra* note 163, at 8.

304. *See id.* Knox attributes this idea to Abram Chayes and Antonia Handler Chayes. *Id. See also* CHAYES ET AL., *Managing Compliance: A Comparative Perspective*, *in* ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS 39, 54 (Edith Brown Weiss & Harold K. Jacobson eds., 1998); ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 205 (1995).

305. Knox, *supra* note 163, at 9.

306. *Id.*

307. *See id.*

citizen-suits as a means to environmental improvement, Jonathan H. Adler has helped debunk the myth that you can use adjudication and enforcement to sue your way to a cleaner planet.[308] Enforcement can be "both economically wasteful and even environmentally harmful,"[309] and "can also compromise efforts to improve environmental quality."[310] By creating a climate of distrust, enforcement raises two related problems. The first problem is one of dynamics: enforcement attacks the polluter instead of persuading him to adopt less harmful practices. The second related problem is one of credibility and legitimacy: what value do threats of added enforcement by an institution have without the capacity to execute them? Especially when "[t]here will undoubtedly be more violations than can be identified and prosecuted."[311] Additionally, setting a strict standard is problematic because it condones a degree of environmental detriment. "[I]t makes the individual polluter base compliance decisions upon what constitutes a technical violation, not what reduces actual environmental impacts [sic]."[312] This is not to say that citizen-suits are "inherently anti-environmental," but rather, that they "can exacerbate the existing failings of the current regulatory regime."[313]

It is because of these shortcomings that the CEC is mandated to "strengthen cooperation on the development and improvement of environmental laws, regulations, procedures, policies and practices," as well as to "enhance compliance with environmental laws" throughout the continent.[314] Recalling for a moment the economic importance of NAFTA, having created the world's largest single economic zone,[315] it seems unlikely that NAFTA countries will drag one another to a tribunal.[316] Given that NAFTA and the NAAEC are non-binding agreements, from which any of the Parties could voluntarily withdraw should relations sour,[317] they are unlikely to make use of the CEC as an international tribunal and sue one another while the world looks on.[318]

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308. *See generally* Adler, *supra* note 164.

309. *Id.* at 63.

310. *Id.* at 64.

311. *Id.* at 61.

312. *Id.* at 64-65.

313. *Id.* at 69.

314. NAAEC Treaty, *supra* note 6, art. 1(f)-(g).

315. *See supra* notes 31-36 and accompanying text.

316. *See* JOHNSON & BEAULIEU, *supra* note 20, at 122-23.

317. *See generally* NAFTA Treaty, *supra* note 12. *See also generally* NAAEC Treaty, *supra* note 6.

318. *See* Schorr, *supra* note 302, at 231.

2. Advantages of a Flexible Approach

Criticism of the role of enforcement should not be read as an appeal to eliminate the regulations and the citizen-suit system, which do yield benefits to environmentalists. In order to achieve the objectives set out in the NAAEC and address environmental problems, however, there are three good reasons to advocate a flexible approach. First, environmental success is measured in results, not by procedures. As David Adler points out, "[t]here is a growing consensus in environmental law that environmental regulations can better achieve their goals if they are more flexible. The EPA, for one, is stressing efforts to experiment with flexible compliance regimes that place environmental results over the technical terms of existing regulations."[319] Because the NAAEC's creation of the CEC is the first serious attempt at an inter-nation treaty intended to identify environmental problems and facilitate collaborative solutions,[320] it must follows procedures. Flexibility is essential to accommodate unforeseeable situations. Prolonged international cooperation is a relatively new idea and flexibility is the best way to solve the inevitable tribulations involved in this type of collaboration.[321]

The second reason to adopt a flexible approach is that identifying and responding to environmental problems requires heavy reliance on science, which is continually developing. As the science of the environment evolves, so must the rules. Preserving a "procedural openness" is the most cautious path for the CEC to take, preventing it from imposing too many restrictions on its own activity.[322]

The third reason to prefer a flexible approach to CEC procedure is the breadth of the organization's scope. The CEC will have to contend with environmental issues as they arise throughout an entire continent.[323] The scope of concerns included in its mandate is broad, the potential for damage is unpredictable in scope, and the effects could be permanent.[324] Furthermore, the degree of importance of each problem is difficult to establish. Even the slightest human impact upon an ecosystem can be termed detrimental; thus, the question is one of degree.[325] Thus, flexibility is the only viable option for an agency attempting to curb human impact on

319. Adler, *supra* note 164, at 66.

320. *See* NAAEC Treaty, *supra* note 6, pmbl.

321. *See* Thompson, *supra* note 1288, at 318.

322. *See infra* Part IV.B.2.

323. *See* NAAEC Treaty, *supra* note 6, pmbl.

324. *See id.*

325. *See* Knox, *supra* note 1633, at 21 (pointing out that the managerial approach to compliance rejects adjudication "as too awkward a tool to manage the fine points of compliance with detailed regulatory agreements").

an entire continent's environment.

3. Intra-Agency Flexibility and Consensus-Building

Flexibility should be visible not only in its program of projects, but at all levels of the CEC. In order to achieve its goal to be a "tri-national model of collaboration, [creating] consensus-based results,"[326] the CEC must use a flexible approach. The CEC's JPAC may be the optimal model for collaboration and consensus-building.[327] Consisting exclusively of professionals from the private sector,[328] the JPAC has been called "the most innovative institution" established by the NAAEC.[329] The JPAC members consider their mission an experiment:[330] "in effect, a model for the future in a process that is without precedent, and which presents great opportunity for cooperative progress."[331] Established to represent both the public voice on CEC matters and the politic-free expertise of the private sector, the JPAC advises the Council and the Secretariat in their deliberations, planning and activities.[332] As stated in 1994, the JPAC's "vision is to promote continental cooperation in ecosystem protection and sustainable economic development, and to ensure active public participation and transparency in the actions of the Commission."[333] They may, under Article 16 "provide advice to the Council on any matter within the scope of this Agreement" in order to assist in the preparation of a factual record—specifically, the scientific or technical issues.[334]

As evidenced by the political turmoil leading up to the passage of the NAAEC, politics can have a tremendous influence on environmental policy.[335] A precaution taken by the CEC to protect itself against political influence is that the JPAC consists of members without political

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326. NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION, *Joint Public Advisory Committee Vision Statement*, *at* http://www.cec.org (last visited Mar. 4, 2003) [hereinafter *Vision Statement*].

327. *See* Johnson, *supra* note 202, at 216.

328. *See* JPAC Guidelines, *supra* note 158. *See also* JOHNSON & BEAULIEU, *supra* note 20, at 139.

329. Kluwer Law International, *supra* note 22, at 108.

330. *See* JPAC Guidelines, *supra* note 158.

331. *Vision Statement*, *supra* note 326.

332. *See* NAAEC Treaty, *supra* note 6, art. 16. *See also* JOHNSON & BEAULIEU, *supra* note 20, at 139.

333. *Vision Statement*, *supra* note 326.

334. NAAEC Treaty, *supra* note 6, art. 16(4). *See also* HUFBAUER ET AL., *supra* note 36, at 21. "Between 1995 and 1999 the JPAC met more than 20 times and provided advice to the Council on over 40 occasions on a wide range of issues." *Id.*

335. *See* JOHNSON & BEAULIEU, *supra* note 20, at 131-36.

identities.[336] The JPAC members are professionals from the private sector who choose the Committee's own procedures, and solicit public input.[337] It is a mechanism that environmentalists can either be a part of, or simply use to voice their concerns directly to the public and the decision-making Council.[338] This point is expressed on their website as follows:

> While we come from three different nations, and have different institutional connections, we serve on the JPAC as individual citizens of the North American continent, joined in a commitment to preserving and enhancing our common environment and to achieving a sustainable society.
>
> JPAC will work to provide firm leadership and constructive contributions to build a trinational model of collaboration, consensus building, and consensus-based results. JPAC is, in effect, a model for the future in a process which is without precedent, and which presents a great opportunity for cooperative progress.[339]

The NAAEC guarantees that through the JPAC there will be meaningful public representation and participation in the CEC's resolutions and activities.[340] The JPAC also provides a framework for the intra-agency collaboration and consensus-building envisioned by the Agreement.[341] The creation of the JPAC, along with the rest of the CEC structure, also evidences NAFTA countries' preference for flexibility: an institutional framework that allows mutual participation between the Council, the Secretariat, the JPAC, and the public.[342]

Beyond the limits of adjudication and justifications for procedural flexibility, there are additional legitimate reasons to attempt compliance through consensus-building and environmental management rather than through enforcement.[343] One reason is that enforcement can "compromise efforts to improve environmental quality"[344] because it creates a climate of distrust.[345] "The risk of enforcement actions can discourage experiments with new ways to reduce environmental impacts."[346] This, in turn, can

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336. *See* NAAEC Treaty, *supra* note 6, art. 16, 17.
337. *See id.*
338. *See* JOHNSON & BEAULIEU, *supra* note 20, at 139.
339. *Vision Statement*, *supra* note 326.
340. *See* Johnson, *supra* note 202, at 216.
341. *See id.*
342. *See id.*
343. *See* Knox, *supra* note 163, at 21-22.
344. Adler, *supra* note 164, at 64.
345. *See id.*
346. *Id.*

"retard environmental progress."[347]

B. The CEC: Pooling the Resources

Another higher purpose of the CEC, beyond enforcement, is to pool resources. Given the practical and theoretical breadth of the CEC's continental mandate, the continual development of its scientific understanding of the environment, [348] and the increasingly rapid rate of environmental damage in North America, the size of the solution should correspond to the size of the problem. The CEC has been trying to meet the continent's environmental challenges.[349] For the CEC to address these problems effectively, it requires the greatest base of resources possible.[350] Since 1995, the CEC has been pooling money, science, and technology to help resolve environmental problems in North America.[351] The peripheral effect of this sharing of knowledge and funding is that NAFTA countries build a consensus on currently acceptable environmental standards and develop joint plans for environmental improvement.[352]

1. North American Money to Fund North American Solutions

There are several advantages to the CEC pooling NAFTA countries' money to address continental environmental problems. The first of these is that money is set aside for the purpose of trans-border environmental problems.[353] While there were precedents for bilateral agreements and treaties, the NAAEC is the first trilateral agreement that addresses trans-border environmental issues.[354] Through Article 43 of the NAAEC,[355] the North American Fund for Environmental Cooperation (NAFEC) gives the CEC the budget to effectuate real change.[356] There are several advantages to the Fund.[357] Having Canada, Mexico, and the United States share the cost of financing its activities protects the CEC's ability to continue its continental agenda.[358] It also ensures that resources are shared evenly

347. *Id.*
348. *See* Mumme, *supra* note 5, at 253.
349. *See id.*
350. *See id.* at 253-55.
351. *See generally* HUFBAUER ET AL., *supra* note 36, at 21-37.
352. *See infra* Part IV.C.3.
353. *See generally* HUFBAUER ET AL., *supra* note 36, at 21-37.
354. *See id.*
355. *See* NAAEC Treaty, *supra* note 6, art. 43.
356. *See* HUFBAUER ET AL., *supra* note 36, at 21.
357. *See* JOHNSON & BEAULIEU, *supra* note 20, at 144-46.
358. *See id.*

among the three countries.[359]

The operating budget, however, has been criticized for several reasons. The chief complaint is that the CEC's modest budget is too small to be of any significance.[360] In 1999, each country contributed $3 million, an amount equal to 0.04% of the United States Environmental Protection Agency's budget, 0.75% of the Environment Canada budget, and 0.34% of Mexico's *Secretaría de Medio Ambiente, Recursos Naturales y Pesca*[361] budget.[362] The CEC's budget represents merely an "insignificant fraction"[363] of the budget accorded to domestic environmental agencies, especially in comparison to the commercial value of NAFTA. As previously stated, NAFTA forged a $300 billion trade partnership,[364] and yet only provides the CEC with $3 million[365] to monitor the effects of the increase in trade—a gross disproportion. Another criticism is that the NAAEC gives member countries the right to refuse to contribute.[366] While such an event has yet to occur, a dispute between members could result in one country revoking its governmental and financial support.[367] Such a decision would devastate the CEC because each member is responsible for one-third of the organization's operating budget.[368] Given the small budget, any reduction would be seriously detrimental to the CEC's operations.[369] "Any NAFTA government has the 'ability to curtail the operation of the CEC by reducing or withholding financial support.'"[370] The NAFEC has been criticized because of this disproportionate budget with respect to the size of the environmental problems and because of the lack of binding obligations on the member countries to fund the CEC's activities.[371]

The criticisms, however, fail to take into account the CEC's accomplishments since its inception in 1995. While Article 43 of the NAAEC obligates the member countries to contribute a minimum of $1 million dollars a year,[372] it merely sets a statutory minimum to fund its programs, grants, and clean-ups. Since 1995, these contributions have

359. *See* HUFBAUER ET AL., *supra* note 36, at 21.
360. *See id.*
361. Secretary of Environment, Natural Resources, and Fishing.
362. *See* HUFBAUER ET AL., *supra* note 36, at 21-22 (figures are for 1999).
363. *Id.* at 21.
364. *See* JOHNSON & BEAULIEU, *supra* note 20, at 12.
365. *See* HUFBAUER ET AL., *supra* note 36, at 21-22 (figures are for 1999).
366. *See* NAAEC Treaty, *supra* note 6, art. 43.
367. *See* JOHNSON & BEAULIEU, *supra* note 20, at 126-30.
368. *See id.*
369. *See id.*
370. HUFBAUER ET AL., *supra* note 36, at 21.
371. *See* Blair, *supra* note 257, at 169-70.
372. *See* HUFBAUER ET AL., *supra* note 36, at 21.

climbed from an operating budget of $9 million in 1999, to one of $13.9 million in 2002.[373] The money funds CEC projects such as grants for community-based environmental projects.[374] In addition to community-based projects, one of the CEC's chief concerns has been its capacity-building initiative.[375] The NAFEC also established the North American Development Bank, which funds environmental projects and infrastructure for the "enormous problems associated with the environmentally overstressed border region" between Mexico and the United States.[376]

Article 43 of the NAAEC establishes a funding framework. The $1 million dollars mandated by Article 43 is a statutory minimum rather than a cap.[377] The CEC's budget may pale in comparison to the value of NAFTA and the budgets of domestic environmental agencies, but as the CEC has continued to establish itself, the continued rise of annual contributions[378] indicate that its efforts have been appreciated and its initiatives welcomed. The statutory minimum merely serves as a guarantee that NAFTA countries will contribute annually, will contribute equally, and will protect the CEC's independence to concentrate on the projects that most require its attention: "continental cooperation or collective action on transnational issues."[379] Thus, the benefits and burdens of the NAFEC are shared evenly among NAFTA countries.[380]

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373. *See* NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION, *2002-2004 Proposed Program Plan and Budget*, *at* http://www.cec.org/files/PDF//3YP02-E3r_EN.pdf (last visited Apr. 22, 2003) [hereinafter *Program Plan & Budget*].

374. *See, e.g.*, NORTH AMERICAN COMMISSION FOR ENVIRONMENTAL COOPERATION, *Annual Report 2000* at 24-25, *at* http://www.cec.org/files/PDF/PUBLICATIONS/AR00-e.pdf (last visited Apr. 22, 2003).

375. *See* Johnson, *supra* note 202, at 217. "Particular attention has been given to enhancing capacities for pollution prevention, environmental monitoring and law enforcement in Mexico. Elements of capacity building are present in almost every CEC project through initiatives that include data sharing, training, and the exchange of best practices." *See also* Kluwer Law International, *supra* note 22, at 109.

376. Kluwer Law International, *supra* note 22, at 109. "The Border Environmental Cooperation Commission is intended to strengthen environmental cooperation between Mexico and the United States and ... establish a variety of cooperative environmental projects and provide technical assistance for environmental matters" (especially for the Mexicans, whose technology in the environmental area lags behind that of the United States). *Id.*

377. *See* NAAEC Treaty, *supra* note 6, art. 43.

378. *See supra* notes 31-36, 373 and accompanying text.

379. *See* Johnson, *supra* note 202, at 217.

380. *See* HUFBAUER ET AL., *supra* note 36, at 21 (citing NAAEC Treaty, *supra* note 6, art. 43).

2. Sharing and Developing Science and Technology

The CEC's money, however, is only well-spent if it effectively addresses the broadest base of continental environmental problems possible. This mandate requires significant efforts in the development of scientific information and technological solutions to North America's environment. It is difficult to find problems that are much broader in scope than pollution and resulting environmental damage. "Many forms of pollution are not contained by national borders but rather go where the wind carries them, sometimes literally."[381] Pollution has also traditionally displayed a marked lack of respect for state borders.[382] "[C]haracteristic of environmental problems is the way in which, once they have occurred, their borderless, complex and slow-moving nature renders states weak in their attempts to cope with them."[383] With individual nations unable to resolve these problems alone, the CEC, as a supranational institution can step in.

As a focal point for the emergent scientific expertise and technology on 'continental' environmental matters, the CEC is the most capable institution to address these issues.[384] Whether the solution is preventive or restorative, a ban or a clean-up, both the NAAEC and NAFTA have given the CEC the specific authority to implement it.[385] While "Article 904(4) [of NAFTA] prohibits the implementation of environmental standards in ways that create unnecessary obstacles to trade, ... Article 2101 allows the use of trade-restrictive measures necessary to protect human, animal or plant life or health."[386] In addition to problem-solving in drastic scenarios, however, the CEC's efforts to conduct studies and gather data are providing the continent with unprecedented and invaluable environmental information.[387] The CEC is also persistently implementing programs to improve the quality of the North American environment.[388] Interestingly, these efforts by the CEC have evaded criticism.

3. Uniting National Governments, the Public, Trade and the

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381. John A. Barrett, Jr., *The Global Environment and Free Trade: A Vexing Problem and a Taxing Solution*, 76 IND. L.J. 829, 829 (2001).

382. *See id.*

383. Jennifer Clapp, *Threats to the Environment in an Era of Globalization: An End to State Sovereignty?*, *in* SURVIVING GLOBALISM: THE SOCIAL AND ENVIRONMENTAL CHALLENGES 127 (Ted Schrecker ed., 1997).

384. *See* HUFBAUER ET AL., *supra* note 36, at 22-26 (listing the Commission's five budget priority areas, three of which involve research, data gathering, and plans development of continental environmental projects between 1996 and 1998).

385. *See id.*

386. *Id.* (emphasis removed).

387. *See* NAAEC Treaty, *supra* note 6, art.13.

388. *See infra* Part IV.C.

Environment

The greatest potential for improvement in the quality of the North American environment is the development of a comprehensive environmental program for the continent.[389] This can only happen through persistent efforts to unify the standards and unite the resources available in North America.[390] The CEC continues to embody consensus-building on three levels: it is the first permanent trilateral committee,[391] the public has access to it, and it is the first agency instituted by treaty to concern itself with issues of trade and the environment.[392]

The CEC develops a continental program of environmental management and takes a trilateral approach to environmental problems.[393] The goal of the NAAEC is to overcome the disparities between NAFTA countries that affect their domestic environmental policies.[394] Neither NAFTA nor the NAAEC was intended "to be 'too political' if there was to be full cooperation between the member nations."[395] Consensus was a "central feature" of these agreements on trade and the environment, precisely because of the fear that domestic politics would play "too big a role" or that one country would dominate the policy of another.[396]

The CEC's founding predicate—that big problems require big solutions—has been criticized in the U.S. by those who advocate the decentralization of environmental programs.[397] Large-scale programs are thought by some to be "inefficient, overly rigid and unnecessarily complex, as well as impos[ing] excessive costs to generate meager returns."[398] The enthusiasm for decentralization often results from the desire to produce simpler, less expensive solutions to environmental problems—saying big programs "are no longer capable of delivering environmental progress at an acceptable cost."[399] The strongest argument in favor of decentralization is that large-scale programs can deprive state and local governments of

389. *See Program Plan & Budget*, *supra* note 373.

390. *See* JOHNSON & BEAULIEU, *supra* note 20, at 47.

391. *See* RUGMAN ET AL., *supra* note 20, at 77, 81-82. *See also* Kass & McCarroll, *supra* note 47, at 3.

392. *See* JOHNSON & BEAULIEU, *supra* note 20, at 138-39.

393. *See* Johnson, *supra* note 2022, at 215

394. *See* JOHNSON & BEAULIEU, *supra* note 20, at 145.

395. Kluwer Law International, *supra* note 22, at 103.

396. *Id.*

397. *See* Jonathan H. Adler, *Let 50 Flowers Bloom: Transforming the States into Laboratories of Environmental Policy*, 31 ENVTL. L. REP. 11284 (2001).

398. *Id.*

399. *Id.*

"sufficient flexibility in tailoring their programs to local needs."[400]

The CEC tries to respond to these concerns by encouraging public participation in its processes.[401] This expansion of the role of public input, through the mechanism of the JPAC,[402] is the second source of CEC consensus-building. While environmental groups in Canada and the United States have grown into a political force to be reckoned with,[403] Mexican environmentalists often complained of the lack of adequate access to government prior to the passage of the NAAEC and the creation of the CEC.[404] The JPAC has held public consultations each year in the three countries, and between 1995 and 1999, it organized over thirty international meetings.[405]

Additionally, CEC attempts to unite the often diverging interests of the environment and trade.[406] "There are essentially two sides to the trade-environment issue. From an environmentalist's perspective, the central issue is how to make trade environmentally friendly. From a free-trader's perspective, the primary focus is on making environmental regulations trade-friendly."[407] In practice, the monetary incentive of a potential increase in trade is the greatest disincentive to enforce environmental laws, and the strongest argument against local environmental programs.[408] Local interest is the reason that border areas have become degraded, as local programs have tolerated environmental destruction in return for economic gain. This process is commonly referred to as the "race to the bottom," in which one state—a self-appointed "dirty state" or "pollution haven"—decides it may observe "looser" environmental standards than the others.[409] Without uniformity and minimum standards of compliance, the results are catastrophic.[410] It is precisely this "tailoring" of environmental programs by local interests that has necessitated federal and supranational institutions to step in and fashion programs that make environmental interests a priority. And as evidenced by passage of NAFTA and the NAAEC, it is impossible for a state to "dirty" itself in isolation because the neighboring

400. *Id.*

401. *See* JOHNSON & BEAULIEU, *supra* note 20, at 138-40.

402. *See id.*

403. *See id.* at 139 n.67.

404. *See* Condon, *supra* note 30, at 284.

405. *See* Johnson, *supra* note 202, at 214.

406. *See* JOHNSON & BEAULIEU, *supra* note 20, at 37-40.

407. Condon, *supra* note 30, at 282.

408. *See* Sweedler, *supra* note 108, at 255-79 (discussing effects local interests have on the U.S.-Mexican border).

409. Knox, *supra* note 163, at 54.

410. *See* Sweedler, *supra* note 108, at 255-79.

states also suffer the consequences of its actions.[411]

A collateral effect of the CEC's consensus-building efforts is that the environmental ethic developed at the supranational level has affected domestic environmental policy.[412] The best example of this is the effect that NAFTA and the NAAEC have had on Mexico.[413] "International influences through the consummation of NAFTA have provided the incentive to restructure government institutions that enforce domestic standards for environmental protection."[414] Observers have noted this paradox, calling it,

> interesting considering that international influences, such as trade agreements, have often been criticized for accomplishing nothing to strengthen environmental protection. This is not the case with NAFTA, as Mexico's acceptance of NAFTA undoubtedly has led to a higher level of environmental protection than existed prior to its enactment, even though Mexican politicians and elites accepted the agreement by primarily considering the economic benefits that would accrue by consummating the total package.[415]

The CEC, through the NAAEC, has been said to "have introduced a form of *hard* international law whereby the Mexican government has an external obligation to abide by treaty terms."[416]

By all accounts, the effects of NAFTA and the NAAEC on Mexico have been impressive.[417] If the change in Mexican domestic environmental policy is any indicator of the potential of consensus-building in a supranational forum, the environmental institutional changes "will likely be profound in the long-term, particularly when considering the relative position from which Mexico began."[418]

In short, the CEC serves an invaluable function by pooling the resources of North America to address environmental problems. The practical and theoretical breadth of the CEC's continental mandate makes its efforts—to fund, develop science and technology, and build a true North American consensus on how best to resolve existing and future environmental

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411. *See* NAAEC Treaty, *supra* note 6, pmbl.

412. *See* Robert Bejesky, *An Analytical Appraisal of Public Choice Value Shifts for Environmental Protection in the United States and Mexico*, 11 IND. INT'L & COMP. L. REV. 251, 286 (2001).

413. *See id.*

414. *Id.* at 285-86.

415. *Id.* at 286.

416. *Id.* at 282.

417. *See id.*

418. Bejesky, *supra* note 413, at 282.

damage—the only reasonable solution appropriate to the problem.[419] Additionally, in trying to meet the continent's environmental challenges, the CEC's efforts have produced the collateral effect that the least environmentally diligent of NAFTA countries has improved its domestic standards of environmental policy and enforcement.[420] These effects have prompted observers to comment that, "NAFTA and its environmental protection provisions will provide a meaningful example to other regions of the world seeking to more fully unite domestic economic systems, despite existing disparities between national positions ...."[421]

C. The CEC as Environmental Educator

Realistically, education is the fundamental requirement for unifying the standards of cleanliness and generally improving environmental conditions throughout North America. As the quality of science and technological information about the continent improve and are disseminated, people begin to understand the consequences. The result is an increase in public and political support for environmental improvement. This education must happen at several different levels: the experts, the private or business interests, and the general public.

1. Fostering Research

Still in its early years as a supranational institution, the CEC has had to begin at the beginning and conduct research on the state of the continent in order to determine how best to address North American environmental issues.[422] "Documenting and researching issues is key to the development of a common understanding of specific policy challenges. It opens doors for trilateral strategies and minimizes the likelihood of disputes."[423] As a result, the CEC has focused its energies on becoming "an information hub and an important body for research and policy analysis."[424]

Despite the difficulties of its first few years, the CEC's efforts were impressive.[425] Between 1995 and 1998, the CEC completed sixty-five projects in six program areas.[426] It has "proven expertise in ... a wide range of continental environmental issues."[427] Among its North American

419. *See supra* Parts IV.B.1-2.
420. Bejesky, *supra* note 413, at 282.
421. *Id.* at 286.
422. *See* Johnson, *supra* note 202, at 215.
423. *Id.*
424. *Id.*
425. *Id.* at 214.
426. *Id.*
427. *Id.*

accomplishments, the CEC has developed: a considerable body of research (including a number of publications), a map of eco-regions, information networks on biodiversity and birds, and a list of conservation areas of bird species.[428] The CEC also published annual reports on air pollutants and set up a website examining air quality.[429]

In addition, Article 13 provides for the CEC to initiate independent investigations and report on issues within the broad scope of its work program.[430] One such report was prepared in 1995, after thousands of birds were killed at the Silva Reservoir in Gunajuanto, Mexico.[431] The CEC released another report on pathways for air pollutants in 1997.[432] Another initiative is still underway to assess water use in the San Pedro Riparian Conservation area along the Mexico-Arizona border.[433]

2. Educating the Private Sector

The best argument for the need to educate the private sector is the difficulties and limitations inherent in enforcement.[434] Because the CEC must address signatory countries for their failure to effectively enforce their own environmental laws, individuals and businesses are shielded from environmental complaints.[435] The CEC cannot reach out to the individual North American business that is out of compliance with environmental law.[436] The only recourse is to promote environmental objectives, implement cleaner technologies, and provide incentives for businesses to become "greener."[437] The CEC, as a supranational institution, may be the only agency capable of presenting environmentally-sound strategies and

428. *See* Johnson, *supra* note 202, at 214-15.

429. *See id. See also* NORTH AMERICAN COMMISSION ON ENVIRONMENTAL COOPERATION, *Cooperation on North American Air Quality Issues*, *at* http://www.cec.org/pubs_docs/documents/index.cfm?varlan=english&ID=53 (last visited Apr. 22, 2003).

430. *See* NAAEC Treaty, *supra* note 6, art.13. *See also* Johnson, *supra* note 202, at 215.

431. *See* Johnson, *supra* note 202, at 215. *See also* SECRETARIAT OF THE COMMISSION FOR ENVIRONMENTAL COOPERATION (CEC), *CEC Secretariat Report on the Death of Migratory Birds at the Silva Reservoir (1994-95)*, *at* http://www.cec.org/files/PDF//silvae_EN.pdf (last visited Apr. 22, 2003).

432. *See* Johnson, *supra* note 202, at 215. *See also* SECRETARIAT OF THE COMMISSION FOR ENVIRONMENTAL COOPERATION (CEC), *CEC Secretariat Report on the Death of Migratory Birds at the Silva Reservoir (1994-95)*, *at* http://www.cec.org/files/PDF//silvae_EN.pdf (last visited Apr. 21, 2003).

433. *See id.*

434. *See supra* Part III.

435. *See* JOHNSON & BEAULIEU, *supra* note 20, at 147.

436. *See* RUGMAN ET AL., *supra* note 20, at 75.

437. *See* HUFBAUER ET AL., *supra* note 36, at 42-44.

programs to trans-national corporations because it is the only institution mandated to protect the environmental quality of the entire continent.[438]

3. Educating the Public

Of course, true change is rare without public pressure, and there is little use in improving enforcement powers and procedures until the public validates the environmental cause. Two things must happen before the CEC has fulfilled its mandated responsibility to the public. First, the CEC must educate the public about the present and future challenges facing the North American environment. As the CEC develops their own scientific knowledge about the North American environment, so too must they disseminate that knowledge and raise public awareness about the environmental challenges to come.[439] Moreover, in educating the public, the CEC can help develop an environmental ethic, which has until now been sadly lacking.[440] Second, the CEC must improve its processes to ensure that there is a stable framework for public participation in its activities.[441] A large part of the CEC's legitimacy rests on the degree of public involvement and the transparency of its activities.[442] These two responsibilities to the public are the foundations of consensus and the CEC must protect them.

In 1998, an Independent Review Committee studied the CEC to ensure that the public has access to its activities and processes.[443] The IRC report reached some disappointing conclusions about the nature of public participation in the CEC's activities, but the CEC has been making progress since that time.[444] Most of the criticism was due to the lack of CEC procedures for integrating public participation into their activities.[445] While acknowledging "the CEC's impressive efforts at fostering public participation," the IRC found that the lack of a framework to integrate participation resulted in the "haphazard functioning of this process."[446] In response, the JPAC produced a memorandum of advice to the Council on how better to integrate public participation, but still needs to state a clear strategic vision on the subject.[447] The CEC has also issued dozens of

438. *See* Kalas, *supra* note 7, at 191-95.
439. *See* Johnson, *supra* note 202, at 215.
440. *See* Thompson, *supra* note 128, at 313.
441. *See* Johnson, *supra* note 202, at 216.
442. *See* NAAEC Treaty, *supra* note 6, pmbl.
443. *See* Johnson, *supra* note 202, at 216.
444. *See id.*
445. *See id.*
446. *Id.*
447. *See generally* JOINT PUBLIC ADVISORY COMMITTEE (JPAC) OF THE COMMISSION

publications and established a web site that includes an environmental law database with hundreds of legal references, a list-service and a regular newsletter.[448] These measures, while helpful, only serve to provide access. What remains to be done is the more difficult task.

The real challenge is simply raising awareness and promoting an environmental ethic to the North American public. There is no purpose in addressing the compliance of nations and private parties unless the public is aware of and supportive of these laws; particularly in the era of NAFTA, the NAAEC, increasing continental integration, and globalization.

> [T]he biggest difficulty remains the lack of political will to ensure that environmental issues are given due consideration when the economic benefits, which trade is supposed to provide, are pursued. The need to move toward higher standards, rather than the lowest common denominator, is still paramount.[449]

Of all the responsibilities mandated by the NAAEC, this will be the CEC's greatest challenge, as the institution's prominence grows and its initiatives mature.[450]

Despite its turbulent early years,[451] the CEC has had successes as well as a long-term importance. It has graduated from "an important experiment"[452] to an independent agency[453] whose purpose is to address environmental detriment throughout the continent, not only that which results from free trade.[454] The CEC's broad continental jurisdiction has more authority to manage environmental problems than to enforce compliance.[455] As the embodiment of the new trilateral approach, the CEC has a greater role to play in the environmental future of the continent than that of mere adjudicator.[456] The CEC is building a North American

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FOR ENVIRONMENTAL COOPERATION (CEC), *Follow-Up to the Four-Year Review of the North American Agreement on Environment Cooperation: The Report of the Independent Review Committee* (May 8, 1999), *at* http://www.cec.org/files/PDF/COUNCIL/sr98-00e_EN.pdf (last visited Apr. 21, 2003).

448. *See id. See also* North American Commission on Environmental Cooperation, *Publications and Information Resources*, *at* http://www.cec.org/pubs_info_resources/databases/index.cfm?varlan=english (last visited Apr. 22, 2003).

449. Thompson, *supra* note 128, at 312-13.

450. *See id.*

451. *See* Kass & McCarroll, *supra* note 47, at 3.

452. *Id.*

453. *See* JOHNSON & BEAULIEU, *supra* note 20, at 9.

454. *See* RUGMAN ET AL., *supra* note 20, at 75.

455. *See* NAAEC Treaty, *supra* note 6, art. 14(2). *See also* JOHNSON & BEAULIEU, *supra* note 20, at 149; Mumme, *supra* note 5, at 253.

456. *See* Mumme, *supra* note 5, at 252-53.

consensus on minimum environmental standards to better identify and treat environmental problems and to educate the public.[457] For all of these reasons, the CEC is an example of how the needs of the North American environment are better met and its problems are better solved by managerial methods and not by stricter enforcement.

V. CONCLUSION

This Note began by stating that the preservation, protection, and restoration of the environment may be the single greatest challenge that humans will face. The CEC's ability to promote compliance with international environmental law is of paramount importance in that process. Moreover, as an institution of international environmental cooperation, the CEC extends unprecedented opportunities to environmentalists, both now and in the future. While its utility as an international tribunal is limited because it provides "little opportunity to obtain redress for harms suffered,"[458] the CEC's role as a North American agency of environmental enforcement is not the greatest contribution that it has to make.[459] To fulfill its mandate of fostering environmental compliance and improvement throughout North America, the CEC will better achieve these ends through cooperation, consensus-building, and a managerial approach.

Commentators have forecasted that the CEC will be expanded to include the entire hemisphere in the coming decade:[460] from three countries to thirty. This possibility means that the supranational institution's ability to build consensus between its member countries and provide a meaningful forum for regional environmental challenges will push its abilities even further than anticipated by the NAAEC. "[A]s the only game in town, it may yet prove a useful precedent, or a viable foundation, for an expanded Environmental Commission of the Americas."[461] The environmental challenges to come will push every nation's abilities to the limit, and no one nation can meet this challenge alone.

Laura C. Bickel

457. *See id.*

458. *See* Kalas, *supra* note 7, at 191-92.

459. *See supra* Part IV.

460. *See* Kass & McCarroll, *supra* note 47, at 3.

461. *See* Kass, *supra* note 62, at C5.

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The ICTY at Ten: A Critical Assessment of the Major Rulings of the International Criminal Tribunal Over the Past Decade: Foreword

Michael P. Scharf *

Ten years ago, on May 25, 1993, the United Nations Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY), the first international criminal court since the World War II Nuremberg and Tokyo Tribunals. The success of the ICTY led to the establishment of the International Criminal Tribunal for Rwanda in 1994, and according to the President of the ICTY, Judge Theodor Meron, these two tribunals have already produced more international criminal law precedent than all of the previous international and domestic war crimes cases combined.

In honor of the tenth anniversary of the founding of the Yugoslavia Tribunal and in anticipation of the opening of the new permanent International Criminal Court, the New England School of Law's Center for International Law and Policy hosted a major international conference entitled "The ICTY at Ten: A Critical Assessment of the Major Rulings of the International Criminal Tribunal over the Past Decade," which featured international prosecutors, defense counsel, judges, diplomats, and scholars. The conference presentations were divided into six panels: (1) An Overview; (2) The Substantive Law; (3) Due Process; (4) The Role of Defense Counsel; (5) Defenses; and (6) The Big Picture. This volume of the New England Law Review contains a dozen articles generated by that Conference, which we believe represent a significant contribution to the literature about the Yugoslavia Tribunal and international criminal law and

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procedure. The authors of these articles can be characterized as "critical supporters" of the ICTY, offering candid critiques of different aspects of the Tribunal's jurisprudence to promote continued improvement of the ICTY and its successor, the International Criminal Court.

It is particularly appropriate that the New England School of Law's Center for International Law and Policy should have undertaken this project. In 1996, as the then Director of the Center, I entered into a unique arrangement with Richard Goldstone, the Prosecutor of the Yugoslavia Tribunal, under which New England School of Law students under my supervision, would provide legal research and analysis to the war crimes prosecutor on issues pending before the tribunal. In 1997, the program was expanded to render assistance to the Office of the Prosecutor of the Rwanda Tribunal. Sponsored by a multi-year grant from the Open Society Institute (George Soros Foundation), this program has to date provided more than 100 legal memoranda and hundreds of thousands of pages of supporting research to the international tribunals. With the permission of the office of the international prosecutor, the memos are available on the Internet at www.nesl.edu/center/wcmemos.

An Overview: Former State Department Attorney-Adviser, Geoff Watson, who is currently a Visiting Professor at George Washington University School of Law, was in the Security Council chamber, sitting behind U.S. Representative Madeleine Albright, when the Council voted to establish the Yugoslavia Tribunal. His article, "The Changing Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia" tells the story of the Tribunal from birth through infancy, focusing especially on the ICTY's responses to the initial challenges that it faced. Reviewing the Tribunal's early case law, Professor Watson finds the ICTY's boldness striking for such a young international institution. As Professor Watson points out, "the Tribunal was only two years old when it passed judgment on its creator, the U.N. Security Council, [and] at age four, the Tribunal took on its aging cousin, the International Court of Justice."

The second article, "Legitimacy and the Expanding Power of the ICTY," by Gregory Lombardi, a Human Rights Fellow at Columbia University Law School who previously worked as a Research Assistant at the International Criminal Tribunal for Rwanda, examines how the ICTY has expanded its powers and jurisdiction beyond the bounds of its Statute. Focusing on several key cases, Lombardi demonstrates that the Tribunal has extended its power beyond the confines of its Statute in three ways: first, by claiming inherent authority flowing from sources outside its Statute; second, by claiming that it could ignore the Statute in appropriate circumstances to achieve fairness; and third, by claiming to be acting with the tacit approval of the Security Council.

The Substantive Law: In the third article, Dr. Kelly Askin, Director of the International Criminal Justice Institute in Washington, D.C., offers her "Reflections on Some of the Most Significant Achievements of the ICTY." In addition to the Judgments delivered by the Trial and Appeals Chambers in two dozen cases, Dr. Askin points out that thousands of pre-trial, trial, and post-trial decisions have been rendered by the ICTY, ranging from contesting appointed counsel, to challenges to the form and substance of the indictment, to requests by detainees for pre-trial release, to requests for protective measures for witnesses, to plea agreements. Dr. Askin's article is a superb tour de horizon of the ICTY's most important decisions, which have laid the foundations for its subsequent jurisprudence.

Due Process: I authored the fourth article, "The Legacy of the Milosevic Trial." The trial of Slobodan Milosevic, the former leader of Yugoslavia, was the case that the Tribunal was built for; every prior decision was just a warm up act. It is often said that while courts try cases, cases also try courts. This has proven to be particularly true with respect to the Milosevic trial, since Milosevic's primary strategy has been to challenge the Yugoslavia Tribunal's legitimacy and impartiality at every turn, rather than to seek an acquittal through conventional tactics. Examining the major developments during the Milosevic trial, as well as a series of public opinion polls taken in Serbia at various stages of the proceedings, the article explores the question of whether history will remember Milosevic as a victim of victor's justice, a scapegoat tried in a show trial before a one-sided court; or will the Milosevic trial be seen as fair and free of political influence, and its judgment supported by credible evidence.

The fifth article, written by Dr. Goran Sluiter of Utrecht University and judge at the Utrecht District Court, is entitled "International Criminal Proceedings and the Protection of Human Rights." In it, Dr. Sluiter argues that the ICTY is bound by international human rights law, especially with respect to the rights of the accused. His article demonstrates that while the Tribunal initially demonstrated a reluctance to apply human rights treaty provisions and customary international law principles that were not explicitly codified in its Statute and Rules, subsequent decisions have displayed an ever increasing tendency to rely on sources of human rights law outside the Statute and Rules of Procedure and Evidence.

The Role of Defense Counsel: Mark Ellis, the Executive Director of the International Bar Association, authored the sixth article, "The Evolution of Defense Counsel Appearing Before the International Criminal Tribunal for the Former Yugoslavia." In his previous capacity as Executive Director of the American Bar Association's CEELI program, Mr. Ellis provided training to defense counsel in the ICTY's very first case. In his article, Mr. Ellis explains that in the early years of the ICTY, addressing the needs of the defense counsel were not a priority for the fledgling tribunal, but that

issues pertaining to the defense counsel slowly gained greater importance. Mr. Ellis identifies the many improvements that were incrementally made, culminating in the recent formation of the Association of Defense Counsel of the ICTY.

In the seventh article, "The ICTY and Defense Counsel: A Troubled Relationship," David Tolbert delves more deeply into some of the problems alluded to in the Ellis piece. Mr. Tolbert, now Executive Director of ABA-CEELI, served as Chef de Cabinet to the President of the ICTY and as Senior Legal Adviser to the Registrar of the Tribunal. Mr. Tolbert's article offers a unique "insider's perspective" on (1) problems relating to the choice and qualifications of counsel; (2) the severe lack of training of defense counsel; (3) serious concerns arising from the payment of counsel, including so-called "fee-splitting"; (4) questions relating to discipline; and (5) the establishment of an effective bar association for defense counsel. While Mr. Tolbert agrees with Mr. Ellis that there have been improvements in these areas, Mr. Tolbert cautions that "real and serious issues relating to defense counsel remain."

Defenses: The eighth article, provocatively titled "The Soldier's Obligation to Die When Ordered to Shoot Civilians or Face Death Himself," by Professor Valerie Epps of Suffolk University Law School, focuses on the inter-relationship between the defenses of duress and obedience to orders. This article offers a pointed critique of one of the most controversial of the ICTY's judgments: Prosecutor v. Drazen Erdomovic. As a young foot soldier in the Bosnian Serb army, Erdomovic had been ordered to shoot hundreds of Bosnian Muslim civilians taken from the UN safe area of "Sebrenica" in 1995. When Erdomovic initially balked at the order, his superior officer told him that he had a choice, he could shoot, or be shot. Professor Epps takes the Tribunal to task for rejecting Erdomovic's defense of duress under these circumstances, suggesting that in its quest to establish accountability for atrocities, the Yugoslavia Tribunal has neglected to recognize a legitimate defense.

The ninth article, "Mens Rea and the International Criminal Tribunal for the Former Yugoslavia," is written by William A. Schabas, Director of the Irish Centre for Human Rights at the National University of Ireland in Galway, and a member of the Truth Commission for Sierra Leone. The concept of mens rea, which literally means "guilty mind," generally requires proof of guilty intent or knowledge as a predicate for a conviction. As Professor Schabas explains, the ICTY applies two exceptions to the mens rea requirement: The first, which flows from the provisions of the tribunal's Statute, is known as command responsibility: a commander can be convicted on the basis of negligent failure to prevent his subordinates from committing war crimes. Professor Schabas argues that the ICTY may in some cases have gone too far in its application of this principle. The

second exception, which was devised by the judges without statutory support, is what the ICTY calls "joint criminal enterprise." Professor Schabas maintains that convictions pursuant to this theory, which has become "the magic bullet of the Office of the Prosecutor," inevitably "diminish the didactic significance of the Tribunal's judgments and compromise its historical legacy."

The Big Picture: The tenth article, "Looking Up, Down, and Across: The ICTY's Place in the International Legal Order," by Professor Mark Drumbl of Washington & Lee University School of Law, describes how the ICTY is "one tree in a small grove of different species of trees" of accountability. Unfortunately, as Professor Drumbl documents, there has been a high degree of disharmony between the ICTY, the International Court of Justice, and domestic institutions involved in both civil and criminal matters arising out of the atrocities committed during the conflict in the Balkans. Drawing from this material, Professor Drumbl argues that the ICTY needs to assess its own place and proper role, as well as institute procedures to facilitate interface with domestic and international institutions of justice.

The eleventh article, "The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo," by Professor Laura Dickinson of the University of Connecticut Law School, examines the phenomena of hybrid domestic-international tribunals, now being used in Sierra Leone, East Timor, Cambodia, and Kosovo. Professor Dickinson, who served as Senior Policy Advisor to Assistant Secretary of State Harold Koh during the Clinton Administration, uses the hybrid domestic-international tribunal established in Kosovo, as a case study for exploring the advantages and disadvantages of this new model as compared to the ICTY. Ultimately, Professor Dickinson argues, the hybrid courts need not be viewed as a replacement for international tribunals, but rather, the successful use of such courts in Kosovo suggests that they may be a useful complement to international tribunals in the future.

In the Symposium Issue's final article, "The Legacy of the ICTY: The International Criminal Court," Professor Leila Nadya Sadat of Washington University School of Law, describes how the ICTY has led to the creation of the permanent international criminal court (ICC). Professor Sadat explores the similarities and differences between the ICTY and the ICC, focusing on the "revolutionary" features of the ICC Statute and its adoption.

Just a few months after the "ICTY at Ten Conference," the judges of the ICC and its Chief Prosecutor were elected, and the new Tribunal became operational. The experience and case law of the ICTY will undoubtedly prove instrumental to the ICC, as well as to domestic war crimes trials taking place in an ever increasing number of countries across the globe.

In his report to the President following the Nuremberg Trial, Chief U.S.

Prosecutor Robert Jackson stated: "Many mistakes have been made and many inadequacies must be confessed. But I am consoled b the fact that in proceedings of this novelty, errors and missteps may also be instructive to the future."[1] Just as the ICTY represents a vast improvement over the Nuremberg Tribunal, it is our hope that the critical assessment contained in this Symposium Issue will help the ICC avoid some of the missteps of the ICTY.

We are extremely grateful to our distinguished panelists for their participation in the "ICTY at Ten" Conference and contributing to this Symposium Issue of the New England Law Review. Our appreciation also goes out to the student editors of this volume who worked diligently on the preparation of this publication.

1. Robert H. Jackson, Report to the President, October 7, 1946, *quoted in* Michael P. Scharf, Balkan Justice 3 (1997).

The Changing Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia

Geoffrey R. Watson*

Happy Birthday, ICTY! I remember the birth of the International Criminal Tribunal for the Former Yugoslavia quite well because I was in the room for the big event. A guest of the U.S. delegation, I sat behind U.S. Representative Madeleine K. Albright in May, 1993, as she negotiated and voted for the establishment of the first international war crimes tribunal since the Nuremberg and Tokyo tribunals. (That's me behind Secretary Albright in the CNN file footage, rocking from side to side like an expectant father, straining to get a better look at the proceedings.) Like any birth, this one had its share of labor pains, and like any newborn, this one – a piece of paper, the Statute of the International Criminal Tribunal – was an almost weightless little bundle, lacking definition but full of promise.

How the little one has grown! The Tribunal now employs over a thousand people, and its annual budget exceeds $200 million.[1] As of this writing, thirty-four defendants have been tried for violations of the Tribunal's Statute, of whom sixteen have been convicted and sentenced, another twelve have been convicted and are currently appealing their convictions, another one has just been convicted but not yet appealed, and five have been acquitted. Eight other defendants, including former Serbian President Slobodan Milosevic, are currently being tried for various violations of international criminal law. Forty-five accused, including

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1. *See Ninth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, 14 August 2002, A/57/150, *available at* http://www.un.org/icty/rappannu-e/2002/index.htm (last visited Feb. 23, 2003); *see also* U.N.G.A. Res. 56/247B (2002) (approving a revised budget of more than $248 million gross, or $223 million net, for 2002-03).

Milosevic, are currently imprisoned in the Tribunal's Detention Unit.[2] The perceived success of the ICTY, and that of its sister tribunal, the International Criminal Tribunal for Rwanda, helped pave the way for the new International Criminal Court.[3]

During its ten-year existence, the ICTY has produced an impressive body of jurisprudence on international humanitarian law and international criminal procedure. Its most important jurisprudential achievement has been to clarify that rape and other crimes of sexual violence can constitute genocide, torture, war crimes, or crimes against humanity.[4] But the Tribunal has also had occasion to add to the law of the U.N. Charter; one of its first decisions pronounced on the validity of the Security Council resolution that gave it life.[5] At the same time, the Tribunal has developed

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2. *See* The ICTY at a Glance, *List of Detainees*, *at* http://www.un.org/icty/glance/index.htm.

3. *See* Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9. The Rome Statute entered into force on July 1, 2002. As of this writing, there are 87 parties to the Statute.

4. *See* Prosecutor v. Kvocka, Case No.: IT-98-30/1-T, Judgement, paras. 546-61, 2 Nov. 2001 (holding that rape can constitute torture); Prosecutor v. Delalic, Case No.: IT-96-21-T, Judgement, 16 November 1998 (torture); Prosecutor v. Kunarac, Case Nos.: IT-96-23-T & IT-96-23/1- T, Judgement, 22 Feb. 2001 (holding that sexual enslavement can constitute a crime against humanity); Prosecutor v. Furundzija, Case No.: IT-95-17/1-T, Judgement, 10 Dec. 1998, *appeal dismissed* 21 July 2000 (violations of the laws and customs of war). The Rwanda Tribunal has made particularly important contributions to the development of the law on sexual violence. *See* Prosecutor v. Akayesu, No.: ICTR-96-4-A, Judgement, 1 June 2001 (genocide); Kelly D. Askin, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 AM. J. INT'L L. 97 (1999).

The Tribunal Statute does list rape as a crime against humanity, but the Statute's definitions of war crimes and genocide make no mention of rape or sexual violence. Thus, as the Tribunal's first Prosecutor, Richard Goldstone, put it,

> It fell to the United Nations tribunals for the former Yugoslavia and Rwanda to employ concepts such as torture and inhuman treatment in order to issue indictments against those accused of systematic mass rape in Bosnia and Rwanda. In was presumably in light of this experience that the Rome Statute for a permanent international criminal court (ICC) treats the subject of gender- related crimes appropriately for the first time in the history of modern humanitarian law.

Richard J. Goldstone, Book Review, 94 AM. J. INT'L L. 416 (2000) (reviewing THEODOR MERON, WAR CRIMES LAW COMES OF AGE (1998)). Indeed, the Rome Statute's definition of crimes against humanity now covers not only rape but also "sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization" and other "sexual violence," and its definition of war crimes contains similar provisions. *See* Rome Statute, *supra* note 3, art. 7(1)(g) and art. 8(2)(b)(xxii).

5. *See* Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No.: IT-94-1-AR72, Oct. 2, 1995, *reprinted in* 35 I.L.M. 32, paras. 28-

its own judicial style, a curious hybrid between civil- and common-law legal systems. In both style and substance, then, the Tribunal has grown into something unique.

That is not to say that the Tribunal's youth was trouble-free. In its infancy, the Tribunal interpreted its Statute aggressively, brashly holding that Article 3 of the Tribunal's Statute – which criminalizes violations of the "laws and customs of war" – applies not just to international armed conflict, but also to internal armed conflict.[6] Likewise, the young Tribunal struggled to find its judicial style, leaning toward a civil-law model as it eschewed plea bargains and permitted prosecutorial appeals of acquittals. Thankfully, in both style and substance, the Tribunal has achieved more of a balance over the years. This essay[7] briefly addresses both facets – substantive and stylistic – of the Tribunal's development.

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The Tribunal's earliest decisions were characterized by a certain amount of *chutzpah*.[8] One example was the Appeals Chamber's holding in *Prosecutor v. Tadic* that the U.N. Security Council had the authority to establish the ICTY. The Trial Chamber had taken the easy way out, holding that the Council's authority was a nonjusticiable political question, though also observing in lengthy *dicta* that the Council appeared to have acted reasonably.[9] The Appeals Chamber took a different approach. It swept aside the justiciability objection in three short paragraphs, quoting from the opinion of the International Court of Justice in *Certain Expenses*:

> It is true that most interpretations of the Charter of the United Nations will have political significance, great or small. In the nature of things it could not be otherwise. The Court, however, cannot attribute a political character to a request which invites it to undertake an essentially judicial task, namely, the interpretation of a treaty provision.[10]

"This dictum," the Appeals Chamber intoned, "applies almost literally to

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48 (1996).

6. *See id.*, paras. 86-91.

7. The title of this essay derives from a study of a different jurist's legal evolution. *See generally* Note, *The Changing Social Vision of Justice Blackmun*, 96 HARV. L. REV. 717 (1983).

8. As to which, see generally ALAN M. DERSHOWITZ, CHUTZPAH (1991).

9. *See* Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No.: IT-94-1-AR72, Oct. 2, 1995, *reprinted in* 35 I.L.M. 32, paras. 21-24 (1996).

10. *Id.* at para. 24 (quoting Certain Expenses of the United Nations, 1962 I.C.J. Reports 151, at 155 (July 20) (advisory opinion)).

the present case."[11] Without further explanation, the Chamber declared that the validity of this exercise of the Security Council's Chapter VII powers was not a political question.[12] This astonishing lack of analysis brings to mind Grant Gilmore's crack about the methodology of common-law judges applying the doctrine of estoppel: "for reasons which the court does not care to discuss, there must be judgment for the plaintiff."[13]

In assessing the validity of the Security Council resolution establishing the ICTY, the Appeals Chamber in *Tadic* was more garrulous but no less audacious. While affirming that the Council has broad discretion to determine whether there is a threat to the peace under Article 39 of the Charter, the Appeals Chamber went out of its way to make clear that this discretion is not absolute:

> It is clear from this text that the Security Council plays a pivotal role and exercises a very wide discretion under this Article. But this does not mean that its powers are unlimited. The Security Council is an organ of an international organization, established by a treaty which serves as a constitutional framework for that organization. The Security Council is thus subjected to certain constitutional limitations, however broad its powers under the constitution may be. Those powers cannot, in any case, go beyond the limits of the jurisdiction of the Organization at large, not to mention other specific limitations or those which may derive from the internal division of power within the Organization. In any case, neither the text nor the spirit of the Charter conceives of the Security Council as *legibus solutus* (unbound by law).[14]

The Chamber also concluded that it had "incidental jurisdiction" to exercise judicial review over the Security Council resolution establishing the Tribunal.[15]

To be sure, the International Court of Justice has also intimated that it has a power of judicial review over Council resolutions, but in much more ambiguous and cautious terms. In *Certain Expenses*, the Court seemed to reject the notion of judicial review, finding no "procedure" in the "structure of the United Nations" for assessing the validity of the acts of other organs, and concluding that those organs must, in the first instance, "determine [their] own jurisdiction."[16] Its 1971 *Namibia* advisory opinion again

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11. *Id.*

12. *See id.*, para. 25.

13. GRANT GILMORE, THE DEATH OF CONTRACT 64 (1974).

14. Prosecutor v. Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No.: IT-94-1-AR72, Oct. 2, 1995, *reprinted in* 35 I.L.M. 32, para. 28 (1996).

15. *See id.*, paras. 21-22.

16. *Certain Expenses*, *supra* note 10, 1962 I.C.J. at 168.

adopted an ambiguous stance, declaring that "[u]ndoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned," but proceeding to consider such "objections" anyway "in the course of its reasoning."[17] In *Libya v. United States*, the majority again shied away from exercising a power of judicial review over a Security Council resolution, but a number of concurring and dissenting opinions argued that the ICJ should consider whether the resolution was valid.[18] Thus, the ICJ has been comparatively reluctant to rule on the constitutional validity of acts of other U.N. organs – in my view too reluctant[19] – and it has never invalidated a resolution of the Security Council.[20]

The Appeals Chamber in *Tadic*, by contrast, displayed no such reluctance; it went on for more than twenty paragraphs on its way to concluding, unsurprisingly, that the Council had authority under Chapter VII to establish the Tribunal. Furthermore, it is true that arbitral panels have often exercised the *compétence de la compétence* to examine the scope of their own jurisdiction, including sometimes the validity of the underlying arbitration agreement itself.[21] As I have argued elsewhere, however, there is a difference between passing on the validity of a private arbitration agreement and passing on a decision of the U.N. Security Council.[22]

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17. Legal Consequences for States of the Continued Presence of South Africa in Namibia (Southwest Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 45 (June 21).

18. Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), 1992 I.C.J. 114, 140, 156, 192-93, 196, 174-75 (Provisional Measures Order of April 14) (Shahabuddeen, J., concurring) (Bedjaoui, J., dissenting) (Ajibola, J., dissenting) (Weeramantry, J., dissenting).

19. *See* Geoffrey R. Watson, *Constitutionalism, Judicial Review, and the World Court,* 34 HARV. INT'L L.J. 1, 1-14, 28-43 (1993) (arguing that the drafting history of the Charter suggests that it did not rule out all forms of judicial review) (arguing for a "Jeffersonian" model of judicial review).

20. For more on the World Court's power of judicial review, see Marcella David, *Passport to Justice: Internationalizing the Political Question Doctrine for Application in the World Court*, 40 HARV. INT'L L.J. 81 (1999); José E. Alvarez, *Judging the Security Council*, 90 AM. J. INT'L L. 1 (1996); Watson, *supra* note 19; W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L L. 83 (1993); Thomas M. Franck, *The "Powers of "Appreciation": Who is the Ultimate Guardian of UN Legality?*, 86 AM. J. INT'L L. 519 (1992).

21. *See generally* IBRAHIM F.I. SHIHATA, THE POWER OF THE INTERNATIONAL COURT TO DETERMINE ITS OWN JURISDICTION; COMPÉTENCE DE LA COMPÉTENCE (1965).

22. Geoffrey R. Watson, *The Humanitarian Law of the Yugoslavia War Crimes Tribunal: Jurisdiction in* Prosecutor v. Tadic, 36 VA. J. INT'L L. 687, 703 (1996) ("it is one thing to say that an arbitral panel may rule on its own jurisdiction and perhaps on the validity of an arbitration agreement between private parties; it is quite another to say that a

I'm not suggesting that the Appeals Chamber reached the wrong result, or even that it should have refrained from examining the Council resolution; but I am suggesting that the tone and length of the Chamber's opinion adds up to a much more aggressive approach than the World Court's own jurisprudence on the same subject. The Appeals Chamber wrote as if it were for the Tribunal to lead the way, when one might expect it to be the other way around; it is the ICJ, of course, that is the "principal judicial organ" of the United Nations.[23] Of course, there is precedent for a dialogue between U.N. organs and other subsidiary bodies in international law. As David Bederman points out, for example, there has been a productive "feed-back loop" between the International Law Commission and the ICJ, as when the ICJ made use of the draft rules on state responsibility in the *Case Concerning the Gabcikovo-Nagymaros Project*,[24] and the ILC later made use of the ICJ's interpretation of the rules in its final draft of the rules.[25] And indeed, the ICJ has started to take note of ICTY precedent.[26] But the ICTY's early attitude toward the ICJ seemed to be more one of indifference or even disregard.

This attitude was especially apparent in the Appeals Chamber's 1997 judgment in *Tadic*.[27] The court had to decide whether there had been an international armed conflict in Bosnia & Herzegovina, and in particular whether the Army of the Serbian Republic of Bosnia and

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subsidiary organ may pass on the validity of a resolution of the U.N. Security Council, the 'top dog' in international law.").

23. U.N. CHARTER, art. 92.

24. (Hungary v. Slovakia), 1997 I.C.J. 7, 56 (Sept. 25) (requiring that countermeasures be, among other things, "commensurate" with the original wrong).

25. *See* Draft Articles on Responsibility of States for Internationally Wrongful Acts, *in* Report of the International Law Commission on the Work of Its Fifty-third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001), *available at* http://www.un.org/law/ilc (last visited Mar. 28, 2003), *reprinted in* JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES (2002), art. 51 (adopting the "commensurate" test); David J. Bederman, *Counterintuiting Countermeasures*, 96 AM. J. INT'L L. 817, 821-22 (2002) (discussing the ICJ's role in the evolution of draft Article 51) (citing Gabčikovo-Nagymaros Project (Hung. v. Slovk.), 1997 I.C.J. REP. 7 (Sept. 25).

26. *See, e.g.*, Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belgium), Request for Provisional Measures (Dec. 8, 2000), Declaration Of Judge Van Den Wyngaert, 2000 I.C.J. REP. 182, 232 & n.15 (noting that several decisions of the ICTY and the Rwanda Tribunal tend to support the proposition that "there is a right and even a duty on States to prosecute" the most serious "core crimes" in international, such as genocide, crimes against humanity, and war crimes).

27. Prosecutor v. Tadic, No.: IT-94-1-T, Appeals Chamber, Judgement 7 May 1997, *reprinted in* 36 I.L.M. 908 (1997). For a useful contemporaneous analysis of the holding, see generally Michael P. Scharf, *International Decisions*, 91 AM. J. INT'L L. 718 (1997).

Herzegovina/Republika Srpska ("VRS") was sufficiently linked to the Federal Republic of Yugoslavia so as to establish an international conflict. Like the Trial Chamber before it, the Appeals Chamber found it useful to resort to the ICJ's holding, in *Nicaragua v. United States*, that a state could incur international responsibility if it exercised a certain degree of control ("effective control," the Court said at one point) over armed rebels fighting another state.[28] It is surprising enough that the ICTY found that *Nicaragua* was so central to the issue in *Tadic*; the question of Yugoslavia's responsibility was not at issue in *Tadic*. As Professor (now Judge) Meron put it: "[C]onsider a conflict in a country where practically all the fighting is done by a foreign state, but where the rebels maintain their independence from the intervening power and do not satisfy the Nicaragua test. Could anyone seriously question the international character of such a conflict?"[29] Still, there is at the very least an analogy between imputation of state responsibility, at issue in *Nicaragua*, and whether an armed conflict is international or internal, at issue in *Tadic*.[30]

But what's most interesting for my purposes is what the Appeals Chamber said next: "The Appeals Chamber, with respect, does not hold the *Nicaragua* test to be persuasive."[31] At the ripe old age of six, in a case not

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28. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Merits, 1986 ICJ REP. 14, 62, 64-65 para. 109 (June 27) (requiring a certain degree of "dependence on the one side and control on the other"); *id.* (finding "no clear evidence of the United States having actually exercised such a degree of control in all fields as to justify treating the contras as acting on its behalf"); *id.*, para. 115 (requiring "effective control").

29. Theodor Meron, *Classification of Armed Conflict in the Former Yugoslavia:* Nicaragua's *Fallout*, 92 AM. J. INT'L L. 236, 241 (1998). *Cf. also* Prosecutor v. Tadic, Case No.: IT/32/Rev. 10, Trial Chamber, Judgement, Separate and Dissenting Opinion of Judge McDonald, 7 May 1997, para. 34 *reprinted in* 186 I.C.M. 908, 979 (concluding that the conflict was international even under an "effective control" test, and that in any case the test "is not a necessary element for a finding of an agency relationship.").

Or, as the commentary to the ILC rules on state responsibility put it, "The Tribunal's mandate is directed to issues of individual criminal responsibility, not State responsibility, and the question in [*Tadic*] concerned not responsibility but the applicable rules of international humanitarian law." Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts adopted by the International Law Comm'n at its 53d sess. (2001), at 106-07, in Report of the International Law Commission on the work of its Fifty-third session, *Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10* (A/56/10, chp.IV.E.2). Indeed, the provisions on attribution in the ILC rules do not address the characterization of an armed conflict as international or internal.

30. *Cf.* Steven R. Ratner, Jus ad Bellum *and* Jus in Bello *After September 11*, 96 AM. J. INT'L L. 905 (2002) (drawing on state responsibility doctrine in the course of analyzing the modern law of self-defense).

31. Prosecutor v. Tadic, No.: IT-94-1-T, Appeals Chamber, Judgement 7 May 1997, para. 115.

involving state responsibility, the ICTY declared "unpersuasive" a significant component of a leading World Court decision on state responsibility in connection with the use of military force! To be sure, ICJ decisions are binding only on the parties,[32] and a robust dialogue between international institutions is generally welcome.[33] Still, the ICTY's boldness is striking, all the more so given that some of its criticism of *Nicaragua* seems overdrawn. The Appeals Chamber attacked the *Nicaragua* test on the grounds that the requisite standard of control should "vary" according to the circumstances of the case.[34] But the *Nicaragua* decision does not advocate a single, rigid standard; it speaks variously of "control and dependency," a certain "degree of control," and "effective control." The Appeals Chamber nonetheless plunged ahead, next criticizing the ICJ's test as "at variance with international judicial and State practice" requiring only "a lower degree of control."[35] Again, this criticism presupposes that *Nicaragua* fixed an "exclusive" and "all-embracing" test, as the Chamber insisted; in fact, *Nicaragua* might fairly be criticized for the opposite – for waffling on precisely what the test is.

Even as it pronounced on the validity and wisdom of Security Council Resolutions and World Court decisions, the young International Criminal Tribunal also adopted a generally broad view of its own jurisdiction. In his report accompanying the Tribunal's Statute, the U.N. Secretary-General cautioned that because the Statute would apply retroactively, it should include only those provisions of humanitarian law that had "beyond any doubt" passed into customary international law, so as not to offend the principle *nullum crimen sine lege*.[36] But in the jurisdiction phase of *Tadic*, the Appeals Chamber held that Article 3 of the Statute – which covers "violations of the laws or customs of war" – applied not only to international armed conflict, but also to internal armed conflict.[37] Indeed, the Tribunal went further, holding that Article 3 operates as a residual

32. Statute of the International Court of Justice, 59 Stat. 1055, Art. 59 (1945).

33. *See Remarks of Richard Bilder*, 96 PROCEEDINGS OF THE AM. SOC. OF INT'L L. 369, 373 (Mar. 16, 2002) (suggesting that disagreement and discourse between international tribunals may be a "good thing"); *cf.* Bederman, *supra* note 25, at 819 (describing a "feedback loop" between the ILC and the ICJ).

34. *See* Prosecutor v. Tadic, No.: IT-94-1-T, Appeals Chamber, Judgement 7 May 1997, para. 117.

35. *Id.*, para. 124.

36. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution* 808 (1993), U.N. Doc. S/25704, 3 May 1993, para. 34; 32 I.L.M. 1163. 11702 (1993).

37. *See* Prosecutor v. Tadic, Case No.: IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, *reprinted in* 35 I.L.M. 32, para. 137 (1996).

clause, covering "*all* serious violations" of humanitarian law not covered elsewhere in the Statute.[38] It is right and good that humanitarian law extend to internal conflict; but it is a more difficult question whether state practice has "beyond any doubt" extended that law to civil war. The ICTY cited no case of a war-crimes prosecution, under either the Hague Regulations or Additional Protocol II to the Geneva Conventions, arising out of a civil war. To be sure, Tadic was on notice that his conduct was criminal; but *ex post facto* doctrine is designed not only to give the accused notice, but also to prevent arbitrary use of power by government – to "ensure that the sovereign will govern impartially and that it will be perceived as doing so."[39]

In some of its early decisions on substantive criminal law, too, the Tribunal staked out an aggressive – or at least pro-prosecution – posture. In *Prosecutor v. Erdemovic* (1997), a 3-2 majority of the Appeals Chamber held (over vigorous dissent) that duress could not be a complete defense to homicides that constitute crimes against humanity or war crimes.[40] The majority acknowledged that national legal systems take different approaches to the question, and in particular that civil-law systems tend to permit a duress defense, but the court rested its conclusion on "our mandated obligation under the Statute to ensure that international humanitarian law, which is concerned with the protection of humankind, is not in any way undermined."[41] Similarly, the ICTY has taken a relaxed view of the *mens rea* of complicity, holding that it suffices for the Prosecution to prove knowledge of the principal's planned acts, not to show that the accomplice also shared the principal's illicit purpose.[42]

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38. *Id.*, para. 92. In the same decision, interestingly, the Tribunal construed Article 2 – on grave breaches of the Geneva Convention – as applying only in international armed conflict. *See* Watson, *supra* note 23, at 709 (approving this holding); *but cf.* Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia,* 93 AM. J. INT'L L. 57, 68-70 (1999) (suggesting that, rather than construing Article 3 too broadly, the Chamber interpreted Article 2 too narrowly).

39. Dobbert v. Florida, 432 U.S. 282, 307-08 (1977) (Stevens, J., dissenting); *see also* Watson, *supra* note 23, at 717-18; M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 290-91 (1993).

40. Prosecutor v. Erdemovic, Case No.: IT-96-22, Judgement, 7 Oct. 1997, para. 19; Prosecutor v. Erdemovic, Case No.: IT-96-22, Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 Oct. 1997, paras. 32-89. For the dissenting opinions, see Prosecutor v. Erdemovic, Case No.: IT-96-22, Separate and Dissenting Opinion of Judge Cassese, 7 Oct. 1997; *id.*, Separate and Dissenting Opinion of Judge Stephen, 7 Oct. 1997.

41. *See* Prosecutor v. Tadic, Case No.: IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, *reprinted in* 35 I.L.M. 32, para. 88.

42. *See* Prosecutor v. Furundzija, Case No.: IT-95-17/1, Judgement, 10 Dec. 1998,

Again, these decisions may be correct, but they all point toward an expansive view of the prosecution's (and the court's) powers.

Has the Tribunal's aggressiveness been justified? Certainly the Tribunal has managed to silence some of the critics who initially dismissed it as a cynical cover for the international community's failure to take effective action in the former Yugoslavia.[43] The ICTY's fulsome, self-assured jurisprudence might have helped establish itself as a serious international institution. But the ICTY's bluster might have also damaged its credibility. Despite the busy proceedings in the Hague, violations of international humanitarian law proceeded apace in the former Yugoslavia, leading some to argue that the ICTY has not deterred crime.[44] Consider also the experience of an institution like the European Court of Human Rights, which adopted a cautious approach to its own jurisdiction and authority in its early years. In its formative years, the European Court did not automatically jump to find a state in violation of the European Convention on Human Rights in any given case, and the Court gained respect because of its perceived willingness to hear both sides.[45] As a result, the European Court is now "unique among international bodies because it routinely imposes sanctions on governments for violating the human rights of their nationals."[46]

There are signs that the ICTY's jurisprudence is changing, that it is starting to resemble that of its more restrained colleague in Strasbourg. In

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paras. 236-49; Prosecutor v. Aleksovski, Case No.: IT-95-14/1, Judgement, 24 Mar. 2000, para. 162; Prosecutor v. Kunarac, Case No.: IT-96-23, Judgement, 22 Feb. 2001, para. 392; Prosecutor v. Vasiljevic, Case No.: IT-98-32, Judgement, 29 Nov. 2002, para. 71.

43. *Cf.* David Tolbert, *The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 FLETCHER F. WORLD AFF. 7, 7-8 (Fall 2002) (asserting that "the ICTY's achievements have exceeded the boldest hopes of its creators" and that its "rise to international significance has defied [its] critics").

44. *See, e.g.*, Paul Williams, Why the Tribunal has Failed to Deter International Crime, Remarks at The ICTY at Ten: A Critical Assessment of the Major Rulings of the International Criminal Tribunal Over the Past Decade; Col. Michael Newton, *Should the United States Join the International Criminal Court*, 9 U.C. DAVIS J. INT'L L. & POL. 35, 42 (2002) ("As far as I saw, the ICTY existence and its jurisdiction had no deterrent effect whatsoever on Milosevic").

45. *Cf.* Richard S. Kay, *The European Convention on Human Rights and the Authority of Law*, 8 CONN. J. INT'L L. 217, 220 (1993) (asserting that the European Court has "earned acceptance" as the "authoritative interpreter of binding legal rules"); *id.* at 223-24 (urging a cautious approach to expansion of the human rights regime to the new democracies of Central Europe). *Cf.* Mark W. Janis, *The Efficacy of Strasbourg Law*, 15 CONN. J. INT'L L. 39, 44-45 (2000) (commenting on the European Court's "increasing" legitimacy).

46. FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS: LAW, POLICY, AND PROCESS 481 (1996).

general, the ICTY seems to have grown more sensitive to the rights of the accused – rights that are guaranteed in human rights law. One example is the Tribunal's greater willingness to permit provisional release of defendants pending trial. Initially the Tribunal was very reluctant to permit release, fearing that the accused would flee. The Trial Chamber's original version of Rule 65(B), the rule governing provisional release, placed a heavy burden on the defendant to justify release to demonstrate that the defendant would not flee, posed no danger to others, and – most notoriously – that there were "exceptional circumstances" justifying provisional release. Under this standard, only four defendants obtained provisional release.[47] In 1999 the Tribunal's Rules Committee amended this rule by removing the requirement that the defendant show "exceptional-circumstances."[48] This change followed the death of two defendants who had been in custody while awaiting trial. According to Judge Wald, the judges of the ICTY became concerned about the "depressive effects" of prolonged pretrial detention.[49] Those effects could be especially troubling at the ICTY, whose trials have been notoriously long and drawn-out. The new, more relaxed rule on provisional release seems more consistent with human rights law, which holds that "it shall not be the general rule that persons awaiting trial shall be detained in custody."[50] Thanks to the rule change, the Tribunal's practice on pretrial release has relaxed – a little. At this writing, eleven defendants are on release, awaiting trial.

The Tribunal's growing receptivity to plea-bargaining is another

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47. *See* Prosecutor v. Kordic and Cerkez, Case No.: IT-95-14/2-T, Order on Motion of the Accused Mario Cerkez for Provisional Release, 14 Sept. 1999; Prosecutor v. Kupreskic, Case No.: IT-95-16-T, Decision on the Motion of Defense Counsel for Drago Josipovic, 9 May 1999; Prosecutor v. Simic, Case No.: IT-95-9-PT, Decision on Provisional Release of the Accused, 26 Mar. 1998; Prosecutor v. Dukic, Case No. IT-96-20-T, Decision Rejecting the Application to Withdraw the Indictment and Order for Provisional Release, Trial 24 Apr. 1996.

48. *See generally* Matthew M. DeFrank, Note, *ICTY Provisional Release: Current Practice, a Dissenting Voice, and the Case for a Rule Change*, 80 TEX. L. REV. 1429, 1430-31 (2002).

49. Patricia Wald & Jenny Martinez, *Provisional Release at the ICTY: A Work in Progress*, *in* ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK MCDONALD 233 (Richard May et al. eds., 2001).

50. International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 9(3), 999 U.N.T.S. 171, 175. The Covenant adds, however, that release "may be subject to guarantees to appear for trial." *Id. Cf. also id.*, Art. 14(2) at 176 ("Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty by law"); *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc. A/810 (1948) (declaring a presumption of innocence).

"signpost on the road"[51] to a more balanced jurisprudence. The Statute of the Tribunal contains no provision explicitly authorizing plea-bargaining, and the ICTY initially omitted any authorization for plea-bargaining from its own rules.[52] In this, as in other things, the early ICTY leaned more toward civil-law than common-law practice. But the ICTY slowly has come to embrace plea-bargaining as a necessary component of a court with a heavy workload and a complex body of governing law.[53] The ICTY has been willing not just to entertain guilty pleas, but also to convict in accordance with plea agreements between the prosecution and the defense, a practice recently formalized in new Rule 62-*ter*.[54]

Overall, the development of plea-bargaining at the ICTY has been a good thing. Plea bargaining has encouraged defendants to cooperate with the Tribunal on cases against other defendants, and has not resulted in outrageously lenient sentences.[55] There is justifiable concern that the ICTY's process for plea-bargaining needs improvement to ensure that

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51. Allegheny Coll. v. Nat'l Chautauqua County Bank of Jamestown, 159 N.E. 173, 175 (N.Y. 1927) (Cardozo, J.) (speaking of "signposts on the road" to the adoption of the doctrine of promissory estoppel).

52. *See* Prosecutor v. Erdemovic, Case No.: IT-96-22-T, Judgement, Separate and Dissenting Opinion of Judge Cassese, 7 Oct. 1997, para. 10.

53. *See, e.g.*, Prosecutor v. Erdemovic, Case No.: IT-96-22-T, Sentencing Judgement, 5 Mar. 1998, paras. 8-11 (convicting a defendant on the basis of a guilty plea); Prosecutor v. Jelisic, Case No.: IT-95-10, Judgement, 14 Dec. 1999, paras. 127, 138 (convicting in accordance with a guilty plea, but according the plea relatively little weight in sentencing); Prosecutor v. Jelisic, Case No.: IT-95-10, Judgement, 5 July 2001 (affirming most but not all findings of guilt below, and affirming the 40-year sentence); Prosecutor v. Todorovic, Case No.: IT-95-9/1, Sentencing Judgement, 31 July 2001, paras. 7-17 (convicting a defendant in accordance with a plea agreement); Prosecutor v. Sikirica, Case No.: IT-95-8, Sentencing Judgement, 13 Nov. 2001, paras. 17-39 (convicting in accordance with plea agreements); Prosecutor v. Simic, Case No.: IT-95-9/2-S, Sentencing Judgement, 17 Oct. 2002, paras. 9-23 (convicting in accordance with a plea agreement).

ICTY Rule 62-*bis* permits (but does not require) the Trial Chamber to convict based on a "voluntary," unequivocal guilty plea that is supported by a "sufficient factual basis." *ICTY Rules of Procedure and Evidence*, U.N. Doc.: IT/32/Rev.24, 11 and 12 July 2002, Rule 62-*bis*. *See generally* Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1, 107-26 (2002) (tracing the development of the ICTY's practice in accepting guilty pleas); Michael Bohlander, *Plea Bargaining Before the ICTY*, in ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK MCDONALD 151 (Richard May et al. eds., 2001).

54. Rule 62-*ter*, entitled "Plea Agreement Procedure," provides that the prosecution and defense "may" agree that the accused will plead guilty and that the prosecutor "shall" apply to amend the indictment, or recommend (or not object to) a sentence or sentencing range. Section (B) of the rule also provides that the Trial Chamber "shall not be bound" by any such agreement.

55. *See* Coombs, *supra* note 53, at 147-48.

guilty pleas are made knowingly and without coercion,[56] but the Tribunal's requirement of full disclosure of evidence to the defense – like the requirement that the trial court find that the plea is voluntary and supported by evidence – ameliorates this concern to a fair extent.[57]

The Tribunal has also moved toward a more "common-law style" in another area: the consideration and exclusion of evidence. The ICTY has from time to time claimed that it adheres neither to the civil-law approach, which favors admissibility of all relevant evidence, including hearsay, and the common-law approach, which imposes stricter limits on the introduction of evidence in general and hearsay in particular. As one Trial Chamber put it,

> neither the rules issuing from the common law tradition in respect of the admissibility of hearsay evidence nor the general principle prevailing in the civil law systems, according to which, barring exceptions, all relevant evidence is admissible, including hearsay evidence, because it is the judge who finally takes a decision on the weight to ascribe to it, are directly applicable before this Tribunal. The International Tribunal is, in fact, a *sui generis* institution with its own rules of procedure which do not merely constitute a transposition of national legal systems. The same holds for the conduct of the trial which, contrary to the Defence arguments, is not similar to an adversarial trial, but is moving towards a more hybrid system.[58]

In practice, as Sean Murphy has observed, "the trial chambers have shown little tendency to exclude evidence, including hearsay evidence."[59]

As with plea-bargaining, the Tribunal's approach to evidence is changing. Whereas the *Tadic* trial mired itself in hours of oral testimony about the history of the former Yugoslavia, the ICTY is now more apt to rely on written summaries of such testimony by using techniques such as judicial notice and written stipulation.[60] While some ICTY trials continue to take several years, generally ICTY proceedings are becoming more efficient. Since ICTY judges serve as the triers of fact, it is unlikely that the ICTY will ever exclude evidence as ruthlessly as common-law judges

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56. *See* Sienho Yee, *The Erdemovic Sentencing Judgement: A Questionable Milestone for the International Criminal Tribunal for the Former Yugoslavia*, 26 GA. J. INT'L & COMP. L. 263, 268-69 (1997).

57. *See* Coombs, *supra* note 53, at 147.

58. Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT'L L. 57, 80 (1999) (citing Prosecutor v. Blaskic, Case No.: IT-95-14-T, Trial Chamber, Decision on the standing objection of the Defence to the admission of hearsay with no inquiry as to its reliability (Jan. 1998)).

59. Murphy, *supra* note 58, at 80.

60. *See* ICTY Rule 94 (judicial notice) & 94-*bis* (written agreement of the parties); Murphy, *supra* note 58, at 81.

do, but at least there are indications that the ICTY is sensitive to the need to streamline its proceedings. As the ICTY has acknowledged, the ICTY statute, like human rights law generally, requires that the accused "be tried without undue delay."[61]

It is harder to generalize about the direction of the ICTY's substantive jurisprudence. The Tribunal has not recently had occasion to pass on the validity of any Security Council resolutions, but it still seems quite willing to take on the ICJ. Presented with a chance to reconsider its holding that *Nicaragua* is "unpersuasive," the Appeals Chamber in *Prosecutor v. Aleksovski* (2000) reaffirmed its earlier decision, finding no "cogent reason" to alter its view.[62] More recently, in the *Celebici* case (2001), the Appeals Chamber acknowledged that it "cannot behave as if the general state of the law in the international community whose interests it serves is none of its concern."[63] Nonetheless, the Appeals Chamber once again sustained its earlier holding that the ICJ was wrong in *Nicaragua*,[64] and the Chamber rejected any notion that the ICTY occupies a lower rung on the ladder of international law than the ICJ:

> [T]his Tribunal is an autonomous international judicial body, and although the ICJ is the "principal judicial organ" within the United Nations system to which the Tribunal belongs, there is no hierarchical relationship between the two courts. Although the Appeals Chamber will necessarily take into consideration other decisions of international courts, it may, after careful consideration, come to a different conclusion.[65]

Thus the Tribunal has not lost all its *chutzpah*. In the end, this aspect of the Tribunal's jurisprudence is welcome. To be sure, international law already suffers from a surfeit of conflicting rules and institutions. But it's hard to see any practical downside to the ICTY's declaration of judicial

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61. Statute of the International Criminal Tribunal, Art. 21(4)(c); International Covenant on Civil and Political Rights, Art. 14(3)(c). *See* Prosecutor v. Kovacevic, No.: IT-97-24, Trial Chamber, Decision on Prosecutor's Request to File an Amended Indictment, 5 Mar. 1998, paras. 8, 12 (refusing prosecutor's request to file an amended indictment, partly on speedy trial grounds).

62. Prosecutor v. Aleksovski, No.: IT-95-14/1, Appeals Chamber, Judgement, 24 Mar. 2000, para. 134 (reaffirming the "overall control" test of *Tadic*). *See also* Prosecutor v. Kordic, No.: IT-95-14/2, Trial Chamber, Judgement, 26 Feb. 2001, paras. 112-13 (applying the "overall control" test).

63. Prosecutor v. Delalic, No.: IT-96-21, Appeals Chamber, Judgement, 20 Feb. 2001 para. 24 (quoting Separate Opinion of Judge Shahabuddeen, appended to Decision, *Le Procureur v. Laurent Semanza*, ICTR, Case No.: ICTR-97-20-A, App. Ch., 31 May 2000, para. 25).

64. *See id.*, paras. 10-27.

65. *Id.*, para. 24 (footnotes omitted).

independence, and there's an obvious upside: the enrichment of international legal discourse. I have argued elsewhere against the notion that the ICJ should enjoy judicial supremacy along the lines of a domestic constitutional court. Instead I have argued for a "Jeffersonian" model of judicial review, in which the Court's decisions can rest alongside other, competing views.[66] The ICTY's approach to *Nicaragua* is consistent with this approach. If the ICTY is wrong about *Nicaragua*, its opinion will be rejected by other international tribunals, such as the International Criminal Court and the ICJ itself, and in the fullness of time the issue will sort itself out. And if the ICTY is right, then so much the better.

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Thus the ICTY heads into its second decade with a judicial style that is gradually growing more balanced. It has loosened its restrictions on pretrial detention, embraced plea-bargaining, placed some restraints on the presentation of evidence, and sped up its trial process. At the same time, it has provided generally fair trials, and those trials have resulted in an impressive array of convictions for crimes of staggering violence, including crimes of sexual violence. On the whole, the ICTY has had a pretty good first ten years.

At this symposium on "ICTY at Ten," so graciously hosted by the New England School of Law, I wondered aloud whether one day we might be celebrating a fiftieth birthday for the ICTY. Yes, Tribunal officials have said that the Tribunal will wrap up its work in a few more years, but the ICTY's Statute is not time-limited; it covers international crimes committed in the former Yugoslavia "since" 1991.[67] Still, there is a new International Criminal Court preparing to take the reins, and for now an uneasy peace stretches across the former Yugoslavia. We all certainly hope that there will be no new mass atrocities for the Tribunal to adjudicate, and thus that the Tribunal will eventually run out of things to adjudicate. Accordingly, we find ourselves in the peculiar position of hoping for the demise of the thing whose birthday we now celebrate.

But I don't want to end on that rather discordant note. Consider this instead: the Tribunal was only two years old when it passed judgment on its creator, the U.N. Security Council. At age four, the Tribunal took on its aging cousin, the International Court of Justice. Imagine what kind of trouble the Tribunal might dig up in its teenage years!

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66. *See* Watson, *supra* note 19, at 39-43.

67. *See* Statute of the International Criminal Tribunal, Art. 1.

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Legitimacy and the Expanding Power of the ICTY

Gregory P. Lombardi*

It may seem odd that concerns over the legitimacy of the International Criminal Tribunal for the Former Yugoslavia (ICTY) remain even after ten years but one only has to look at the trial of Slobodan Milosević to see that the issue is still very much alive. With the first words he spoke at his initial appearance before the ICTY, Milosević attacked the legitimacy of the Court. Responding to Judge May's inquiry as to whether he wanted counsel, Milosević retorted: "I consider this Tribunal a false Tribunal and [this] indictment a false indictment. It is illegal being not appointed by the UN General Assembly, so I have no need to appoint counsel to [an] illegal organ."[1] It was much the same at his next appearance. Angered that his claim that the Tribunal was illegal was being characterized as a jurisdictional problem, Milosević shot back: "It is clear to any lawyer in the world that [the] question of jurisdiction can be open when juridical institutions are concerned, and you are not [a] juridical institution; you are [a] political tool."[2]

The longevity of the legitimacy debate is a product of the continuing tension inherent in the dual form of the Tribunal. The Security Council labored to create a tribunal with circumscribed powers[3] and a limited

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1. Prosecutor v. Milosević, Case No.: IT-02-54, Transcript of Initial Appearance, 3 July 2001, at 2, *available at* http://www.un.org/icty/ind-e.htm (last visited Mar. 16, 2003) .

2. Prosecutor v. Milosević, Case No.: IT-02-54, Transcript of Status Conference, 30 August 2001, at 24-25, *available at* http://www.un.org/icty/ind-e.htm (last visited Mar. 16, 2003).

3. "The Security Council's decision in resolution 808 (1993) to establish an international tribunal is circumscribed in scope and purpose: the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." *Report of the Secretary-General Pursuant to*

lifespan that would serve the Council's political goal—to restore international peace and security.[4] But to achieve that goal, the Tribunal had to be seen as independent and impartial.[5] The institution that resulted is a strange creation: "a subsidiary organ . . . but of a judicial nature."[6]

Faced with this duality, the Tribunal has alternatively acknowledged that its jurisprudential and rulemaking power emanates from the Security Council through the ICTY Statute and expanded its power beyond what the Statute provides. These expansions have generally taken three forms: 1) a claim that the ICTY did not need statutory authority; 2) a claim that it could ignore the Statute to achieve fairness (usually coupled with dubious statutory interpretation so that ignoring it did not seem so egregious); and 3) those with either express or tacit Security Council approval.

This brief article examines a few examples of these expansions and comments on their effect on the Tribunal's legitimacy. Both legitimacy as a construct and the legitimacy of particular Security Council actions including the creation of the ICTY have been well canvassed in the past ten years, and I will not rehash those debates.[7] For discussion, I assume both that there was a "threat to the peace" sufficient to enable the Security

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Paragraph 2 of Security Council Resolution 808 at para. 12, U.N. SCOR, 42d Sess., para. 28, U.N. Doc. S/25704 (1993) (*reprinted in* 32 I.L.M. 1159) [hereinafter Secretary-General's Report].

4. U.N. SCOR, U.N. Doc. S/RES/827 (1993) (*reprinted in* 32 I.L.M. 1203).

5. *See* MICHAEL P. SCHARF, BALKAN JUSTICE 56 (1997) (commenting that the Secretary General likely rejected the U.S. proposal that he declare the conflict in the former Yugoslavia an "international conflict" because he did not want to interfere with out of respect for the Tribunal's jurisdiction.) In contrast, the Security Council effectively decided that the conflict in Rwanda was internal—despite the deep involvement of France and Uganda—when it did not grant the ICTR jurisdiction over grave breaches of the Geneva Conventions, crimes punishable only in international conflicts. *Compare* Statute of the International Tribunal art. 2-5 (annexed to S/RES/827 (1993) and as amended by S/RES/1166 (1998) and S/RES/1329 (2000) and S/RES/1411 (2002) and S/RES/1431 (2002)) [hereinafter ICTY Statute], *available at* http://un.org/icty/legaldoc/index.htm (last visited Mar. 31, 2003) *with* Statute of the International Tribunal for Rwanda, art. 2-4 (annexed to S/RES/955 (1994) and as amended by S/RES/1165 (1998) and S/RES/1329 (2000) and S/RES/1411 (2002) and S/RES/1431 (2002)), *available at* http://wwww.ictr.org/wwwroot/ENGLISH/basicdocs/statute/html (last visited Feb. 14, 2003).

6. Secretary-General's Report, *supra* note 3, para. 28.

7. *See, e.g.*, THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); José E. Alvarez, *The Quest for Legitimacy: Review Essay of Thomas Franck's* The Power of Legitimacy Among Nations, 24 N.Y.U. J. INT'L L. & POL. 199 (1991); David Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. 'INT'L L. 552 (1993); Martti Koskenniemi, *The Police in the Temple: Order, Justice and the UN: A Dialectical View*, 6 EUR. J. INT'L L. 325 (1995).

Council to act under Chapter VII[8] and that creating the ICTY was within the Security Council's powers under the Charter, though each assumption can be disputed.[9] I am interested in the way that the Tribunal's jurisprudence has affected the legitimacy of the subsidiary judicial organ that resulted. In this context, I use the term "legitimacy" to mean "social legitimacy,"[10] the extent to which society views the Tribunal as unbiased and impartial in the sense that it is free from outside influence, particularly from the Security Council and the Permanent Members that dominate it. As the *Tadić* Trial Chamber put it, criminal law is only efficacious if the body that determines criminality is "viewed as legitimate."[11]

I conclude that initially, the Tribunal expanded its powers in an attempt to "find expression for itself,"[12] to demonstrate its independence from the Security Council, and ultimately to establish its legitimacy. But more recently, the expansions have had the opposite effect, actually emphasizing the sense of collusion between the Tribunal and the Security Council and undermining any legitimacy that had been previously enjoyed.

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8. "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." Charter of the United Nations, art. 39. A "breach of the peace" is said to exist when "hostilities are engaged in between armed units of two states." THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 609 (Bruno Simma ed., 1994). A "threat to the peace" does not necessarily require armed conflict. *Id.* "The concept of the threat to the peace can be understood in an extraordinarily broad manner when there is unanimity within the Security Council." *Id.* at 612.

9. *See, e.g.*, Alfred P. Rubin, *An International Criminal Tribunal for the Former Yugoslavia*, 6 PACE INT'L L. REV. 7, 8 (1994) (questioning the existence of authority in Chapter VII to permit the creation of an institution which threatens the internal operation of a state); *see also* Prosecutor v. Tadić, Case No.: IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, para. 27 (listing Tadić's arguments against the Security Council's use of its Chapter VII power). But this is a difficult argument to win. "[W]hen the Organization takes action which warrants the assertion that it was appropriate for the fulfillment of one of the stated purposes of the United Nations, the presumption is that such action is not *ultra vires* ... ." *Certain Expenses of the United Nations*, 1962 I.C.J. 151, 168 (20 July). For a discussion of this point in the context of Security Council Resolution 1422 (2002) and the International Criminal Court, see Carsten Stahn, *The Ambiguities of Security Council Resolution 1422 (2002)*, 14 EUR. J. INT'L L. 85 (2002).

10. Joseph H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2468-69 (1991) (describing three models of legitimacy: democratic legitimacy, formal legitimacy, and social legitimacy).

11. *See* Prosecutor v. Tadić, Case No.: IT-94-1, Decision on the Defence Motion on Jurisdiction, 10 Aug. 1995, para. 6.

12. Prosecutor v. Tadić, Case No.: IT-94-1-AR72, Separate Opinion of Judge Sidhwa on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, para. 1.

STATUTORY AUTHORITY IS UNNECESSARY

Initially, the Tribunal emphasized that its authority flowed from sources other than the Statute. As evidenced by the Tribunal's decisions on jurisdiction in *Prosecutor v. Tadić*, this was not an obvious conclusion.[13] In that case, the Trial Chamber concluded that it was a Tribunal with a "limited criminal jurisdiction" derived solely from the Statute which could not question the "legality of its [own] creation."[14] The Appeals Chamber disagreed, Judge Li dissenting, and held that under the principle of "*la compétence de la compétence*" it had the inherent jurisdiction to determine its own jurisdiction.[15]

> To assume that the jurisdiction of the International Tribunal is absolutely limited to what the Security Council 'intended' to entrust it with, is to envisage the International Tribunal exclusively as a 'subsidiary organ' of the Security Council . . ., a 'creation' totally fashioned to the smallest detail by its 'creator' and remaining totally in its power and at its mercy.[16]

The Appeals Chamber acknowledged that some constitutive instruments may expressly limit this form of jurisdiction, a prospect it found troubling because of its potential to undermine the judicial independence of the Tribunal. But it concluded that it need not reach this issue because it is "absolutely clear that such a limitation, to the extent to which it is admissible, cannot be inferred" but must be expressly stated.[17] As the Statute does not expressly limit the Tribunal, the Chamber had jurisdiction.[18]

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13. *See, e.g.*, José E. Alvarez, *Nuremberg Revisited: The Tadić Case*, 7 EUR. J. 'INT'L L. 245, 250 (1996) (describing the two decisions as reflecting competing paradigms of the interpretation of Chapter VII powers).

14. Prosecutor v. Tadić, Case No.: IT-94-1-T, Trial Chambers Decision on the Defence Motion on Jurisdiction, 10 Aug. 1995, para. 5.

15. *See* Prosecutor v. Tadić, Case No.: IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, para. 18. As the Appeals Chamber observed, some statutes expressly grant this jurisdiction. *See, e.g.*, Statute of the I.C.J., art. 36 *at* http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm (last visited Mar. 31, 2003).

16. Prosecutor v. Tadić, Case No.: IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, para. 15.

17. *Id.*, para. 19.

18. The Trial Chamber in *Prosecutor v. Milosević* reiterated the Appeals Chamber's conclusions in November 2001. *See* Prosecutor v. Milosević, Case No.: IT-02-54, Decision on Preliminary Motions, 8 Nov. 2001. Indeed, it was required to do so under the Tribunal's *stare decisis* rules. *See* Prosecutor v. Aleksovski, Case No.: IT-95-14/1-A, Judgement, 24 Mar. 2000, para. 113 ("a proper construction of the Statute requires that the *ratio decidendi* of its decisions is binding on the Trial Chambers.").

The Appeals Chamber's conclusion that it could hold Tadić's attorney in contempt despite a lack of statutory authority also turned on the presence of inherent jurisdiction. While some scholars have suggested that this is an "intricate" problem,[19] the Appeals Chamber did not treat it as such. As the Chamber acknowledged, "[T]here is no mention in the Tribunal's Statute of its power to deal with contempt."[20] Yet, as it also remarked, "[T]he Tribunal has, since its creation assumed the right to punish for contempt."[21] Rule 77 has been amended multiple times over the years to elaborate on the types of conduct subject to contempt.[22] The Appeals Chamber reasoned that the power to "punish conduct which tends to obstruct, prejudice or abuse its administration of justice is a necessity in order to ensure that its exercise of the jurisdiction which is expressly given to it by its Statute is not frustrated and that its basic judicial functions are safeguarded."[23] It concluded that this power derived from its judicial function and was therefore inherent in its jurisdiction.

THE TRIBUNAL IS FREE TO IGNORE THE STATUTE TO ACHIEVE FAIRNESS.

In these cases, the Tribunal portrays international law as malleable, with none of the rigidity of national law, and argues that it should be modified to administer justice fairly. Though expansion is usually justified on fairness-to-the-defendant grounds, a desire to contribute to the development of international law is also a significant factor.

The first example of this form concerns interlocutory appeals. Before the Appeals Chamber could reach its momentous "*la compétence de la compétence*" decision in *Tadić*, it had to determine if it had jurisdiction to hear his appeal. Interlocutory appeals are not mentioned anywhere in the ICTY Statute. Article 25, the sole article governing appellate proceedings, refers to appeals "by persons convicted by the Trial Chambers or from the

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19. *See, e.g.*, Gabriël Oosthuizen, *Of Misconduct, Contempt, False Testimony, Rule Mutations*, *in* ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK MCDONALD 392 (Richard May et al. eds., 2001) ("The rather intricate issues of whether the Tribunal actually possesses such far-reaching inherent powers and whether the Rules do not express limits to those inherent powers, will be skirted for lack of space.").

20. Prosecutor v Tadić, Case No.: IT-94-1-A-R77, Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin, 31 Jan. 2000, para. 18.

21. *Id.*, para. 19.

22. *Compare* Rule 77 in the following revisions of the Rules of Procedure and Evidence: U.N. Doc. IT/32 Rev.6, 6 Oct. 1995; U.N. Doc. IT/32 Rev.11, 15 July 1997; U.N. Doc. IT/32 Rev.12, 20 Oct. and 12 Nov. 1997; U.N. Doc. IT/32 Rev.13, 9 and 10 July 1998; U.N. Doc. IT/32 Rev.14, 4 Dec. 1998; U.N. Doc. IT/32 Rev.16, 2 July 1999; and U.N. Doc. IT/32 Rev.22, 13 Dec. 2001.

23. Prosecutor v Tadić, Case No.: IT-94-1-A-R77, Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin, 31 Jan. 2000, para. 18.

Prosecutor."[24] Yet Rules have provided for interlocutory appeals in various forms since the fifth plenary session in January 1995.[25] Most commentators have glossed over the lack of statutory authority[26] and the Appeals Chamber did not do much better in *Tadić*.

Observing that the ICTY statute is "general in nature," the Chamber concluded that to avoid potentially "lengthy, emotional and expensive" trials[27] the Security Council "surely expected that [the Statute] would be supplemented where advisable, by the rules which the Judges were mandated to adopt."[28] This is not the epitome of legal reasoning.

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24. Article 25 provides in full:

> 1. The Appeals Chamber shall hear appeals from persons convicted by the Trial Chambers or from the Prosecutor on the following grounds: (a) an error on a question of law invalidating the decision; or (b) an error of fact which has occasioned a miscarriage of justice.
>
> 2. The Appeals Chamber may affirm, reverse or revise the decisions taken by the Trial Chambers.

ICTY Statute, *supra* note 5, art. 25.

25. The original Rules, adopted in February 1994, provided for motions and preliminary motions but made no reference to the possibility of interlocutory appeal. ICTY Rules of Procedure and Evidence, U.N. Doc. IT/32, 11 Feb. 1994, Rules 72-73. In January 1995, Rule 72 was amended to allow interlocutory appeal for jurisdictional questions only. ICTY Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.3, 30 Jan. 1995, Rule 72(B). In June 1996, it was amended to allow interlocutory appeal on other grounds for cause. ICTY Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.9, 25 June 1996, Rule 72(B)(i). In November 1997, the Plenary made wholesale structural changes, moving the content of Rule 72 to Rule 73 and vice versa. ICTY Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.12, 20 Oct. and 12 Nov. 1997, Rules 72-73. They were last amended at an extraordinary plenary session on 23 April 2002. ICTY Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.23, 23 Apr. 2002, Rules 72-73. Today, Rule 72 permits interlocutory appeals of preliminary motions regarding jurisdiction (but can be denied by three judge panel under 72 (E)) and Trial Chamber certified questions on other enumerated preliminary issues. Rule 73 allows interlocutory appeals of mid-trial decisions on evidentiary and procedural motions upon a party's request and certification by the Trial Chamber; and of decisions on all other motions upon request and leave of three judge panel of Appeals Chamber. *Id.*

26. *See, e.g.*, John Hocking, *Interlocutory Appeals before the ICTY in* ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK MCDONALD 464 (Richard May et al. eds., 2001) ("It would appear to be well settled that the International Tribunal has jurisdiction to entertain interlocutory appeals.").

27. Prosecutor v. Tadić, Case No.: IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, paras. 4-6.

28. *Id.*, para. 4. This conclusion is not merely of academic interest. Finding interlocutory jurisdiction has had a significant impact on the Tribunal's work load. The Appeals Chamber is severely overloaded and the vast majority of appeals are interlocutory. From 1 August 2001 to 31 July 2002, the Appeals Chamber decided twenty-two such

As Judge Sidhwa acknowledged in his concurring opinion, the general rule is that no appeal lies unless conferred by statute.[29] Granted, international law "seeks to keep itself free of rigid, strict and inflexible national rules and principles where they tend to be dogmatic or obstruct a fair, liberal or equitable approach to a problem."[30] But requiring a statutory grant of jurisdiction is hardly an example of such a principle. Judge Sidhwa resolves this dilemma by observing that "[t]he view of the Judges when they drafted Rule 72(B), seems to suggest that they assumed that Article 25 covered appeals against the main case and interlocutory matters."[31] On the strength of that assumption, Sidhwa concludes that Rule 72 supplies a deficiency in the Statute, notwithstanding his earlier observation that a court cannot assume appellate power in this manner.

To drive home the point that this is not a principled decision, consider what happened later in the same case. When witness Dragan Opacić sought review of an order that he be remanded to Bosnia,[32] the Appeals

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appeals while twenty-three new interlocutory appeals were filed. *Ninth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, U.N. SCOR, 57th Sess., at para. 166, U.N. Doc. A/57/379 (2002) [hereinafter Ninth Annual Report]. This overload led the Security Council to adopt Resolution 1329 providing for *ad litem* judges and a reorganization of the Appellate Chamber to add judges from the ICTR. *See* U.N. SCOR, Res. 1329, 4240th mtg. at 1, U.N. Doc. S/RES/1329 (2000). It also led the Tribunal to amend the Rules of Procedure and Evidence to restrict what had been the burgeoning availability of interlocutory appeal. *See* Ninth Annual Report, para. 14. The availability of interlocutory appeal is not considered a basic right of a defendant under any international instrument. Considering the spiraling costs and the long delays in fully litigating cases, one questions whether the Security Council intended this particular result.

29. "[T]he court may, by the adoption of reasonable and proper rules, supply deficiencies in the statutory provisions as to practice" but it cannot assume power not granted by statute under any theory of inherent jurisdiction or by amending rules. Prosecutor v. Tadić, Case No.: 9494-1-A, Separate Opinion of Judge Sidhwa on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, para. 6.

30. *Id.*, para. 11. For a strong opinion cautioning against the blind adoption of national rules in an international context, see Prosecutor v. Erdemović, Case No.: IT-96-22-A, Judgement, Separate and Dissenting Opinion of Judge Cassese, paras. 2-5.

31. Prosecutor v. Tadić, Case No.: IT-9494-1-A, Separate Opinion of Judge Sidhwa on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, para. 12. Judge Sidhwa also relies upon a dubious interpretation of Article 25, reading it to allow an accused to appeal only after conviction but the prosecutor to appeal anytime. Thus, in his view, Rule 72 (now 73) simply achieves fairness and equity by leveling the playing field to allow an accused to appeal before conviction too. He acknowledges that the use of the word "judgment" in Article 25 could be interpreted to mean only a "final judgment," but he dodges that issue by stating that the judges drafting Rule 72 did not interpret it that way.

32. Opacić had been detained at the Tribunal as a witness against Tadić. He did not testify quite the way the Prosecutor had expected, admitting to a U.N. investigator that he

Chamber concluded just the opposite. "The Tribunal has a limited appellate jurisdiction which categorically cannot be invoked by non-parties."[33] The importance of demonstrating its independence was not as great.

Staying with the appellate theme, the second example concerns the Appeals Chamber's power on appeal of the Trial Chamber's final judgment. Under Article 25, the Appeals Chamber may "affirm, reverse or revise" the decisions taken by the Trial Chambers.[34] In *Prosecutor v. Jelisić*,[35] the Appeals Chamber opted for a different disposition. Although it agreed that the Trial Chamber had improperly acquitted Jelisić, the Appeals Chamber, Judge Wald dissenting, refused to remit the case for further proceedings. "The Appeals Chamber . . . is not obliged, having identified an error, to remit for retrial."[36] In effect, it declined to reverse.

The majority had a number of rationales for its decision: Jelisić had already been sentenced to 40 years in prison on other charges, he needed psychiatric care more readily available in prison, and a retrial would be expensive. But again, its legal reasoning left a lot to be desired. It summarily concluded that "Article 25 . . . is wide enough to confer" a power not to remit and that the text of Rule 117(C) reinforces this interpretation.[37] In fact, neither a plain reading of Article 25[38] and Rule 117(C) nor review of their drafting histories supports this result. More significantly, the majority's decision is inconsistent with the object and purpose of the Tribunal (to try persons accused of crimes), with the separation of powers set forth in the Statute (giving the Prosecutor sole discretion to determine whom to prosecute), and with the Judges' obligation to remain impartial and decide each case according to the law. As Judge Wald observed in her dissent, there is no language empowering the Chamber to "veto a prosecution in the interests of justice, judicial economy or otherwise."[39]

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had lied under oath allegedly on the orders of the Bosnian military to avoid being killed. On 27 May 1997, the Trial Chamber ordered that he be remanded to the authorities of the Republic of Bosnia and Herzegovina. Prosecutor v. Tadić, Case No.: IT-94-1, In the Case of Dragan Opacić Decision on Application for Leave to Appeal, 3 June 1997, *available at* http://www.un.org/icty/tadic/appeal/decision-e/70603al3.htm (last visited Apr. 28, 2003).

33. *Id.*

34. ICTY Statute, *supra* note 5, art. 25. For the full text of Article 25, *see supra* note 24.

35. Prosecutor v. Jelisić, Case No.: IT-95-10-A, Judgement, 5 July 2001.

36. *Id.*, para. 77.

37. *Id.*, para. 73.

38. By no stretch, can the ordinary meaning of "affirm, reverse, or revise" be interpreted to include "decline to reverse."

39. Prosecutor v. Jelisić, Case No.: IT-95-10-A, Judgement, Partial Dissenting Opinion of Judge Wald, 5 July 2001, para. 5.

IT'S NOT ILLEGAL IF THE SECURITY COUNCIL APPROVES.

In the last example, the acts in excess of statutory authority are not intended to assert independence. Instead, they are actually part of a completion strategy enacted with Security Council approval to finish the Tribunal's work by 2008. The Tribunal's Ninth Annual Report to the Security Council in 2002 details a two-pronged approach to achieve this goal: 1) focusing the remaining ICTY prosecutions on those crimes which "most seriously violate international public order" and 2) referring "intermediary-level accused" for trial in national courts.[40] The Security Council endorsed this strategy in July 2002.[41] In furtherance of it, the Tribunal adopted Rule 11 *bis*, allowing the suspension of indictments and the transfer of cases to national courts. At the same time, the Tribunal enacted Rule 62 *ter*, allowing plea bargaining, and Rule 92 *bis*, permitting written statements in lieu of oral testimony, to speed resolution of existing cases.

The fact that none of these Rules have their origin in the Statute is apparently beside the point. Yet the Tribunal' has acknowledged on more than one occasion that even though the Security Council delegated rule-making authority to the Tribunal through Article 15, Rules of Procedure and Evidence cannot be created out of whole cloth to meet circumstances not envisioned by the Statute. ""Judge Shahabuddeen made this point in Tadić: Article 15 "does not permit rules to be adopted which constitute *new* offences, but it does permit the judges to adopt *rules of procedure and evidence* for the conduct of matters falling within the inherent jurisdiction of the Tribunal as well as matters within its statutory jurisdiction."[42] Judge Wald later emphasized it in Prosecutor v. Jelisić: "[n]eedless to say, the Rules cannot confer power on the Chambers greater than that provided by the Statute, unless it is power recognised universally as essential to the functioning of a court of law."[43] None of the new Rules address matters within the inherent jurisdiction of the Tribunal. Nor do they implicate universally recognized judicial powers.

Of all the recent amendments to the Rules, the decision to permit the

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40. Ninth Annual Report, *supra* note 28, para. 6. This is just an extreme example of a practice which is troubling in its own right: the President of the Tribunal and the Prosecutor going hand in hand to the Security Council every year to justify their continued existence and ask for money.

41. Statement by the President of the Security Council, S/PRST/2002/21, 23 July 2002.

42. Prosecutor v. Tadić, Case No.: IT-94-1-A-R77, Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin, 31 Jan. 2000, para. 24.

43. Prosecutor v. Jelisić, Case No.: IT-95-10-A, Judgement, Partial Dissenting Opinion of Judge Wald, 5 July 2001, para. 7.

transfer of cases from the Tribunal to national courts has been the most controversial. Under Rule 11 *bis*, "[i]f an indictment has been confirmed, irrespective of whether or not the accused is in the custody of the Tribunal," a Trial Chamber can order the accused transferred to the authorities of a State in whose territory the crime was committed or in which the accused was arrested for prosecution.[44] If the accused is not in custody, the Trial Chamber has the power to issue an arrest warrant and direct the accused to be transferred to the State.[45] The transfer is not final. At any time after the order and before the accused is convicted or acquitted in the national court, the Prosecutor can move the Trial Chamber to rescind the order and request the national court to transfer the accused back to the Tribunal.[46]

There is no statutory basis for this procedure. Article 9 grants the power to request a deferral "in accordance with the present Statute and the Rules of Procedure and Evidence."[47] But there is no provision authorizing the Trial Chamber to suspend an indictment and to transfer a case back to a national court. Perhaps for this reason, the Judges of the Tribunal, meeting in an extraordinary Plenary on 23 April 2002, declined to amend Rule 11 *bis* outright and mandated the President to take the matter to the Security Council.[48]

Under Rule 62 *ter*, in exchange for a guilty plea to one or more counts of the indictment the Prosecutor can agree to 1) amend the indictment (to dismiss charges) 2) recommend a specific sentence or sentencing range; or

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44. Amendments to the ICTY Rules of Procedure and Evidence, U.N. Doc. IT/210, 11 Oct. 2002, Rule 11 *bis*, *reprinted in* ICTY, Judicial Supplement No. 37 *available at* http://www.un.org/icty/pub.htm (last visited Mar. 16, 2003).

45. *See id.*

46. *See id.* Under an earlier version of the Rule, adopted in 1997, the Tribunal could only transfer a defendant already in the Tribunal's custody and only to the State where he was arrested. *See* ICTY Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev.24, 11 and 12 July 2002, Rule 11 *bis*. The ICTR adopted a similar Rule in July 2002. *See* ICTR Rules of Procedure and Evidence, U.N. Doc. ICTR/11bis/Rev., 6 July 2002.

47. ICTY Statute, *supra* note 5, art. 9.

48. Ninth Annual Report, *supra* note 28, para. 42. Rule 11 *bis* raises other concerns. For example, there is no limit on when the transfer of a case can occur. Since double jeopardy does not attach when the trial begins, the Trial Chamber can theoretically transfer the case to a national court after trial in the ICTY has already begun. perhaps after events have suggested that the defendant will likely prevail. With trials starting and stopping for long periods of time, this scenario is not difficult to imagine. In the same vein, there are no guidelines for determining when transfer back to the Tribunal would be proper. If the Prosecutor can seek a transfer back to the ICTY on any basis, (e.g., requesting a transfer back to the Tribunal if the Prosecutor believes the accused is likely to be acquitted in the national court) this also creates the potential for abuse.

3) not oppose a defendant's sentencing request.[49] The Trial Chamber is not bound by any agreement[50] but it is hard to see how the Rule can have any effect if the agreements are not honored. In the ICTR, the Tribunal's refusal to reduce the sentence in exchange for a guilty plea in *Kambanda* has eviscerated any effort to encourage defendants to plead guilty and avoid trial in that Tribunal.[51] The Rule has already been put into practice. In *Sikirica*, the Prosecutor reached plea agreements with defendants Sikirica, Dosen, and Kolundzija.[52] In exchange for each defendant's guilty plea to one count of persecution, the Prosecutor dismissed all other charges[53] and agreed to recommend a sentence within a particular range.[54] The Trial Chamber accepted the agreements and sentenced the defendants within the agreed ranges.[55]

Unlike the transfer to national courts, plea bargaining is not an explicit part of the Tribunal's completion strategy but by definition it has to be seen as an implicit part of a plan to eliminate future trials. While it is debatable whether Rule 11 *bis* is compatible with the object and purpose of the Statute, Rule 62 *ter* marks a complete reversal of the original attitude towards plea bargaining. The Statute does not authorize plea bargains for good reason: the drafters made a definite policy choice not to allow them.[56]

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49. *See* Amendment to the Rules of Procedure and Evidence, U.N. Doc. No.: IT-199, 21 Dec. 2001, Rule 62 *ter bis*, *reprinted in* ICTY, Judicial Supplement No. 29 *available at* http://www.un.org/icty/supplement/supp29-e/index.html (last visited Feb. 13, 2003). This Rule was adopted at the 25th Plenary on 12-13 December 2001.

50. *See id.*

51. *See* Prosecutor v. Kambanda, Case No.: ICTR 97-23-S, Judgement and Sentence, 4 Sept. 1998. The Chamber recognized that Kambanda had cooperated with the Prosecutor and that his guilty plea was "likely to encourage other individuals to recognize their responsibilities" but it found that the crimes for which he was guilty "carry an intrinsic gravity, and their widespread, atrocious and systematic character is particularly shocking to the human conscience" and that Kambanda's position as Prime Minister made his crimes even more serious. *See id.*, para. 61. The aggravating circumstances negated the mitigating circumstances *in toto*, and Kambanda was sentenced to life imprisonment. *See id.*, para. 62.

52. Prosecutor v. Sikirica, Case No.: IT-95-8-S, Sentencing Judgement, 13 Nov. 2001, para. 17, *available at* http://www.un.org/icty/sikirica/judgement/index_2.htm (last visited Apr. 28, 2003).

53. *See id.*, paras. 13, 15.

54. *See id.*, paras. 25, 31, 37.

55. *See id.*, para. 245.

56. *See* Michael Bohlander, *Plea Bargaining before the ICTY*, *in* ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK MCDONALD 152 (Richard May et al. eds., 2001) ("The Statute of the ICTY does not contain any provisions about the admissibility and the procedure to be followed in case of guilty pleas, let alone plea bargains."). *Compare* Statute of the International Criminal Court, U.N. Doc. A/Conf.183/9, 17 July 1998, art. 65(5) ("Any discussions between the Prosecutor and the defense regarding modification of the charges, the admission of guilt or the penalty to be imposed shall not be

They knew this would make the Prosecutor's job more difficult and more expensive but the nature of the crimes made plea bargaining inappropriate. Their attitude was, to paraphrase Judge Cassese, "no immunity no matter how useful."[57]

Rule 92 *bis* is designed to speed up trials that will take place in Tribunal. It allows the Trial Chamber to admit witness statements "in lieu of oral testimony which goes to proof of a matter other than the acts and conduct of the accused as charged in the indictment" and to disallow cross-examination in its discretion.[58] The accused can object to this procedure but the Trial Chamber can admit the statement over his objection.[59] While the Rule provides a list of criteria for the Trial Chamber to consider in deciding whether to admit or exclude the statements, the principle consideration must be the obligation imposed by Article 21 to ensure a fair trial.

This Rule violates the Statute because giving the Trial Chamber the ability to admit the witness statements without cross-examination over a defendant's objection denies him his statutory right to confront the witnesses against him.[60] Unlike the procedure for admitting deposition testimony in lieu of oral testimony,[61] cross-examination is not guaranteed. The Trial Chambers have justified this deficiency by arguing that statements which go to proof of matters other than the acts and conduct of accused do not implicate the accused in a "critical way."[62] To allow

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binding on the Court.").

57. SCHARF, *supra* note 5, at 67 (quoting Judge Cassese).

58. ICTY Rules of Procedure and Evidence, *supra* note 46, Rule 92 *bis*.

59. *See id.* The Rule first appears in Rev.19 on 13 December 2000 so it must have been adopted in a plenary session that year. The ICTR adopted an identical rule. *See* ICTR Rules of Procedure and Evidence, *supra* note. 46, Rule 92 *bis*.

60. *See* ICTY Statute, *supra* note 5, art. 21(4)(e).

61. *See* ICTY Rules of Procedure and Evidence, *supra* note 46, Rule 71. Even this procedure, which allowed for cross-examination, was intended to be used only in extraordinary circumstances. *See First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, U.N. Doc. A/49/342, 29 Sept. 1994 (reprinted in International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Yearbook 1994, at 81-133, U.N. Sales No. E.95.III.P.2 (ICTY 1995)).

62. Prosecutor v. Milosević, Case No.: IT-02-54, Decision on Prosecution's Request to Have Written Statements Admitted under Rule 92 *bis*, Separate Opinion of Judge Patrick Robinson, 21 March 2002, para. 5. Several cases have had occasion to apply Rule 92 *bis*. *See, e.g.*, Prosecutor v. Sikirica, Case No.: IT-95-8-T, Decision on Prosecution's Application to Admit Transcripts under Rule 92 *bis*, 23 May 2001; Prosecutor v. Naletilić, Case No.: IT-98-34-T, Decision Regarding Prosecutor's Notice of Intent to Offer

statements which do implicate the accused in a critical way would breach his statutory right to cross-examination but otherwise they would not. This is a nonsense distinction. Any evidence that may be used to convict the accused implicates him in a "critical way." Any evidence considered peripheral enough to warrant admission under Rule 92 *bis* over the objection of the accused should be barred on the ground that it is more prejudicial than probative.[63]

THE EFFECT OF THESE EXPANSIONS ON THE TRIBUNAL'S LEGITIMACY

Milosević's charge that the Tribunal is a "political tool" resonates for a number of people, many of whom reside in the former Yugoslavia where it is arguably most important for the Tribunal to be seen as legitimate. The Tribunal strengthens its social legitimacy among these people in large part by demonstrating its independence and insulation from political influence. Above and beyond the tensions inherent in its origin, the Tribunal must counteract other forces which suggest its partiality: its financial dependence on the Security Council,[64] the *amicus curiae* procedures,[65] and its apparent unwillingness to sanction states for violating its orders.[66]

In this context, the expansions of the Tribunal's power cut both ways. In their first two forms, the Tribunal asserts its independence. The Security Council had granted it certain powers but when the Tribunal found them too limiting, it expanded them to meet its own perceived requirements. It was only willing to acknowledge its limitations in administrative matters

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Transcripts under Rule 92 *bis* (D), 9 July 2001; Prosecutor v. Brdjanin and Talic, Case No.: IT-99-36-T, Decision on the "Objection and/or Consent to Rule 92 *bis* Admission of Witness Statements Number One" filed by Brdjanin on 16 January 2002 and "Opposition du General Talic a l'Admission des Depositions Recueillies en Application de l'Article 92 B du Reglement" filed by Talic on 21 January 2002, 30 Jan. 2002, para. 17; Prosecutor v. Galić, Case No.: IT-98-29-T, Decision on the Admission into Evidence of Written Statement By a Deceased Witness, Hamdija Cavcić, and Related Report Pursuant to Rule 92 *bis* (C), 2 Aug. 2002.

63. *See* Prosecutor v. Sikirica, Case No.: IT-95-8-T, Decision on Prosecution's Application to Admit Transcripts under Rule 92 *bis*, 23 May 2001, para. 3 (confirming that this general requirement of admissibility continues to apply to witness statements).

64. *See* Graham T. Blewitt, *International and National Prosecutions in* REIGNING IN IMPUNITY FOR INTERNATIONAL CRIMES AND SERIOUS VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS: PROCEEDINGS OF THE SIRACUSA CONFERENCE 17-21 SEPTEMBER 1998 156 (Christopher C. Joyner & M. Cherif Bassiouni, eds., 1998).

65. José E. Alvarez, *Crimes of State/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 422, n.286 (suggesting that these procedures allow the permanent members of the Security Council to exert undue influence).

66. Batram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 409-11 (1998).

such as the provision of judges or the organization of the Tribunal. The three amendments to the Statute concern only these matters.[67]

Claiming inherent jurisdiction and invoking the interests of justice to decide cases in ways not contemplated by the Statute were two ways to emphasize the judicial quality of the Tribunal and to de-emphasize its political component. In some contexts, acting in excess of granted powers may raise the specter of judicial activism and decrease a tribunal's legitimacy. This was not the case in the ICTY. Despite the clarion calls for justice, many viewed the Tribunal as a means to a political end. As Michael Reisman has observed:

> The real purpose of the Tribunal was never to function as such but rather to stop the war. The Secretary-General's Report stated, with remarkable candor, 'As an enforcement measure under Chapter VII, however, the life span of the international tribunal would be linked to the restoration and maintenance of international peace and security in the territory of the former Yugoslavia, and Security Council decisions related thereto.'[68]

For the Tribunal to gain legitimacy, it needed to challenge this attitude and to demonstrate that it was indeed a functioning judicial body.

If the early attitude of the Tribunal was to demonstrate its independence from the Security Council, it has retreated from that position fairly dramatically in recent years. While the Appeals Chamber in *Tadić* went almost as far as to suggest that it could review the propriety of Security Council Resolutions, the Tribunal now seeks Security Council approval for case management strategy. Any legitimacy gained from early inherent-jurisdiction decisions has been subsequently undermined. The recent rule amendments actually emphasize the sense of collusion between the Security Council and the Tribunal. It is not the substance of these changes. To a certain extent, social legitimacy is undermined by the glacial pace of the trials, so amendments directed at speeding this up are likely to increase legitimacy. It is the manner in which the amendments were adopted which undercuts any legitimacy gained by this move.

If the Tribunal has been unsuccessful in establishing its legitimacy over the last ten years, we might question whether this will have any impact on

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67. *See* S. Res. 1166, U.N. SCOR, 3878th Mtg., S/RES/1166 (1998) (establishing a third Trial Chamber); S. Res. 1329, U.N. SCOR, 4240th Mtg., S/RES/1329 (2000) (establishing a pool of *ad litem* judges); S. Res. 1411, U.N. SCOR, 4535th Mtg., S/RES/1411 (2002) (determining the nationality of dual-national judges for the purpose of judicial eligibility); S. Res. 1431, U.N. SCOR, 4601st Mtg., S/RES/1431 (2002) (making minor technical changes).

68. W. Michael Reisman, *Stopping Wars and Making Peace*, 6 TUL. J. INT'L & COMP. LAW 5, 48 (1998) (citing Secretary-General's Report, *supra* note 3, para. 28).

the future of international criminal law. In particular, we might expect that the new International Criminal Court will fare differently since it was created through an entirely different process. Unfortunately, early indications suggest similar systemic problems. Article 16 of the Rome Statute already yields the Security Council a measure of control over investigations and prosecutions in the Court in a way that could impinge on its independence.[69] And through Resolution 1244 (2002), the Security Council has injected itself into the Court's affairs in a way that arguably exceeds its Article 16 function and impinges on the Court's independence. The Court will be anxious to demonstrate that independence at the first opportunity.

The Tribunal's expansions beyond the Statute also give weight to U.S. fears about a rogue prosecutor in the ICC. The standard response to those fears has been that the powers of the Court and of the prosecutor are carefully circumscribed by the Rome Statute and that there are multiple protections against this possibility built into the Statute. Yet if the ICTY has gone beyond its Statute, it seems equally possible that the ICC may do the same.

69. *See Report of the Special Rapporteur on the independence of judges and lawyers, Mr. Param Cumaraswamy*, U.N. Commission on Human Rights, 55th Sess., Agenda Item 11(d), para. 39, U.N. Doc. E/CN.4/1999/60 (1999).

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Reflections on Some of the Most Significant Achievements of the ICTY

Kelly D. Askin*

It is an honor to be speaking at a conference dedicated to the Yugoslav Tribunal's[1] 10th anniversary. For a number of reasons, this institution and its counterpart for Rwanda[2] are very special, and their establishment has been the impetus for a series of pioneering developments in international justice initiatives. I've been privileged to oscillate between academia and international justice institutions for several years. Working in all three organs of the Tribunal, namely the Office of the Prosecutor, Registry, and Chambers, including the Trial and Appeals Chamber of the Yugoslav Tribunal and the Appeals Chamber of the Rwanda Tribunal, has granted me a unique opportunity to observe firsthand some of the extraordinary achievements gained over the past decade.

Remarkable progress has been made in the ICTY despite the enormous obstacles and inherent challenges facing a nascent international judicial institution, especially one responsible for adjudicating exceptionally serious crimes involving massive numbers of victims and perpetrators. Among other hurdles, the Tribunal had scarce legal or procedural precedent to follow, endured near insurmountable handicaps in acquiring evidence and securing arrests, faced acute language and translation difficulties, and was located far from the conflict region. There is no doubt that certain aspects and decisions of the ICTY have generated skepticism of its ability to fulfill its mandate, and valuable constructive criticisms of the Tribunal have been articulated at this conference and elsewhere. But what I want to

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1. *See* International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 29, U.N. Doc. S/827/1993 (1993). The Statute is contained in U.N. Doc. S/25704, Annex (1993), and attached to the "Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808." [hereinafter ICTY or Yugoslav Statute].

2. *See* International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 15, U.N. Doc. S/955/1993, Annex (1994) [hereinafter ICTR or Rwanda Statute].

highlight in my presentation, and indeed celebrate, are some of the Tribunal's most notable successes and perhaps its most positive contributions.

ENDING IMPUNITY AND FACILITATING JUSTICE INITIATIVES

The most obvious contribution is the role the mere establishment of the Yugoslav Tribunal had in signaling that the United Nations was finally ending fifty years of impunity typically received by instigators and perpetrators of war crimes, crimes against humanity, and genocide. Not since the post World War II trials in Nuremberg and Tokyo had an international tribunal been created to prosecute the principal authors of mass atrocity. The establishment of the Yugoslav Tribunal represented the first United Nations effort to prosecute serious international crimes, and had the UN Security Council not established the ICTY, it is highly unlikely that justice initiatives would have commenced in other places, such as Rwanda, East Timor, Kosovo, and Sierra Leone.

Furthermore, military personnel, political leaders, and citizens of all walks of life worldwide are now far more knowledgeable about topics such as war crimes, the Geneva Conventions, the United Nations, the International Committee of the Red Cross, peacekeeping, intervention, universal jurisdiction, and international justice than they were prior to the establishment of the ICTY. Governments, international organizations, experts, and academics are now fully engaged in efforts seeking practical solutions to international crimes and attempting to improve justice endeavors in order to make them more efficient, effective, affordable, and germane to the victimized population. Hence, progress has been generated on many fronts – political, jurisprudential, educational, legal, developmental, intellectual, etc. – simply as a result of the ICTY's establishment and its evolution into a credible, thriving institution.

THREAT OF PROSECUTION, SEALED INDICTMENTS

The existence of the two Tribunals and their ability to issue both public and sealed indictments has significantly reduced the capacity of powerful people to terrorize, dominate, or harm others. Many indicted leaders, such as Radovan Karadžić and Ratko Mladić,[3] have had their mobility, authority, and influence diminished by being forced into hiding or having their assets frozen.

Many war criminals likely are concerned about whether they have been secretly indicted and consequently they tend to keep a lower profile, which

3. *See* Prosecutor v. Mladić, Case No.: IT-95-5/18-I, Amended Indictment, 11 Oct. 2002; Prosecutor v. Karadžic, Case No.: IT-95-5/18-I, Amended Indictment, 31 May 2000.

hinders their ability to move freely, make public speeches, incite violence, threaten witnesses, or inflict abuse. The authority granted to the Tribunals to issue sealed indictments[4] facilitates arrests and leaves those who have committed criminal activity feeling much more vulnerable than they would be if they knew they had not been indicted. If nothing else, investigations by the Tribunal have caused many perpetrators stress and insecurity, strains which would be absent if the Tribunal did not exist. Additionally, for those who have been publicly indicted but not arrested, there is surely some stigma associated with being accused of war crimes, crimes against humanity, or genocide by an international tribunal.

The reliance of the Tribunal on states or other enforcement entities and its inability to secure the arrest of all indictees has significantly tempered its capacity to secure justice or contribute to peace and reconciliation. It is perplexing that there has been so much condemnation of the Tribunals for holding trials against mid-to-lower level accused when indictments have been issued for top leaders who nonetheless remain at large. If the Tribunals have evidence that lower level accused have committed heinous atrocities, its docks should not sit empty waiting on the higher level indictees to be arrested and transferred to the custody of the Tribunal.

It is tough to justify, however, considerable expenditure of Tribunal time and resources solely on lower level accused, and additionally, resource allocation should be proportional to the gravity of the harm and the level of responsibility within the context of all atrocities committed. Whereas it might be reasonable to hold a four month trial for a sadistic soldier accused of the brutal murder, torture, or rape of half a dozen victims, a two year trial in this situation may not be warranted given the fact that the Tribunal only has three courtrooms and limited time and resources to fulfill its mandate. To put it bluntly, there are bigger fish to catch and, without a neat paper trail or proverbial smoking gun, proving the culpability of persons holding top positions of power will entail a time-consuming and complex evidentiary process.

BROAD RANGE OF INDICTEES

The Tribunal has indicted both civilian and military persons at all levels of the hierarchy and from each major ethnic or national party to the conflict. A variety of accused have been indicted: low level bullies and opportunistic thugs who used the war to commit despicable crimes, concentration camp guards who stood by when members of opposing sides were murdered, tortured, and persecuted in the camps, combatants who violated the laws of war or followed illegal orders or policies, military

4. *See* ICTY Rules of Procedure and Evidence, Rule 61, IT/32/Rev. 26 (as amended Dec. 12, 2002).

commanders who ordered or ignored crimes, persons who incited crimes, businesspersons who facilitated crimes for their own gain, and political and military leaders who orchestrated the campaigns of terror and destruction or failed to use their power and authority to prevent or halt crimes. As mentioned above, I think it is imperative that the Tribunals prosecute at least some mid-to-lower level actors, including those who knowingly commit crimes under orders or play a role in facilitating atrocities, as well as those who commit crimes because war and the brutality it engenders creates the opportunity.

Because it is typically the lower level persons who physically commit the murders, rapes, and other crimes, and the ones survivors tend to identify as their victimizers, it is important to get the physical perpetrators in the dock. Nonetheless, the main focus must remain on prosecuting the persons bearing the greatest level of responsibility for the most serious crimes, namely, the political and military leaders. Having the authority and discretion to indict any person that evidence indicates has committed serious offences, regardless of which side of the conflict they are on or hierarchical level, is an essential prosecutorial weapon against impunity. Moreover, it sends an unambiguous message to civilians, common soldiers, and leaders that all are indictable and may be called to account for criminal activities.

STREAMLINING INDICTMENTS AND COALESCING CHARGES

The Tribunals are continuously learning lessons and changing strategies to improve their operations. Streamlining and consolidating counts in the indictments, so that trials are shorter and the charges more condensed, has been a method increasingly employed by the ICTY. For example, the prosecution amended an indictment against a mid-level accused, reducing an eighty count indictment to eight counts by focusing on charging the gravest offences and then utilizing the broader crimes of "persecution" and "inhumane acts" to capture an array of other criminal activities, such as killing, torture, expulsion, rape, and beatings.[5] This type of charging strategy allows the prosecution to by pass the extremely time-consuming and onerous process of proving each and every element of the subsumed crimes separately, yet it still allows for the creation of an historical record of the broader range of atrocities. Indeed, the prosecution appears to be using persecution as an umbrella charge to capture a litany of various inhumane or discriminatory acts. Admittedly, however, the lack of specificity or immediate transparency as to what these broader crimes

5. *See* Prosecutor v. Nikolić, Case No.: IT-94-2-I, Amended Indictment, 12 Feb. 1999 (80 counts); Prosecutor v. Nikolić, Case No.: IT-94-2-PT, Second Amended Indictment, 15 Feb. 2002 (8 counts).

entail can obscure the scope and nature of the crimes committed.[6]

JOINT TRIALS

Charging several accused in a single indictment or consolidating separate indictments to hold joint trials for more than one accused is another means commonly utilized to increase the efficiency of the trials. Joint trials typically join accused who worked at a notorious concentration camp, were involved in a particular location or site where crimes were committed, or who held similar positions. Thus joint trials tend to be either thematic (media, commanders, political leaders, religious leaders, etc.) or location-specific. Joint trials can create special challenges in the courtroom and require exceptional effort by the Judges to balance the rights of both the victims and the accused. For example, when six co-defendants each have two attorneys in the courtroom, and each accused wish to cross-examine a witness or contest a legal or factual point by the prosecution, allowing the accused to rigorously defend him or herself without abusing the witness will require careful attention.

ENHANCED DEVELOPMENT OF INTERNATIONAL LAW, PRACTICE, AND PROCEDURE

Substantive international humanitarian law, international criminal law, and international criminal procedure have developed immensely as a result of the Tribunals' ten years of practices and jurisprudence. In addition to the Judgments delivered by the Trial and Appeals Chambers, thousands of pre-trial, trial, and post-trial decisions have been rendered, ranging from contesting appointed counsel, to challenges to the form and substance of the indictment, to requests by detainees for pre-trial release, to requests for protective measures for witnesses, to plea agreements. In adopting, refining, and applying the Rules of Procedure and Evidence during the course of the proceedings, international criminal law practice and procedure has taken a far more tangible, concrete form.

The Tribunals combine common and civil law systems, taking the best practices used in domestic proceedings around the world and melding them together to create an international judicial practice consistent with international human rights standards. While merging common and civil law is by no means an easy feat or a perfect fit, the integration has

6. For example, while the crimes of extermination, torture, enslavement, and rape may be consolidated into one persecution charge in order to reduce the total number of charges, a single conviction for one count of persecution for a range of inhumane acts would not carry the degree of specificity, or generate the outrage, that four separate convictions for extermination, torture, rape, and enslavement would.

nonetheless resulted in a reasonably successful effort of consolidating the best global criminal trial practices into a fair and manageable procedure that endeavors to balance the rights of both victims and accused, and that protects the interests of justice.[7]

The jurisprudence of the Tribunals is particularly rich in regards to delineating, defining, and developing substantive crimes. Applying the law to the facts of each case, the Tribunals have rendered decisions concerning such things as the nature of the armed conflicts, the application and scope of Common Article 3 to the 1949 Geneva Conventions, the criteria for establishing whether a widespread or systematic attack against a civilian population occurred, and the prerequisite requirements necessary for proving the core crimes within the jurisdiction of the Tribunals. It has provided detailed insight into, *inter alia*, what acts constitute 'cruel treatment' for grave breaches or 'causing serious bodily or mental harm' for genocide, when a superior can be held criminally liable for crimes committed by subordinates, what acts constitute indicia of enslavement, and the constituent elements required to prove torture under international humanitarian law.

It would be impossible here to adequately summarize all of the decisions of the ICTY's Trial and Appeals Chambers, so I'll merely highlight perhaps some of the most notable jurisprudence. The first case, *Tadić,* produced findings regarding, among other things, the legitimacy of the Tribunal, the definition and nature of armed conflict, the scope of customary international law pertaining to internal and international armed conflict, the applicability of crimes against humanity, and the scope of grave breaches to the 1949 Geneva Conventions.[8] The jurisprudence developed in *Tadić* laid the foundation for many subsequent decisions.

The *Erdemović* case determined that duress is not a defense to crimes against humanity or war crimes, but can be used as a mitigating factor in punishment.[9] The *Čelebići* case detailed requirements of command responsibility and when a civil or military superior can be held criminally responsible for failing to prevent, halt, or punish crimes committed by

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7. *See, e.g.*, ESSAYS ON ICTY PROCEDURE AND EVIDENCE: IN HONOUR OF GABRIELLE KIRK MCDONALD (Richard May et al. eds., 2001); GÖRAN SLUITER, INTERNATIONAL CRIMINAL ADJUDICATION AND THE COLLECTION OF EVIDENCE: OBLIGATIONS OF STATES (2002). Ideally, domestic systems will incorporate some of the best practices of the international tribunals into domestic laws and codes.

8. *See, e.g.*, Prosecutor v. Tadić, Case No.: IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995; Prosecutor v. Tadić, Case No.: IT-94-1-T, Trial Chamber Opinion and Judgement, 7 May 1997; Prosecutor v. Tadić, Case No.: IT-94-1-A, Appeals Chamber Judgement, 15 July 1999.

9. *See* Prosecutor v. Erdemović, Case No.: IT-96-22-T, Sentencing Judgement, 29 Nov. 1996; Prosecutor v. Erdemović, Case No.: IT-96-22-A, Judgement, 7 Oct. 1997.

persons under their control or authority.[10] It also established the permissibility and parameters of cumulative convictions.[11] The *Aleksovski* case further solidified the law regarding who constitutes "protected persons" within the meaning of Article 4 of the Fourth Geneva Convention, concluding that the Convention should be interpreted broadly to afford as much protection as possible to civilians, including victims having technically the same nationality as their perpetrators, such as Bosnian Muslims victimized by Bosnian Serbs.[12] The *Kupreškić* case articulated appropriate standards for appellant review in light of new facts, namely that the appellant must establish that no reasonable trier of fact could convict based on the evidence before the Trial Chamber and the additional evidence admitted on appeal.[13] The *Krstić* case concluded that genocide was committed in Srebrenica and that the accused General on trial incurred responsibility for the role he played in facilitating or acquiescing to the slaughter of some 7,000-8,000 men and boys over a seven day period.[14] The *Kvočka* case developed more extensively the joint criminal enterprise theory of responsibility and applied it to certain persons working in Omarska camp, a camp used to persecute non-Serbs.[15]

Additionally, the ICTY has made huge strides in redressing gender crimes and demonstrating that sexual violence is strategically used as a weapon of war and an instrument of terror. The two Tribunals have together rendered Judgments recognizing rape and other forms of sexual violence as crimes against humanity, war crimes, instruments of genocide, means of persecution, and forms of torture, particularly sexual violence manifested in the form of rape, sexual slavery, forced nudity, and sexual

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10. *See* Prosecutor v. Delalić et al., Case No.: IT-96-21-T, Trial Chamber Judgement, 16 Nov. 1998; Prosecutor v. Delalić et al., Case No.: IT-96-21-A, Appeals Chamber Judgement, 20 Feb. 2001; Prosecutor v. Mučić et al., Case No.: IT-96-21-T*bis*-R117, Sentencing Judgement, 9 Oct. 2001.

11. *See id.*

12. *See* Prosecutor v. Aleksovski, Case No.: IT-95-14/1-T, Trial Chamber Judgement, 25 June 1999; Prosecutor v. Aleksovski, Case No.: IT-95-14/1-A, Appeals Chamber Judgement, 24 Mar. 2000, paras. 147-52. The Fourth Geneva Convention, which protects civilians, stipulates it protects persons "who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 4, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

13. *See* Prosecutor v. Kupreškić et al., Case No.: IT-95-16-A, Appeals Chamber Judgement, 23 Oct. 2001, paras. 45-58.

14. *See* Prosecutor v. Krstić, Case No.: IT-98-33-T, Trial Chamber Judgement, 2 Aug. 2001, paras. 719-20.

15. Prosecutor v. Kvočka et al., Case No.: IT-98-30/1-T, Trial Chamber Judgement, 2 Nov. 2001, paras. 265-312.

mutilation.[16] The ICTY's groundbreaking *Furundžija, Čelebići*, and *Kunarac* cases have adjudicated various forms of sexual violence as war crimes and crimes against humanity committed in the Balkan conflict,[17] a particularly positive development since gender crimes were largely ignored by the Nuremberg and Tokyo war crimes proceedings.[18] The ICTY case law can be used as precedential authority in other international, hybrid, and domestic proceedings.

JOINT CRIMINAL ENTERPRISE THEORY

The *Tadić* and *Kvočka* cases extensively developed the joint criminal enterprise theory of responsibility. The Appeals Chamber in *Tadić* first articulated the theory,[19] based largely on jurisprudence derived from the post-World War II Nuremberg trials; the *Kvočka* Trial Chamber further examined the common purpose doctrine/joint criminal enterprise theory in the Nuremberg caselaw and applied the theory of responsibility to persons knowingly working in Omarska prison camp in Bosnia.[20] In the last two

16. For example, see especially ICTY cases: Prosecutor v. Furundžija, Case No.: IT-95-17/1-T, Trial Chamber Judgement, 10 Dec. 1998; Prosecutor v. Furundžija, Case No.: IT-95-17/1-A, Appeals Chamber Judgement, 21 July 2000 (declaring rape as a violation of the laws or customs of war, including Common Article 3 of the Geneva Conventions; sexual violence as a form of torture and an outrage upon personal dignity); Prosecutor v. Delalić et al., Case No.: IT-96-21-T, Trial Chamber Judgement, 16 Nov. 1998 (declaring rape as a grave breach of the Geneva Conventions; male sexual violence; torture by means of rape); Prosecutor v. Kunarac et al., Case No.: IT-96-23/1-T, Trial Chamber Judgement, 22 Feb. 2001; Prosecutor v. Kunarac et al., Case No.: IT-96-23/1-A, Appeals Chamber Judgement, 12 June 2002 (declaring rape as a crime against humanity; rape in conjunction with enslavement; sexual violence as torture; forced nudity as an outrage upon personal dignity); Prosecutor v. Kvočka et al., Case No.: IT-98-30/1-T, Trial Chamber Judgement, 2 Nov. 2001 (declaring rape as form of persecution; threat of rape as a form of torture; foreseeable rape during course of a joint criminal enterprise); Prosecutor v. Tadić, Case No.: IT-94-1-T, Trial Chamber Judgement, 7 May 1997 (male sexual mutilation). Furthermore, see ICTR cases, particularly Prosecutor v. Akayesu, Case No.: ICTR-96-4-T, Trial Chamber Judgement, 2 Sept. 1998 (finding rape as an instrument of genocide; rape as a crime against humanity; forced nudity as an inhumane act).

17. *See* Furundžija, Case No.: IT-95-17/1-T, Trial Chamber Judgement, 10 Dec. 1998; *see also* Delalić et al., Case No.: IT-96-21-T, Trial Chamber Judgement, 6 Nov. 1998; *see also* Kunarac et al., Case No.: IT-96-23/1-T, Trial Chamber Judgement, 22 Feb. 2001.

18. *See, e.g.*, discussion in Kelly Dawn Askin, *Prosecuting Wartime Rape and Other Gender Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21(2) BERKELEY J. INT'L L. (*forthcoming* Winter, 2003); KELLY DAWN ASKIN, WAR CRIMES AGAINST WOMEN: PROSECUTION IN INTERNATIONAL WAR CRIMES TRIBUNALS (1997).

19. *See* Tadić, Case No.: IT-94-1-A, Appeals Chamber Judgement, 15 July 1999.

20. *See* Kvočka et al., Case No.: IT-98-30/1-T, Trial Chamber Judgement, 2 Nov. 2001.

years, it appears that participating in a joint criminal enterprise has become the principal charging preference in ICTY indictments,[21] and it is particularly effective when charged in conjunction with persecution.[22] Participation in a joint criminal enterprise has been a prominent feature in the *Milošević* trial, in which Slobodan Milošević is alleged to have been a co-perpetrator of crimes committed during the course of or as a foreseeable part of a joint criminal endeavor.[23] This theory of criminal responsibility is encompassed under the individual responsibility subarticle of the Statute (Article 7(1)), and is thus distinct from a superior responsibility charge (Article 7(3)).[24]

PLEA AGREEMENTS

Erdemović entered the ICTY's first guilty plea in 1996; since then, six additional accused have pled guilty to certain crimes charged against them.[25] The more recent guilty pleas, entered either in the midst of or prior to trial, have been submitted after negotiations between the accused and the prosecution result in a plea agreement. In most instances, the prosecution has agreed to drop other charges in exchange for a guilty plea comprising a single count of persecution as a crime against humanity. While the Judges

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21. *See, e.g.*, Prosecutor v. Milošević, Case No.: IT-02-54-I, Second Amended Indictment [Kosovo], 29 Oct. 2001; Prosecutor v. Milošević, Case No.: IT-02-54-I, First Amended Indictment [Croatia], 23 Oct. 2002; Prosecutor v. Milošević, Case No.: IT-02-54-I, Indictment [Bosnia], 22 Nov. 2001; Prosecutor v. Šešelj, Case No.: IT-03-67, Indictment, 14 Feb. 2003; Prosecutor v. Borovčanin, Case No.: IT-02-64, Indictment, 6 Sept. 2002; Prosecutor v. Blagojević et al., Case No.: IT-02-60-I, Amended Joinder Indictment, 27 May 2002; Prosecutor v. Beara, Case No.: IT-02-58-I, Indictment, 26 Mar. 2002; Prosecutor v. Popović, Case No.: IT-02-57-I, Indictment, 26 Mar. 2002; Prosecutor v. Nikolić, Case No.: IT-02-60-I, Indictment, 26 Mar. 2002; Prosecutor v. Meakić et al., Case No.: IT-02-65-I, Consolidated Indictment, 29 Nov. 2002.

22. *See* Kvočka et al., Case No.: IT-98-30/1-T, Trial Chamber Judgement, 2 Nov. 2001.

23. *See* Prosecutor v. Milošević, Case No.: IT-02-54-T, Prosecution's Second Pre-Trial Brief (Croatia and Bosnia Indictments), 31 May 2002; Prosecutor v. Milošević, Case No.: IT-99-37-PT, Prosecution's Pre-Trial Brief Pursuant to Rule 65*ter*(E)(i), 26 Nov. 2001.

24. *See* ICTY Statute, *supra* note 1, at art. 7. The *Krstić* and *Kvočka* Judgements concluded that in the context of a joint criminal enterprise, any underlying conduct convicted under article 7(1) of the Statute as individual responsibility subsumes superior responsibility under article 7(3) of the Statute. *See* Krstić, Case No.: IT-98-33-T, Trial Chamber Judgement, 2 Aug. 2001; Kvočka et al., Case No.: IT-98-30/1-T, Trial Chamber Judgement, 2 Nov. 2001.

25. *See* Prosecutor v. Erdemović, Case No.: IT-96-22-T*bis*, Sentencing Judgement, 5 Mar. 5, 1998; Prosecutor v. Todorović, Case No.: IT-95-9/1, Sentencing Judgement, 31 July 2001; Prosecutor v. Sikirica et al., Case No.: IT-95-8, Sentencing Judgement, 13 Nov. 2001; Prosecutor v. Simić, Case No.: IT-95-9/2, Sentencing Judgement, 17 Oct. 2002; Prosecutor v. Plavšić, Case No.: IT-00-40/1, Sentencing Judgement, 27 Feb. 2003.

are not bound by the plea agreements, including the sentencing recommendations, thus far the Trial Chambers have adhered fairly closely to the agreements reached between the parties. In light of the rather lenient sentences handed down in the Judgments after guilty pleas,[26] I'll be surprised if other accused do not forego an arduous and excruciating trial process and simply plead guilty to one count of persecution in exchange for dropping other charges.

SENTENCING PRACTICES

A recurring criticism of the Tribunals, especially from countries allowing the death penalty or regularly imposing long or harsh domestic sentences for persons convicted of crimes, involves the surprisingly low sentences handed down by the ICTY and ICTR, including for those convicted of crimes against humanity and genocide. Despite the Yugoslav Statute allowing for a sentence of life imprisonment,[27] and despite convictions for some of the most serious international crimes committable, of the thirty individuals convicted thus far in the ICTY, not a single person has been sentenced to life imprisonment, and indeed the average sentence imposed is approximately sixteen years. Ten persons have received sentences of less than ten years imprisonment, and only three have sentences between forty to forty-six years.[28]

Not surprisingly, the harshest sentences have generally been reserved for the highest level accused or the physical perpetrators who commit their crimes with exceptional relish or ruthlessness. My own view is that if the prosecution is not going to request more than ten year's imprisonment for a

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26. Erdemović ultimately received a 5-year sentence after pleading guilty to one count of murder as a violation of the laws or customs of war. *See* Erdemović, Case No.: IT-96-22-T*bis*, Sentencing Judgement, 5 Mar.1998; Todorović pled guilty to one count of persecution as a crime against humanity and all other charges were dropped. He received a 10-year sentence. *See* Todorović, Case No.: IT-95-9/1, Sentencing Judgement, 31 July 2001; In the midst of their joint trial, Sikirica, Došen, and Kolundžija pled guilty to one count of persecution as a crime against humanity and all other charges against them were withdrawn. They received 15, 5, and 3 year prison terms, respectively. *See* Sikirica et al., Case No.: IT-95-8, Sentencing Judgement, 13 Nov. 2001; Simić pled guilty to two counts of torture as crimes against humanity, and all other charges against him were withdrawn. He was sentenced to 5 years imprisonment on each count, to run concurrently. *See* Simić, Case No.: IT-95-9/2, Sentencing Judgement, 17 Oct. 2002; Plavšić pled guilty to one count of persecution as a crime against humanity, and all other charges against her were withdrawn. She received a sentence of 11 years imprisonment. *See* Plavšić, Case No.: IT-00-40/1, Sentencing Judgement, 27 Feb. 2003.

27. *See* ICTY Statute, *supra* note 1, at art. 24(1).

28. *See* ICTY, Judgements, *at* http://www.un.org/icty/judgements.htm (last visited Apr. 24, 2003). The sentences range between three to twenty-eight years or forty to forty-six years. No one has been sentenced to between twenty-nine to thirty-nine years. *See id.*

person who may be convicted by the Tribunal, it should not bring the case and should instead refer it to domestic proceedings. To spend significant time and resources on a trial—averaging millions of dollars per case—and then seek and receive a five-year sentence for the convicted person seems to me to be a poor use of the Tribunal's time, courtroom space, resources, and mandate (particularly in light of the hostile reaction such low sentences provoke in the victimized country).

IMPROVING THE INTERNATIONAL JUDICIAL PROCESS

The Tribunals have been accused of being too expensive and having trials run too long. Each year, however, the Tribunals have generally improved their expeditiousness and efficiency and have taken measures intended to reduce the length of trial. For example, in bringing war crime charges, the prosecution will usually charge violations of laws or customs of war under article 3 of the Statute instead of grave breaches under article 2.[29] The reason for this is that article 3 charges do not require the prosecution to undertake the lengthy process of proving that the armed conflict was international in character at the time and place of the crimes alleged in the indictment.[30]

With each Judgment, the amount and type of evidence necessary to prove the charges is increasingly clarified. Yet it should be emphasized that the very nature of the crimes within the jurisdiction of the Tribunals involves complex factual, legal, and evidentiary issues. An investigation may involve locating and exhuming mass graves which contain badly decomposed remains void of identification yet full of forensic evidence, or intercepting radio communications between leadership circles using garbled messages and code words that require deciphering, or securing voluminous potential evidence in need of immediate professional translation. Proving the crimes beyond a reasonable doubt and the accused's culpability in their commission is an onerous task, particularly when victims are dead, traumatized, fearful, or unavailable and states fail to cooperate in evidentiary matters or are outright deceptive or obstructive.

It is not uncommon for lengthy trials to be held in domestic systems in sensitive, high-profile, dangerous, or pioneering cases,[31] thus it should have been expected that the initial or highest level indictee cases in the ICTY would be time consuming. Proving charges of genocide and crimes against humanity—often involving systematic massacres and annihilation of whole

29. *See* ICTY Statute, *supra* note 1, at art. 2 (grave breaches), art. 3 (violations of the laws or customs of war).

30. *See id.*, art. 3.

31. For example, in the U.S., the high profile O.J. Simpson domestic criminal trial, involving one person accused of murdering two people, lasted nine months.

communities—in an international arena is inherently more challenging than a domestic murder trial, so it is unrealistic to expect that most trials will not take at least several months. Thus far, trials have ranged from ten trial days[32] to 239 trial days,[33] with most averaging about nine months of half day trials. Lengthiness depends largely on the number of accused on trial, the number of charges, the type and novelty of charges, the position of the accused, and the ability to secure witnesses and other evidence.

CONCLUSION

By and large, in my view the Yugoslav Tribunal has done a commendable job rendering justice, particularly considering it had little precedent for guidance and numerous handicaps to overcome, many beyond its control. International justice is imperfect justice. Yet thousands of years of domestic judicial practices also fail to render perfect justice, thus it is unrealistic to expect a decade old international institution to be able to do what considerably older domestic systems have never been able to achieve. Justice is expensive, but history consistently reveals that impunity generates hostility, revenge, and negativity and is ultimately far more costly. And there can be no doubt that the high cost of impunity is not merely a financial one.

32. *See* Furundžija, Case No.: IT-95-17/1-T, Trial Chamber Judgement, 10 Dec. 1998.

33. *See* Prosecutor v. Kordić & Čerkez, Case No.: IT-95-14/2-T, Trial Chamber Judgement, 26 Feb. 2001.

The Legacy of the Milosevic Trial

Michael P. Scharf*

I. INTRODUCTION

Slobodan Milosevic. Derided as the Butcher of the Balkans. From 1991 to 1999, his Serb troops and Bosnian Serb proxies fought four brutal Balkan wars. Hundreds of thousands died, most of them innocent civilians, and millions were displaced. Milosevic saw himself as a modern-day Abe Lincoln, employing force in a valiant effort to hold his crumbling Yugoslavia together. He now stands accused of the most serious crimes known to mankind—grave breaches of the Geneva Conventions, crimes against humanity, and genocide.

On February 12, 2002, the former Serb leader became the first head of state ever to face trial before an international criminal tribunal. With the combative Milosevic acting as his own lawyer, a legal battle of epic proportions is being waged at the Security Council-created Tribunal in The Hague. It is often said that while courts try cases, cases also try courts. This has proven to be particularly true with respect to the Milosevic trial, since Milosevic's primary strategy has been to challenge the Yugoslavia Tribunal's legitimacy and impartiality, rather than to seek an acquittal through conventional tactics.

Will history remember Milosevic as a victim of victor's justice, a scapegoat tried in a show trial before a one-sided court? Or will the Milosevic trial be seen as fair and free of political influence, and its judgment supported by credible evidence? Written at the mid-point in the Milosevic trial (which is expected to last through 2004), this article seeks to answer these questions through an examination of the proceedings to date

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and by drawing comparisons to the post World War II Nuremberg trials for historic perspective.

Although the Yugoslavia Tribunal has tried two dozen other indicted war criminals, *Prosecutor v. Slobodan Milosevic*[1] is clearly the trial for which the Ad Hoc Court was created. Thus, the answer to these questions may dictate the ultimate success or failure of the Tribunal itself as a mechanism for restoring peace in the Balkans.

If viewed as legitimate, the Milosevic trial could potentially serve several important functions in the Balkan peace process. By pinning prime responsibility on Milosevic and disclosing the way the Yugoslav people were manipulated by their leaders into committing acts of savagery on a mass scale, the trial would help break the cycle of violence that has long plagued the Balkans. While this would not completely absolve the underlings for their acts, it would make it easier for victims to eventually forgive, or at least, reconcile with former neighbors who had been caught up in the institutionalized violence. This would also promote a political catharsis in Serbia, enabling the new leadership to distance themselves from the discredited nationalistic policies of the past. The historic record generated from the trial would educate the Serb people, long subject to Milosevic's propaganda, about what really happened in Kosovo, Croatia, and Bosnia, and help ensure that such horrific acts are not repeated in the future. On the other hand, a trial seen as "victor's justice" would undermine the goal of fostering reconciliation between the ethnic groups living in the former Yugoslavia. The historic record developed by the trial would forever be questioned. The trial would add to the Serb martyrdom complex, amounting to another grievance requiring vengeance, and the judicial precedent would be tainted. For any real advance to be made in the long march toward the establishment of a permanent international criminal court, Milosevic's trial must be seen to be more about real justice, than realpolitik.

II. A MODERN DAY DAVID VERSES GOLIATH?

Typically, in most countries, a defendant is permitted to decline appointed counsel and represent himself if he is determined to be of sound mind.[2] No decision would have a more profound effect on the course of the Milosevic trial than the Yugoslavia Tribunal's ruling permitting Milosevic to act as his own counsel during the proceedings.[3]

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1. Prosecutor v. Milosevic, Case No.: IT-02-54, Initial Indictment, 24 May 1999, *available at* http://www.un.org/icty/indictment/english/mil-ii990524e.htm (last visited Apr. 4, 2003).

2. *See* Estelle v. State of Mississippi, 558 So. 2d 843 (1990 Miss. LEXIS 153)

3. The Tribunal appointed a team of "Amicus Attorneys" to ensure that legal issues

First of all, the Tribunal's ruling has significantly affected the length of the trial, as well as the amount of testimony the prosecution can present. Because the sixty-one year old Milosevic has extremely high blood pressure (240 over 120) and a severe heart condition, the Tribunal has cut the number of days per week for the trial from five to three, the daily maximum number of hours for the trial from eight to four, and has on several occasions adjourned for two-to-three week periods to allow Milosevic to regain his strength.[4]

Nevertheless, the Committee for Milosevic's defense, known as Slobda, accuses the court of "attempted murder."[5] His health problems have boosted Milosevic's underdog appeal back home in Serbia. Moreover, the one thing the Tribunal wants to avoid more than anything else is having Milosevic expire during the trial. His death would literally erase history from being recorded since under the Tribunal's precedent, a judgment cannot be rendered if the defendant is not alive at the time it is issued.[6] In an effort to try to keep the Trial on track to finish in 2004, the Tribunal has ordered the prosecution to pare down its witnesses, "to the point where prosecutors claim their case is being emasculated."[7]

In addition, the decision to allow Milosevic to defend himself enabled him to generate the illusion that he was a solitary individual pitted against an army of foreign lawyers and investigators. Day after day he sits alone in the courtroom behind a row of conspicuously empty desks that would ordinarily be occupied by the defense team. To get a flavor for how this plays back in Serbia, according to a Serb who has watched the trial proceedings on television in Belgrade: "We cheer when he outsmarts the prosecutors. When he's defending himself all alone against the world."[8]

In reality, Milosevic, himself a lawyer who graduated near the top of his class from the prestigious University of Belgrade School of Law, has had a

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favoring the defense would be brought to the attention of the Tribunal, but the Amicus lawyers are not permitted to play any role in the actual trial proceedings. *See* ICTY Rules of Procedure and Evidence, Rule 74 (adopted 11 February 1994, last amended 12 December 2002)

4. *See* Marlise Simons, *Milosevic Now Faces Genocide Charges*, N.Y. TIMES, Sept. 27, 2002, at 10A.

5. Marc Champion, *Court of Opinion: With Hague Case, Defiant Milosevic Wins at Home; As Daily Coverage Keeps Serbs Riveted to TV, Many Feel As if They're on Trial Too*, WALL ST. J., Jan. 10, 2003, at A-1, *available at* 2003 WL-WSJ 3956244.

6. *See* PAUL R. WILLIAMS AND MICHAEL P. SCHARF, PEACE WITH JUSTICE: WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA, 122-23 (2002).

7. Mirko Klarin, *War Crimes Manipulation; Slobodan Milosevic's Refusal to Accept Help in His War Crimes Trial is Making it Difficult to Provide him a Fair Hearing*, LONDON FREE PRESS, Aug. 24, 2002, at F4.

8. Champion, *supra* note 5.

squadron of legal counsel assisting him from behind the scenes, including some of the world's most distinguished trial attorneys. Heading Milosevic's legal team are Ramsey Clark, a former U.S. Attorney General, and Jacques Verges, the French lawyer who defended Gestapo chief Klaus Barbie.[9] Under their direction, and with funding from a network of Milosevic defense committees in Serbia, the United States, Britain, Russia, and France, lawyers and supporters of Milosevic dig up files and background on witnesses who are about to appear in court.[10] Armed with this material, Milosevic often seems better informed than the prosecution, which is convinced that he has a stash of secret police and army files that he has refused to produce in contravention to the Court's Rules.[11] Prosecutors also believe that Milosevic supporters in Serbia have withheld official documents and discouraged witnesses from giving evidence.[12]

Yet, the most significant ramification of the Tribunal's ruling is that it gives Milosevic the chance to make unfettered speeches throughout the trial.[13] In contrast, a Defendant is ordinarily able to address the court only when he takes the stand to give testimony during the Defense's case-in-chief. In the usual case, the Defendant is limited to giving evidence that is relevant to the charges, and he is subject to cross examination by the prosecution.

By acting as his own counsel, Milosevic was able to begin his case with eleven hours of opening argument, which included a Hollywood-quality video and slide-show presentation showing the destruction wrought by the 1999 NATO bombing campaign. The lead prosecution attorney, Queen's Counsel Geoffrey Nice, had shown some of the prosecution's own photos of victims of Serb atrocities during his opening, but they were not nearly as numerous or as gruesome as those Milosevic presented, prompting the New Yorker to conclude, "Horror for horror, [Nice] was outdone by Milosevic."[14] Milosevic made a similarly compelling presentation on September 26, 2002, at the start of the second phase of the prosecution's case, involving the war with Croatia. And, he will have the chance to do so again when the case turns to the charges concerning Bosnia in the spring of 2003, and yet again after the prosecution rests and he begins his defense in the summer of 2003.

Bending over backward to maintain the appearance of fairness, the

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9. *See id.*

10. *See id.*

11. *See id.*

12. *See id.*

13. *See id.*

14. Joseph Lelyveld, *The Defendant; Slobodan Milosevic's Trial, and the Debate Surrounding International Courts*, THE NEW YORKER, May 27, 2002, at 82.

Tribunal's judges have allowed Milosevic to treat the witnesses, prosecutors, and themselves in a manner that would earn ordinary defense counsel expulsion from the courtroom.[15] In addition to regularly making disparaging remarks about the court and repeatedly brow-beating witnesses, Milosevic pontificates at length during cross examination of every prosecution witness. While the Tribunal at first gave Milosevic substantial leeway, the judges eventually began to express impatience with Milosevic's "political points." On numerous occasions, the Tribunal's presiding judge has warned: "Mr. Milosevic, you are making speeches . . . [y]ou're supposed to be asking questions and not making denigrating comments about the witnesses."[16] Nevertheless, Milosevic's cross examinations continue to average twice the length of the Prosecution's direct examinations.[17]

Summing up the impact of Milosevic's trial performance, one former employee of the Tribunal has stated: "You can't help falling under his spell . . . [h]e's very sharp and he's funny. It's sick, I know, given what he's there for, but he's so cynical and quick that he's had the courtroom in fits of laughter at times."[18] As long as it continues to prove its case, the prosecution team does not seem concerned about the effect of Milosevic's performance on those who watch the daily broadcasts of the proceedings, which are beamed into Serbia by the U.S. Agency for International Development.[19] Yet, according to Serbian Prime Minister Zoran Djindjic, "The prosecution says 'What we care about is the law, and the fact that Milosevic has hundreds of hours to promote his politics is not our problem . . . .' That's naive."[20]

III. REAL JUSTICE OR REAL POLITIK?

A. Challenges to the Legitimacy of the Yugoslavia Tribunal

Beginning at his arraignment before the Yugoslavia Tribunal on July 3, 2001, Milosevic launched his challenge to the validity of the Security Council-created court. "You are not a judicial institution; you are a political tool," Milosevic told the panel of three judges.[21] Drawing on the

15. See Klarin, *supra* note 7.

16. Champion, *supra* note 5.

17. See Klarin, *supra* note 7.

18. Champion, *supra* note 5.

19. *See id.*

20. *Id.*

21. Martin Fletcher, *The Balkans: Milosevic in Mid-Tirade as Judges Walk Out*, TIMES ONLINE, (Times Newspapers Ltd. Aug. 31, 2001) *available at* http://www.timesonline.co.uk/article/0,,1107-105560,00.html (last visited Apr. 29, 2003);

commonly accepted notion that the post-World War II Nuremberg Trials were tainted by "victor's justice," one of Milosevic's shadowy lawyers, former U.S. Attorney General Ramsey Clark, publicly circulated a draft brief (which included Milosevic's handwritten notations), the sole purpose of which appeared to be to discredit the Tribunal.[22]

While the Nuremberg Charter precluded challenges to the legitimacy of the Nuremberg Tribunal itself, the Yugoslavia Tribunal considered the question in its first case in 1996. The Tribunal ruled that, although its creation by the Security Council was without precedent, it was a valid product of the Security Council under the Council's broad powers to take action to maintain international peace and security.[23] However, as Milosevic himself has pointed out, the judges that made that decision could not be seriously expected to decide the issue impartially, given that their incredibly prestigious, $150,000 (tax free) per year jobs would have been instantly extinguished if they had decided otherwise.[24]

Having rendered that decision, the Yugoslavia Tribunal has declined to revisit the question in the Milosevic trial.[25] In response to Milosevic's challenges to the Tribunal's legitimacy at a pre-trial hearing in August 2001, Presiding Judge Richard May responded: "Mr. Milosevic, we are not going to listen to these political arguments."[26] While this might seem unduly harsh, it was, and still is, a bit late for Milosevic to be challenging

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see also Stéphanie Maupas, *Judicial Diplomacy: Chronicles and Reports on International Criminal Justice: Court Seeks Friends*, (copyright Judicial Diplomacy 30 August 2001) - All rights reserved- *available at* http://www.diplomatiejudiciaire.com/UK/Tpyuk/MilosevicUK2.htm (last visited Apr. 29, 2003).

22. *See* Defense Brief Challenging the Legitimacy and Competence of the Yugoslavia Tribunal, obtained from Nina Bang-Jensen, Coalition for International Justice (copy on file with the author); *see also* Michael Ignatieff, *The Right Trial for Milosevic*, John F. Kennedy School of Government, Harvard University, *reprinted from* N.Y. TIMES, Oct. 10, 2000, *available at*, http://www.ksg.harvard.edu/news/opeds/2000/ignatieff_milosevic_nyt.htm (last visited Apr. 28, 2003).

23. *See* Diane Orentlicher, *War Crimes Tribunal Dismisses Jurisdictional Challenge, War Crimes Tribunal Research Office*, American University, *available at*, http://personal.ecu.edu/williamsjoh/jurisdiction.htm (last visited April 28, 2003).

24. *See* ICTY Amended Statue, art.13 *quarter* (1)(a) (adopted May 26, 1993 by Resolution 827, last Amended May 17, 2002 by Resolution 1411) (stating that salary of ICTY judges shall be the same as ICJ judges); International Court of Justice Annual Report Budget 2000-2001, Budget of the Court for the Biennium 2000/2001, p. 115 (reporting salary of ICJ judges), *available at*,
http://www.lawschool.cornell.edu/library/cijwww/icjwww/igeneralinformation/igeninf_Annual_Reports/iICJ_Annual_Report_2000-2001.PDF (last visited Apr. 28, 2003).

25. *See* Orentlicher, *supra* note 23.

26. Prosecutor v. Milosevic, Case No.: IT-99-37-PT, Transcript, 30 Aug. 2001, at 25.

the Tribunal on legitimacy grounds, given that he recognized the legitimacy of the Tribunal when he signed the Dayton Accords in 1995, which required the parties to cooperate with the Tribunal.[27] Any doubt should have been erased when Milosevic authorized the transfer of Drazen Erdemovic for prosecution before the Tribunal for the part the young Serb soldier played in the massacres at Srebrenica.[28]

Having failed to convince the Yugoslavia Tribunal to reconsider this issue, Milosevic attempted to attack the legitimacy of the Tribunal in the Hague District Court.[29] However, the Dutch Court declared itself incompetent to consider the question.[30] Milosevic then took his case to the European Court of Human Rights, which ruled that it lacked jurisdiction to consider the claim since Milosevic had failed to exhaust domestic remedies by neglecting to appeal the Hague District Court decision to the Dutch Court of Appeals prior to filing his claim with the European Court of Human Rights.[31] That Milosevic's high-powered legal team would unintentionally make such a novice legal mistake is hard to believe. It is more likely that they desired this outcome so that Milosevic could make the political argument that he was being railroaded at The Hague.

B. Victor's Justice

To the extent Milosevic's goal is not to obtain a dismissal or acquittal but to publicly discredit the Tribunal, he is having a greater degree of success with his argument that the Yugoslavia Tribunal, like Nuremberg, represents "victor's justice."[32]

In contrast to Nuremberg, however, the Yugoslavia Tribunal was created neither by the victors nor by the parties involved in the conflict, but rather by the United Nations, representing the international community of States.[33] The judges of the Yugoslavia Tribunal come from all parts of the world, and are elected by the General Assembly, in which each of the

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27. *See* The Dayton Peace Agreement, Nov. 21, 1995, General Framework Agreement for Peace in Bosnia and Herzegovina, U.S. Dept. State Dispatch Supp., vol. 7, no. 1.

28. *See* Lawrence Weschler, *The Defendant*, THE NEW YORKER (July 16, 2001).

29. *See* Milosević v. The Netherlands, Case No.: KG 01/975, ELRO No. AD3266, Judgement, 31 Aug. 2001, *reprinted in* 41 I.L.M. 86 (2002).

30. *See id.*

31. European Court of Human Rights, Milosevic v. The Netherlands, Application no. 77631/01 (March 19, 2002), *available at*, http://hudoc.echr.coe.int/Hudoc1doc2/HEDEC/200203/77631_01_di_chb2_19032002e.doc (last visited April 6, 2003)

32. Gary J. Bass, *Why Not Victor's Justice?*, WASH. POST, Feb. 15, 2002, at A33.

33. *See* Press Release, United Nations, UN General Assembly Elects 27 Judges to ICTY, (June 14, 2001), *available at*, http://www.usembassy.it/file2001_06/alia/a1061415.htm (last visited Apr. 29, 2003).

world's 188 countries gets an equal vote.[34] Moreover, the message of the International Tribunal's indictments, prosecutions, and convictions to date of Muslims and Croats, as well as Serbs, has been that a war crime is a war crime, regardless of who commits it; the Tribunal has self-consciously taken no sides.[35]

On the other hand, Milosevic has pointed out that the decision to establish the Yugoslavia Tribunal was made by the U.N. Security Council, which cannot truly be characterized as a neutral third party; rather, it has itself become deeply involved and taken sides in the Balkan conflict.[36] The Security Council has, for example, imposed sanctions on Milosevic's Serbia, which it felt was most responsible for the conflict and atrocities.[37] Throughout the conflict, the Security Council had been quite vocal in its condemnation of Serb atrocities, but its criticisms of those committed by Muslims and Croats were comparatively muted.[38] And most problematic of all, three of the Permanent Members of the Council, the United States, France, and the United Kingdom, led the seventy-eight day bombing campaign against Milosevic and Serbia in 1999.[39] Finally, as Milosevic has repeatedly observed, NATO cruise missiles specifically targeted Milosevic's residence in an effort to kill him and his family.[40]

While both the Prosecutor and the judicial Chambers of the Yugoslavia Tribunal were conceived to be independent from the Security Council, one cannot ignore the fact that the Statute provides that the Tribunal's Prosecutor is selected by the Security Council.[41] The Judges are selected by the General Assembly from a short list proposed by the Security

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34. *See id.*

35. *See Hague spokeswoman tells Serbian public tribunal's role not to try Serbs only*, BBC WORLDWIDE MONITORING (Belgrade), Mar. 7, 2003.

36. *See* Steve Coll, *A Trail of Missteps: Dilemma in Responding to Initial Breakup Continues to Bedevil an Uncertain West*, WASH. POST, Apr. 20, 1994, at A17.

37. *See* John Pomfret, *Croatian Drive Turns Tables on Serbians; Military Blitz Through Krajina Marks Fundamental Shift in Power Balance*, WASH. POST , Apr. 22, 1995, at A01.

38. *See generally* Raymond Bonner, *Conflict In The Balkans: The Diplomacy; Croats Widen Threat to Rebel Serbs, and Diplomats Seem to Acquiesce*, N.Y. TIMES, Aug. 1, 1995, at A6.

39. *See* J.F.O. McAllister Washington, *To Bomb Or Not To Bomb?; Clinton settles on a tougher policy toward Serbian aggression. Now he has to sell it*, TIME, May 10, 1993, at 48.

40. *See* Radio Belgrade in Serbo-Croat, Programme Summary of Serbian Radio news 1300 gmt 22nd April 1999 (Copyright 1999 British Broadcasting Corporation, BBC Monitoring Europe – Political Supplied by BBC Worldwide Monitoring).

41. *See* Amended Statute of the International Tribunal, art. 16, para. 4, *available at* http://www.un.org/icty/legaldoc/index.htm (last visited April 28, 2003).

Council, and they have to stand for re-election after a four-year term.[42] Moreover, the operation of the Tribunal has been dependent on tens of millions of dollars in contributions from the United States and its Western allies and most of the staff of the Office of the International Prosecutor are on loan from NATO countries.[43]

Although a creature of the United Nations, the Tribunal has, according to its former president, Antonio Cassese, tended to "take into account the exigencies and tempo of the international community."[44] Milosevic has suggested that this means that the Tribunal has yielded to the objectives of the United States and other NATO powers, without whose financial and military support the Tribunal could not function.[45] Thus, it should come as little surprise that in a survey by the U.S. polling firm Greenberg, Quinlan and Rossner for the National Democratic Institute for International Affairs in May 2002, found that eighty percent of 1,300 Serbs believed the Tribunal prosecutes Serbs more vigorously than it does non-Serbs, while fifty-seven percent said they were convinced the Tribunal was unjust.[46]

C. The Timing of the Indictment

For evidence of the political influence of the United States on the Yugoslavia Tribunal, Milosevic has pointed to the suspicious timing of his indictment.[47] The indictment was issued on May 22, 1999, sixty-days into the seventy-eight day NATO bombing campaign against Serbia.[48] The indictment came down at a crucial time when popular support for the intervention was waning in several NATO countries in the face of intense press criticism of NATO's use of cluster bombs and depleted uranium munitions, attacks on civilian trains, truck convoys, and media centers, and the accidental bombings of the Chinese Embassy in Belgrade and the territory of neighboring Bulgaria.[49] If this press criticism forced a premature end of the bombing campaign, American officials feared that

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42. *See* Amended Statute of the International Tribunal, art. 13*bis*, paras. 1, 3, *available at* http://www.un.org/icty/legaldoc/index.htm (last visited Apr. 6, 2003).

43. *See* Madeleine K. Albright, *We Won't Let War Criminals Walk; With or Without a Balkan Peace Deal, the U.S. Won't Relent*, WASH. POST, Nov. 19, 1995, at C01.

44. Seamus Milne, *The Hague is not the place to try Milosevic*, GUARDIAN, Aug. 2, 2001, *available at* http://www.guardian.co.uk/Print/0,3858,4232337,00.html (last visited Apr. 29, 2003).

45. *See* Albright *supra* note 43.

46. *See* Champion, *supra* note 5.

47. *See* Bob Graham, *Milosevic Snubs 'Illegal' War Crimes Court; World's Most Wanted Man Goes Into the Dock*, THE EXPRESS, July 4, 2001, at 6.

48. *See* Romesh Ratnesar, *The Case Against Evidence*, TIME, Oct. 8, 2001, at 64.

49. *See* Lara Marlowe, *On a Ruthless Ruler: Milosevic*, IRISH TIMES, Nov. 30, 2002, at 61.

there might be irrevocable damage to the credibility of NATO, potentially leading to its demise.[50]

After years of pressuring the International Prosecutor not to indict the Serb leader whose cooperation was seen as essential for the Balkan peace process, suddenly the United States was pressing for the immediate issuance of charges against Milosevic, knowing that it would bolster the political will of NATO countries to continue the bombing campaign, and would ultimately force Milosevic to accept NATO's terms for Kosovo.[51] After years of refusing to turn over sensitive intelligence data to the Tribunal in order to protect "sources and methods," the United States and Britain were hurriedly handing over reams of satellite imagery, telephone intercepts, and other top secret information to help the Prosecutor make the case against Milosevic.[52]

To make matters even more questionable, just two weeks after issuing the Milosevic indictment, the International Prosecutor, Louise Arbour, was given her dream job, the only seat on the Supreme Court of Canada open to an Ontario resident that was likely to be available during her professional lifetime.[53] Not much imagination is needed to guess what would have happened to Arbour's judicial prospects if, instead of indicting Milosevic, she had issued an indictment charging NATO leaders with war crimes in the midst of the intervention.

D. The Manner of Milosevic's Surrender

The newly elected President of the Federal Republic of Yugoslavia, Vojislav Kostunica, backed up by a federal court ruling, refused to permit the extradition of Milosevic to The Hague.[54] But, in a late night move that caught everyone off guard, Kostunica's political rival, Prime Minister Zoran Djindjic, instructed the Serb police under his command to secretly take Milosevic to an American air base in Tuzla, Bosnia, from which Milosevic was transferred by military jet to The Hague on July 28, 2001.[55] In announcing the action in defiance of the Supreme Court's Order,

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50. *See* Albright *supra* note 43.

51. *See* Marlowe *supra* note 49.

52. John Diamond, *CIA Director's Allies Outrank His Enemies*, USA TODAY, Oct.10, 2002, at 4A; Staff Reports, *Closed Session Ordered For Envoy's War Crimes Testimony*, THE AUSTRALIAN, June 14, 2002, at 9.

53. Associated Press, *UN tribunal's Arbour gets appointment, CRISIS IN KOSOVO*, BOSTON GLOBE, June 11, 1999, at A25.

54. *See* Staff Reports, *The Great Ethnic Cleanser Will Finally Answer For 220,000 Dead*, SYDNEY MORNING HERALD, June 30, 2001, at 1.

55. *See* Marlise Simons & Carlotta Gall, *The Handover Of Milosevic: The Overview; Milosevic Is Given To U.N. For Trial In War-Crime Case*, N.Y. TIMES, June 29, 2001, at A1.

Djindjic said that he had been forced to take a "difficult but morally correct" decision to protect the interests of Serbia—that is, the United States and its European allies were promising 1.28 billion dollars in aid in return for the surrender of Milosevic.[56] This led Serb newspaper headlines to proclaim that Milosevic had become "Serbia's most valuable export commodity."[57] Immediately thereafter, a furious Kostunica protested that the extradition of Milosevic was "illegal and unconstitutional."

Meanwhile, on board the flight to The Hague, Milosevic reportedly told the tribunal officials who read him his rights, "You are kidnapping me, and you will answer for your crimes."[58] In analogous cases,[59] the European Court of Human Rights had held that luring or abduction in violation of established extradition procedures is a human rights violation for which dismissal is the appropriate remedy. But the Yugoslavia Tribunal rejected the argument in the *Dokmanovic Case*[60] on the ground that a formal extradition treaty did not between the Tribunal and the Federal Republic of Yugoslavia.[61] Whatever the technical legal merits of his argument, politically, the timing of Milosevic's irregular surrender could not be worse for the Tribunal. He arrived at the Yugoslavia Tribunal on St. Vitus's day, the solemn holiday commemorating the historic Serb defeat to the Ottoman Turks at the battle of Kosovo Polje in 1389, which figures so prominently into the Serb mythology of victimization.

E. Unclean Hands

To further illustrate the Tribunal's politicization, Milosevic has tried to force the Tribunal to face the "*tu quoque*" argument (literally meaning "you too"). The argument had some success at Nuremberg with respect to the charge of waging unrestricted submarine warfare levied against German Grand Admiral Karl Doenitz. In light of an affidavit obtained by Doenitz's lawyer from U.S. Admiral Chester Nimitz, indicating that the United States Navy had used the same tactic in the Pacific, the Nuremberg Tribunal acquitted Doenitz of the charge.[62]

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56. *See id.*

57. Konstantinos D. Magliveras, *The Interplay Between the Transfer of Slobodan Milosevic to the ICTY and Yugoslav Constitutional Law*, 13 EUR. J. INT'L L. 661, 676 (2002).

58. Simon Mann, *Ghosts Of Milosevic Haunt Serbia*, THE AGE, July 2, 2002, at 1.

59. *See* Stocké v. Germany, App. No.: 00011755/85 (1991) *at* http://www.ehcr.coe.int/eng (last visited April 6, 2003); Bozano v. France, App. No.: 00009990/82 (1986) *at* http://www.echr/coe.int/eng (last visited April 6, 2003).

60. Case No.: IT-95-13a-PT, 1997.

61. Ben Macintyre, *Serb stands trial for the massacre of 2000*, Section: THE TIMES (London), Jan. 20, 1998.

62. *See* MICHAEL SCHARF, BALKAN JUSTICE 11-12 (1997).

Drawing on the Nuremberg precedent, Milosevic first complained that Franjo Tudjman, the former leader of Croatia, was never indicted by the Tribunal for the mass atrocities that Croatian troops committed against the Serbs in re-taking Serb-controlled areas of eastern Croatia.[63] In fact, Tudjman was welcomed to the United States for cancer treatment at Walter Reed Hospital in Washington, D.C. a few months before his death in 1999.[64]

Next, Milosevic has repeatedly raised the issue of NATO war crimes. When several respected human rights organizations urged the Tribunal to investigate the possibility that NATO had committed war crimes during the 1999 intervention, the then Prosecutor, Louise Arbour (from Canada, a NATO country), assigned the task to her Legal Adviser, William Fenrick. Fenrick is a former NATO lawyer, who went to the tribunal directly from his post as Director of Law for Operations and Training in the Canadian Department of Defense.[65] Not surprisingly, Fenrick's report, which was released in June 2000, concluded that NATO had committed no indictable offenses.[66] But critics have been quick to seize upon the clause of the report that notes that the review of NATO's actions relied primarily on public documents produced by NATO, and that the authors of the report "tended to assume that the NATO and NATO countries' press statements are generally reliable and that explanations have been honestly given."[67]

Finally, Milosevic has suggested that the Bush Administration's opposition to a permanent international criminal court has undermined its moral right to participate in any way in the trial of Milosevic.[68] According to U.S. officials, such international tribunals are prone to politicization—the very argument that Milosevic has made about the Yugoslavia Tribunal.

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63. *See* Peter Maas, *Milosevic and the Beginning of Honesty*, N.Y. TIMES, June 30, 2001, at A15.

64. *See* Mike Finch, *Letter: Balkan Rivalries*, THE INDEPENDENT (London), Mar. 26, 2001, at 2.

65. *See* Michael Mandel, *Twelfth Annual Philip D. Reed Memorial Issue the Balkans Region: Legal Perspectives and Analyses NATO's Bombing Of Kosovo Under International Law Politics and Human Rights In International Criminal Law: Our Case Against NATO And The Lessons To Be Learned From It*, 25 FORDHAM INT'L L.J. 95, 117 (2001).

66. *See* Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 8 June 2000 (copy on file with the author).

67. Michael Mandel, *Milosevic Has a Point*, International Justice, Toronto Globe and Mail (July 6, 2001) *available at* http://www.globalpolicy.org/intljustice/tribunals/2001/0706milo.htm (last visited Apr. 29, 2003).

68. While there is no U.S. judge on the Milosevic trial bench, one of the trial attorneys is an American former Department of Justice prosecutor, and much of the evidence used by the prosecution has been provided by U.S. authorities.

There are several answers to Milosevic's *tu quoque* challenge, which the prosecution will presumably make during its closing argument. First, whatever Franjo Tudjman and NATO have done, their actions do not excuse the actions of Milosevic. Second, the Tribunal's Prosecutor at the time of the Milosevic indictment, Louise Arbour, has stated that she was about to issue an indictment for Franjo Tudjman just before the Croatian President passed away, demonstrating that the Tribunal was striving to be evenhanded.[69] Third, whether or not one believes NATO violated the laws of war during the 1999 bombing campaign, NATO did not systematically set out to kill and torture civilians on a mass scale, the crimes of which Milosevic has been accused. The alleged NATO offenses are just not in a league with those of which Milosevic is charged. Fourth, established democracies have mechanisms (a free press, political opposition, and an independent judiciary) to examine publicly their own past—for example America's actions in Vietnam or France's use of torture in Algeria. While Serbia was willing to try Milosevic for corruption, the Yugoslavia Tribunal is the only venue where his war crimes and crimes against humanity could be exposed.

Finally, while these arguments might suggest that the Tribunal's Prosecutors may have been out to get Milosevic, selective prosecution is never a valid defense, even in domestic trials. Milosevic's ultimate fate is in the hands of the Tribunal's judges, not its prosecutor. As long as the bench is impartial, and the procedures are equitable, the trial of Milosevic should be considered credible.

F. Composition of the Bench

Unlike most domestic systems, the Yugoslavia Tribunal's judges are not randomly assigned to cases by lot. Given that the pool of the Tribunal's judges that were available for the Milosevic trial included citizens from several countries that had no stake in the Balkan conflict, the jurist picked by Judge Jorda of France, the President of the Tribunal, to preside over the Milosevic case "represented a most unfortunate selection."[70] The problem is that the judge selected to head the panel, Richard May, hails from one of the NATO countries (the United Kingdom) that led the 1999 intervention against Serbia. May is also said to have close continuing contacts with officials of the British government.

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69. *See* Aleksa Djilas, *The Politicized Tribunal*, International Justice, Institute of War and Peace Reporting (July 25, 2001) *available at* http://www.globalpolicy.org/intljustice/tribunals/2001/0725icty.htm (last visited Apr. 29, 2003).

70. Patricia Wynn Davies, *Court Steps up Pursuit of Serb leaders*, THE INDEPENDENT (London), July 11, 1996, at 12.

Judge Jorda selected Richard May for the job because he was widely viewed as the best trial judge among the Tribunal's judges, a man uniquely capable of keeping Milosevic in line and the trial moving smoothly forward. "Perhaps this distinguished jurist could not be expected to recuse himself from presiding over the Milosevic trial because that would be an admission of his bias, and would subvert the credibility of the Tribunal as a whole."[71] Indeed, in none of the two-dozen cases tried before the Yugoslavia Tribunal and its sister institution, the Rwanda Tribunal, has a judge recused him or herself, despite numerous attempts by defendants to obtain recusal.[72] And yet, however fair and impartial Judge May actually turns out to be, one can certainly understand why some might perceive that the "fix is in" as long as a British judge presides. In this regard, Osgoode Hall Law Professor Michael Mandel maintains that "Milosevic has about as much chance of getting a fair trial from this court as he had of defeating NATO in an air war."[73]

G. Fairness of the Procedures

In addition to an impartial bench, the validity of the trial depends on the court allowing Milosevic the equality of arms and fair procedures which the defendants at Nuremberg did not receive. While the prosecution has brought the President of Croatia, as well as several military commanders and international figures to The Hague to testify against Milosevic, the defendant has been rebuffed in his initial efforts to obtain the testimony of former President Bill Clinton, Secretary of State Madeline Albright, Special Envoy Richard Holbrooke, and NATO Generals Wesley Clark and Michael Rose.

Milosevic's strategy as the trial enters the defense phase will be to call such officials to the stand and ask them point blank: "you embraced me as a crucial element in the peace negotiations; after the conclusion of the Dayton Accords I was mentioned as a leading candidate for the Nobel Peace Prize; how can you now argue that I am responsible for crimes in Bosnia of which you were perfectly aware at the time of Dayton?"

In an early draft of his memoire, General Wesley Clark reportedly wrote of a conversation with Milosevic in which Clark asked, "[w]hy did you let General Mladic do what he did at Srebrenica?"[74] According to the passage,

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71. MICHAEL P. SCHARF & WILLIAM A. SCHABAS, SLOBODAN MILOSEVIC ON TRIAL: A COMPANION 109 (2002) (author's opinion).

72. *See* Cecile Meijer & Amardeep Singh, *News for the International Criminal Tribunal*, vol. 8, issue 1, American University, Washington College of Law (2000) *at* http://www.wcl.american.edu/hrbrief/08/1tribunals.cfm (last visited Apr. 29, 2003).

73. Mandel *supra* note 67.

74. Lelyveld, *supra* note 14, at 91-92.

which was cut out of the book in its final editing (presumably at the insistence of the Department of State), Clark recalled that Milosevic had replied, "Well, I warned him not to do this, but he wouldn't listen to me."[75] Such testimony would obviously go a long way toward proving that Milosevic lacked effective control over the Bosnian Serbs who were responsible for acts of genocide in Bosnia.

With respect to the charges concerning Kosovo, Milosevic will seek to compare his actions with the post-September 11, 2001 American war on terrorism and its efforts to drive the Taliban and al-Qaeda from Afghanistan. As late as February 1998, the United States, and other members of the so-called "Contact Group" (France, the United Kingdom, Germany, Italy, and Russia) were calling the Kosovo Liberation Army a "terrorist group," and condemning the organization's violent actions.[76] Milosevic will want to call Western leaders to testify about the basis for the terrorist designation, which served as the bedrock of his public justification for the use of force in Kosovo.

Unlike a domestic court, the Yugoslavia Tribunal does not have the power to subpoena persons who are no longer in government.[77] If the former officials listed above refuse to be called as witnesses, which is likely to be the case, then Milosevic will have a strong argument that he was in fact, denied a fair trial.

Another development that has given Milosevic ammunition to argue that the process at The Hague is less than fair occurred when the Tribunal's appointed amicus curiae counsel, Michail Wladimiroff, told the press half way through the trial that Milosevic's chances of acquittal "were negligible."[78] Milosevic charged that by giving such an assessment, Wladimiroff—who had been appointed by the Tribunal over Milosevic's objections precisely to ensure that Milosevic received a fair trial—had instead prejudged the Tribunal's verdict.[79] The Trial Chamber reluctantly agreed. "The statements taken as a whole would, in the Chamber's view, give rise to a reasonable perception of bias on the part of the amicus curiae," Judge May said in his decision to remove Wladimiroff from the

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75. *Id.*, at 92.

76. *See* PAUL WILLIAMS & MICHAEL SCHARF, PEACE WITH JUSTICE: WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA 176-177 (2002).

77. *See* Patricia M. Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on Day-To-Day Dilemmas of an International Court*, 5 J. L.& POLICY 87 (2001).

78. *Yugoslavia: Milosevic Lawyer Dismissed for Comments*, Radio Liberty, Radio Free Europe, (1995-2001 Radio Liberty Inc.) *at* http://www.rferl.org/nca/features/2002/10/10102002130037.asp (last visited Apr. 29, 2003).

79. *See Yugoslavia: Hague Tribunal Fires 'Amicus Curiae' in Milosevic Case*, BBC MONITORING EUR., Oct. 10, 2002.

case.[80] But by that time the damage to the Tribunal's integrity had already been done.

IV. CONCLUSION: THE IMPACT ON PEACE AND RECONCILIATION IN THE BALKANS

Witness by witness, document by document, the prosecution is slowly constructing a formidable case against Slobodan Milosevic at The Hague. Convinced that exposure to the Milosevic trial would have a cathartic effect on the Serb population, the U.S. Agency for International Development is paying $24,000 a month to broadcast the trial proceedings throughout Serbia.[81] During the trial's first couple of weeks, five channels carried the proceedings live, and more than half of all Serbian households were tuned in.[82] At the trial's midpoint, the trial proceedings are still shown for up to five hours each day on Station B92, where it receives the network's biggest market share – an average 27 percent.[83]

Perhaps the trial broadcasts would have achieved the hoped for effect if it were not for Milosevic's refusal to play by the rules (that is, to let a lawyer defend him in the conventional manner). While his defense strategy is unlikely to win him an acquittal, a Balkans expert described it as "brilliantly cunning, designed to play on Serbia's psychological vulnerabilities and continued Serb resentment of the 1999 NATO bombing."[84]

To the extent that it is aimed not at the court of law, but the court of public opinion back home in Serbia, Milosevic's strategy is unquestionably paying off. His approval rating in Serbia doubled during the first weeks of his trial.[85] A recent poll found that thirty-nine percent of the Serb population rated Milosevic's trial performance "superior," while less than twenty-five percent felt that he was getting a fair trial, and only thirty-three percent thought that he was actually responsible for war crimes.[86] Milosevic has gone from the most reviled individual in Serbia to number

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80. Prosecutor v. Milosevic, Decision concerning an Amicus Curiae, 10 Oct. 2002, *at* http://www.un.org/icty/milosevic/trialc/decision-e/021010vlad.html (last visited Apr. 29, 2003).

81. *See* Champion, *supra* note 5.

82. *See id.*

83. *See id.*

84. Dusko Doder, *Book Review of* Slobodan Milosevic and the Destruction of Yugoslavia *by Louis Sell*, THE NATION, May 27, 2002, at 25.

85. *See* Andre Purvis, *Star Power in Serbia; Slobodan Milosevic's Performance at his War Crimes Trial has Won Him Increased Popularity at Home*, TIME, Sept. 30, 2002, at 46.

86. *See* Transcript, CNN International: Q&A with Zain Verjee, Early Afternoon, Feb. 12, 2002; *see also* Gary J. Bass, *Milosevic in the Hague*, FOREIGN AFF., May 2003 – June 2003, at 82.

four on the list of most admired Serbs.

"You really have two trials going on at the same time, one in the court and the other in the forum of public opinion," observes Judith Armatta, an American lawyer who monitors the trial for the coalition for International Justice, a non-profit organization that supports international efforts to bring war criminals to justice.[87] "You may get two very different results."[88]

Does its present lack of legitimacy in the eyes of the majority of the Serbian people mean that the Milosevic trial will fail to achieve the goals of denying collective guilt by establishing individual responsibility, enabling the dismantling of institutions responsible for perpetuating the commission of atrocities, establishing an accurate historical record, providing a cathartic process for victims, and deterring further instances of violence in the Balkans as well as deterring atrocities in similar conflicts elsewhere? To answer this question, one might turn to the precedent of the Nuremberg Tribunal. Like the Yugoslavia Tribunal, the Nuremberg Tribunal was accused of victor's justice and unfair proceedings.[89] As the Yugoslavia Tribunal has done with Milosevic, the Nuremberg Tribunal permitted Nazi leader Hermann Goering relatively free reign in his testimony.[90] Like Milosevic, the unrepentant Goering repeatedly attacked the validity of the proceedings, indulged in propaganda, and attempted to justify his policies and actions as Hitler's Reich Marshal.[91] Indeed, history records that Goering got the better of the lead Nuremberg prosecutor, Justice Robert Jackson of the U.S. Supreme Court during a cross examination that went on for two days in 1946.[92]

One of the modern myths of Nuremberg is that the German people immediately accepted the legitimacy of the International Tribunal and its judgment.[93] It is generally believed that few Germans questioned the validity of the findings of the Nuremberg Tribunal because the defendants

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87. *See* Coalition for International Justice, Former Yugoslavia, (CIJ 2002) *at* http://www.cij.org/index.cfm?fuseaction'viewOverview&tribunalID'1 (last visited May 7, 2003).

88. Champion, *supra* note 5.

89. *See* John Holbrook, *Why The Hague is not Nuremberg*, spiked-liberties, Mar. 22, 2002, *available at* http://www.spiked-online.com/Articles/00000006D84F.htm (last visited Apr. 29, 2003).

90. *See* Geoffrey Robertson, *Playing the odds in Justice Game*, THE GUARDIAN, Dec. 19, 2002, *available at* http://www.guardian.co.uk/yugo/article/0,2763,862405,00.html (last visited Apr. 29, 2003).

91. *See id.*

92. *See* TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 334-337 (1993).

93. *See id.*

were convicted on the strength of their own meticulously kept documents.[94] Likewise, diplomats hope that if the International Prosecutor is able to prove the case against Milosevic with compelling evidence, Milosevic will fail in his effort to convince the people of Serbia that his trial represents a denial of justice.

Yet, such aspirations for the Milosevic trial are based on a inaccurate reading of history. Opinion polls conducted by the U.S. Department of State from 1946 through 1958 indicated that a large majority of West Germans considered the Nuremberg proceedings to be nothing but a show trial, representing victor's justice rather than real justice.[95] By 1953, the State Department had concluded that the Nuremberg and Control Council Law No. 10 trials had failed to "reeducate" West Germans.[96] According to a de-classified 1953 State Department report:

> From the political point of view, the crux of the war criminals problem in Germany is the refusal of a large number of Germans to accept the principles underlying the [Nuremberg] trials or the findings of the trials . . . In spite of all the Western powers have said to the contrary, the trials are generally portrayed as acts of political retribution without firm legal basis.[97]

Two generations later, however, the German people largely speak of the Nuremberg Tribunal with respect,[98] and Germany is the foremost advocate of the permanent international criminal court, a modern day Nuremberg Tribunal. Perhaps, this suggests that no matter the strength of the evidence, the Serb people should not be expected to immediately embrace the findings of the Yugoslavia Tribunal in the Milosevic case, and that the question of its success must await the judgment of future generations.[99]

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94. *See id.*

95. *See* PETER MAGUIRE, LAW AND WAR: AN AMERICAN STORY 241(2000)

96. *See id.*

97. Maguire, *supra* note 95, at 246.

98. *See, e.g.*, The American Jewish Committee; *German Attitudes Toward Jews*, The Holocaust and the United States, *available at* http://www.ajc.org/InTheMedia/PublicationsPrint.asp?did'708 (last visited April 6, 2003). The German popular view of the Nuremberg trials must be viewed in the light of the aggressive "reorientation" program which the United States imposed on Germany in the decade after the end of the second world war, as well as Germany's own domestic war crimes trials that began in the 1960s. *See* Donna E. Arzt, *Nuremberg, Denazification and Democracy: The Hate Speech Problem at the International Military Tribunal*, 12 N.Y.L. SCH. J. HUM. RTS. 689, 731 (1995).

99. Ironically, the gains Milosevic made in Serb popular opinion during the first half of his trial were largely erased when information surfaced as this article was going to press that Milosevic was behind the assassination of two popular Serb politicians: former Serbian president Ivan Stambolic who was killed in 2000, and Serbian Prime Minister Zoran

Djindjic, who was killed on March 12, 2003. *See* "Milosevic Charged with Trying to Kill Serbian Opposition Leader," Agence France Presse, Apr. 29, 2003.

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International Criminal Proceedings and the Protection of Human Rights

Dr. Göran Sluiter*

INTRODUCTION

Like other international criminal tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are considered important tools to improve the protection of human rights. And rightly so. However, the important mandate of international criminal tribunals should not make us lose sight of the fact that as *criminal* tribunals, these institutions may potentially violate human rights themselves. There are various fair trial rights and the right to liberty and security of persons that may be violated. Other rights may be at stake as well. For example, when the ICTY or ICTR Judges issue a search warrant, the right to privacy and inviolability of the home may be compromised. Likewise, in one case an ICTY Trial Chamber curtailed the right to freedom of expression when a newspaper was ordered not to publish names of protected witnesses.[1]

As models for international criminal justice, the ICTY and the ICTR may be expected to fully respect internationally protected human rights. In the long run, the support for and confidence in forms of international criminal adjudication, including the recently established permanent international criminal court (ICC) will depend on whether or not the tribunals can live up to this expectation.

In this contribution I will address the question of whether this has been the case for the ICTY and ICTR over the past years. I will first address the question of how internationally protected human rights apply to these Tribunals from a theoretical perspective. I will then look into some problems pertaining to the application of human rights in the Tribunals'

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1. *See* Prosecutor v. Mrkšić and others, Case No.: IT-95-13a-PT, Decision on Prosecution Motion for an Order for Publication of Newspaper Advertisement and an Order for Service of Documents, 19 December 1997.

daily practice.

APPLICABILITY OF HUMAN RIGHTS STANDARDS

A central and crucial question is to what extent the ICTY and ICTR are bound by international human rights law. This question needs to be dealt with before concentrating on some practical problems in the application of this body of law.

Human rights "enter" the legal framework of the Tribunals in a number of ways. The most direct application of human rights law constitutes the rights explicitly set out in the Statutes and the Rules of Procedure and Evidence (RPE). It is self-evident that the Tribunals must abide by the provisions of their own "primary legal framework," namely the Statutes and RPE. Article 21 of the ICTY Statute and Article 20 of the ICTR Statute contain the rights of the accused. Both provisions derive their language almost directly from Article 14 of the International Covenant on Civil and Political Rights (ICCPR).[2] Rule 42 of the ICTY and ICTR RPE contains the rights of suspects during investigation.[3] Reading the Statute and Rules, one notices that they are far from complete and that some important rights have not been included. An important omission is the right not to be subjected to arbitrary arrest and detention, as contained in Article 9 of the ICCPR.

In a more indirect way human rights enter the legal framework of the Tribunals on the basis of the oft-quoted commentary by the UN Secretary-General to Article 21 of the ICTY Statute: "It is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings."[4] The report of the Secretary-General has been approved by the Security Council when establishing the ICTY and can therefore be considered an authoritative interpretation of the Statute.[5]

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2. *See* 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 226 (1995); M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 957 (1996); 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 513 (1998).

3. *See* Prosecutor v. Delalić and others, Case No.: IT-96-21-T, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, 2 September 1997, *reprinted in* 1 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 1993-1998 193 (André Klip & Göran Sluiter eds., 1999) [hereinafter ALC-I] (discussion of the right to counsel, as one of the rights contained in Rule 42).

4. *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808* at para. 106, UN Doc. S/25704 (1993).

5. Given the practically identical language of Article 20 of the ICTR Statute, the

Human rights are also applicable to the Tribunals as principles of the United Nations, pursuant to Articles 24 and 1 of the UN Charter.[6] However, the determination of the scope of application of these purposes and principles of the Charter as well as their relationship *inter se* is problematic. More specifically, it is uncertain *which* human rights can be identified as principles of the Charter.[7]

Finally, human rights law binds the Tribunals in their activities to the extent that it is part of customary international law or constitutes general principles of law. One should take as a starting point here that international organizations including their subsidiary organs, are creations of international law and are, therefore, subjected to international law.[8] A practical application of this view can be found in the case law of the Court of Justice of the European Communities, according to which "the European Community must respect international law in the exercise of its powers."[9] There is no reason as to why this should be different for the UN, including the Security Council and the Ad Hoc Tribunals. They should thus abide by peremptory norms of international law under all circumstances and respect other rules of international law when they have not been empowered to deviate from these rules.[10]

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commentary by the Secretary General to Article 21 of the ICTY Statute is equally applicable to the ICTR provision.

6. *See* VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 513 (1998).

7. Morris and Scharf in this respect refer to the most important human rights instruments, the International Bill of Human Rights, consisting of the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). *See id.* They do not address the question, however, if all the rights contained therein fall under the principles of the UN. *See id.*

8. *See* Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, 1980 I.C.J. 73, 89-90 (Advisory Opinion of Dec. 20) ("[I]nternational organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law . . ."). *See also* Henry G. Schermers & N. Blokker, INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY, at § 1574 (3rd ed. 1995) (citing compelling arguments as to why international organisations should be considered bound by international law, even without their consent).

9. Case C-286/90, Anklagemyndigheden v. Poulsen, 1992 E.C.R. I-6019, para. 9. *See also* Case C-162/96, A. Racke Gmbtt & Co. v. Hauptzollamt Mainz, 1998 E.C.R. I-3655, para. 45. The latter case related to the suspension of the operation of a co-operation agreement between the Socialist Federal Republic of Yugoslavia and the European Economic Community (EEC). In that respect, the Court held that "[the] rules of customary international law concerning the termination and suspension of treaty relations by reason of a fundamental change of circumstances are binding upon the Community institutions and form part of the Community legal order." *Id.* at para. 46 .

10. For more detail on the applicability of international law to the Security Council,

The application of human rights norms as part of customary international law or general principles of law raises a number of problems for international criminal tribunals. A major difficulty is the identification of human rights being part of customary law or amounting to general principles of law. Not all of the rights set out in the various international and regional human rights treaties reflect customary international law or general principles of law. A complicating factor in making that determination, furthermore, is that a considerable number of human rights may be derogated from under certain conditions, for example when this is "necessary in a democratic society"[11] or "[i]n time of public emergency which threatens the life of the nation."[12] These conditions, however, concern the application of human rights within national societies and may not fit easily into the application of human rights by international criminal tribunals. For these reasons, when confronted with questions as to the exact scope of application of human rights law, resort to customary international law and general principles may be a highly complicated and time and energy consuming matter for the Tribunals.

Application of human rights treaties, and in particular well-developed interpretations of the provisions in these treaties by supervisory bodies of a full or quasi-judicial nature, is a far more attractive alternative. This is what the Tribunals have done. It is true that in initial case law, in particular the *Tadić protective measures* case, the ICTY was reluctant to take human rights treaty law, including decisions of supervisory bodies, into account.[13] Subsequent decisions, however, have displayed a greater ease with sources of law outside the Statute and RPE and have increasingly applied treaty based human rights law.[14] In the *Mucić exclusion of evidence* case, for

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see T. Gill, *Legal and Some Political Limitations on the Power of the UN Security Council to Exercise Its Enforcement Powers Under Chapter VII of the Charter*, 26 NETH. Y.B. INT'L LAW 33, 61-64 (1995).

11. European Convention on Human Rights, art. 8, para. 2 (adopted 4 Nov. 1950) *at* http://conventions.coe.int/treaty/en/Treaties/Html/005.htm (last visited Mar. 24, 2003). This language is repeated throughout the second sections of various provisions of this document. *See id.*

12. International Covenant on Civil and Political Rights, art. 4, para. 1 (adopted 16 Dec. 1966) *at* http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (last visited Mar. 15, 2003).

13. *See* Prosecutor v. Tadić, Case No. IT-94-1-T, T. Ch. II, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 Aug. 1995 , *reprinted in* ALC-I, *supra* note 3, at 155, para. 27. Where it held that "the interpretation given by other judicial bodies to Article 14 of the ICCPR and Article 6 of the ECHR is only of limited relevance ...." *Id.* It also ruled that "the International Tribunal must interpret its provisions within its own legal context and not rely in its application on interpretations made by other judicial bodies . . . ." *Id.*, para. 28.

14. The *Tadić protective measures* decision "uncovers a deep uncertainty about the sources of international procedural law and the relevance of international standards in

example, the Trial Chamber had ample regard to case law of the European Court on Human Rights (ECHR) in order to determine the scope of the right to counsel under Rule 42.[15] In the *Dokmanović arrest* case, dealing with the legality of arrest, the Trial Chamber gave ample consideration to relevant case law of the European Court of Human Rights and, to a lesser extent, the Human Rights Committee in this field.[16] At the appellate level account may be taken of the decision of the Appeals Chamber in the *Blaškić subpoena* case. In that decision, when considering the power of the Tribunal to hold, in absentia, contempt proceedings against individuals not complying with a subpoena, the Appeals Chamber held the view that the guarantees provided for in the context of the ECHR should be respected.[17] More recently, the Appeals Chamber applied human rights treaties and decisions of supervisory bodies in the *Barayagwiza* case.[18] Concerning the legality of Mr. Barayagwiza's arrest and his detention, the Appeals Chamber considered which were the applicable and authoritative provisions. It held that:

> The International Covenant on Civil and Political Rights is part of general international law and is applied on that basis. Regional human rights treaties, such as the European Convention on Human Rights and the American Convention on Human Rights, and the jurisprudence developed there under, are persuasive authorities which may be of assistance in applying and interpreting the Tribunal's applicable law. Thus, they are not binding of their own accord on the Tribunal. They are, however, authoritative as evidence of international custom.[19]

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making procedural decisions." Natasha A. Affolder, *Tadic, the Anonymous Witness and the Sources of International Procedural Law*, 19 MICH. J. INT'L L. 445, 448 (1998).

15. *See* Prosecutor v. Delalić and others, Case No. IT-96-21-T, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, 2 September 1997, paras. 50 – 51, *reprinted in* ALC-I, *supra* note 3, at 227. The analysis of the European case law contained some flaws and its impact on the outcome of the case may be very limited, but the Trial Chamber nevertheless took it explicitly into account. See also my commentary to that case in ALC-I, *supra* note 3, at 242.

16. *See* Prosecutor v. Mrkšić and others, Case No. 95-13a-PT, Decision on the Motion for Release by the Accused Slavko Dokmanović, 22 October 1997, paras. 62 – 68, *reprinted in* 3 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 1997-1999 127 (André Klip & Göran Sluiter eds., 1999) [hereinafter ALC-III].

17. *See* Prosecutor v. Blaškić, Case No.: IT-95-14-AR108*bis*, A. Ch., Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, , para. 59, *reprinted in* ALC-I, *supra* note 3, at 245 (*Blaškić subpoena* decision, A. Ch.).

18. *See* Prosecutor v. Barayagwiza, Case No.: ICTR-97-19-AR72, Decision, 3 November 1999, *reprinted in* ALC-I, *supra* note 3, at 129.

19. *Id.* at para. 40.

This citation is indicative of the role of international human rights law in the framework of the Tribunals. It nevertheless raises a number of questions. For example, what is meant by declaring the ICCPR part of general international law? Does it reflect customary international law, or general principles of law? Is it in its entirety part of general international law? Furthermore, if the regional instruments are evidence of international custom,[20] do they bind the Tribunals on the basis of customary international law? Notwithstanding these questions, the citation creates a desirable clarity. It is desirable[21] and legitimate to apply fully the ICCPR as a universal instrument because the accused benefits from this protection in most national jurisdictions as well. Full application of the ICCPR should include the views of the Human Rights Committee, as authoritative interpretations of the provisions in this instrument.

Problems of the ICCPR's exact scope of application will subsist, especially since the provisions address the protection of human rights by States. As was already mentioned, whereas States are permitted to derogate from certain human rights on limited and specific grounds, one can hardly imagine how these grounds could apply to the Tribunals.[22] The fact that the rights set out in the Covenant are minimum rights can be expected to play an important role in passing judgment on their applicability. The emphasis that the rights contained in the ICCPR and other instruments are *minimum* rights can be encountered in the *Barayagwiza* case[23] and the recent *Nikolic*

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20. In particular the ECHR can be considered to reflect customary international law. It is true that this is only a regional convention and therefore the ensuing State practice is by definition limited, but this Convention dates from 1950 and served as a model for the ICCPR.

21. *See* A. Swart, *Violations of International Human Rights Standards, noted in*, 3 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 1994-1999 201 (André Klip & Göran Sluiter eds., 2001) [hereinafter ALC-II]. (Swart refers to the role of the Tribunals as universal models of criminal justice)..

22. In this respect it may seem understandable that the majority in the *Tadić protective measures* decision ruled that:

> the interpretation given by other judicial bodies to Article 14 of the ICCPR and Article 6 of the ECHR is only of limited relevance in applying the provisions of the Statutes and Rules of the International Tribunal as these bodies interpret their provisions in the context of their legal framework, which do not contain the same considerations.

Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995, para. 27, *reprinted in* ALC-I, *supra* note 3, at 155.

23. *See* Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, A. Ch., Decision, 3 November 1999, para. 79, *reprinted in* ALC-II, *supra* note 21, at 129. "[S]uspects held at the behest of the Tribunal . . . are entitled, at a bare minimum, to the protections afforded

arrest case.[24]

SCOPE OF APPLICATION

The criminal procedure of the ICTR and ICTY is fragmented over two or even more jurisdictions. For example, evidence is collected in different States, the accused is arrested by others than Tribunal investigators, and finally the sentences are enforced by States. The degree of fragmentation is a vital distinction with respect to national criminal procedures. Of course, also in a national case there may be a need to request another jurisdiction to collect evidence or to arrest and extradite the accused, but it is not daily practice, as is the case with international criminal tribunals.

The dispersal of the criminal procedure over various jurisdictions raises some pertinent questions regarding the scope of application of human rights law, which, as was established above, binds the ICTY and ICTR in their activities. From a practical point of view, the most vital question is, to what extent the ICTY should bear responsibility (in the sense of providing remedies) for human rights violations that have occurred in the framework of its proceedings. There can be no discussion that the Tribunals bear full responsibility for every conduct within the courtroom or within the Detention Unit, which are within their "exclusive domain." Thus, violation of the right to counsel or ill-treatment of prisoners constitute unlawful conduct which can be fully attributed to these institutions.

As to conduct that occurs outside The Hague or Arusha, the situation is much more complicated. One view has been expressed that argues (human rights) violations that occur outside the trial forum's jurisdiction are of no concern to the trial forum, or have no consequences for the trial. An argument supporting this position is that the trial forum simply lacks the competence to supervise acts of criminal procedure taking place in another sovereign State. This argument has its roots in the rule of non-inquiry and seems also to have been used by Trial Chamber II of the ICTR, refusing to review the legality of a number of searches and seizures and arrests by national authorities:

> [S]ince it is a sovereign State that carries out arrests and searches and seizures, the Tribunal is not competent to supervise the legality of these actions.[25]

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under these international [human rights] instruments." *Id.*

24. Prosecutor v. Nikolic, Case No.: IT-94-2-PT, Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, para. 110, *available at* http://www.un.org (last visited Jan. 1, 2003). "This Chamber observes that these norms [provisions from ICCPR and ECHR, GKS] only provide for the absolute minimum standards applicable." *Id.*

25. See the following ICTR decisions: Prosecutor v. Nyiramasuhuko, Case No.:

Another argument used in a national decision is that laws have only territorial application and "foreigners" do not benefit from their protection. This was the position of the United States Supreme Court majority in the *Verdugo-Urquidez* case, dealing with the question of whether or not the United States Constitution governed a search of a home in Mexico by U.S. law enforcement officials.[26]

I am, however, in favor of a different view; namely that the trial forum must take account of every human rights violation that occurs in the framework of the criminal proceedings. This view finds its ultimate basis in simple fairness and in the nature of the relationship between the accused and the trial forum. Justice Brennan, in his dissenting opinion to the *Verdugo-Urquidez* case, coined the notion of mutuality: "If we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them.... Mutuality is essential to ensure the fundamental fairness that underlies our Bill of Rights."[27]

The same argument can be used with respect to the ICTR and ICTY, meaning that the individuals appearing before them should enjoy the protection of their legal framework, including internationally protected human rights. In the case of these Tribunals, the obligation not to disregard human rights violations that have occurred prior to trial follows from their Statutes. Article 20 (1) of the ICTY Statute and Article 19 (1) of the ICTR Statute explicitly oblige the Trial Chamber to ensure that a trial is fair and

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ICTR-97-21-T, Decision on the Defence Motion for Exclusion of Evidence and Restitution of Property Seized, 12 October 2000, para. 26; Prosecutor v. Ngirumpatse, Case No.: ICTR-97-44-I, Decision on the Defence Motion challenging the Lawfulness of the Arrest and Detention and seeking Return or Inspection of Seized Items, 10 December 1999, para. 56; Prosecutor v. Kajelijeli, Case No.: ICTR-98-44-I, Decision on the Defence Motion concerning the Arbitrary Arrest and Illegal Detention of the Accused and on the Defence Notice of Urgent Motion to Expand and Supplement the Record of 8 December 1999 Hearing, 8 May 2000, para. 34; Prosecutor v. Karemera, Case No.: ICTR-98-44-I, Decision on the Defence Motion for the Restitution of Documents and other Personal or Family Belongings Seized (Rule 40 (C) of the Rules of Procedure and Evidence), and the Exclusion of such Evidence which may be used by the Prosecutor in preparing an Indictment against the Applicant,10 December 1999, para. 4.2; Prosecutor v. Nzirorera, Case No.: ICTR-98-44-T, Decision on the Defence Motion challenging the Legality of the Arrest and Detention of the Accused and requesting the Return of Personal Items Seized, 7 September 2000, para. 27; *available at* http://www.ictr.org (last visited Mar. 21, 2003).

26. *See* United States v. Verdugo-Urquidez, 494 U.S. 259 (1990). For a commentary, see Bonnie Albrecht, United States v. Verdugo-Urquidez: *The Reach of United States Law Enforcement Agents Abroad – Are there Any Fourth Amendment Limits?*, 22 UWLA L. REV., 303 (1991), and David. Haug, *United States: Extraterritorial Application of the Fourth Amendment* – United States v. Verdugo Urquidez, 32 HARV. INT'L L.J., 295 (1991).

27. *Verdugo-Urquidez*, 494 U.S. at 284.

expeditious. This implies that pre-trial human rights violations must be addressed, since they can affect the fairness of the trial.

When one looks at the jurisprudence of the ICTY and ICTR one notices that the Chambers are generally aware of their obligation to ensure the fairness of the trial as a whole. The decisions of Trial Chamber II of the ICTR mentioned above[28] should be seen as unfortunate exceptions to this rule. In at least three cases, the ICTY and ICTR Chambers have reviewed the legality of pre-trial investigative and other measures in the light of internationally protected human rights.

In the *Celebici* case the ICTY Trial Chamber was confronted with the question of whether a statement obtained in absence of the accused's counsel could be admitted into evidence.[29] The accused, Zdravko Mucic, was, prior to his transfer, interrogated by Austrian police, not at the request of the ICTY, but with a view to his transfer to the ICTY or even his extradition to a State. Under Austrian law, there is no right for counsel to be present at these types of interrogations. The Prosecutor essentially adopted the position that the Tribunal itself, including its organs, had not violated the right to counsel, as protected by Rule 42 of the ICTY Rules and international human rights instruments, and as a result, there was no reason to exclude the evidence.[30] The Trial Chamber, however, underlined that the exclusion of evidence obtained in violation of internationally protected human rights is mandatory under Rule 95.[31] In this respect it is irrelevant whether the Tribunal in any way requested or was involved in the collection of evidence, although involvement of the Prosecutor in obtaining evidence in violation of human rights could result in remedies additional to the exclusion of evidence.

Two other cases I would like to mention here both concern alleged violations of the human rights pertaining to arrest and pre-trial detention. The first case relates to the arrest of and pre-trial detention in Cameroon of Jean-Bosco Barayagwiza.[32] Barayagwiza's arrest was lawful, but following

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28. *See supra* note 25 and accompanying text.

29. *See* Prosecutor v. Delalić and others, Case No.: IT-96-21-T, Decision on Zdravko Mucić's Motion for the Exclusion of Evidence, 2 September 1997, *reprinted in* ALC-I, supra note 3, at 227.

30. *See id.* at para. 22.

31. *See id.* at para. 43.

32. *See* Prosecutor v. Barayagwiza, Case No.: ICTR-97-19-AR72, A. Ch., Decision, 3 November 1999, *reprinted in* ALC-II, supra note 21, at 129; *see also* Prosecutor v. Barayagwiza, Case No. ICTR-97-19-A, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000. For a critical commentary on "*Barayagwiza* I", see Bert Swart, Commentary to Decision, Prosecutor v. Barayagwiza, Case No. ICTR-97-19-AR72, A. Ch., 3 November 1999, ALC-II, *supra* note 21, at 208, for a critical commentary on "*Barayagwiza* I and II", see William A. Schabas, Barayagwiza v. Prosecutor, 94 AM. J. INT'L

the long period of detention in Cameroon the accused's right to be promptly informed of the charges against him and the right to challenge the legality of his detention before a court of law were violated. The complexity of the Barayagwiza case lies not so much in the facts of the case, but rather in the question of responsibility for these various facts. The Prosecutor tried to diminish her own role in the strongly prolonged pre-trial detention of the accused in Cameroon and the related violations of the accused's rights; instead, she sought to allocate much of the responsibility to Cameroon. It is true that the role of the Prosecutor was of great significance for the choice of remedies in "*Barayagwiza* I": termination of the proceedings, based on the Prosecutor's significant role in the violations of the accused's rights. In "*Baraygwiza* II", however, the Appeals Chamber decided that on the basis of new information the violations of Barayagwiza's rights were more due to Cameroon than the Prosecutor, and, therefore, the remedies adopted previously were reversed. Be this as it may, the question of allocation of responsibilities between the Prosecutor and Cameroon can be considered irrelevant with respect to the question of whether the violations should be addressed by the Chamber. The Appeals Chamber made it clear that it would fully exercise its supervisory powers over pre-trial human rights violations. According to the Chamber, "[t]he use of such supervisory powers serves three functions: to provide a remedy for the violation of the accused's rights; to deter future misconduct; and to enhance the integrity of the judicial process." [33]

It also appears the Appeals Chamber considers it self-evident that the trial forum is the appropriate place to address human rights violations that occurred in the framework of the criminal proceedings:

> At this juncture, it is irrelevant that only a small portion of that total period of provisional detention is attributable to the Tribunal, since it is the Tribunal-and not any other entity-that is currently adjudicating the Appellant's claims. Regardless of which other parties may be responsible, the inescapable conclusion is that the Appellant's right to be promptly informed of the charges against him was violated.[34]

The first *Barayagwiza* decision was altered in a questionable review procedure.[35] However, this review only concerned the choice for the

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L. 563 (2000).

33. Prosecutor v. Barayagwiza, Case No.: ICTR-97-19-AR72, Decision, 3 November 1999, para. 76, *reprinted in* ALC-II-129, *supra* note 21, at 129.

34. *Id.* para. 85.

35. Prosecutor v. Barayagwiza, Case No.: ICTR-97-19-A, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000. See the criticism by Schabas, to which I fully subscribe: William A. Schabas, Barayagwiza v. Prosecutor, 94AM. J. INT'L. L 536, 567-68 (2000).

remedies. "*Barayagwiza* II" did not in any way affect the guiding principles established in "*Barayagwiza* I.[36] In summary, the ICTY or ICTR Trial Chamber should exercise supervisory powers with respect to every violation of individual rights that occurs in the framework of its proceedings. This supervision aims at preserving the integrity and the fairness of the proceedings. Although the Barayagwiza decisions can be criticised on many points, they should be welcomed for having established the above principle, which aims at preventing unacceptable gaps in the protection of human rights.

The final decision I would like to address concerns the method of arrest of the accused Nikolić.[37] The accused in this case claimed that his arrest and following detention were unlawful because he was abducted by unknown individuals from the territory of the Federal Republic of Yugoslavia and then put in the hands of the Tribunal's "special police force" (SFOR). The case raises a classical issue of *male captus bene detentus*: can jurisdiction still be lawfully exercised over an unlawfully arrested individual?[38] Therefore, the focus is immediately on the remedy, termination of the proceedings. However, another question should be addressed first: to what extent should the ICTY review the legality of the arrest of the accused? One notices here that the ICTY Trial Chamber follows the *Barayagwiza* jurisprudence. The Trial Chamber recognizes that violations of the rights of the accused in the pre-trial phase can negatively affect the fairness and integrity of the entire proceedings. It is worth quoting the most relevant paragraph of the decision:

> There exists a close relationship between the obligation of the Tribunal to respect the human rights of the Accused and the obligation to ensure

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36. *See* Prosecutor v. Barayagwiza, Case No. ICTR-97-19-A, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, para. 28. Declaration by Judge Nieto-Navia,:

> Human rights treaties provide that when a state violates fundamental human rights, it is obliged to ensure that appropriate domestic remedies are in place to put an end to such violations and in certain circumstances to provide for fair compensation to the injured party. Although the Tribunal is not a State, it is following such a precedent to compensate the Appellant for the violation of his human rights...."

Id.

37. *See* Prosecutor v. Nikolić, Case No.: IT-94-2-PT, Decision on Defence Motion challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002.

38. On the applicability of *male captus bene detentus* doctrine to international criminal tribunals, see Susan Lamb, *The Power of Arrest of the International Criminal Tribunal for the Former Yugoslavia*, LXXBRIT. Y.B. INT'L. L., 167 (1999), and Michael Scharf, *The* Prosecutor v. Slavko Dokmanovic*: Irregular Rendition and the ICTY*, 11 LEIDLEY J. INT'L L. 369 (1998).

> due process of law. Ensuring that the Accused's rights are respected and that he receives a fair trial forms, in actual fact, an important aspect of the general concept of due process of law. In that context, this Chamber concurs with the view expressed in several national judicial decisions, according to which the issue of respect for due process of law encompasses more than merely the duty to ensure a fair trial for the Accused. Due process of law also includes questions such as how the Parties have been conducting themselves in the context of a particular case and how an Accused has been brought into the jurisdiction of the Tribunal. The finding in the *Ebrahim* case that the State must come to court with clean hands applies equally to the Prosecution coming to a Trial Chamber of this Tribunal. In addition, this Chamber concurs with the Appeals Chamber in the *Barayagwiza* case that the abuse of process doctrine may be relied on if "in the circumstances of a particular case, proceeding with the trial of the accused would contravene the court's sense of justice ". [sic] However, in order to prompt a Chamber to use this doctrine, it needs to be clear that the rights of the Accused have been egregiously violated.[39]

Thus, like the Appeals Chamber in *Barayagwiza*, the Trial Chamber in *Nikolić* considers it imperative to address pre-trial human rights violations.[40] However, the question in *Nikolić* was whether the violation in question should result in the termination of the proceedings. It seems now accepted that this remedy is not excluded, but still should not be taken lightly taking account of the nature of the accusations we are dealing with here. Crucial factors in determining whether or not this remedy should be provided for are the following:

> 1. The degree of attribution of the violation to the Tribunal, in particular the Prosecutor (significant involvement in the violation by the Prosecutor could damage the integrity of the proceedings to such an extent that the trial cannot be continued);
>
> 2. The nature of the violation of individual rights (violation of individual rights of an egregious nature, such as subjecting the individual to inhuman or degrading treatment, may constitute a legal impediment to exercise of jurisdiction by the Tribunal, regardless of whether or not the Tribunal, in particular the Prosecutor, had anything

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39. Prosecutor v. Nikolić, Case No.: IT-94-2-PT, Decision on Defence Motion challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, para. 111.

40. Compare the other ICTY decision dealing with the legality of arrest, in which the method of apprehension was reviewed, inter alia, in light of ECHR jurisprudence: Prosecutor v. Mrkšić and others, Case No.: 95-13a-PT, Decision on the Motion for Release by the Accused Slavko Dokmanović, 22 October 1997, *reprinted in* ALC-III, *supra* note 16, at 127.

to do with the violation).

In the *Nikolić* case the Chamber ruled that the Tribunal and its SFOR were not involved in the abduction and that, furthermore, the manner in which the accused was abducted did not amount to serious mistreatment.[41] I agree with the Chamber that in such circumstances, release of the accused would be a disproportionate remedy. However, one wonders why the Trial Chamber, as the Appeals Chamber did in *Barayagwiza*, did not consider alternative remedies. In this respect, one can envisage the reduction of the sentence, in case of conviction, or financial compensation, in case of acquittal.

CONCLUDING REMARKS

The jurisprudence of the ad hoc Tribunals has developed progressively over the years as far as the protection of human rights is concerned. Taking account of that jurisprudence, it can now be said that the protection of human rights is generally in good hands with these Tribunals.[42] This appears to be the case with all components of the criminal proceedings, including the part that takes place outside the courtroom.

It cannot be emphasized enough that to maintain the continuing support of the international community for the ICTY and ICTR, as well as the ICC in the future, it is of vital importance that these institutions provide adequate protection of individual rights. Otherwise, we can expect that in the future more and more participants in these international criminal proceedings will turn to national courts of the host-state for review.[43] In the *Opačić* case, dealing with alleged violations of human rights of a detained witness, a Dutch court refused to review an ICTY decision in light of the ECHR.[44] However, the explanatory memorandum to the Dutch "ICC Cooperation Act" made it clear that, in future cases, the Netherlands reserves the right to review ICC decisions which require the active

41. Prosecutor v. Nikolić, Case No. IT-94-2-PT, T. Ch. II, Decision on Defence Motion challenging the Exercise of Jurisdiction by the Tribunal, 9 October 2002, paras. 67, 114.

42. This is apparently also the opinion of the European Court of Human Rights in *Naletilic v. Croatia*: "[the ICTY] offers all the necessary guarantees including those of impartiality and independence." *Naletilić v. Croatia,* Eur. Ct. of HR 491, 494 (2000) (not yet reported).

43. Surprisingly, to this day, Milošević is the only accused who sought to address alleged violations of his rights by the ICTY before a Dutch court; *see* Milošević/de Staat der Nederlanden, Rb. 's-Gravenhage, 31 augustus 2001, KG 01/975 (ann. EvL).

44. *See* Opacić/de Staat der Nederlanden, Rb. 's-Gravenhage, 30 mei 1997 KG 97/742).

cooperation of the host-state in light of obligations incumbent on the Netherlands under the ECHR.[45] This will in all likelihood also apply to ICTY decisions. Such review could result in withholding the requested assistance (for example, the return of a detained witness to state X). Although this may hamper the functioning of the Court, or Tribunal, I believe the Netherlands, and other states, make the right choice in according priority to their human rights obligations.

45. *See* Tweede Kamer, vergaderjaar 2001-2002, 28 098 (R1704), nr. 3, p. 46.

The Evolution of Defense Counsel Appearing Before the International Criminal Tribunal for the Former Yugoslavia

Mark S. Ellis*

There is no question that history will judge the Tribunals for the former Yugoslavia and Rwanda on the fairness or unfairness of their proceedings. Whether there are convictions or whether there are acquittals will not be the yardstick. The measure is going to be the fairness of the proceedings. - Justice Richard J. Goldstone[1]

INTRODUCTION

In 1993, the International Criminal Tribunal for the Former Yugoslavia ("ICTY," "Tribunal")[2] was created under Chapter VII, Article 39 of the U.N. Charter, which empowers the Security Council "to maintain or restore international peace and security."[3] Born in the aftermath of some of the worst human rights atrocities committed in the latter half of the twentieth century, the ICTY has the seemingly insurmountable task of bringing those responsible to justice.

The Tribunal's Statute provides for jurisdiction over "serious violations

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1. Richard J. Goldstone, Address Before the Supreme Court of the United States, 1996 CEELI Leadership Award Dinner (Oct. 2, 1996) (transcript on file with author).

2. *See Statute of the International Criminal Tribunal for Persons Responcible for Serious Violation of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, U.N. SCOR, 48th Sess., 3217th mtg. at 28, U.N. Doc. S/RES/827 at art.1. (1993) [hereinafter *ICTY Statute*].

3. U.N. CHARTER, art. 39.

of international humanitarian law."[4] This essentially covers four types of crimes. The first type of crime falls under the 1949 Geneva Conventions, which protect certain persons such as prisoners of war and civilians in time of international conflict against "grave breaches" like willful killing, torture, and inhumane treatment.[5]

Violations of the Laws and Customs of War (War Crimes), established under the 1907 Hague Convention, are the second type of crime under the Tribunal's jurisdiction.[6] For instance, a state is prohibited from using poisonous weapons, wantonly destroying cities, towns or villages, or willfully damaging institutions dedicated to religion, charity, and education. The third criminal act punishable under the Tribunal's Statute is the Crime of Genocide.[7] Codified in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, genocide constitutes "the intent to destroy, in whole or in part, a national, ethnic, racial or religious group."[8] Lastly, the Tribunal has jurisdiction over crimes against humanity as first recognized in the Nuremberg Trials.[9] Crimes against humanity involve ongoing, widespread and systematic attacks, including deportation, imprisonment and rape directed against a civilian population.[10]

In contrast to the Nuremberg prosecutions, where membership in the Nazi party was a punishable offence, the Tribunal's jurisdiction extends only to "natural" persons, not to "juridical" persons such as organizations.[11] In essence, the prosecutors must prove that the defendant engaged in acts constituting serious violations of international humanitarian law as outlined by the above-mentioned criminal definitions; association or membership with a certain group is not enough evidence for conviction.

Representing those accused of some of the most heinous crimes of the past century are the defense counselors of the ICTY. The position of defense counsel of the ICTY has improved considerably since the Tribunal's first case. The ICTY has made important changes to its rules and procedures to alleviate some of the financial and work burdens that initially

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4. *Id.*

5. *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T 3316, 75 U.N.T.S 135.

6. *See ICTY Statute*, *supra* note 2, art. 3.

7. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277, art. 2 [hereinafter Genocide]; *see also ICTY Statute*, *supra* note 2, art. 4; Charter of the International Military Tribunal, Aug. 8, 1945, [hereinafter Nuremburg Charter].

8. Genocide, *supra* note 7, art. 2.

9. *See* Nuremburg Charter, *supra* note 7, art. 6(c).

10. See *ICTY Statute*, *supra* note 2, art. 5.

11. *Compare* Nuremburg Charter, *supra* note 7, art. 10 *with ICTY Statute*, *supra* note 2, art. 6-7.

plagued defense counsel appearing before it.

This article identifies several key issues relevant to defense counsel appearing before the ICTY. The author discusses the evolution of defense counsel within the context of these issues and whether their status has improved during the past ten years.

THE FINANCIAL POSITION OF DEFENSE COUNSEL

The growth of the ICTY, both financially and in terms of human resources, has been significant. The staff of the ICTY numbers approximately 1,052 (up from 258 in 1995) and its current annual budget is $223,169,800 (up from $38,819,700 in 1995).[12] The ICTY has spent millions of dollars to support defense counsel for the accused.[13] Approximately 90% of suspects and accused appearing before the ICTY require assigned counsel.[14] In 1999, the ICTY spent $14 million for payments to assigned counsel, roughly 15% of its entire budget.[15]

Issues such as financial remuneration for defense counsel are handled through the ICTY's Registrar. In 1994, the Registrar established the Directive on the Assignment of Defense Counsel.[16] The Directive has been amended a number of times since 1994.[17] The Directive, including the

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12. *See* Approved Level of Fiscal and Staffing Resources ICTY 1994-2003. E-mail from Rommel Loveranes, Staff Assistant at the ICTY, to Mr. Ellis (Nov. 29, 2002) (on file with author).

13. *See* ICTY Press Release JL/P.I.S./479-e, U.N., Remark of Judge Richard May, Judge of the International Criminal Tribunal for the former Yugoslavia, to the Fourth Session of the Preparatory Commission for the International Criminal Court (Mar. 20, 2000) [hereinafter Judge May] (transcript on file with author).

14. *See Financing of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*; *Financing of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States between 1 January and 31 December 1994*; U.N. GAOR, 54th Sess., Agenda Items 142 and 143, at 64, U.N. Doc. A/54/634 (1999) [hereinafter U.N. Financial Report].

15. *Id.*

16. *See Directive on Assignment of Defense Counsel, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, U.N. Doc. IT/73/Rev 1 (1994) [hereinafter Original Directive] *reprinted in* 33 I.L.M. 1576 (1994).

17. The Original Directive has been amended seven times: on 30 January 1995 (50th Sess., U.N. Doc. IT/73/Rev. 2 (1995)) [hereinafter 1995 Directive]; on 25 June 1996 (51st Sess., U.N. Doc. IT/73/Rev. 3 (1996)) [hereinafter 1996 Directive]; on 1 August 1997 (52nd

amendments, governs the procedures for the assignment of defense counsel, their conduct and the calculation and payment of their fees.[18]

Compensation for defense counsel is one area that has drastically changed over the years. Current defense counsel salaries have substantially improved from the first ICTY case against Dusko Tadic.[19] The original 1994 *Directive on Assignment of Defense Counsel* provided for limited remuneration for defense counsel.[20] Assigned counsel was paid according to three separate schedules. First, attorneys were paid on a fixed rate basis at $400, payable at specific stages of the trial.[21] In the *Tadic* case, there were two stages for a total of $800. The second type of payment was a daily allowance for the attorneys who came from outside of The Hague. The payment was based on the United Nations Schedule of Daily Sustenance Allowance Rates.[22] The third type of payment and the most important was the daily fee. The daily fee was fixed to the number of days worked and, for assigned counsel, was limited to $200 a day.[23] The reason for such low fees was that such payments were determined in 1995 and were premised on a pre-trial and trial stage that would last approximately nine months. The fact is that trials have lasted much longer than initially anticipated.[24]

Looking back at the *Tadic* case, assigned counsel spent twelve to fourteen hours a day, six days a week completing pre-trial and trial work.[25] Counsel prepared for more than eighty-five cross-examinations, and for over thirty-five direct examinations of defense witnesses.[26] When calculated on the basis of a seven and one-half hour workday, the lead defense counsel was paid $26 per hour, which also had to cover general

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Sess., U.N. Doc. IT/73/Rev. 4 (1997)) [hereinafter 1997 August Directive]; on 17 November 1997 (52nd Sess., U.N. Doc. IT/73/Rev. 5 (1997)) [hereinafter 1997 November Directive]; on 10 July 1998 (53rd Sess., U.N. Doc. IT/73/Rev. 6 (1998)) [hereinafter 1998 Directive]; on 19 July 1999 (54th Sess., U.N. Doc. IT/73/Rev. 7 (1999)) [hereinafter 1999 Directive]; and on 15 December 2000 (55th Sess., U.N. Doc. IT/73/Rev. 8 (2000)) [hereinafter 2000 Directive]. *See Rules of Procedure and Evidence*, U.N. Doc. IT/32/Rev. 26 (2002) [hereinafter *ICTY Rules*]. The various Directives implement ICTY Rules 44 and 45 regarding qualification and assignment of counsel. *See id.*

18. *See* Stuart Beresford, *The International Criminal Tribunal for the Former Yugoslavia and the Right to Legal Aid and Assistance*, 2 INT'L J. HUM. RTS. 49 (1998).

19. *See* Prosecutor v. Tadic, Case No.: IT-94-1-T, Judgement, 13 Feb. 1995.

20. *See* Original Directive, *supra* note 16.

21. *See id.* art. 24.

22. *See id.* art. 23.

23. *See id.* art. 25.

24. *See* U.N. Financial Report, *supra* note 14, at 75-76.

25. *See* Telephone Interview with Stephen Kay (Sept. 10, 2002).

26. *See id.*

administrative costs for the counsel's office.[27] The remuneration was hardly commensurate with the amount of time devoted to the case.

Since *Tadic*, changes in compensation for counsel have generally improved. The 2000 Directive countermanded earlier directives and raised the fixed rate from $400 to $2,000.[28] The fixed daily rate has also been raised considerably. The *Tadic* defense counsel petitioned the ICTY Registry for an increase in his daily fee.[29] In what would be an extremely important decision by the Registrar to assist the defense counsel, an informal agreement was negotiated, increasing the fee from $200 to $825 a day ($110 per hour).[30] The 1996 Directive formally legitimized this arrangement by increasing the rate to $110 per hour for counsel with twenty years or more experience.[31]

Presently, lead counsel at the ICTY is remunerated at a rate of between $80 and $110 per hour (depending on the years of experience) up to a maximum of 175 hours per month.[32] Thus, today an experienced counsel could earn more than $230,000 per year.[33] Expenditures such as phones, mailing, office equipment, rent, fax services and secretarial support are included in the payment to counsel of fees and costs.[34] On average, a defense team in the ICTY at the pre-trial stage costs the Tribunal $22,000 to $25,000 per month and during the trial, the costs increase to about $45,000.[35] These new pay scales are sufficient to attract quality European and North American attorneys.[36]

As to defense counsel fees, the Tribunal does not distinguish between an assigned counsel from the U.S. and one from the former Yugoslavia, although the latter would receive a significant windfall in comparison to

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27. William W. Horne, *For the Record: Mikhail Wladimiroff*, AM. LAW., Apr. 1996, at 71, 75.

28. *See* 2000 Directive, *supra* note 17, art. 25.

29. *See* Telephone Interview with Alphons Orie (Sept. 10, 2002).

30. *See id.*

31. Other figures provided for 1996 were: Counsel with 15-19 years of experience ($100/hr); 10-14 years of experience ($90/hr); 5-9 years of experience ($80/hr). *See* 2000 Directive, supra note 17, annex VI.

32. *See* 1999 Directive, *supra* note 17, annex I.

33. In addition to the hourly rate, counsel is paid a fixed rate for each stage of the proceedings, in order to allow counsel familiarity with the pertinent documents of the case and applicable law. Since 1998, that amount has been established at $2,000 per stage (i.e., pre-trial, trial and appeal). Co-counsel receives a fixed rate of $80 per hour, up to a monthly maximum of 175 hours (up to $14,000 per month). *See* 2000 Directive, *supra* note 17, ch. 7.

34. *See* 2000 Directive, *supra* note 17, art.2.2.(B)

35. *See* U.N. Financial Report, *supra* note 14, at 64.

36. *See Developments in the Law: III. Fair Trials and the Rule of International Criminal Defense* 114 HARV. L. REV. 1982, 1997 (2001) [hereinafter *Fair Trials*].

their "normal" fees. For attorneys who work in developing economies, such as attorneys from the former Yugoslavia, the money is remarkable by local standards.[37] Considering that on average an attorney in Belgrade earns $100-$215 per client,[38] the ICTY work is significant compensation.

Due to the large bureaucracy associated with the current method of billing, the ICTY is currently considering a plan that could provide a lump-sum payment for each case.[39] The ICTY Registrar and a number of defense counsel support this change because it would eliminate the significant burden of preparing, reviewing and paying individual invoices.[40]

THE ASSIGNMENT OF COUNSEL

Another major change regarding defense counsel has been the actual assignment of counsel by the ICTY. The Original Directive entitled the suspect or the accused to *one* attorney as assigned counsel.[41] The word "one" was literal.[42] However, due to the enormous amount of work involved in the Dusko Tadic case, the assigned counsel successfully petitioned the ICTY for an additional defense attorney.[43] In 1996, as a result of the *Tadic* trial, the Original Directive was amended again to allow the possibility of assigning a second counsel to the accused "[u]nder

37. *See* Tracy Wilkinson, *One Reason to Take on War Crimes Tribunal Lawyers are Scrambling to Represent Suspects in the Balkans. It Means Long Hours and Risking Death Threats. But it also offers a Chance to Rewrite Case Law—and the Pay's Good*, L.A. TIMES, May 15, 1998, at A3.

38. *See* Interview with Blazo Nedic, Attorney, in Belgrade, Yugoslavia (Nov. 26, 2002) (on file with author). Attorneys in the former Yugoslavia charge a fee per action. The amount of the fee depends on the maximum stipulated sanction. For example, for a possible sanction of up to three years' imprisonment, an attorney would charge 3,000 dinars (50 USD) to draft a legal document, and 3,500 dinars (58.33 USD) for a court appearance. For 3-5 years' imprisonment a lawyer earns about 100 USD per action. For 5-10 years' imprisonment a lawyer earns about 175 USD per action. For 10 years' and above imprisonment a lawyer earns about 215 USD per action. *See id.*

39. *See* U.N. Financial Report, *supra* note 14, at 76.

40. *See* Interview with Hans Holthuis, ICTY Registrar (Oct. 11, 2002) [hereinafter Holthuis Interview].

41. *See* Original Directive, *supra* note 16, art. 16A.

42. *See id.* Article 16A of the Directive stated that "a suspect or accused shall only be entitled to have one counsel assigned to him and that counsel shall deal with all stages of the procedure and all matters arising out of the representation of the suspect or accused or of the conduct of his defense." *Id.*

43. *See* Mark S. Ellis, *Achieving Justice Before the International War Crimes Tribunal: Challenges for the Defense Counsel*, 7 DUKE J. COMP. & INT'L L. 519, 528 (1997). The ICTY Registrar reasoned that the Directive, while limiting counsel to one attorney, nevertheless allowed discretionary use of funds to secure the services of a defense counsel consultant. *See id.*

exceptional circumstances."[44]

By 2000, the ICTY again relaxed the ruling regarding co-counsel. The current Directive provides that, "[i]n the interests of justice and at the request of the person assigned as counsel, the Registrar . . . may assign a second counsel to assist the lead counsel."[45] In fact, the current ICTY Registrar has made it a pro forma practice to provide not only co-counsel to the defendant but investigators and translators as well.[46] The Registrar has also provided defense counsel with "language assistants" who help identify relevant issues from the copious volumes of transcripts and evidentiary documents.[47]

Attorneys interested in becoming ICTY defense counsel join a long list of attorneys from all over the world who have met U.N. requirements to be added to the list of persons willing to represent indigent accused and detainees.[48] Between 1996 and 1997 alone, the attorneys willing to represent indigent suspects rose from thirty-one attorneys from eleven countries to two hundred-thirty attorneys from seventeen countries.[49] The lawyers represent a variety of countries in the world including Bosnia Herzegovina, Croatia, Serbia and Montenegro, Canada, France, the United States and the United Kingdom.[50] The vast majority of defense attorneys come from the former Yugoslavia (66%). Presently, there are four hundred-thirty attorneys registered under the Rule 45 list.[51] Any attorney who wishes to be considered for defense counsel simply notifies the Registrar.[52]

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44. 1996 Directive, *supra* note 17, art. 16. "Under exceptional circumstances and at the request of the person assigned as counsel, the Registrar may, in accordance with Article 14 . . . assign a second counsel to assist the lead counsel. The counsel first assigned shall be called the lead counsel." *Id.* The 1996 Directive also outlined the roles of lead counsel and co-counsel, stating that "co-counsel may deal with all stages of the procedure and all matters arising out of the representation of the accused or of the conduct of his defense. Lead counsel shall sign all documents submitted to the Tribunal unless he authorizes co-counsel." *Id.*

45. 2000 Directive, *supra* note 17, at Ch. V, art. 16(c).

46. *See* Holthuis interview, *supra* note 40.

47. *See id.*

48. *See Statement by the Registrar, Mr. Adama Dieng, on Some Issues Relating to the Defence of Accused Persons*, ICTR/INFO-9-3-02.EN, (June 13, 2001).

49. *See* Beresford, *supra* note 18, at 59.

50. The percentage breakdown of nationalities of defense counsel appearing before the ICTY, as of October 1999, is: Former Yugoslavia (66%); USA (20%); UK (8%); France (4%); Canada (2%); and others (34%). *See* Michael Bohlander, *International Criminal Defence Ethics; the Law of Professional Conduct for Defense Counsel Appearing Before International Tribunals*, 1 S.D. INT'L L.J. 75-78 (2000).

51. *See* Telephone Interview with Laurent Wastelain, ICTY Staff (Dec. 10, 2002) [hereinafter Wastelian Interview].

52. For example, Mr. Michail Wladimiroff notified the Tribunal on October 17, 1994

When the criteria are met, the ICTY Registrar assigns counsel from the list to a defendant found to be indigent. The criteria to join the list are not too burdensome. The ICTY requires defense counsel to have knowledge of its two working languages (French or English), unless there are exceptional circumstances.[53] It requires the defense counsel only to be admitted to practice law in any country (not necessarily in their home country) or have a position as a university professor of law.[54] One of the major ongoing problems with the selection of defense counsel is that these minimal standards were and still are insufficient to guarantee qualified counsel. The standards lack any proof of continual legal education, trial experience, or knowledge of international humanitarian law.[55] The main objective of keeping these minimal standards is to be as inclusive as possible in having the widest number of available counsel.[56] The ICTY did try to strengthen the standards for counsel by amending its Directive in 2000 to require

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of his interest in acting as counsel to indigent suspects. On October 19, 1994, the Acting Registrar for the ICTY, Theo van Boven, responded to Mr. Wladimiroff in a letter stating the following:

Rule 45(a) of the Rules of Procedure and Evidence requires for the Registrar to keep a list of counsel who speak one or both of the working languages of the Tribunal, meet the requirements of Rule 44 and have indicated their willingness to be assigned by the Tribunal to indigent suspects or accused. In light of the information provided in your letter and your curriculum vitae your name will be placed on the list.

Telephone Interview with Michail Wladimiroff (Sept. 10, 2002).

53. *See* 2000 Directive, *supra* note 17, art. 14. An amendment to the ICTY's Rules of Procedure and Evidence allows for the appointment of counsel who does not speak English or French. Rule 45 (A) (ii) now reads:

In particular circumstances, upon the request of an indigent suspect or accused, the Registrar may be authorised, by a Judge or a Trial Chamber, seized of the case, to assign counsel who speaks the language of the suspect or the accused but does not speak either of the two working languages of the Tribunal.

Rules of Procedure and Evidence, Amendments Adopted during the Eleventh Plenary Meeting, Rule 45 [hereinafter *Rules*]. This same language is found in the 1997 Directive, *supra* note 17, art. 14. This change is also reflected in the 1996 Directive, which reads:

In particular circumstances, a Judge or the Trial Chamber seized of the case may, upon the request of the suspect or the accused, authorise the Registrar to assign counsel who speaks the language of the suspect or the accused but does not speak either of the two working languages of the Tribunal.

1996 Directive, *supra* note 17, art. 14(B). In the *Erdemovic* case, the defense counsel was assigned to the accused even though he did not speak English or French. The Court felt that he had already earned the trust of the accused. *See* Beresford, *supra* note 18, at 56.

54. *See Rules, supra* note 53, art. 44.

55. *See* Richard J Wilson, *Assigned Defense Counsel in Domestic and International War Crimes Tribunals: The Need for a Structural Approach*, 2 INT'L CRIM. L. REV. 145, 167 (2002).

56. *See id.*

counsel to possess "reasonable experience in criminal and/or international law."[57] However, these new standards are still vague and ineffectual in attracting the most qualified lawyers.

The lack of experience and general legal knowledge is only exacerbated for non-western attorneys. For these attorneys, the ICTY is often seen as an alien land. Often the local Yugoslav attorneys who appear in front of the ICTY lack the skills necessary to undertake a massive international war crimes case.[58] War crimes trials are often long and grueling affairs.[59] They also involve a blend of international and domestic concepts that require a unique set of skills.[60] Many of the "qualified" non-western attorneys were trained in the communist/socialist era, in a system that is antithetical to the Tribunal's substantive and procedural laws. The repertoire of skills used in a "domestic" criminal case, while relevant, does not necessarily include the legal background required in an international war crimes case.

For instance, the substantive law of the ICTY is uncharted legal waters. The crimes within the subject matter jurisdiction of the ICTY genocide, crimes against humanity, and war crimes – are still relatively new concepts in international law. Not since the Nuremberg trials have these crimes been addressed; therefore, the defense attorneys find themselves struggling to comprehend the meaning and legal precedence of the ICTY substantive law.

An example of the difficulties faced by a defense attorney in understanding the ICTY substantive law can be found in the *Erdemovic* case.[61] In that case, the defendant originally pled guilty to crimes against humanity, a crime much more serious than the original charge of war crimes. This was overturned by the Appeals Chamber who ruled that the crimes were so clearly more nefarious than war crimes that Erdemovic's attorney could not have possibly understood the substantive law when he

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57. 2000 Directive, *supra* note 17, art. 14(A)(iii). The Draft Rules of Procedure and Evidence of the International Criminal Court actually tries to expand these new standards by requiring counsel to have "established competence in international or criminal law and procedure, as well as the necessary relevant experience whether as a judge, prosecutor, advocate[,] or [other in] similar capacity, in criminal proceedings." *Report of the Preparatory Commission for the International Criminal Court Finalized Draft Text of the Rules of Procedure and Evidence*, 7th Sess., Rule 22, U.N.PCNICC, U.N. Doc PCNICC/200/1/Add.1. [hereinafter *ICC Rules*].

58. *See* Wilkinson, *supra* note 37.

59. *See* Wilson, *supra* note 55, at 150 (noting that a single trial has lasted five years).

60. *See id.*

61. *See* Prosecutor v. Erdemovic, Case No.: IT-96-22-A, Judgement, 7 Oct. 1997, *reprinted in* 111 I.L.R. 298, *available at* http://www.un.org/icty/erdemovic/appeal/judgement/erd-aj971007e.htm (last visited Apr. 3, 2003).

allowed his client to plead to the greater charge.[62] One of the judges noted that both Erdemovic and his attorney were neither familiar with "the concept of guilty pleas" nor "the relatively arcane area of international humanitarian law."[63]

Many defense counsel also lack general familiarity with the ICTY and its procedures.[64] Because of the character of the ICTY's elaborate Rules of Procedure and Evidence (Rules) as well as its numerous directives, these attorneys find themselves unfamiliar with the Tribunal. For example, the former Yugoslavia is based on civil law where the judge assumes a dominant role in questioning and investigating and where the lawyer's role includes acting as an independent organ of the administration of justice. However, Yugoslav lawyers appearing in front of the ICTY face an adversarial system and, therefore, are unfamiliar with and unskilled in examination and cross-examination techniques of these types of trials. Since the Rules[65] are based largely on an adversarial model[66] and do not follow the inquisitorial approach used in civil law systems, assigned counsel must be adept at arguing cases in an adversarial proceeding.[67] Judges do not actively participate in the trial proceedings; responsibility for cross-examining witnesses rests with the defense attorneys. Despite the ICTY's reliance on the adversarial model, however, the current Rules do not specifically require counsel to have common-law trial experience.

Generally, non-western attorneys that want to transfer their "local" knowledge and experience to The Hague find the rules are dramatically different.[68] This has led to disjointed, prolonged trial proceedings because defense counsel is insufficiently prepared, or engages in frivolous or dilatory conduct.[69] For example, in 1997 and 1998, there were over 500

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62. *See* Prosecutor v. Erdemovic, Case No.: IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 Oct. 1997 at paras. 20-27, *reprinted in* 111 I.L.R. 298, 327-29, *available at* http://www.un.org/icty/erdemovic/appeal/judgement/erd-asojmcd971007e.htm (last visited Apr. 3, 2003).

63. Prosecutor v. Erdemovic, Case No.: IT-96-22-A, Separate and Dissenting Opinion of Judge Stephen, 7 Oct. 1997, para. 5, *available at* http://www.un.org/icty/erdemovic/appeal/judgement/erd-asojste971007e.htm (last visited Apr. 3, 2003).

64. *See* Judge May, *supra* note 13.

65. *See ICTY Rules*, *supra* note 17.

66. The Rules were based heavily upon the U.S. proposal. *See* VIRGINIA MORRIS & MICHAEL P. SCHARF, 1-2 AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1995).

67. In a civil law system, the judge is an independent, active investigator. The prosecutor and defense attorney play a relatively passive role during the trial.

68. *See* Wilkinson, *supra* note 37.

69. *See Report of the Office of Internal Oversight Services on the Investigation into Possible Fee-Splitting Arrangements Between Defence Counsel and Indigent Detainees at*

pre-trial motions, orders and applications in the ICTY, many of which were without merit and caused undue delays.[70]

A solution that has worked for the Tribunal is teaming a Yugoslav attorney with co-counsel familiar with Anglo-Saxon jurisprudence who is a more seasoned international criminal lawyer. The Yugoslav attorney brings expertise in the history of the region and access to contacts within Yugoslavia who would otherwise not be willing to speak to a "foreign" attorney, while learning the technical merits of ICTY procedure.[71]

The most successful experiment in this co-counsel approach before the ICTY was during the *Tadic* trial. Professor Michail Wladimiroff, one of the Netherlands' most respected criminal lawyers was assigned as lead counsel for Mr. Tadic. Mr. Wladimiroff had impeccable credentials. He selected Alphons Orie as his co-counsel, who is currently a judge with the ICTY. However, recognizing their own lack of experience in an adversarial trial, Mr. Stephen Kay, a highly skilled English barrister was added to the defense team. Immediately, Mr. Kay took the responsibility of cross-examining witnesses[72] while Wladimiroff and Orie continued to direct the overall case and move arguments. The Wladimiroff/Orie/Kay defense team approach is the paradigm for international war crime tribunals.

INDIGENCE

The right of the indigent suspect and the accused to have legal assistance assigned without costs is a fundamental tenet of international law.[73] The Universal Declaration of Human Rights provides that: "[e]veryone charged with a penal offence has the right to all . . . the guarantees necessary for his defence."[74] By authority found in the ICTY Statute (8, 214 (4)), the Rules

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the International Criminal Tribunal for Rwanda and the International Tribunal for the Former Yugoslavia, U.N. GAOR, 55th Sess., U.N.Doc A/55/759 (2001), at 13 [hereinafter U.N. Fee Splitting Report].

70. *See* U.N. Financial Report, *supra* note 14, at 27.

71. *See* Wilkinson, *supra* note 37.

72. Mr. Kay estimates that he handled 95% of witness cross-examinations. *See* Kay interview, *supra* note 26.

73. A person charged with a criminal offense has the right "to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any case if he does not have sufficient means to pay for it." *International Covenant on Civil and Political Rights*, Feb. 23, 1967, 999 U.N.T.S. 171, 6 I.L.M. 368, 373, art.14 (3)(d) (entered into force Mar. 23, 1976) [hereinafter *ICCPR*]. The U.N. Principles on the Role of Lawyers state that governments "shall ensure the provision of sufficient funding and other resources for legal services to the poor." *The United Nations Basic Principles on the Role of Lawyers,* U.N. Doc A/CONF.144/28/Rev. 1 (1990), art. 3.

74. *United Nations Universal Declaration of Human Rights,* G.A. Res. 217A (III), U.N. G.A.O.R., 3d Sess., art.11(1), U.N. Doc. A/810, (1948).

of Procedure and Evidence[75] and the Directive on the Assignment of Counsel,[76] suspects and accused persons in the ICTY are entitled to legal assistance if deemed "indigent" by the ICTY Registrar.[77] In addition, the assigned counsel will have their legal fees and costs covered by the ICTY.

The International Covenant on Civil and Political Rights (ICCPR) ensures that every person charged with a criminal offence has the right to "have legal assistance assigned to him, in any case where the interests of justice so require. . . ."[78] Other conventions that guarantee the right to legal assistance are the American Convention on Human Rights,[79] the European Convention on Human Rights,[80] and the African Charter on Human and People's Rights.[81] In fact, the ICTY's provision dealing with the right to legal assistance is taken verbatim from the ICCPR.[82]

Pursuant to article 5 of the Directive, "a suspect or an accused shall be considered to be indigent if he does not have sufficient means to retain counsel of his choice."[83] As of December 2002, 98% of the accused have claimed indigence (only Mr. Kordic and Mr. Blaskic are not indigent).[84] In

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75. *See ICTY Rules*, *supra* note 17, Rule 45(B).

76. *See* Original Directive, *supra* note 16.

77. Rule 2 of the ICTY Rules defines a "suspect" as "[a] person concerning whom the Prosecutor possesses reliable information which tends to show that the person may have committed a crime over which the Tribunal has jurisdiction." An "accused" is a "person against whom one or more counts of indictment have been confirmed". *See ICTY Rules*, *supra* note 17, at Rule 2.

78. *ICCPR*, *supra* note 73.

79. The American Convention on Human Rights provides the accused the right "to be assisted by legal counsel of his own choosing" and "be assisted by counsel provided by the state . . . ." American Convention on Human Rights, Nov. 22, 1969, art. 8 (2)(d), (e), 9 I.L.M. 673, 678 (entered into force July 18, 1978).

80. The European Convention provides the accused the right to be given legal assistance when the interests of justice so require. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 6(3), 213 U.N.T.S. 222 (entered into force Sept. 3, 1953).

81. The African Charter provides the accused "the right to defence, including the right to be defended by counsel of his choice." African Charter on Human and Peoples' Rights, adopted on 27th June 1981, OAU Doc. CAB/LEG/67/3/Rev. 5, art. 7(1)(c), 21 I.L.M. 58, 60 (1982).

82. Both the ICTY Statute and the ICCPR state that an accused shall be entitled:

[T]o defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance of this right; and to have legal assistance assigned to him in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

ICTY Statute, *supra* note 2, art. 21(4)(d); *ICCPR*, *supra* note 73, art. 14(3)(d).

83. Original Directive, *supra* note 16, art. 5.

84. *See id.*

addition, Mr. Martic, Mr. Mrksic, Mr. Sainovic, Mr. Ojdanic and Mr. Deronjic have to partially contribute to their defense.[85] This is consistent with other international and domestic war crime trials, where the overwhelming majority of defendants cannot afford a private attorney.[86]

One of the issues that has emerged is the lack of a clear definition of "indigence." The term "sufficient means" is not defined in the Directive,[87] and this has to lead to abuse.[88] The Directive, however, does set forth some guidelines in determining whether the accused is indigent. The Registrar can account for:

> [M]eans of all kinds of which he has direct or indirect enjoyment or freely disposes, including but not limited to direct income, bank accounts, real or personal property, pensions, and stocks, bonds, or other assets held, but excluding any family or social benefits to which he may be entitled. In assessing such means, account shall also be taken of the means of the spouse of the suspect or accused, as well as those of person with whom he habitually resides.[89]

However, in reality, only the disposable income and capital of the accused are taken into account when determining their financial means.[90]

The only clarification on this issue is the ICTY's decision to exclude real property from asset evaluation when determining "sufficient means."[91] The ICTY does have the authority to "request the gathering of any information, hear the suspect or accused, consider any representation, or request the production of any documents likely to verify the request" for establishing indigence.[92] However, because of the lack of resources, time, and experienced investigators, the ICTY's Registrar is forced to rely on the

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85. *See id.*

86. *See* Wilson, *supra* note 55, at 147.

87. U.N. Fee Splitting Report, *supra* note 69, at 6. The Report indicates that "currently, the term is interpreted as not having sufficient liquid means or means available for liquidation in order to support a defence." *Id.* at 15.

88. *Id.* at 6. For example, one detainee of the ICTR has privately retained counsel before being transferred to the detention facility. The detainee subsequently claimed indigence and was assigned the same counsel. *Id.*

89. 2000 Directive, *supra* note 17, art.8(b).

90. *See* Beresford, *supra* note 18, at 57 (citing Prosecutor v. Dokmanovic, Case No.: IT- 95-13a-PT, Further Explanation of the Registrar regarding the Decision not to assign Toma Fila as Defence Counsel to Slavko Dokmanovic, 4 Sept. 1997).

91. *See* Prosecutor v. Dokmanovic, Case No.: IT-95-13ap-T, Decision on Defense Preliminary motion on the assignment of Counsel, 30 Sept. 1997. (noting the difficulty of gaining information of the disposal of real property, the court ruled that the accused would be indigent but for the property in controversy).

92. 2000 Directive, *supra* note 17, art. 10.

"representations of the suspect/accused . . . themselves."[93] Only in special cases can the Registrar afford to send out its one full-time investigator.[94] The ICTY's Registrar, however, can withdraw the assignment of counsel if it is shown that the accused is no longer indigent.[95] However, the burden of proof in reversing a showing of indigence is still with the Registrar, and the court remains reluctant to tamper with the finding that a defendant is indigent.[96] This is due to the fact that, in view of international covenants and the ICTY statutory provisions dealing with the rights of the accused to assigned counsel, the Tribunal has always been reluctant to do anything that could be perceived as interfering with this right.[97]

A recently adopted experiment dealing with defense counsel is determining whether a defendant is "partially indigent." If the Registrar finds the defendant to have financial resources that could be applied to funding his/her own defense, then the ICTY will pay only a portion of the fees attached to providing free legal counsel.[98] The ICTY Registrar admits that this new experiment must still pass the ICTY's own jurisprudence to determine if it violates the defendant's fundamental right to legal assistance if he/she is indigent.

The ICTY has also developed guidance as to whether or not an indigent defendant has an absolute right to choice of counsel. The ICTY has generally followed its sister court – the International Criminal Tribunal for Rwanda (ICTR)[99] – in leaving the administrative task of selecting counsel to the discretion of the Registrar. The result has been that the accused has no absolute right to choice of counsel. This position is consistent with rulings on this subject matter by the European Court of Human Rights.[100] According to the European Court's case law, indigent accused persons are not entitled to choose the lawyer who will represent them.[101] The accused

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93. U.N. Fee Splitting Report, *supra* note 69, at 6.

94. *See* Holthuis Interview, *supra* note 40.

95. *See id.*

96. *See The Registrar Withdraws Assignment of Defence Counsel to Seven Accused,* JL/P.I.S./428-E (Aug. 11, 1999); *Seven to Appeal Registrar's Decision to Withdraw Assignment of Defence Counsel,* JI/P.I.S./431-E (Aug. 23, 1999); and *Decision to Withdraw Seven Accused Assignment of Counsel Reversed by Trial Chambers,* JL/P.I.S./434-E (Sept. 6, 1999). (stating that the Trial Chambers had reversed a decision of the Registrar to withdraw the assignment of counsel for a defendant who benefited from an art auction which raised money for ICTY detainees).

97. *See* U.N. Financial Report, *supra* note 14, at 30.

98. *See* Hothuis Interview, *supra* note 40.

99. *See Statute of the International Criminal Tribunal for Rwanda,* U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/955 (1994) [hereinafter *ICTR Statute*].

100. *See* Beresford, *supra* note 18, at 52.

101. *Id.* at 54.

"should be offered the possibility of designating the counsel of his/her choice from the list drawn up by the Registrar for this purpose," but that request may be denied on "reasonable and valid grounds."[102] Even the Appeals Chamber has upheld this principle, noting that "the right to choose counsel applies only to those accused who can financially bear the costs of counsel."[103] As for an indigent accused, the Registrar "has wide discretion" in assigning counsel.[104] In practice, however, the ICTY Registrar has tried to respect the wish of the suspect or accused as much as possible, given the importance of the relationship between counsel and client.[105] In the case of the *Prosecutor v. Delalic*, the court ruled that the "practice of the Registrar has been to permit the accused to select any available counsel from the list and to add counsel to the list if selected by an accused, provided that such counsel meets the necessary criteria."[106]

EQUALITY OF ARMS

In the first case before the ICTY, the defense attorneys for Mr. Tadic argued that the "inequality of arms" had seriously handicapped preparation of the case.[107] Mr Wladimiroff, in his opening statement before the Tribunal, framed the problem as:

> In preparing the defence, we have struggled with the hostility and suspicion with which the Tribunal is viewed in the Serb Republic and, in particular, in the Prijedor area. Those in power in this area have blocked avenues of investigation.... It might be thought that they would be eager to help Dusko Tadic in his defence at this trial and treat him as one of their own. This, your Honours, has not been the case. The Defence of Dusko Tadic has been prepared with little or no help from the Prijedor authorities, and there have been active attempts to prevent us from obtaining evidence on behalf of our client to prove his innocence.[108]

The inability to enter key villages and towns in hostile states necessary to build the defense's case had weakened counsel's position. Whereas,

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102. *In Re* Surrender of Ntakirutimana, 184 F.3d 419 (5th Cir. 1999).

103. Prosecutor v. Akayesu, Case No.: ICTR-96-4, Judgement, 1 June 2001.

104. *Id.*

105. *See* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1431 (Antonio Cassese et al eds., 2002) [hereinafter Cassese]; *see also* U.N. Financial Report, *supra* note 14, at 70.

106. Prosecutor v. Delalic et al, Case No.: IT-96-21-PT, Decision on Request by Accused Mucic for Assignment of New Counsel, 24 June 1996.

107. *See* Ellis, *supra* note 43, at 533.

108. Prosecutor v. Tadic, Case No.: IT-94-1-T, Michail Wladimiroff, Opening Remarks, 7 May 1996, at 69.

most of the prosecution witnesses were outside Bosnia, all of the defense witnesses were inside the conflict zone.[109]

Often times the defense attorney is regarded as an "enemy" to the state, which in turn will persistently try to stymie the defense case.[110] For instance, in one of the earliest cases tried before the ICTY, once the defense team questioned a witness, the local police chief would have the individual brought to the police station for questioning.[111] In the end, the Court allowed witnesses the opportunity to testify through a satellite-linked video unit set up in Banja Luka.[112] Unlike the prosecutors and judges, who have the full authority of the ICTY, defense lawyers are independent actors whose only standing is that they are there to carry out work on behalf of their clients.[113]

According to interviews with current ICTY defense counsel and the Registrar, the problems of access for defense counsel to the region of the former Yugoslavia have greatly diminished over the years. In addition, the archives held by state authorities in Bosnia and Croatia have been liberalized to the extent that defense counsel now have access to the documents.[114] There are very few complaints now as to this element of equality of arms.

However, because documents are now so readily accessible, there has emerged another very serious equality of arms issue for defense counsel. The myriad of documents needed to be reviewed by defense counsel is simply overwhelming.[115] For defense counsel, this is the number one concern raised with the Registrar.[116] Defense counsel are demanding more financial resources to hire more translators and the ICTY continues to state that it simply has no further funds to allocate.[117]

FEE-SPLITTING ARRANGEMENTS

Another persistent issue for the ICTY has been "fee-splitting" arrangements between indigent detainees and their counsel. This arrangement is usually manifested in one of two ways: (1) a regular

109. *See* Stephen Kay, *International Criminal Court Law; Justice, Where Now? The Society for the Reform of Criminal Law 10th Anniversary International Conference, London*, The Reformer (1998) (on file with author).

110. *See* Cassese, *supra* note 105, at 1424.

111. *See* Kay, *supra* note 109.

112. *See id.*

113. *See* Cassese, *supra* note 105, at 1425.

114. *See* Holthuis Interview, *supra* note 40.

115. *See id.*

116. *See id.*

117. *See id.*

apportionment of a percentage of the counsel's fee to the detainee, or (2) providing gifts and other indirect support and maintenance for the detainees and their relatives.[118] This would also include the hiring of friends or relatives of the suspect/accused person as investigators.[119] Under these types of pernicious arrangements, U.N. funds have been wasted through the allocation of public money to the suspect/accused or their families.[120]

Both the ICTY and the ICTR have indicated that fee-splitting is "unacceptable and merits sanctions under the Rules."[121] In fact, the ICTR adopted a new provision in its Code of Conduct for Defense Counsel that expressly prohibits fee-splitting in various forms between defense counsel remunerated by the Tribunal and their clients.[122] If counsel is being encouraged to enter into this type of illicit arrangement, he/she must advise his client on the unlawfulness of such practice and report the incident to the Registrar.[123]

Fee-splitting also results in longer trials. It has not been uncommon for the suspect/accused and Defense counsel to engage in lethargic acts that would lengthen the pre-trial and trial stage of the case in order to generate additional fees.[124] Reports from the ICTY indicate that some counsel seek remuneration for legal work that far exceeds what would be otherwise expected during the pre-trial and trial stages (e.g., during summer and

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118. *See* U.N. Fee Splitting Report, *supra* note 69, at 7.

119. *See id* at 9. For example, the ICTR Registrar dismissed an investigator for a defense team, who himself was accused of genocide and who was a colleague of the defendant. *See Statement of the Registrar Concerning the Contract of Employment of a Defense Investigator*, ICTR/INFO-3-04.EN (August 17, 2001), *available at* http:www.ictr.org/wwwroot/ENGLISH/PRESSREL/2001/9-03-04.htm (last visited Apr. 2, 2003).

120. *See* U.N. Fee Splitting Report, *supra* note 69, at 5. The ICTY and the ICTR expended $8.5 million a year in 1999 and anticipated expending the same in 2000 for defense counsel support. *See id.* at 6.

121. *Statement by the Registrar, Mr. Adama Dieng on Allegations of Fee Splitting between a Detainee of the ICTR and his Defence Counsel,* ICTR/INFO-9-3-06.EN (October 29, 2001), *available at* http://www.ictr.org/wwwroot/default.htm (last visited Apr. 3, 2003).

122. The ICTR has adopted a series of measures to prevent abuse of the Tribunal legal aid system. The measures include (1) restrictions on gifts given by defence counsel to their client, (2) strict personal searches of persons visiting or meeting detainees (in order to prevent the transfer of gifts and money) and (3) requiring personal history forms to be filled in by individuals who are hired by defence counsel as defence investigators to ensure that they are not related to the accused persons. *See* U.N. Fee Splitting Report, *supra* note 69, at 8-9.

123. CODE OF PROFESSIONAL CONDUCT FOR DEFENCE COUNSEL FOR THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA art. 5 *bis*, *available at* http://www.ictr.org/wwwroot/ENGLISH/basicdocs/codeconduct.htm).

124. *See* U.N. Fee Splitting Report, *supra* note 69, at 10.

Christmas recess periods).[125]

This has led to many disagreements between the Tribunal and assigned counsel regarding invoices.[126] The ICTY judges themselves have witnessed numerous defense counsels that submit "completely ridiculous motions" as a way to delay trial and collect as much in fees as possible.[127] The ICTR judges have become more active in imposing financial penalties on counsel who advance these types of motions.[128] However, the judges of the ICTY have yet to implement a policy of denying remuneration on frivolous motions.

ETHICS

The issues of ethics and discipline for defense counsel developed into a very serious problem for the ICTY. Because the Tribunal has defense counsel from various countries, the ethical codes attached to the attorneys remain diverse. In domestic jurisdictions, ethical issues are handled by professional bar associations or regulatory bodies.[129] However, there is no comparable body for an international court such as the ICTY.

One of the significant developments of the ICTY was the promulgation of a Code of Professional Conduct. The Code was created in 1997 and came into force on June 12, 1997, two years after the first war crimes case was tried at the ICTY.[130] The Code was adopted to countervail a number of allegations of ethical misconduct endemic to assigned counsel and pressure from the U.N. to "clean up" the problem.[131] The Code was based on the authority of Rules 44-46 of the Rules of Procedure and Evidence[132] which confers on the Tribunal the responsibility of ensuring that only counsels who are qualified appear before the Tribunal. However, the Code

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125. *See id.* at 12. For example, several defense counsel claimed to have studied the Nuremberg cases during the Christmas break when in fact the trials of their respective clients had ended in mid-November. *See id.* At the ICTR, the Registrar dismissed a UK solicitor who was acting lead counsel on a case. The solicitor was found to have inflated his bills, which constituted a serious violation of the Code of Professional Conduct for Defence Counsel. *See* Press Release, International Criminal Court for Rwanda, Defence Lawyer Removed for Financial Dishonesty, ICTR/INFO-9-2-299.EN (Feb. 6, 2002).

126. *See* U.N. Financial Report, *supra* note 14, at 66.

127. *See* U.N. Fee Splitting Report, *supra* note 69, at 13.

128. *See id.*

129. *See* Judge May, *supra* note 13.

130. *See* CODE OF PROFESSIONAL CONDUCT FOR COUNSEL APPEARING BEFORE THE INTERNATIONAL TRIBUNAL, ICTY Doc. IT/125 (June 12, 1997) [hereinafter ICTY CODE].

131. *See* Holthuis Interview, *supra* note 40.

132. *See Rules*, *supra* note 54, arts. 44-46. Although Article 46 relates to the Tribunal's ability to regulate the conduct of persons appearing before it, the Rules do not specifically give the Registrar the power to draft and promulgate a Code. *See id.*

was drafted by the ICTY judges, not its lawyers.[133]

The Code incorporates many obligations, restrictions and responsibilities found in national Codes of Conduct.[134] In fact, the Registry relied on a number of national codes when drafting the ICTY code.[135] In particular, the ICTY relied extensively on the American Bar Association's Model Rules of Professional Conduct, which greatly influenced the ICTY Code.[136]

One of the main reasons that the Code was created was to make counsel aware of their rights and obligations toward the Tribunal since they are subject to disciplinary proceedings under Rule 44.[137] Failure by a counsel to specifically adhere to the Code may lead to withdrawal of counsel by the Trial Chamber.[138] However, while the Code does fill the void of established standards, there are no effective mechanisms to monitor or enforce attorneys' general adherence to the Code.[139] General ethical requirements expected of defense cannot be monitored by the Court.[140]

For example, the Code is still inadequate on the issues of fee-splitting and counsel's billings. For instance, the Code prohibits assigned counsel

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133. The Code was submitted to an Advisory Panel of practicing ICTY attorneys. *See* Cassese, *supra* note 111, at 1434.

134. For instance, the Code refers to competence, diligence, communications, confidentiality, conflict of interest, and conduct before the Tribunal. *See* ICTY CODE, *supra* note 136.

135. The following Codes of Professional Conduct and related sources were used by the Registry: Australia, New South Wales Bar Association, Barrister's Rules; Belgium, Code Judiciaire; Bosnia & Herzegovina, Bar Association Code of Legal Ethics, 1989; European Community, Commission Consultative des Barreaux de la Communauté Européenne (CCBE), Code of Conduct for Lawyers in the European Community; France, Reglement interieur de l'ordre des Avocats à la cour de Versailles, deliberé par le Conseil de l'Ordre en sa séance du 7 decembre 1992, (mise a jour le 01/01/93) Code de Procedure Civile, Decr. 27 Nov. 1991, Titre III; International Association of Penal Law and International Commission of Jurists, 1982 Draft Principles on the Independence of the Legal Profession ("Noto Principles"); Netherlands Bar Association, Rules of Conduct; Spain, Estuto General de la Abagocia, Real Decreto 2090/1982; Union Internationale des Avocats, International Charter of Defence Rights; United States of America, American Bar Association, Model Rules of Professional Conduct (1992). *See* ICTY CODE, *supra* note 130.

136. *See* Bohlander, *supra* note 50, at 82.

137. *See* ICTY CODE, *supra* note 130, at Preamble. The Code of Conduct takes precedence over domestic Codes; Article 19 contains the general rule that the Code shall override any conflict between it and a national Code of Conduct. *See id.*, art. 19. Article 19 of the Code reads: "If there is any inconsistency between this Code and any other Code which counsel is bound to honour, the terms of this Code prevail in respect of the counsel's conduct before the Tribunal." *Id.*

138. *See* U.N. Fee Splitting Report, *supra* note 69, at 6.

139. *See* Judge May, *supra* note 13.

140. *See id.*

from accepting outside compensation other than from the Tribunal unless the client consents after consultation.[141] So long as the assigned counsel is being paid by the Tribunal, there should be a strict prohibition against any additional outside compensation. Furthermore, the Code's response to billing is to require counsel to "account in good faith for the time working on a case and maintain and preserve detailed records of time spent."[142] This one-sentence discussion on an issue that has become so controversial is inadequate to resolve the problem of "padding" billing statements.

In only two instances did ethical violations result in removal of assigned defense counsel from the ICTY's defense counsel list. The first occurred in the case involving Dusko Tadic. The Appeals Chamber convicted attorney Milan Vujin of contempt and he was subsequently removed by the Registry from the list of assigned counsel.[143] The Court also informed the Serbian Bar.[144] In another case, a defense counsel was fined 10,000 guilders for contempt of the Tribunal, by knowingly disclosing the identity and occupation of a protected witness.[145]

The need for a Code of Conduct has also been recognized by the ICC. The rules permit the Registrar to develop a Code of Professional Conduct in consultation with appropriate legal associations.[146] The International Bar Association is taking the lead on drafting the code, to be presented to the ICC Registrar.[147]

DEFENSE COUNSEL ASSOCIATION

The ICTY has recently established the Association of Defense Counsel of the ICTY ("Association"), after more than a year of work by a special ad hoc working group.[148] The working group which included judges, the

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141. *See* ICTY CODE, *supra* note 130, art. 9 (4) [19(B)(i)].

142. *Id.* art. 11.

143. *See* Prosecutor v. Dusko Tadic, Case No. IT-94-1-A-R77, Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin, 31 January 2000; *and* Prosecutor v. Dusko Tadic, Case No.: IT-94-1-A-AR77, Appeal Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin, 27 February 2001.

144. *See id.*

145. *See* Prosecutor v. Zlatko Aleksovski, Case No.: IT-95-14/1-T, Finding of Contempt of the Trial Chamber 1, 11 Dec. 1998.

146. *See ICC Rules, supra* note 57, Rule 20(3).

147. After the Rome Conference failed to include a defence unit several countries have petitioned the ICC to create an independent defence office. *See Revised Proposal to Create a Defence Unit Submitted to Preparatory Commission 10 August 1999*, U.N. Doc. PCNC/1999/WERPE/DP.2/Rev.1 (Aug. 6, 1999).

148. The working group was established by the ICTY's Registrar. *See Association of Defense Counsel Formally Recognized by the ICTY*, JA/P.I.S/720e (Dec. 19, 2002) [hereinafter *Association*].

office of the Prosecutor, current defense counsel and the Dutch Bar Association finalized the statute for the new Association in September of 2002.[149] The Registrar calls the Association a "milestone" and a "major breakthrough" in the ICTY's focus on defense issues.[150] With the creation of the Association of Defense Counsel, the ICTY has officially recognized its authority on ethical matters dealing with defense counsel. The Association has, in fact, adopted its own code of conduct which covers a number of contentious issues, including fee-splitting.[151] Although not a "proper" Bar Association, the Association will have the same structure, including a board of Directors, appeals board and fee requirements for members.[152]

The Association has been established as a private association according to Dutch law and recognized by the Tribunal as the official representative of defense counsel appearing in front of the ICTY.[153] This has been accomplished by amending Article 45 of the Rules of Procedure and Evidence to require membership in an association of counsel participating before the ICTY as a qualification for counsel.[154] Thus, membership in the Association is now compulsory.

The Association will also oversee the amendment of the current Code of Conduct.[155] The objectives of the Association are:

- To support the function and the efficiency of Defence Counsel at ICTY[;]
- To encourage Defence Counsel to participate in the Tribunal activities[;]
- To advise the Tribunal regarding proposed procedural changes[;]
- To oversee the performance of Defence Counsel at ICTY.[156]

Furthermore, any person who is qualified to practice before the ICTY and

149. *See* Hans Holthuis, *Operational Aspects of Setting Up the International Criminal Court: Building on the Experience of the ICTY*, 27 INT'L LEGAL PRAC. 43, 43 (June 2002).

150. *See* Holthuis Interview, *supra* note 40.

151. *See Draft Rules for the Association for Counsel Practising Before the International Criminal Tribunal for the Former Yugoslavia*, (July 12, 2002) (on file with the author) [hereinafter *Draft Rules*].

152. *See id.*

153. *See* Holthuis Interview, *supra* note 40.

154. *See* Hans Holthuis, *Memo on Amendment of Professional Conduct for Defense Counsel*, (Apr. 12, 2002), (on file with author).

155. *See id.*

156. *See Draft Rules*, *supra* note 151.

is a current or former ICTY defense counsel is eligible to be a *full* member of the Association.[157] Any person who *intends* to practice before the ICTY and is qualified to practice before the ICTY is eligible to be an *aspirant* member of the Association.[158]

An important aspect of the Association Rules is that a member can be removed if he/she "acts contrary to the articles, regulations and resolutions of the Association, or when the conduct adversely affects the Association in an unreasonable manner."[159] Expulsion of a member can also occur if "the Association cannot reasonably be expected to allow the membership to continue."[160]

Equally important is the right of the Association to monitor the conduct of its members when representing a suspect or accused.[161] The conduct is assessed by what is required under the ICTY Statute, the Rules, the Code of Professional Conduct, the Directive and the Detention Rules and Regulations of the ICTY.[162] In addition, the Association can judge the conduct of a member under the code of practice governing the profession of the member in his/her home jurisdiction.[163]

This type of Association will also be of tremendous value to the cadre of defense counsel who will now rely on the Association for training and professional development. The only legal assistance currently provided by the ICTY to assigned counsel is a publication entitled *Manual for Practitioners*, a publication designed to assist defense counsel in appearing before the Court.[164] Though helpful and very solid, the Manual cannot substitute for trial advocacy experience. In short, there is a lack of training by the ICTY, which is a major shortcoming in ICTY proceedings.

The complexities of undertaking the defense of an alleged war criminal in an international tribunal are daunting. In such trials the defense counsel must master substantive and procedural legal aspects as numerous and as

157. *See id.* art. 3(1).

158. *See id.* art. 3(2).

159. *Id.* art. 4 1(d).

160. *Id.* art. 4 1(c)(39).

161. *See id.* art. 14(b).

162. *See id.*

163. *Id.* art. 14(c).

164. The *Manual for Practitioners* reviews the Tribunal's procedures and provides information on courtroom protocol. The Manual is intended to educate practitioners on the specific requirements for appearing before an international judiciary body. Topics covered include: the facilities of the Tribunal, the status of defense counsel, and the relationship between defense counsel and the Court, the relationship between a client and defense counsel, and procedures before the Court. *See Int'l Crim. Tribunal for the Former Yugoslavia, Manual for Practitioners, Version 1.1, available at* http://home.c2i.net/arnt/Geneve/manual.htm (last visited May 5, 2003).

diverse as international humanitarian law, comparative law, trial and written advocacy skills. This type of expertise is rarely found in a domestic legal setting; therefore, there is a great need for specialized training programs in the area of practice before war crimes tribunals.

There has always been the need for extensive training courses for defense counsel. There has been a call for mandatory training for all defense counsel.[165] With the creation of the Association of Defense Counsel, all future training for ICTY attorneys will be conducted through the Association. The ICTY Registrar has entered into a "gentlemen's agreement" to transfer the responsibility of defense counsel training from the ICTY to the Association.[166]

The Association has already planned a very active training program. The first of these will be a "basic course" which will be implemented in 2003.[167] This introductory course will be mandatory for those who have been assigned their first case at the ICTY.[168] The Association also plans to create an "advanced course" as a means of continuing education for those practicing at the ICTY.[169]

The Association will also assist in providing defense counsel with a support mechanism when preparing their cases so that they do not reinvent the "case wheel" by working alone and duplicating what others have already done.[170] The Association has also created a "Saturday Forum," a roundtable exchange of experience, information, and ideas between lawyers working on cases before the ICTY.[171] The Association will also act as a lobbying arm for defense counsel before the ICTY's Registrar,[172] as well as contributing to the process of amending ICTY rules and participating in disciplinary proceedings against counsel.[173]

One of the corresponding areas that has hindered defense counsel is the lack of an independent defense unit within the Registry. The ICTY is still perceived to have an institutional bias in favor of the prosecution and, to a lesser extent, in favour of the judges.[174] Even with the creation of a Defense Association, the Registry was required to formally recognize the

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165. *See* Judge May, *supra* note 13.
166. *See* Holthuis Interview, *supra* note 40.
167. *See Association*, *supra* note 148.
168. *See id.*
169. *See id.*
170. *See id.*
171. *See id.*
172. *Id.*; *see also*, *Fair Trials*, *supra* note 36, at 10.
173. *See* Holthuis Memo, *supra* note 146.
174. *See Fair Trials*, *supra* note 37, at 2004.

Association.[175] The close connection between the Association and the ICTY is reflected in the Rules requiring the Association to provide its full financial records on an annual basis to the ICTY Registrar.[176] A permanent defense unit would provide a balance against the strength of the existing prosecutorial and judicial branches.[177] It would also assist in acting as an "inside voice" to coordinate the concerns of and needs expressed by the Defense Counsel Association, which will be outside the ICTY structure.

The need for an Association of Defense Counsel has already been recognized by the newly created International Criminal Court (ICC). The ICC's Rules of Procedure and Evidence foresee a creation of an "independent representative body of counsel."[178]

CONCLUSION

In the ten years since the U.N. Security Counsel created the ICTY, the international community has witnessed a growing recognition of the body of the law that is referred to as international humanitarian law. The role of the ICTY and the ICTR in this evolution of legal thought cannot be underestimated. The ICTY's output, in both procedural and substantive law, has established legal standards in the field of international humanitarian law and its perceived success is certainly a major reason for the creation of the ICC.

The ICTY has also shown a propensity to adapt to changing circumstances and needs. Representing those accused of some of the most heinous crimes of the past century is one of the most crucial aspects of the Tribunal. Yet, at the genesis of the ICTY, issues addressing the needs of the defense counsel were not a priority for the newborn Tribunal.

However, because of the foresight of the ICTY's first prosecutor, Richard Goldstone, and the Registrar, Dorothy de Sampayo, issues pertaining to the defense counsel slowly gained greater importance. Although the last ten years have not been a panacea for all of these issues, the overall structure of the defense counsel has reached a new zenith. The financial support for defense counsel has significantly improved over this period. The number of assigned counsel and support staff provided to indigent defendants has also increased significantly. The right of the suspect or the accused to have free legal assistance has been constantly upheld by the Tribunal. Over 90% of all suspects and accused appearing before the ICTY have assigned counsel. Although not required, the ICTY has adopted a very liberal policy with respect to permitting the accused to

175. *See Association*, *supra* note 148.

176. *See Draft Rules*, *supra* note 163, art. 9(2).

177. *See Fair Trials*, *supra* note 37, at 2004.

178. *See ICC Rules*, *supra* note 57, arts. 20(3) and 21(1).

select any available counsel who is qualified to appear in front of the Tribunal.

The ICTY has also made significant progress in improving the integrity of the defense structure. Fee-splitting arrangements between indigent detainees and their counsel have been reduced by tougher standards and sanctions imposed by the ICTY. The adoption of a Code of Professional Conduct for defense counsel also represented a milestone in countering the unsavory allegations of ethical misconduct by assigned counsel. Finally, one of the hallmark changes is the recent formation of the Association of Defense Counsel of the ICTY. Notwithstanding the years needed for its formation, the Association represents the titanic progress made by defense counsel over the past ten years within the Tribunal.

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The ICTY and Defense Counsel: A Troubled Relationship

David Tolbert*

I. INTRODUCTION

It is axiomatic that a criminal defendant have access to competent defense counsel and, where appropriate, legal aid.[1] While these fundamental rights are clearly recognized in the Statute and Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"),[2] it is fair to say that the defense counsel and legal aid systems have been the ICTY's Achilles' heel. Unfortunately, there are a number of specific and troubling issues regarding defense counsel that defy simple solutions and have generated considerably legitimate criticism.

Before turning to specific issues and problems that have arisen at the ICTY regarding defense counsel, it is worth noting at the outset that there are more general and overarching difficulties with defense issues for those interested in international criminal justice. International criminal justice has for most of those in the field focused on the identification and punishment of the guilty.[3] Thus, while there is widespread

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xecutive Director, American Bar Association Central European and Eurasian Law Initiative (ABA-CEELI), Washington, D.C., formerly Chef de Cabinet to the President and Senior Legal Adviser, Registry, International Criminal Tribunal for the former Yugoslavia, The Hague, Netherlands, 1996-2001. The views expressed are those of the author alone. The author would like to thank Andreea Vesa, currently a CEELI Fellow, for her valuable help and assistance with this article.

1. *See* International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, art. 14(3)(d).

2. *See* Statute of the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. S/25704 (as amended May 17, 2002), art. 21(4), *available at* http://www.un.org/icty/basic/statut/stat2000.htm [hereinafter ICTY Statute] (last visited Feb. 24, 2003); *see also* Rules of Procedure and Evidence for the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. IT/32/REV.24 (as amended Jul. 11-12, 2002), rules 44 & 45, *available at* http://www.un.org/icty/basic/rpe/IT32_rev24.htm [hereinafter ICTY Rules] (last visited Feb. 24, 2003).

3. *See* M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need To Establish A Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 61-62 (1997) ("Impunity must no longer be the reward of those who commit the most egregious international crimes and violations of human rights. . . . While an international justice system might not stop future conflicts, it would vindicate the victims of international

acknowledgement that a robust defense is essential to justice and hence the work of the ICTY,[4] the focus remains on the work of the court and, in particular, the Prosecutor. Even the ICTY's full name, the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, conflates the court and the Prosecutor in one phrase and thus inadvertently reinforces this focus. Moreover, for those who have visited the ICTY, one can hardly fail to notice that in its very physical layout, with Prosecutor and Court located "cheek by jowl" and defense counsel situated generally off site, there is perhaps a metaphor for where the defense fits into the scheme of things. This physical remoteness of defense counsel is also perhaps emblematic of the ICTY's failure to engage the region's justice systems generally (the defense counsel being, other than the accused themselves, the only ones from the region with any visibility in the proceedings).[5]

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crimes and remind ourselves and future generations of the victims' plight and the perpetrators misdeeds."); *see also* Louise Arbour, *War Crimes Courts are a Powerful Force for Peace and Liberty*, INT'L HERALD TRIB., Apr. 5, 2001 ("Modern international criminal prosecution efforts will continue to demonstrate that personal responsibility for war crimes and crimes against humanity can find its proper place as a measure by which to promote peace and ensure an appropriate balance between security and liberty."); *see also* David J. Scheffer, Address at the Peace Palace, The Future of International Criminal Justice 1 (1997), *available at* http://www.state.gov/www/global/narcotics_law/970919_scheffer.html (last visited Feb. 24, 2003) (describing the United States' commitment during the Clinton administration, "to pursue the investigation and prosecution of individuals charged with the heinous international crimes of genocide, crimes against humanity, and war crimes.").

4. *See* John E. Ackerman, *Assignment of Defence Counsel at the ICTY*, *in* ESSAYS ON ICTY PROCEDURE AND EVIDENCE 167, 169 (Richard May et al. eds., 2001); *see also* Dr. Christian Rhode, *Legal Aid & Defence Counsel Matters*, *in* INTERNATIONAL CRIMINAL COURTS: PRACTICE, PROCEDURE AND EVIDENCE 543, 556 (Rodney Dixon & Karim Kahn, eds. 2003) Dr. Rhode points out that:

> [T]he establishment and verification of certain qualification criteria perhaps not guaranteeing but at least indicating good professional skills of counsel becomes essential. These skills are relevant both for clients seeking counsel and for the judicial procedure itself. A lack of qualification of the defence would disturb the balance of the judicial system at the ICTY and its credibility.

5. *See* Toma Fila, *The ICTY from the Perspective of Defence Counsel from the Former Yugoslavia: My Point of View*, *in* ESSAYS ON ICTY PROCEDURE AND EVIDENCE 187,188 (Richard May et al. eds., 2001) Mr. Fila proposes that:

> [W]e should inevitably remind ourselves of the chronology of missed opportunities to inform the public [in the former Yugoslavia] in a timely manner about all the functions of this international court, in order, perhaps, to avoid future misunderstandings. It is especially important to inform intellectuals and legal experts, all those with an open mind, so that in the future they can contribute to the affirmation of the ICTY as the predecessor of a permanent international court.

II. ISSUES WITH DEFENSE COUNSEL AT THE ICTY

Mark Ellis has provided a thorough description of the development of the systems of defense counsel assignment and legal aid,[6] so I will focus on the concrete problems that have arisen at the ICTY relating to these matters. Those who have witnessed proceedings at the ICTY have seen evidence of the problems in the courtroom itself with shockingly poor performances by some defense counsel.[7] The Expert Group, which was established in 1999 by the United Nations to review the work and practices at the ICTY and its sister tribunal for Rwanda, characterized the performance of a number of defense counsel as very poor, particularly with respect to the examination of witnesses.[8] These poor courtroom performances, which raise questions regarding whether accused are receiving effective assistance of counsel, arise from a number of specific systemic issues, which the ICTY is now belatedly attempting to address. These issues include: 1) problems relating to the choice and qualifications of counsel; 2) the severe lack of training of defense counsel; 3) serious concerns arising from the payment of counsel, including so-called "fee-splitting;" 4) questions relating to discipline; and 5) the establishment of an effective bar association for defense counsel.

Id.; *see also* David Tolbert, *The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 FLETCHER F. OF WORLD AFF. 7, 8 (2002) ("Unfortunately, principally due to a failure in design and, to a lesser extent, in implementation, the tribunal's long-term impact on the systems of justice in the area of conflict has been minimal.").

6. *See* Mark Ellis, *The Evolution of Defense Counsel Appearing Before the International Criminal Tribunal for the Formaer Yugoslavia*, 37 NEW ENG. L. REV. 949, 954-63 (2003).

7. *See* Ackerman, *supra* note 4, at 170. Mr. Ackerman, in describing the inexperience that plagues ICTY defense counsel, writes that:

> To some extent, at least, trials are lengthened by the lack of experience and training of defence counsel appearing before the Trial Chambers. Many have no experience whatsoever with criminal law. Many have no experience whatsoever with the adversary nature of trial proceedings before the ICTY. Many are unfamiliar with the Statute and Rules of Procedure and the practice before the Tribunal that has developed through the case law that has interpreted and applied the provisions of the Statute and Rules.

Id.

8. *See Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda*, at para. 210, U.N. Doc. A/54/634 (1999) ("Both judges and defence counsel have expressed misgivings regarding the qualifications of some assigned counsel who have represented accused. In some instances in which accused have sought replacement of assigned counsel, assertions have been made questioning their competence.") [hereinafter Expert Group Report].

In addressing these issues, it should be borne in mind that defense counsel matters, including the legal aid system, are primarily the responsibility of the ICTY Registrar.[9] Moreover, over 95% of the defendants who have appeared before the ICTY have been compensated under the legal aid system.[10] Thus, the following discussion will focus on defense counsel compensated under the legal aid system and the ICTY's Registry relationship with that group.

A. Choice, Qualifications and Training of Defense Counsel

Regarding the defendant's choice of counsel, the ICTY's Statute provides that an accused has the right "to defend himself in person or through legal assistance of his own choosing" and "to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it."[11] Moreover, it is also accepted that an accused must have "equality of arms" with the Prosecutor.[12]

Although the ICTY Statute can be interpreted to limit the choice of counsel of those accused who resort to the legal aid system, in practice, the right to choose counsel has reigned supreme for all accused. The only restraints to that choice, at least until fairly recently, have been certain minimal qualifications required of those assigned as counsel at the ICTY: admission to a bar, or being a law professor; good standing with a bar association; and proficiency in one of the Tribunal's languages (English or French).[13] Regarding the language requirement, this has been waived in approximately 20% of cases, although the number of exceptions has declined substantially since 1998.[14]

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9. *See* ICTY KEY FIGURES (Dec. 4, 2002) *at* http://www.un.org/icty/glance/keyfig-e.htm (last visited Feb. 24, 2003) (the relevant information can be found under the subheading of "Registry."); *see also* Rhode, *supra* note 4, at 544; *see also* ICTY Statute, *supra* note 2, art. 17 (delineating the general duties of the ICTY Registrar); *see also* ICTY Rules, *supra* note 2, rules 44 & 45; *see generally* Directive on Assignment of Defence Counsel for the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. IT/73/REV.9 (as amended Jul. 12, 2002), *available at* http://www.un.org/icty/basic/counsel/IT073-rev9-e.htm [hereinafter ICTY Directive] (last visited Feb. 24, 2003).

10. *See* Rhode, *supra* note 4, at 544.

11. ICTY Statute, *supra* note 2, art. 21.

12. *Id.*, art. 21(4)(e).

13. *See* ICTY Rules, *supra* note 2, rule 44(A); *see also* ICTY Directive, *supra* note 9, art. 14(A).

14. *See* Rhode, *supra* note 4, at 561; *see also* ICTY Rules, *supra* note 2, rule 44(B) ("At the request of the suspect or accused and where the interests of justice so demand, the

As John Ackerman, President of the newly established ICTY Association of Defence Counsel[15] has noted: "[t]hese are, perhaps, the least stringent requirements that could conceivably be imposed."[16] Although recent steps have been taken to bolster these qualifications to include some expertise in criminal law,[17] in the past there have been a number of assigned counsel with little knowledge of international humanitarian law or the procedures of the Tribunal. Moreover, defense counsel from the region are generally unfamiliar with the adversarial system on which the ICTY's procedures are modeled and have thus had difficulty with cross-examination and other aspects of advocacy. Not only has this led to poor representation in certain cases but also to delays in the proceedings, as these lawyers have struggled in an unfamiliar system. It should be noted that these problems have not been limited to lawyers from the region but include lawyers from other countries as well. The nadir of this phenomena was perhaps reached in the *Erdemovic* case when the Appeals Chamber essentially found that the attorney did not understand the concept of a guilty plea, much less explain it to his client.[18]

Registrar, may admit a counsel who does not speak either of the two working languages of the Tribunal but who speaks the native language of the suspect or accused. . . .").

15. *See* Press Release, ICTY, Association of Defence Counsel Formally Recognised by the ICTY (Dec. 19, 2002) *available at* http://www.un.org/icty/pressreal/p720-e.htm (last visited Feb. 24, 2003) (describing the formal recognition and objectives of the newly established Association of Defence Counsel); *see also Ninth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, at 48, U.N. Doc. A/57/379-S/2002/985 (2002) [hereinafter 2002 ICTY Report]; *see generally* Association of Defence Counsel Practising Before the International Criminal Tribunal for the Former Yugoslavia, *at* http://www.adcicty.com (last visited Feb. 24, 2003).

16. Ackerman, *supra* note 4, at 170.

17. Now, the ICTY has taken steps to include in the rules established competence in criminal law. *See* ICTY Directive, *supra* note 9, art. 14(A)(iv).

18. *See* Prosecutor v. Erdemovic, IT-96-22-A at 16 (1997), *available at* http://www.un.org/icty/judgement.htm (last visited Feb. 24, 2003). Stating:

> However, the Appeals Chamber, for the reasons set out in the Joint Separate Opinion of Judge McDonald and Judge Vohrah, finds that the guilty plea of the Appellant was not informed and accordingly remits the case to a Trial Chamber other than the one which sentenced the Appellant in order that he be given an opportunity to replead.

Id.; *see also Erdemovic*, at 7-8 (1997) (separate opinion by Judge Gabrielle McDonald and Judge Lal Chand Vohrah), *available at* http://www.un.org/icty/erdemovic/appeal/judgement/erd-asojmcd971007e.htm:

> We feel unable to hold with any confidence that the Appellant was adequately informed of the consequences of pleading guilty by the explanation offered during the initial hearing. . . . Moreover, *it appears to us that the defence counsel consistently advanced arguments contradicting the admission of guilt and*

I would note that the International Criminal Tribunal for Rwanda ("ICTR")[19] has taken a different position on the issue of qualifications, requiring that counsel have ten years of experience.[20] Some have argued that this is an arbitrary number and that it effectively eliminates some qualified attorneys.[21] In my view, while the ICTR rule is not particularly helpful—after all, ten years of experience that is not relevant does not an effective attorney make—some reasonable criteria should be established. Thus, for counsel assigned under the legal aid system, he or she should be required to demonstrate competence in criminal law and have extensive experience in criminal law proceedings. With the recent advent of the ICTY Association of Defence Counsel, there is the opportunity to establish reasonable criteria that would be acceptable to defense counsel themselves as well as to the Registrar.

An essential requirement in addressing the issues of defense counsel competence and performance, in my view, is a mandatory training course, which would be required for all defense counsel appearing before the ICTY. Some early training was conducted by the Central European and

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> *criminal responsibility implicit in the guilty plea. If the defence had truly understood the nature of a guilty plea, it would not have persisted in its arguments which were obviously at odds with such a plea.* (emphasis added).

Id.

19. *See generally* The International Criminal Tribunal for Rwanda, *at* http://www.ictr.org/wwwroot/main.htm (last visited Feb. 24, 2003).

20. *See* Rules of Procedure and Evidence for the International Criminal Tribunal for Rwanda (as amended Jul. 6, 2002), rule 45(A), *available at* http://www.ictr.org/wwwroot/ENGLISH/rules/060702/4.htm (last visited Feb. 24, 2003) [hereinafter ICTR Rules]:

> A list of counsel who speak one or both of the working languages of the Tribunal, meet the requirements of Rule 44, have at least 10 years' relevant experience, and have indicated their willingness to be assigned by the Tribunal to indigent suspects or accused, shall be kept by the Registrar.

Id.; *see also* Directive on the Assignment of Defence Counsel (as amended Jul. 1, 1999), art. 13(i), *available at* http://www.ictr.org/wwwroot/ENGLISH/basicdocs/directiveadc.htm (last visited Feb. 24, 2003). ("Any person may be assigned as Counsel if the Registrar is satisfied that he fulfils the following prerequisites: [h]e is admitted to practice law in a State, or is a professor of law at a university or similar academic institution and has at least 10 years' relevant experience. . . .") [hereinafter ICTR Directive].

21. *See* Michael Greaves, *The Right to Counsel Before the ICTY and the ICTR for Indigent Suspects: An Unfettered Right?*, *in* ESSAYS ON ICTY PROCEDURE AND EVIDENCE 177, 179 (Richard May et al. eds., 2001) ("[A] significant and crucial difference has been introduced which restricts those who have less than ten years relevant experience from being assigned as counsel. Thus, at a stroke, a vast swathe of legal practitioners and junior University Professors is rendered ineligible for practice before the ICTR.").

Eurasian Law Initiative ("CEELI")[22] and the Coalition for International Justice ("CIJ"),[23] which Mark Ellis has described in his contribution. While there is some limited training provided at this point, there is the need for an extensive training course.[24] This should be coordinated with the newly formed Association of Defence Counsel, but it is imperative that the Registry maintain overall responsibility for the course, to ensure that high standards are met and maintained. Training should be provided regarding the ICTY and its procedures, including advocacy, as well as substantive aspects of international humanitarian law and on other matters such as procedures relating to witnesses and administrative issues. It is indeed remarkable that such training was never previously required, as many courts require training prior to admission to practice.[25] Moreover, the costs should be relatively small and the benefits, e.g., more competent counsel, speedier trials,[26] would be great.

There has been at least one other noteworthy attempt, in an international context, to impose restrictions on an accused's choice of defense counsel. In the ICTR, the ICTR Registry attempted for some time to refuse the assignment of certain defense counsel on the grounds that it was attempting to achieve a better geographic distribution of counsel; this led to a temporary moratorium on additional Canadian and French defense counsel at the ICTR.[27] This practice apparently was an attempt to import the concept of geographical diversity, which is followed by international organizations, and apply it to defense counsel. While the principle of geographic diversity is obviously justifiable in the context of international organizations generally, it is nonsense to apply it to defense counsel, who are by definition not UN staff. Moreover, by restricting the accused's

22. *See generally* ABA/CEELI Focal Area: Conflict Mitigation and Post-Conflict Transition, *at* http://www.abanet.org/ceeli/areas/conflict.html (last visited Feb. 24, 2003).

23. *See generally* Coalition for International Justice Programs: ICTY, *at* http://www.cij.org/index.cfm?fuseaction=cijprograms&tribunal1ID=1 (last visited Feb. 24, 2003).

24. *See* 2002 ICTY Report, *supra* note 15, at 48-49.

25. For example, in the United States, various states require newly admitted members to the bar to attend a mandatory course on the rules of professional conduct and the general practice of law. *See* District of Columbia Bar; Mandatory Course on the D.C. Rules of Professional Conduct and District of Columbia Practice, *at* http://www.dcbar.org/for_lawyers/membership/prospective_members/mandatoryCourse.cfm (last visited Feb. 24, 2003); *see also* Maryland Bar; Admission to the Bar by the General Bar Examination; A Checklist for the Applicant, *at* http://www.courts.state.md.us/ble/genbarexamdetails.html (last visited Feb. 24, 2003).

26. The ICTY has frequently been criticized for the length of its proceedings. *See* Michael P. Scharf, *The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslav Tribunal*, 49 DEPAUL L. REV. 925, 936-37 (2000).

27. *See* Greaves, *supra* note 21, at 183.

choice of counsel on such arbitrary grounds, the practice undermines the guarantees provided by both tribunals' statutes and the standards established in the International Covenant on Civil and Political Rights. Mercifully, after a great deal of criticism,[28] this misguided practice was discontinued.[29]

There are, of course, more stringent qualifications that might be imposed, such as passing a qualifying examination, although at present such a development seems unlikely. As an alternative, the Association of Defence Counsel will hopefully assist the Registry in imposing more stringent qualifications on prospective defense counsel. It should be noted in this regard that the Registry has no power to regulate attorneys in the Office of the Prosecutor.[30] At present, the only qualifications for prosecutorial staff are those imposed by the United Nations system; unlike defense counsel, who are paid as outside contractors, members of the Prosecutor's staff are UN staff members and are subject to UN staff rules and procedures. The Prosecutor has issued certain regulations regarding the conduct of her staff, but other than being subject to the rules established by the ICTY judges for conduct in court proceedings, the staff of the Prosecutor is not subject to external supervision. Thus, attorneys in the Office of the Prosecutor are unlike virtually any other group of lawyers in the world, as they are generally not required to meet established qualifications to practice at the ICTY and are not subject to disciplinary action or ethical supervision by an external source. This is a lacuna that should also be addressed.

B. The ICTY's Legal Aid System and "Fee-splitting"

Although issues relating to the qualifications and training of counsel are serious ones, the area in which the ICTY has received the most criticism relates to the administration of its legal aid system.[31] The ICTY has spent some 15% of its budget over the span of many years, exceeding $50

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28. *See* Prosecutor v. Akayesu; Decision Relating to the Assignment of Counsel, ICTR-96-4-A at 1 (1999), *available at* http://www.ictr.org/wwwroot/ENGLISH/cases/Akayesu/judgement/Arret/annexa.htm (last visited Feb. 24, 2003).

29. *See* Greaves, *supra* note 21, at 184.

30. *See* ICTY Statute, *supra* note 2, art. 16(2) ("The Prosecutor shall act independently as a separate organ of the International Tribunal. He or she shall not seek or receive instructions from any Government or from any other source."); *see also* ICTY Rules, *supra* note 2, rule 37(A) ("The Prosecutor shall perform all the functions provided by the Statute in accordance with the Rules and such Regulations, consistent with the Statute and the Rules, as may be framed by the Prosecutor.").

31. *See* Rhode, *supra* note 4.

million, on legal aid.[32] These are public funds which require stringent supervision.

One of the chief issues arising from the legal aid system has been the appropriate rate of remuneration. Until recently, the ICTY paid a standard rate of $110 per hour, to a maximum of 175 hours per month, plus certain office costs, travel expenses, etc.[33] This rate has applied regardless of the defense counsel's country of residence or practice.[34] In theory, this is justified, since compensating lawyers of the same level of experience at different rates would appear to be unfair, and the UN would hardly want to be in the position of discriminating on the basis of nationality. However, in practice, this approach leads to great disparities, as $110 per hour is much higher than standard rates in certain countries, particularly in the former Yugoslavia, but quite low for lawyers from, for example, New York or London.

While the ICTY's approach is understandable and defensible, it has led to several major issues. One is "fee-splitting," which is addressed below. Another is that defense counsel from the countries of the former Yugoslavia, who are representing individuals alleged to have committed heinous acts, have done quite well financially. This makes the ICTY's outreach efforts in the region all the more difficult,[35] as there are many victims of these atrocities who are refugees or in dire situations and the presence of defense counsel who have profited from the ICTY in their midst does not sit well with these victims.

In an effort to address some of the issues noted above and in response to a recommendation made by the Expert Group, the ICTY shifted, in 2001, to a lump sum remuneration system.[36] Under this system, defense counsel are paid a specified sum for each phase of the case, depending on the difficulty of the case (there are three categories of difficulty) in addition to certain expenses. This system places the financial planning burden on the defense and arguably increases transparency by eliminating certain unscrupulous billing practices. It has been criticized by certain defense counsel as unworkable since it is impossible to work out in advance how much time a case will take.[37] However, despite its possible defects, it has the benefit of

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32. *See* Expert Group Report, *supra* note 8, at para. 203.

33. *See* ICTY Directive, *supra* note 9, arts. 23-27, annex I.

34. *See id.* art. 14(A) ("*Any* person may be assigned as counsel if the Registrar is satisfied that he is admitted to the list of counsel envisaged in Rule 45(B). . . .") (emphasis added).

35. *See generally* Lal C. Vohrah & Jon Cina, *The Outreach Programme*, *in* ESSAYS ON ICTY PROCEDURE AND EVIDENCE, at 547 (Richard May et al. eds., 2001) (explaining the ICTY's Outreach Programme at length); *see also* Tolbert, *supra* note 5, at 13.

36. *See* Expert Group Report, *supra* note 8, para. 207.

37. *See* Ackerman, *supra* note 4, at 175.

addressing some of the more substantial abuses in the previous system. Thus, unlike the former system, whereby defense counsel in some cases appeared to attempt to bill for anything to reach the maximum number of hours,[38] the incentive for defense counsel is to plan and to use his or her time more effectively than under the previous system.

Another problem that has arisen under the legal aid system is that of "fee-splitting."[39] Fee-splitting has taken two forms. The more pernicious is simply for the attorney, who is seeking to be assigned as counsel in a case, to agree to split his fee in some manner with the accused or his family. Once the agreement has been reached, the accused then requests the appointment of that defense counsel. This has resulted, in part, because the fees available to defense counsel are very large by the standards of the region.[40] Another form of fee-splitting is for the defense counsel to hire a member of the accused's family; this practice is perhaps easier to identify and take action against. Both of these practices are now explicitly forbidden in the revised ICTY Code of Conduct.[41]

The ICTY is open to criticism on the fee-splitting practices, as it can be argued that there should have been a more rigorous investigation into these allegations from the beginning. Although these allegations would have been difficult to investigate and tough to prove, a more thorough investigation would have been justified. This would have both helped protect the ICTY's reputation and put defense counsel on notice that such conduct would not be tolerated.

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38. For example, one counsel billed for time he spent reading Immanuel Kant's *Perpetual Peace*. *See* Rhode, *supra* note 4, at 32.

39. *See* Code of Professional Conduct for Counsel Appearing Before the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. IT/125REV.1 (as amended on Jul. 12, 2002), art. 18, *available at* http://www.un.org/icty/basic/counsel/IT125_Rev1-e.htm (last visited Feb. 24, 2003) [hereinafter ICTY Code of Conduct].

40. *See, e.g.*, Press Release, Coalition for International Justice, Crackdown on War Profiteering at Tribunals: Court Acts to Eliminate Extortion of Fees from Appointed Counsel (Jul. 19, 2002), *available at* http://www.cij.org/index.cfm?fuseaction=viewReport&reportID=129&tribunalID=1 (last visited Feb. 24, 2003) (explaining how defense counsels for Zoran Zigic allegedly used the practice of "fee-splitting" to funnel circa $175,000.00 to the accused and his family, "enabling them to purchase 2 apartments, a business, 3 vehicles, 3 laptop computers, a nearly $35,000.00 renovation of his parents' home and travel for family members to The Hague costing $18,000.00.").

41. *See* ICTY Code of Conduct, *supra* note 39, art. 18(A); *see also* 2002 ICTY Report, *supra* note 15, at 48 ("[R]ecently adopted amendments to the Code introduce disciplinary provisions to sanction breaches of the rules of professional ethics and, in particular, fee-splitting between counsel and client.").

C. The Association of Defence Counsel and the Code of Conduct

The Registrar initially adopted the Code of Conduct in 1997. Regardless of whether they are compensated by the legal aid system or not, the Code applies to all defense counsel. It does not apply to the lawyers in the Office of the Prosecutor, as the Registrar does not have the power under the ICTY Statute to regulate these aspects of the Prosecutor's staff.[42] While the original Code of Conduct contained many useful provisions, it did not contain effective disciplinary and enforcement mechanisms. The revised Code of Conduct, which has been adopted in conjunction with the establishment of the Association of Defence Counsel, does provide for specific disciplinary mechanisms, which is a strong step in the direction of addressing some of the problems noted above. However, one of the problems faced at the ICTY has been the difficulty in conducting investigations for violations of its Code of Conduct. An investigator has now been added to the Registrar's staff.[43] This will provide for the possibility of much stronger enforcement of the applicable rules as well as the opportunity to ferret out improper practices.

One of the long-term issues that the ICTY has faced is the lack of a properly functioning bar association for defense counsel. In domestic jurisdictions much of the role for education of lawyers, creation of standards and discipline is handled by the relevant bar association.[44] However, establishment at the ICTY of a defense counsel association that would have the wide powers of a traditional domestic bar association would be problematic. At this stage, the number of defense practitioners at the ICTY is relatively small, and there is the danger that such a small group could be infected by cronyism or would take too narrow a view on a variety of subjects. The Registrar is the only authority in a position to protect the public interest and ensure that the Code of Conduct and other rules relating to the legal aid system are properly followed and enforced. Thus, it is essential that the Registrar keep firm control over the creation of Code of Conduct and its application as well as issues relating to qualifications and discipline of defense counsel. Nonetheless, in view of the limited resources of the Registrar and the positive contribution to be made by practitioners, it is important for defense counsel to play a role in these matters.

Fortunately, while it is late in the ICTY's development, the new

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42. *See supra* note 30 and accompanying text.

43. *See* 2002 ICTY Report, *supra* note 15, at 48 (explaining how an investigator was added to the Office of Legal Aid and Detention Matters, which is part of the ICTY Registry).

44. *See generally* American Bar Association Model Rules of Professional Conduct, *reprinted in* REGULATION OF LAWYERS: STATUTES AND STANDARDS (Stephen Gillers & Roy D. Simon, eds., 2001), at 3-463.

Association of Defence Counsel and the new Code of Conduct appear to be taking the above considerations into account. While the Code of Conduct gives the Association of Defence Counsel roles in carrying out discipline and in establishing qualifications, the ultimate responsibility rests with the Registrar. Thus, the more recent steps taken by the ICTY regarding the establishment of the Association of Defence Counsel and revised Code of Conduct are encouraging.[45]

III. CONCLUSION

In conclusion, there have been many difficult issues which have arisen at the ICTY relating to defense counsel, which the ICTY has struggled to address. While there are recent positive steps on the Code of Conduct, the Defence Counsel Association and the change in the legal aid payment system, real and serious issues relating to defense counsel remain. Moreover, it has taken many years to tackle these problems.

All in all, in the key area of the ICTY and defense counsel, it has indeed been a troubled relationship.

45. *See* ICTY Code of Conduct, *supra* note 39, art. 40.

The Soldier's Obligation to Die When Ordered to Shoot Civilians or Face Death Himself

Valerie Epps*

INTRODUCTION

Whether the defense of duress is available for murder or other serious crimes has been the subject of scholarly debate for decades.[1] That debate has also raised much contention when the defendant has been accused of serious international crimes.[2] This article examines the treatment of the defense of duress in the context of the Yugoslav Tribunal's decision in the case of *Prosecutor v. Drazen Erdemovic*,[3] and also attempts to place the debate in the broader context of the jurisprudence of international criminal culpability.

The International Military Tribunal at Nuremberg rejected the

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1. *See generally*, Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

2. *See* George C. Christie, *The Defense of Necessity Considered from the Legal and Moral Points of View*, 48 DUKE L.J. 975 (1999); Major Stephen C. Newman, *Duress as a Defense to War Crimes and Crimes Against Humanity*-Prosecutor v. Drazen Erdemovic, 166 MIL. L. REV. 158 (2000); David Turns, *The International Criminal Tribunal for the Former Yugoslavia*: The Erdemovic Case, 47 INT'L & COMP. L.Q. 461 (1998); Sienho Yee, *The* Erdemovic *Sentencing Judgement: A Questionable Milestone for the International Criminal Tribunal for the Former Yugoslavia*, 26 GA. J. INT'L & COMP. L. 263 (1997); and Abbe L. Dienstag, Comment, Federenko v. United States: *War Crimes, the Defense of Duress, and American Nationality Law*, 82 COLUM. L. REV. 120 (1982).

3. Prosecutor v. Erdemovic, Case No.: IT-96-22-T, Sentencing Judgement, 29 November 1996; Prosecutor v. Erdemovic, Case No.: IT-96-22-A, Judgement, 7 October 1997; and Prosector v. Erdemovic, Case No.: IT-96-22-T*bis*, Sentencing Judgement, 5 March 1998.

proposition that "international law is concerned with the actions of sovereign States, and provides no punishment for individuals."[4] The Tribunal stated that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[5] The creation of the International Criminal Tribunals for the Former Yugoslavia[6] and for Rwanda[7] carry forward the principle of individual responsibility for violations of certain international crimes defined by the statutes applicable to each tribunal.[8]

Criminal law, both domestic and international, requires an intentional act on the part of the culprit to secure conviction. Broadly speaking, the law requires the defendant to have intended the natural consequences of his voluntary acts. Criminal law has always accepted the notion that there are certain defenses, available to the defendant, even if it is proved that he committed the criminal act. A number of these defenses, including duress, essentially negate the intent necessary for conviction and demonstrate that the actions were not voluntary. Generally, when a criminal defendant raises the defense of duress, the court will examine whether the defendant was threatened by a force to such an extent that "a person of reasonable firmness in his situation would have been unable to resist."[9] If a sufficient threat is found, the defendant will be acquitted. In such a situation, the defendant, is not regarded as either having acted voluntarily or having the necessary criminal intent.

In the famous British case of *Regina v. Dudley & Stephens*,[10] sailors were adrift at sea and starving. The sailors killed and ate a dying cabin boy and were convicted of murder despite the court's acknowledgment that all would have perished had they not eaten the boy. Though the case is strictly

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4. International Military Tribunal (Nuremberg) Judgement and Sentences (Oct. 1, 1946), reprinted in 41 AM. J. INT'L L. 172, 220 (1947).

5. *Id.* at 221.

6. S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993) [hereinafter ICTY Statute]. This statute has been amended three times, most recently by U.N. Doc. S/RES/1411 (2002).

7. S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].

8. *See* ICTY Statute, *supra* note 6, arts. 2, 3, 5; ICTR Statute, *supra* note 7, arts. 2, 3, 4.

9. MODEL PENAL CODE, § 2.09 (1) (1962).

10. 14 Q.B.D. 273 (1884), *reprinted in* THE ALL ENGLAND LAW REPORTS REPRINT 1881-1885 61 (G.F.L. Bridgman, Esq., O.B.E. ed., Butterworth & Co. Ltd. 1964). There is a similar American case, *U.S. v. Holmes*, 26 F. Cas. 360 (C. C. E. D. Pa. 1842) (No. 15, 383), where sailors in a leaky longboat threw some of the passengers overboard to lighten the load and save themselves.

one of necessity[11] rather than duress, the principle of an outside force overbearing the will of the defendant is the same. Common law jurisdictions tend to allow the defense of duress for all criminal activities, except murder, where the criminal acts were carried out under threat of imminent serious bodily injury or death. However, a number of American states have adopted the Model Penal Code, which allows duress as a defense even for murder.

The refusal to allow the defense of duress in murder cases can be traced to William Blackstone's remark that a person "ought rather to die him[s]elf, than e[s]cape by the murder of an innocent."[12] The idea behind the exception for murder is that a person who, for example, is told to kill another person or face death himself has no basis upon which to prefer his own life to another's. Civil law countries and the Model Penal Code reject this exception based on the argument that the instinct for self-preservation is so strong that very few people, if any, will prefer preserving someone else's life over their own and that the law should not require the criminal defendant to make a choice that the overwhelming majority of people would not make. The preference equation may be resolved differently if the defendant has a special relationship to the third party. For example, many parents would choose to die if the choice was between their life and their child's.

The *Erdemovic* case raises the important question of whether the defense of duress should be available to those accused of war crimes. The facts of the case, however, present a troubling variation on the usual dilemma of preferring one life for another. Erdemovic was presented with the choice of killing unarmed civilians during wartime or adding one more to those slaughtered by a firing squad, namely himself. This new factual twist to the old problem resulted in a serious division between the judges on the Yugoslav Tribunal who heard Erdemovic's appeal.

"MANIFESTLY ILLEGAL" ORDERS

There is a line of authority, running from at least as far back as the Lieber Code,[13] to support the proposition that the defense of superior orders will not serve to exonerate a soldier who violates the laws of war if

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11. The defense of "necessity" refers to coercion by physical force whereas "duress" refers to threats by one human being against another; *see also infra* note 122.

12. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 30 (Dawsons of Pall Mall, 1966)(1765-1769) *available at* http//:www.yale.edu/lawweb/avalon/blackstone/bk4ch2.htm (last visited April 5, 2003).

13. *Instructions for the Government of Armies of the United States in the Field, reprinted in* THE LAWS OF ARMED CONFLICTS 3 (Dietrich Schindler & Jiri Toman eds., 3d ed. 1988).

the superior's order was "manifestly unlawful."[14] Such an order may serve to mitigate the sentence but will not prevent the soldier from being found guilty of the offense.[15] The cases where a low level soldier raises the defense of having been ordered to violate the law by a commanding officer are always difficult. Usually the commanding officer will deny that such an order was given,[16] so that the trier of fact first has to decide whether to believe the soldier. Even if the soldier is believed, there is always a shadow of doubt when the basis of the defense has been disputed.

Where it is clear that the soldier was given an order which he knew, or should have known, was clearly illegal, the cases are still troubling because we know that recruits to the armed forces are indoctrinated from the first day on the necessity of obeying orders from superior officers and because the soldier knows that if he wrongly disobeys an order, the consequences will be severe.[17] If the soldier wrongly disobeys an order during hostilities,

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14. *Rome Statute of the International Criminal Court*, art. 33, U.N. Doc. 32/A/CONF. 183/9 (July 17, 1998), *reprinted in* 37 I.L.M. 999 (1998) [hereinafter ICC Statute]. The statute provides in part:

> 1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless ... (C) The order was not manifestly unlawful. 2. For the purposes of this article, orders to commit genocide or crime against humanity are manifestly unlawful.

See United States v. Calley, 22 C.M.A. 534 (1973) *rev'd sub. nom.* Calley v. Callaway, 382 F. Supp. 650 (M.D. Ga. 1974), *rev'd*, 519 F.2d 184 (5th Cir. 1975), *cert. den*ied, Calley v. Hoffman, 425 U.S. 911 (1976). Calley's defense counsel argued that "the orders he received to kill everyone in the village were not palpably illegal...." *Calley*, 22 C.M.A. at 539. However, the court ruled that the proper test was that:

> The acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior's order is one which a man of ordinary sense and understanding would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful.

Id. at 542. *See generally*, Regina v. Finta, [1994], 1 S.C.R. 701 which includes a history of the defense of superior orders together with the establishment of the manifestly illegal test. *See also*, L.C. GREEN, *Superior Orders and the Reasonable Man*, *in* ESSAYS ON THE MODERN LAWS OF WAR 43, 49 (1985).

15. *See* ICTY Statute, *supra* note 6, art. 7 (4); ICTR Statute, *supra* note 7, art. 6 (4); ICC Statute, *supra* note 14, art. 31, 33, 78; Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, art. 8, signed London, 8 Aug. 1945, entered into force 8 Aug. 1945; 59 Stat. 1554, 82 U.N.T.S. 279 [hereinafter The London Charter].

16. *See, e.g.*, *Calley*, 22 C.M.A. at 538.

17. *See, e.g.*, Uniform Code of Military Justice, 10 U.S.C. § 890(2) (2000):

> Any person subject to this chapter who: ... (2) willfully disobeys a lawful

the result could even be his own execution.[18] Military law puts the soldier operating under such orders in an almost untenable situation and, no matter how heinous the soldier's alleged acts, none but the hardest hearted can fail to be moved by the soldier's dark dilemma. In a very real sense the soldier is under duress, but international and domestic military law has been clear that the soldier obeys the manifestly illegal order at his peril and if he makes the wrong choice, he will bear the consequences.[19] International law has decided to reject the defense of duress in such circumstances preferring the preservation of the victim's life to the exoneration of the soldier. The statutes for the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court all have roughly similar provisions making it clear that obeying illegal orders does not relieve the soldier from criminal responsibility but may mitigate the sentence.[20] The statutes reflect the same provisions found in the London Charter, which governed the Nuremberg Tribunal.[21]

THE *ERDEMOVIC* FACTS

The tale of Drazen Erdemovic presents an even darker dilemma and one that has not received much legal attention. Erdemovic, a Croat, was a low ranking member[22] of the Bosnian Serb army during the Balkan war. On July 16, 1995, he found himself as part of a firing squad located at the Branjevo farm at Pilicia in Eastern Bosnia near Srebrenica. A number of unarmed civilian Muslim men had been rounded up and were being detained by the Bosnian Serb army. Erdemovic claims that he was ordered to shoot the civilians by his superior officer. In terms of the laws of war,

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command of his superior officer; shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if committed at any other time, by such punishment, other than death, as a court-martial may direct.

Id.

18. *See id.*

19. *See, e.g.*, The London Charter, *supra* note 15, art. 8.

20. *See* ICTY Statute, *supra* note 6, art. 7 (4); ICTR Statute, *supra* note 7, art. 6(4); ICC Statute, *supra* note 14, arts. 31, 33, 78.

21. *See* The London Charter, *supra* note 15, art. 8.

22. *See* Prosecutor v. Erdemovic, Case No.: IT-96-22-T, Sentencing Judgement , 29 November 1996, para. 79. Erdemovic stated that he had been a sergeant in command of a small unit but that he had been demoted before taking part in the alleged crimes. There were no documents presented to confirm his rank and the indictment simply describes him as a soldier in the 10th Sabotage Unit of the Bosnian Serb Army. The Trial Chamber describes him as "low ranking."

the Bosnians were either unarmed civilians[23] or they were prisoners of war.[24] In either case, the Bosnian Serb army was definitively prohibited from shooting, or in any way mistreating, the Bosnians.[25] Erdemovic claims that he remonstrated with his commander when ordered to shoot: "When I refused, they told me: 'If you're sorry for them, stand up, line up with them and we will kill you too.'"[26] Erdemovic concluded that, if he had refused to shoot the civilians, he would have been lined up with them and shot by the firing squad. He stated that he was "not sorry for myself but for my family, my wife and son who then had nine months."[27] He reasoned that the civilians were going to be shot by the firing squad no matter what he did and that the only result of his refusal to shoot the men would be that one more person, namely Erdemovic himself, would die. As a result, he joined the firing squad and shot the civilians. A total of 1,200 unarmed civilians were killed over a five-hour period.[28] It was estimated that Erdemovic was responsible for the death of somewhere between ten and one hundred people. [29]

ERDEMOVIC'S DEFENSE

Erdemovic's defense was based not simply on the need to obey superior orders that he, and his lawyers, well understood would not exculpate him but on the notion that his commanding officer placed him under duress, where he could either obey an illegal order or face death. The Yugoslav Tribunal, both at the trial and appellate level, decided that the defense of duress could not be accepted with the result that the law required him to sacrifice his own life with no hope of saving the civilians rather than obey the illegal order to shoot the civilians.[30]

The *Erdemovic* case is heartrending for a number of reasons quite apart from the horrendous slaughter of the Muslim men and boys. If Erdemovic

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23. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516, arts. 3, 4 (entered into force 21 October 1950).

24. *See* Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 U.N.T.S. 135, 6 U.S.T. 3316, arts. 3, 4 (entered into force 21 October 1950).

25. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 23, at arts. 3, 13-78; Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 24, at arts. 3, 12-108.

26. Prosecutor v. Erdemovic, Case No.: IT-96-22-T, Sentencing Judgement , 29 November 1996 para. 10.

27. *Id.*

28. *See id.* para. 85.

29. *See id.*

30. *See id.* para. 91; Prosecutor v. Erdemovic, Case No.: IT-96-22-A, Judgement, 7 October 1997, para. 19.

had not decided to tell his story, there is every reason to think that the world would never have heard of him or of his crimes. The Prosecutor stated that without Erdemovic's statements he would not have known of the massacres at the Branjevo farm and the killing of another 500 civilians in the public building at Pilicia. Erdemovic has cooperated with the Prosecutor's office in The Hague and provided considerable evidence about the massacres at Pilicia. He has also provided specific evidence in hearings against Radovan Karadzic and Ratko Mladic.[31]

ERDEMOVIC'S GUILTY PLEA AND SENTENCING

On May 31, 1996, Erdemovic pled guilty to one count of a crime against humanity.[32] He was initially sentenced to ten years imprisonment, with time held in detention deducted.[33] The trial court considered the following circumstances to mitigate his punishment: his youth at the time the crimes were committed; his low military rank; his remorse; his voluntary surrender; his cooperation with the Prosecutor's Office; the fact that he posed no on-going threat; and that he had a personality capable of reform.[34] After his appeal, the case was remanded to a new Trial Chamber where Erdemovic was permitted to replead to the charges. On January 14, 1998, he pled guilty to the alternative charge of a violation of the laws and customs of war, rather than pleading guilty to the charge of a violation of a crime against humanity.[35] The Prosecutor withdrew the latter charge. After a sentencing hearing, the Trial Chamber reduced Erdemovic's sentence to five years imprisonment with time deducted for the period already spent in custody.[36]

THE "DURESS" OR "URGENT NECESSITY" DEFENSE IN THE TRIAL CHAMBER

In pleading guilty, Erdemovic raised the defenses of urgent necessity to obey his military superior and the "physical and moral duress stemming from fear for his own life and that of his wife and child."[37] The court thus had to consider whether these defenses might be "regarded as a defence for

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31. *See* Prosecutor v. Erdemovic, Case No.: IT-96-22-T, Sentencing Judgement, 29 November 1996, para. 96.

32. *See id.* para. 3.

33. *See id.* at Disposition.

34. *See id.* para. 99.

35. *See* Prosecutor v. Erdemovic, Case No.: IT-96-22-T*bis*, Sentencing Judgement, 5 March 1998, at Disposition.

36. *See id.*

37. Summary of Trial Chamber Judgement: Prosecutor v. Erdemovic, Case No.: IT-96-22-T, Sentencing Judgement, 29 November 1996, para. 14.

the criminal conduct which might go so far as to eliminate the mens rea of the offence and therefore the offence itself."[38] In other words, although the ICTY Statute only permits mitigation of punishment for obeying illegal orders,[39] not removal of criminal responsibility, the court had to consider whether the defenses proffered justified the acts. If so, the court would have had to reject the guilty plea. An accused that pleads guilty but at the same time asserts the elements of a defense, which, if proved, would exonerate him, is not knowingly and clearly waiving his right to a trial.[40]

The Trial Chamber recognized that, although the current statute is silent on the defenses of "duress" or "urgent necessity," the International Military Tribunal at Nuremberg and other military courts have permitted duress and necessity to remove responsibility for a crime in certain very limited circumstances.[41] In other cases, duress or necessity was merely considered

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38. *See id.*

39. *See* ICTY Statute, *supra* note 6, art. 7 (4).

40. *See* Rule 62 *bis* of the Rules of Procedure and Evidence of ICTY, U.N. Doc. IT/32/Rev.26 (2002), *available at* http://www.un.org/icty/legaldoc/index.htm (last visited on April 5, 2003) [hereinafter ICTY Rules]. The rule states:

> If an accused pleads guilty in accordance with Rule 62 (vi), or requests to change his or her plea to guilty and the Trial Chamber is satisfied that:
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> (i) the guilty plea has been made voluntarily;
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> (ii) the guilty plea is informed;
>
> (iii) the guilty plea is not equivocal; and
>
> (iv) there is a sufficient factual basis for the crime and the accused's participation in it, either on the basis of independent indicia or on lack of any material disagreement between the parties about the facts of the case,
>
> the Trial Chamber may enter a finding of guilty and instruct the Registrar set a date for the sentencing hearing.

Id.

41. *See Trial of Alfried Felix Alwyn Krupp von Bohlen and Halbach and eleven others*, U.S. Military Tribunal, Nuremberg, 17 November 1947-30 June 1948, Case No. 58, The United Nations War Crimes Commission, *Law Reports of Trials of War Criminals* [hereinafter *L.R.T.W.C.*], Vol. X, at 147; *Einsatzgruppen Case, In re Ohlendorf and Others, quoted in L.R.T.W.C.*, Vol. XV, at 174. *See also The German High Command Trial, Trial of Wilhelm von Leeb and thirteen others*, U.S. Military Tribunal, Nuremberg, 30 December 1947-28 October 1948, Case No. 72, *L.R.T.W.C.*, Vol. XII, at 72; *I.G. Farben Case, Trial of Karl Krauch and twenty-two others*, U.S. Military Tribunal, Nuremberg, 14 August 1947-29 July 1948, Case No. 57 *L.R.T.W.C.*, Vol X, at 57; *Trial of Friedrich Flick and five others*, U.S. Military Tribunal, Nuremberg, 20 April 1947-22 December 1947, Case No. 48, *L.R.T.W.C.*, Vol. IX, at 20; *Trial of Erhard Milch*, U.S. Military Tribunal, Nuremberg, 20 December 1946-17 April 1947, *L.R.T.W.C.*, Case No. 39, Vol. VII, at 40; *Trial of Lieutenant General Shigeru Sawada and three others*, U.S. Military Commission, Shanghai, 27 February 1946-15 April 1946, Case No. 25 *L.R.T.W.C.*, Vol. V at 18-19; *Trial of Rear-Admiral Nisuke Masuda and four others of the Imperial Japanese Navy, Jaluit Atoll Case*,

as an element for mitigation of the sentence.[42] The Trial Chamber noted that the report of the Secretary-General of the United Nations on the ICTY Statute had addressed duress in the context of superior orders and noted that the superior order may be considered "in connection with other defenses such as coercion or lack of moral choice."[43] In this case, the trial judges did not consider that the defenses fell within the narrow class of cases which warranted full exculpation, although they recognized that the WWII cases, which had rejected defenses of duress or necessity, had involved officers claiming such defenses rather than a rank and file soldier, as here.[44]

In analyzing the mitigating circumstances occurring at the time of the criminal act (as opposed to the accused's attitude after the act), the Trial Chamber listed questions to be addressed relating to "urgent necessity stemming from duress and a superior order":[45]

> - could the accused have avoided the situation in which he found himself?
>
> - was the accused confronted with an insurmountable order which he had no way to circumvent?
>
> - was the accused, or one of his immediate family members, placed in danger of immediate death or death shortly afterwards?
>
> - did the accused possess the moral choice to oppose the orders he had received? Had he possessed that freedom, would he have attempted to oppose the orders?[46]

The Trial Chamber listed the above issues for consideration when

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U.S. Military Commission, U.S. Naval Air Base, Kwajalein Island, Kwajalein Atoll, Marshall Islands, 7-13 December 1945, Case No. 6, *L.R.T.W.C.*, Vol. I, at 74-76, 79-80; *Trial of Wilhelm List and Others*, U.S. Military Tribunal, Nuremberg, 8 July 1947-19 February 1948, *L.R.T.W.C.*, Case No. 47, Vol. VIII, at 50-52; and 1956 U.S. Dep't of the Army, Field Manual 27/10 501 (1956).

42. *See RU v. Eck* (*Peleus case*), *L.R.T.W.C.* Vol. I at 21; *U.S. v, Sawada*, *L.R.T.W.C.* Vol V at 13-14; *U.S. v. Von Leeb* (*High Command case*), *L.R.T.W.C.* Vol. XII, at 1; XI *Trial of War Criminals* (*T.W.C.*) 1, at 563; *France v. Carl Bauer*, *L.R.T.W.C.* Vol. VIII, at 15; *U.S. v. Wilhelm List* (*Hostage case*), *L.R.T.W.C.* Vol. VIII, at 74-76; *U.S. v. Ohlendorf* (*Einsatzgruppen case*) (1948) 4 *T.W.C.*, at 1.

43. The Report of the Secretary General Pursuant to Paragraph 2 of S.C. Res. 808, U.N. Doc. S/25704, para. 57 (1993).

44. *See* Prosecutor v. Erdemovic, Case No.: IT-96-22-T, Sentencing Judgement, 29 November 1996, paras. 92-95.

45. *See id.* para. 89.

46. *Id.*

addressing the defense of "necessity" or "duress" but did not undertake any further analysis because Erdemovic provided no corroborating evidence of his version of the events constituting his defense.[47] The judges, therefore, refused to accept his defense of "urgent necessity" or "duress" even though they recognized that "some credibility may be given to the overall account of the accused."[48] The Trial Chamber did not engage in any discussion of why Erdemovic's defense required corroborative evidence.[49] One can only suppose that the judges were concerned about the ease of raising such a defense if no corroborative evidence were required.

The Trial Chamber was thus in the unusual position of recognizing that a plea of duress or necessity, if proved, could exonerate the accused who had, nevertheless pled guilty. In such circumstances, the Trial Chamber could not have accepted the guilty plea because the plea would have revealed a defense, which could have exonerated the accused. In this case, however, having discovered that defense counsel had no evidence for the proffered defense, other than Erdemovic's word, the judges reached the evidentiary conclusion that they could not accept the defense as a matter of fact.[50] That being the case, the defense collapsed and thus there was no reason not to accept the guilty plea. In other words, although the Trial Chamber was, in principle, ready to hear defenses based on duress or necessity, it was not prepared to find in favor of any defendant who could not present corroborating evidence on such defenses.

THE APPEAL CHAMBER JUDGMENT OF 7 OCTOBER 1997

On appeal, the Appeals Chamber was presented with the issue of whether the Trial Chamber correctly accepted the guilty plea. That issue turned on the embedded issue of whether duress or necessity were exculpatory defenses and, if so, whether such defenses require corroborative evidence.[51] If necessity or duress could be accepted as exculpatory defenses, then the Trial Chamber should not have accepted the plea, unless such defenses always require corroborative evidence. If the defenses of duress or necessity were simply unavailable for charges of crimes against humanity or violation of the laws and customs of war, then

47. *Id.* para. 90.

48. *Id.*

49. The Appeals Chamber determined that the requirement of corroborative evidence to establish a defense of duress or necessity was not justified. Prosecutor v. Erdemovic, Case No.: IT-96-22-A, Joint Separate Opinion of Judges McDonald and Vohrah, 7 October 1997.

50. *See* Prosecutor v. Erdemovic, Case No.: IT-96-22-T, Sentencing Judgement, 29 November 1996, para. 91.

51. *See* Prosecutor v. Erdemovic, Case No.: IT-96-22-A, Joint Separate Opinion of Judges McDonald and Vohrah, 7 October 1997, para. 90.

the Trial Chamber would have been correct in accepting the guilty plea.

There were several grounds of appeal, but essentially one argument related to duress. Although Erdemovic was guilty of the offense, it was argued that his sentence be commuted or considerably reduced on the ground that the Trial Chamber should not have required corroboration of the defenses of duress or necessity, given the fact that the only evidence of Erdemovic's guilt was his uncorroborated testimony that he participated in the firing squad?[52] In other words, the appeal was not based on the theory that duress or necessity should have been accepted as an exculpatory defense, but rather that duress and necessity should have been accepted as arguments in mitigation of punishment without the requirement of corroborative testimony.[53]

The Appeals Chamber, however, decided to raise certain issues on its own authority, all revolving around the validity of Erdemovic's guilty plea. It addressed the following questions:

> (1) In law, may duress afford a complete defence to a charge of crimes against humanity and/or war crimes such that, if the defence is proved at trial, the accused is entitled to an acquittal?
>
> (2) If the answer to (1) is in the affirmative, was the guilty plea entered by the accused at his initial appearance equivocal in that the accused, while pleading guilty, invoked duress?
>
> (3) Was the acceptance of a guilty plea valid in view of the mental condition of the accused at the time the plea was entered? If not, was this defect cured by statements made by the accused in subsequent proceedings?[54]

The Appeals Chamber found unanimously that Erdemovic's plea was voluntary but, with one dissent, that the plea was not informed. It was unclear whether Erdemovic understood the difference between the two charges (crimes against humanity or violation of the laws and customs of war) in light of the fact that his defense counsel did not appear to understand the differences. The majority indicated that the charge of crimes against humanity was a more serious charge than violation of the laws and customs of war and that it was not clear that Erdemovic understood the distinction. Judge Li vigorously disputed this point. As a result, the case was sent back to a new Trial Chamber to allow Erdemovic to "replead in full knowledge of the nature of the charges and the consequences of his plea."[55] On remand, Erdemovic pled guilty to the

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52. The Prosecutor did present evidence of a massacre at the Branjevo farm but not that Erdemovic had killed any one there. *See* Prosecutor v. Erdomovic, Case No.: IT-96-22-A, Judgement of 7 October 1997, para. 9.

53. *See id.*

54. *Id.* Judgement of 7 October 1997, para. 16.

55. *Id.* at Disposition § 5.

alternative charge of a violation of the laws and customs of war, rather than a crime against humanity. After a sentencing hearing, the new Trial Chamber sentenced Erdemovic to five years imprisonment, less the time already spent in custody.

DURESS AS A COMPLETE DEFENSE TO CRIMES AGAINST HUMANITY OR WAR CRIMES

A majority of the Appeals Chamber, Judges McDonald, Vohrah and Li, found that "duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings."[56] As a result, the majority accepted the guilty plea and was not prepared to find it "equivocal."[57] Two members of the Appeals Chamber, Judges Cassese and Stephen, dissented from this view and were prepared to find that, under certain limited conditions, duress or extreme necessity could operate as a complete defense to indictments alleging war crimes or crimes against humanity. In their opinion, therefore, the guilty plea should not have been accepted. This stark division between the judges evoked a number of separate opinions.

APPROPRIATE SOURCES OF LAW ON THE AVAILABILITY OF THE DEFENSE OF DURESS

Judges McDonald and Vohrah, in their Joint Separate Opinion, first asked what sources they might use in answering the question of the availability of the defense of duress in this case. They quoted article 38 of the Statute of the International Court of Justice that, although only directly applicable to the World Court, is generally regarded as stating the appropriate sources of international law.[58] They found no applicable treaty

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56. *Id.* para. 19.

57. *Id.*

58. Statute of the International Court of Justice, 26 June, 1945, art. 38, 59 Stat. 1055 (entered into force 24 October 1945 [hereinafter ICJ Statute]. It states:

> (1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
>
> (2) This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono,* if the parties agree thereto.

Id.

law on the subject of duress as a defense, thus the Appeals judges looked for custom emanating from the post WWII military tribunals and national courts.

(1) Custom

Judges McDonald and Vohrah insisted that the only cases they were willing to consider relevant were the cases that related to duress as a defense where the charges were of killing innocent people. Although the judges noted that the International Law Commission concluded that the post World War II military tribunals of nine nations considered duress as a complete defense,[59] they distinguished most of the cases cited. In fact, they stated that the only cases supporting duress as a complete defense were the British Military Tribunal case of *Jepson*[60] (which was overruled by both the *Stalag Luft* III[61] case and the *Feurstein*[62] case) and the *Einsatzgrupen*[63] case decided by a United States military tribunal. The latter case was largely discounted as it failed to cite any precedent for the proposition that duress affords a complete defense, was contrary to U.S. common law precedent, and was directly contradicted by the current U.S. Manual for Courts-Martial.[64] Judges McDonald and Vohrah also noted that the International Law Commission had conceded that "[t]here are different views as to whether even the most extreme duress can ever constitute a valid defence or extenuating circumstance with respect to a particularly heinous crime, such as killing an innocent human being."[65]

Despite numerous citations to national cases[66] that appeared to accept

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59. *See* Report of the International Law Commission on the work of its forty-eighth session, 6 May-26 July 1996, U.N. GAOR, 51st Sess., Supp. No. A/51/10 (1996) [hereinafter 1996 ILC Report].

60. *See Case of Gustaf Alfred Jepson and Others*, Proceedings of a War Crimes Tribunal held at Luneberg (13-23 August, 1943) judgment of 24 August 1946, Law Reports, Vol. XV, at 172.

61. *See Trial of Max Wielen and Seventeen Others* (*Stalag Luft III case*), Law Reports, Vol. XI, at 33.

62. *See Trial of Valentine Feurstein and Others* (*Feurstein Case*), Proceeding of the Court held at Hamburg (4-24 Aug. 1948), Law Reports, Vol. XV, at 173.

63. *See Trial of Otto Ohlendorf* (*Einsatzgruppen Case*), Trials of War Criminals, Law Reports, Vol. IV, at 480.

64. *See* U.S. MANUAL FOR COURTS-MARTIAL RULE § 916(h) (2000 ed.). Duress is a defense "to any offense except killing an innocent person." *Id.*

65. 1996 ILC Report, *supra* note 48, at 77.

66. *See* Prosecutor v. Erdemovic, *supra* note 3 and cases cited therein; Joint Separate Opinion of Judge McDonald and Judge Vorhrah, para. 47; Llandovery Castle Case (German Supreme Court 1920), English translation *printed in* 16 AMER. J. INT'L L. 708 (1922); Mueller (1949 Belgian Military Court and Belgian Court of Cassation); 1949 Annual Digests and Reports of Public International Law Cases, 400-403; Attorney-General of the

the notion of duress as a complete defense to murder, the judges either distinguished the particular case or discounted it for a variety of reasons and refused to accord the principle any status as customary international law. Even the trials carried out under the London Charter of 1945 and Control Council Law No. 10, although created by the four allied powers and in that sense "international," were regarded by the judges as applying national law. Judges McDonald and Vohrah ultimately concluded that "no rule may be found in customary international law regarding the availability or the non-availability of duress as a defense to a charge of killing innocent human beings."[67]

(2) General Principles of Law

The judges next examined whether "general principles of law," recognized as a source of international law,[68] revealed a rule on duress. They undertook "a limited survey of the treatment of duress in the world's legal systems."[69] Within the civil law countries, the judges determined that "civil law systems . . . consistently recognise duress as a complete defence to all crimes."[70] They quoted from a variety of civil codes, ranging from Chile to Finland.[71] Turning to the common law systems, the judges examined a wide range of national laws.[72] Some countries allowed duress

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Government of Israel v. Eichmann (1962 Supreme Court of Israel), English translation *printed in* 36 INT'L L. REP. 277, 318 (1962) (E. Lauterpacht ed. 1968); Papon Case, unpublished transcript of Judgment of 18 Sept. 1996, Cour D'Appel de Bordeaux, Chamber d'Accusation, Arrêt du 18 Sept. 1996, No. 806; Retzlaff. (Soviet Military Tribunal) *discussed in* The People's Verdict A Full Report of the Proceedings at the Krasnodar and Kharkov German Atrocity Trials 65 (London-New York). Sablic (Military Court of Belgrade, Yugoslavia) Decision of 26 June 1992; Bernadi and Randazzo, unpublished text, Italian Court of Cassation, 14 July 1947; Srá. (Italian Court of Cassation) *printed in* Giurisprudenza Completa Della Corte Suprema di Cassazione, sez. pen., 1947, No. 2557, at 414; Masetti (Italian Court of Cassation 17 Nov. 1947) printed in Massimario della Seconda Sezione della Cassazione, 1947, No. 2567, at 416; S. and K. (Landesgericht of Ravensburg, 21 May 1948) printed in II Justiz and NS-Verbrechen at 521, 526-527 (1969); Warsaw Ghetto Case (Court of Assize of Dortmund, 13 March 1954) XII Justiz und NS-Verbrechen at 340-341 (1974); Wetzling (Court of Assize in Arnsberg, 12 Feb. 1958) XIV Justiz und NS-Verbrechen at 563, 616-623 (1976).

67. Prosecutor v. Erdemovic, Case No.: IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, at para. 55.

68. I.C.J. Statute, *supra* note 47, art. 38(1)(c).

69. Prosecutor v. Erdemovic, Case No.: IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, para. 58.

70. *Id.* para. 59.

71. *See id.*

72. *See* Prosecutor v. Erdemovic, Case No.: IT-96-22-A,

72. Prosecutor v. Erdemovic, Case No.: IT-96-22-A, Joint Separate Opinion of Judge

to operate as a complete defense for all crimes except a few very serious crimes such as murder or treason.[73] Other states, such as Japan or China, engaged in a balancing analysis and asked whether the harm produced by averting the danger to the accused's life exceeded the harm that was sought to be avoided.[74] Duress operated as a complete defense only where preserving the accused's life was seen as avoiding a greater harm than killing the victims.[75] Virtually all legal systems were prepared to take duress into account when determining whether to mitigate punishment or sometimes even to lessen the offense charged.[76]

After this detailed survey of the treatment of duress as a defense or mitigation, the judges concluded that:

> The rules of the various legal systems of the world are, however, largely inconsistent regarding the specific question whether duress affords a complete defence to a combatant charged with a war crime or a crime against humanity involving the killing of innocent persons.[77]

The judges noted, however, that: "the common law systems throughout the world, with the exception of a small minority of jurisdictions in the United States . . . reject duress as a defense to the killing of innocent persons." [78] Some states that allowed duress to operate as a complete defense required proportionality between the harm caused and the harm threatened.[79] Some cases did not permit duress as a complete defense where "'it can be fairly expected of the actor that he suffer the risk . . . if he stands in a special legal relationship to the danger."[80]

The common law rule that rejected duress as a complete defense to murder, even when the accused would suffer death, was seen as arising from "the assertion ...of a moral absolute."[81] This moral absolute had two parts; first, the protection of human life and second, the notion that the accused had no right to prefer his own life to that of another person.[82] A number of British cases were cited as stating unequivocally that in such circumstances, the accused "ought rather to die himself, than kill an

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McDonald and Judge Vohrah, 7 October 1997, para. 60.

73. *See id.*
74. *See id.*
75. *See id.* para. 61.
76. *See id.* para. 63-65.
77. *Id.* para. 67.
78. *Id.* para. 63-64.
79. *Id.* para. 68.
80. *Id.* para. 69 (quoting from the German Penal Code, § 35(1)).
81. *Id.* para. 71.
82. *See id.*

innocent,"[83] or that the law "denies to a man the right to take an innocent life even at the price of his own or another's life."[84]

CHOOSING NORMATIVE PURPOSES AS A GUIDE WHEN NO RULE EMERGES

Having failed to find treaty law, customary law or general principles of law that answer the question of whether duress can operate as an exculpatory defense to crimes against humanity or war crimes involving the killing of civilians, one might have expected the judges simply to reject the notion of such a defense. However, Judges McDonald and Vohrah delved further in seeking to justify their rejection of the defense.[85] Perhaps they were somewhat unsettled by the fact that there are a good number of cases that permit the defense of duress even for war crimes.[86] The lack of a consistent rule on the exculpatory effect of the defense of duress persuaded the judges to examine the context of the creation of the Tribunal, including the crimes over which it exercised jurisdiction and its "mandate ... in the Statute . . . in relation to 'serious violations of international humanitarian law.'"[87] The judges feared that allowing duress to operate as a complete defense would bring in its wake a panoply of evils such as securing impunity for criminals who collude with their agents in threatening them with death if they do not obey their commands. The judges recognized that they were choosing to reject duress in order that the law should serve "normative purposes in light of its social, political and economic role."[88] The crucial factor that persuaded the judges to reject duress as a defense to charges of war crimes and crimes against humanity was that the Tribunal was dealing with "the most heinous crimes known to humankind . . . ."[89] The judges noted that national courts and national criminal codes are only dealing with ordinary domestic crimes, whereas the Tribunal is dealing with crimes "committed in armed conflicts of extreme violence with egregious dimensions."[90] They were concerned about the normative effect of the rules attaching to duress "upon soldiers bearing weapons of destruction and upon the commanders who control them in armed conflict

83. *See, e.g. id.*, para. 71 (quoting Lord Hale, Pleas of the Crown 51 (1800) vol. 1, p. 51). *See id.* para. 71 n. 153.

84. *See, e.g., id.* para. 71 (quoting Regina v. Howe and Others [1987] 1 ALL ER 777 at 785). *See id.* para. 71 n.155.

85. *See id.* para. 66-67.

86. *See id.*

87. Prosecutor v. Erdemovic, Case No.: IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, para. 72.

88. *Id.* para. 75/

89. *Id.*

90. *Id.*

situations."[91] They noted that one of the main objectives of international humanitarian law is "the protection of the weak and vulnerable in such a situation where their lives and security are endangered."[92] The judges meant the rule rejecting duress to operate as a deterrent, and they noted that situations such as the one in this case are not infrequent during armed conflict. Waxing more philosophic, the judges readily admitted that social policy and law are never truly separate and that ultimately the choice of a legal rule is grounded in social policy.

The basis of Judges McDonald and Vohrah's rejection of duress as a defense to war crimes or crimes against humanity rests on the notion that regular domestic criminal murder is distinct from, and therefore not useful as a guide for, the international criminal offenses of war crimes or crimes against humanity. They regarded the latter crimes as different in kind from regular domestic murder and they saw the soldier cast in a protective role towards civilians under the rubric of international humanitarian law governing the conduct of armed hostilities. That being so, they refused to use the test of whether an ordinary person in similar circumstances would prefer his own life to shooting the victims.

DURESS AS A DEFENSE WHERE DEATH IS THREATENED IF ILLEGAL ORDERS ARE NOT OBEYED

Judges McDonald and Vohrah then examined the exceptional situation of the Erdemovic case. They observed that the dissenters concluded that although the rejection of duress may be justified in most cases, the Erdemovic situation could be distinguished by the fact that the victims were going to be shot by the firing squad anyway. This then was not a situation where the accused was choosing his own life over that of his victims. Regardless of what Erdemovic did, the Muslim civilians were going to be shot. If Erdemovic had disobeyed his commander, the result would have been one more person dead, namely Erdemovic. The 1948 Italian case of Masett[93]i accepted the argument that, in such extraordinary situations, the defense of duress should be accepted. The court acquitted the accused on the ground that the sacrifice of Masetti's life would have been to no avail because the victims were going to be executed anyway. The decision to accept duress in such circumstances is referred to by the Tribunal as "the *Masetti* approach."[94] Judges McDonald and Vohrah

91. *Id.*

92. *Id.*

93. *See id.* and citation therein at n. 169; *see also* Masetti (Italian Court of Cassation 17 Nov. 1947) printed in Massimario della Seconda Sezione della Cassazione, 1947, No. 2567, at 416.

94. Prosecutor v. Erdemovic, Case No.: IT-96-22-A, Joint and Separate Opinion of

carefully rejected this approach.

The judges described the *Masetti* approach as based on "utilitarian logic"[95] that they did not accept. They refused to balance harms for and against killing because of the context in which the rule operates under the Tribunal's mandate. They wanted to send a clear message to soldiers that duress will not be available as a defense to any killing of innocent civilians during armed conflict. In any event, trying to weigh harms in any context is extremely difficult and the judges determined that the better approach was to consider duress in mitigation of punishment.

In rejecting the *Masetti* approach, the judges wondered whether they were creating a law demanding more than is reasonable, that is, what the proverbial ordinary person could be expected to do in similar circumstances. The judges quoted from some eloquent passages which announce in various forms that "law is ineffective in the deepest sense, indeed . . . hypocritical, if it imposes on the actor who had the misfortune to confront a dilemmatic [sic] choice, a standard that his judges are not prepared to affirm that they should and could comply with if their turn to face the problem should arise."[96] This interesting discussion was brought to an abrupt halt by the assertion that the judges' rejection of the *Masetti* approach "does not depend upon what the reasonable person is expected to do. [The judges] assert an absolute moral postulate which is clear and unmistakable for the implementation of international humanitarian law."[97] The absolute moral postulate from which the judges appear to devise the rule is that a soldier can never kill unarmed civilians even where his refusal to kill the civilians will result in the soldier's own death and even where his own death will not prevent the civilians' deaths. Such an absolute rule is bound to be controversial.

Despite asserting an absolute moral postulate, the judges attempted to justify their rule by pointing out that soldiers "are expected to exercise fortitude and a greater degree of resistance to a threat than civilians, at least when it is their own lives which are being threatened" [98] So the question for the judges became: what may be expected of ordinary soldiers who "by the very nature of their occupation, must have envisaged the possibility of violent death in pursuance of the cause for which they fight."[99] Given the

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Judge McDonald and Judge Vohrah, 7 October 1997, para. 79.

95. *Id.* para. 80.

96. *Id.* para. 82 (quoting American Law Institute Model Penal Code § 2.09, cmt. 2 (1985)).

97. *Id.* para. 83.

98. *Id.* para. 84.

99. Prosecutor v. Erdemovic, Case No.: IT-96-22-A, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, para. 84. One might reasonably reply that although the soldier may envisage violent death at the hands of the enemy (or even from

known occupational hazard of death for soldiers engaged in combat, the judges concluded that the defense of duress was unacceptable where the accused killed innocent persons. Because of the special protective role given by international humanitarian law to soldiers towards civilians, the judges concluded that suffering death is the unwavering rule for the soldier rather than killing civilians, regardless of whether the soldier's death will save the civilians.

Because the judges recognized that duress does operate as a mitigation of punishment under the ICTY Statute,[100] their argument then took an extraordinary turn. They reasoned that because mitigation of punishment is available, the law does not in fact expect the soldier to throw away his life in vain. What the judges seemed to imply is that soldiers who find themselves in the same situation as Erdemovic in the future, should carry out the order to shoot (despite the fact that such killing is illegal and duress will not exonerate them) thereby saving their own lives, in the knowledge that duress will operate to save them from harsh punishment. In fact the judges recognized that in some cases "the offender may receive no punishment at all."[101] The whole tenor of this part of the opinion undermines the high moral tone of the insistence that the rejection of duress as a defense was based on the necessity of having an absolute rule for soldiers engaged in combat. The Geneva Convention require states to instruct their troops in the laws of war.[102] Trying to formulate the rule that an instructor would announce in light of judges McDonald's and Vohrah's opinion, is a considerable challenge but it might go something like this:

> Soldiers are never allowed to shoot unarmed civilians. If your superior officer orders you to shoot civilians, that is a manifestly illegal order and you will be held responsible if you obey the command although your punishment may be reduced because of the order. If your superior officer orders you to shoot civilians and tells you that if you refuse to obey his order, you will be lined up with the civilians and be shot by a firing squad that is ready to carry out the officer's orders, you will still be held responsible for the civilians' deaths if you join the firing squad.

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friendly fire), he can hardly expect violent death at the hands of his superior officer.

100. *See* ICTY Statute, *supra* note 6, art. 7(4)

101. Prosecutor v. Erdemovic, Case No.: IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, para. 85.

102. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 U.N.T.S. 3314, 6 U.S.T. 3114, art. 47 (entered into force 21 October 1950); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces At Sea, 12 August 1949, 75 U.N.T.S. 3217, 6 U.S.T. 3217, art. 48; Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 24, art. 127; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 23, art. 144.

> If you decide to save your own life and join the firing squad, however, duress will operate to mitigate your punishment and may, in fact, result in no punishment being imposed, although you would still, technically, be guilty of war crimes or crimes against humanity.

Is there a responsible lawyer who could in good conscience tell a soldier-client that he should not join the firing squad under such circumstances?

Having concluded that duress is never a full defense to war crimes or crimes against humanity, the judges determined that Erdemovic's guilty plea was not equivocal. They noted that the Trial Chamber had incorrectly required corroborating evidence of the defense. Because of other issues concerning the accused's lack of understanding of the distinction between war crimes and crimes against humanity,[103] the plea was determined not to be informed and the case was remanded to another Trial Chamber for repleading.

DISSENTING SEPARATE OPINION OF JUDGE LI

The separate opinion of Judge Li is interesting because he concluded, together with Judges McDonald and Vohrah, that "if the act was a heinous crime, for instance, the killing of innocent civilians or prisoners of war, duress cannot be a complete defence, but can only be a ground of mitigation of punishment if justice requires."[104] Nonetheless, after examination of military tribunals, he concluded that generally "duress can be a complete defence if the following requirements are met, (a) the act was done to avoid an immediate danger both serious and irreparable, (b) there was no other adequate means to escape, and (c) the remedy was not disproportionate to the evil."[105] In this case, the exception to accepting duress as a complete defense was applicable because the act charged was heinous and international humanitarian law is quintessentially concerned with the protection of innocent civilians. Judge Li would not have remanded the case to the Trial Chamber because he regarded it as quite clear that Erdemovic understood the charge to which he was pleading and was only asserting duress as a ground of mitigation of punishment and not as a defense. Judge Li also argued forcefully that there was no indication, from any source, that crimes against humanity are necessarily more serious than war crimes.

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103. *See* Prosecutor v. Erdemovic, Case No.: IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 91.

104. Prosecutor v. Erdemovic, Case No.: IT-96-22-A, Separate and Dissenting Opinion of Judge Li, 7 October 1997, para. 5.

105. *Id.*

THE TWO SEPARATE AND DISSENTING OPINIONS OF JUDGE CASSESE AND JUDGE STEPHEN

Both Judges Cassese and Stephen concluded that, because of the circumstances of Erdemovic's case, duress could operate as a complete defense and that the case should therefore be remanded for repleading with clear knowledge of the possibility of exculpation, or in the event that Erdemovic decided not to plead guilty, a trial.

SEPARATE AND DISSENTING OPINION OF JUDGE CASSESE

Judge Cassese noted that Judges McDonald and Vohrah found no specific international law on duress. In such circumstances, he concluded, they should have applied the general rule, namely, that duress can operate as a defense to murder under certain conditions. He criticized the plurality opinion for simply adopting common-law concepts while rejecting the civil law approach. He then undertook an examination of the idea of duress and the conditions required for its applicability. He distinguished *duress,* which involved "threats or compulsion [by] a third party" from *necessity,* which is a broader concept involving duress from causes other than third parties such as extreme hunger where life is threatened by lack of food.

He concluded that duress required four conditions to be met:

> (i) the act charged was done under an immediate threat of severe and irreparable harm to life or limb;
>
> (ii) there was no adequate means of averting such evil;
>
> (iii) the crime committed was not disproportionate to the evil threatened .... In other words ... the crime committed under duress must be, on balance, the lesser of two evils;
>
> (iv) the situation leading to duress must not have been voluntarily brought about by the person coerced.[106]

He also added that if the accused had some special protective duty towards the victim, the defense may not be available, though he did not elaborate on this point. Specifically, he did not indicate whether he thought that a combatant had any special protective duty towards civilians that would vitiate the defense. One can only assume that Judge Cassese would not always conclude that combatants have such a duty towards civilians, sufficient to rule out the defense.

Judge Cassese did not subscribe to the Prosecution's view that

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106. Prosecutor v. Erdemovic, Case No.: IT-96-22A, Judgment, 7 October 1997, Separate Opinion of Judge Casesse, para. 16.

customary international law precluded duress as a defense to murder. He undertook a detailed analysis of the British cases upon which the plurality relied and concluded that they do not, in fact, "support the proposition that duress is unavailable to an accused charged with unlawful killing."[107] Ultimately, he found only one Canadian case and British and U.S. Military Manuals that except duress as a defense to murder, which he pointed out is hardly a sufficient basis upon which to ground a customary rule.

In fact, Judge Cassese found and discussed a good number of cases where courts assumed that duress was a complete defense to murder although under the facts presented the defense was not successful. Indeed, even in the Eichmann[108] case in the Israeli Supreme Court, there was a discussion of the conditions to be met if a plea of "constraint," "necessity" or "coercion" was to be met. Although Eichmann did not in fact raise the defense of coercion, the Court noted that the facts would not have supported such a plea, thereby implying that different circumstances could have supported such a defense.

Judge Cassese then examined a number of cases where the defense of duress was successful in cases charging unlawful killing. He detailed a number of Italian cases, including the *Masetti* case, and a number of German cases. In some of these cases, the crimes in question were war crimes or crimes against humanity involving the killing of innocent persons. Judge Cassese thus concluded that "no special customary rule has evolved in international law on whether or not duress can be admitted as a defence in cases of crimes involving the killing of persons."[109] From the absence of a rule, Judge Cassese would have concluded that the Tribunal must apply the general rule on duress to all crimes, including the four preconditions for its application. He recognized that the proportionality requirement will often be the most difficult to meet and may perhaps never be met where the accused shoots the victim in order to save his own life[110] but, where the "life for a life" situation is not present, it may be possible to satisfy the requirement. In any event, the defense should have been available to be presented to the trial court. Of course, he recognized that the availability of duress as a defense is severely restricted because "the right to life is one of the most fundamental and precious human rights . . . ."[111] In a case, such as Erdemovic's, where the victims will be

107. *Id.* para. 25.

108. Attorney-General of the Government of Israel v. Eichmann, 36 I.L.R. 277 (Sup.Ct.Israel 1962).

109. Prosecutor v. Erdemovic, Case No.: IT-96-22A, Judgment, 7 October 1997, Separate Opinion of Judge Cassese, para. 40.

110. Judge Cassese does in fact relate such an instance where he believed duress should be upheld. *See id.* para. 47.

111. *Id.* para. 43.

shot anyway by a firing squad, the law cannot demand that the accused "sacrifice his own life"[112] "for no benefit to anyone and no effect whatsoever apart from setting a heroic example for mankind . . . ."[113] The low military rank of the perpetrator may also make it more likely that he enjoyed no real choice when threatened with death. The law should not require "acts of martyrdom."[114]

Judge Cassese considered mitigation of punishment, even the possibility of no punishment, insufficient if duress is proved. He pointed out that if there is a conviction, the court has ruled that the accused's act is criminal, whereas if duress is accepted as an exculpatory defense the accused will be acquitted. Judge Cassese also criticized the Appeals Chamber for blatantly basing its refusal to accept duress as a defense on policy considerations. He believed that the Tribunal must apply *lex lata,* otherwise it would run the risk of violating the principle *nullam crimen sine lege.*

As a result of Judge Cassese's determination that duress can, under limited conditions, operate as a complete defense even to charges of war crimes or crimes against humanity, he would have remanded the case to the Trial Chamber to allow Erdemovic to replead. If Erdemovic raised the defense of duress, the Trial Chamber should then determine whether the evidence satisfied the stringent conditions for the plea. If it did, Erdemovic should be acquitted.

THE SEPARATE AND DISSENTING OPINION OF JUDGE STEPHEN

Judge Stephen concluded that because Erdemovic in his guilty plea disclosed evidence, which might have formed the basis of a complete defense, the plea should not have been accepted. The Trial Chamber's factual conclusion that Erdemovic could not present evidence sufficient to meet the stringent requirements of the duress defense was improper because the Trial Chamber had no evidence at all before it. Judge Stephen found no rule of customary international law on duress and thus looked to "general principles of law recognized by civilized nations."[115] There he found duress accepted by "the great majority of . . . legal systems, other than those of the common law."[116] In the common law jurisdictions he did find an exception on the viability of the defense of duress in murder cases, but only when the choice offered was between the accused's life and the life of another. Erdemovic's case was clearly distinct from such a line of

112. *Id.* para. 44.

113. *Id.*

114. *Id.* para. 47.

115. ICJ Statute, *supra* note 47, art. 38(1)(c).

116. Prosecutor v. Erdemovic, Case No.: IT-96-22-A, Separate and Dissenting Opinion of Judge Stephen, 7 October 1997, para. 25.

cases. The refusal to accept duress as a defense in murder cases had, in any event, been heavily criticized in common law jurisdictions. The exception for murder was based entirely on the concept of the law's refusing to allow the accused to prefer his own life over that of an innocent victim, and many cases had referred to the maxim that the accused "ought rather to die himself than kill an innocent." The common law cases were based on circumstances concerning the choice between saving the life of the accused *or* saving the life of the victim, not between saving the life of the accused *or* ensuring that the accused was killed along with the victims. Judge Stephen noted that in Erdemovic's case it was never possible to save the victims' lives.

Judge Stephen then undertook a detailed description of a number of English cases where the unavailability of the defense of duress in murder cases was heavily criticized, briefly ruled available, and then rapidly restored to the former rule of unavailability.[117] He concluded it was illogical to allow duress to operate in mitigation of punishment but not as a defense. All the English cases involved "one life or another" rather than "one life or both lives," as in Erdemovic's case.

A review of various authors also persuaded Judge Stephen that duress should sometimes operate as a complete defense. Proportionality must always play a role in determining whether the defense of duress is available. The evil perpetrated by succumbing to the duress must not outweigh the evil perpetrated if the accused had not succumbed to the duress.

From the cases he reviewed and a discussion of the reasons for the rules and the exceptions, Judge Stephens deduced a general principle of law accepting duress as a defense to murder. He was ready to apply this principle in international jurisprudence at least where the accused is not simply preferring his life over another person's life but is choosing, under extreme duress, to save his own life where the victims will die no matter what the accused does. Judge Stephen agreed that the case should be remanded so that Erdemovic could replead to the charges in full knowledge of the consequences.

THE IRRECONCILABLE DIFFERENCE IN THE JUDGES' OPINIONS

The Erdemovic case reveals a sizable chasm in the thinking of the Appeals Chamber judges both with respect to the availability of the defense of duress in war crimes trials and on the question of appropriate sources of law applicable in the Tribunal. Judges McDonald, Vohrah, and Li were not prepared to allow the defense of duress to exonerate a soldier accused of war crimes or crimes against humanity despite the fact that they recognized

117. *See id.* para. 29.

that most countries do allow such a defense to murder, that certain international tribunals had allowed such a defense, and that Erdemovic's case presented a distinctive factual scenario where his refusal to obey his commanding officer's illegal order would not have resulted in the saving of the victims' lives. These judges wanted an absolute rule prohibiting the shooting of civilians made applicable to all soldiers in combat.

Judges Cassese and Stephen, in their separate dissenting opinions, thought there was ample precedent permitting the defense of duress, in both domestic and international courts, for murder and for the killing of civilians in certain very limited circumstances. They thought that the factual peculiarity of Erdemovic's case, where none of the victims would be saved, meant that it was possible that Erdemovic might be able to meet the stringent conditions applicable to the availability of the duress defense and that Erdemovic was entitled to a trial on the issue.

As for appropriate sources of law to be applied by the Tribunal, Judges McDonald and Vohrah found no applicable treaty, customary rule, or general principles of law. They therefore looked to the overall purposes of the Tribunal and of international humanitarian law, and, rejecting "utilitarian logic,"[118] based their judgment on "an absolute moral postulate."[119] Such a source of law may come close to resembling the personal moral views of particular judges and thus may be expected to change as the judges change.

Judge Cassese also found no applicable treaty or customary rule but, from the absence of such sources, he concluded that the Tribunal should apply the general rule on duress, which he found available as a defense in certain limited circumstances. Judge Stephen also concluded that the appropriate source of law was "general principles of law recognized by civilized nations,"[120] which he concluded did not prevent the availability of the defense of duress in the unusual circumstances of Erdemovic's case.

DURESS UNDER THE STATUTE OF THE INTERNATIONAL CRIMINAL

Article 31 of the Rome Statute of the International Criminal Court is titled "Grounds for excluding criminal responsibility" and specifically includes duress:

> 1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct: . . .

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118. Prosecutor v. Erdemovic, Case No.: IT-96-22-A, Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, para. 80.

119. *Id.* paa. 83.

120. *See id.* para. 1(d)(ii).

> (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and responsibly to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
>
> (i) Made by other persons; or
>
> (ii) Constituted by other circumstances beyond that person's control.[121]

The ground of duress[122] as a basis for excluding criminal responsibility is included in the ICC's Statute despite the fact that the Statute also treats the defense of superior orders in much the same way as the ICTY and ICTR Statutes. Article 33 of the ICC's Statute states:

> 1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
>
> (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
>
> (b) The person did not know that the order was unlawful; and
>
> (c) The order was not manifestly unlawful.
>
> 2. For purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.[123]

The ICC's Statute's treatment of the defense of duress and the defense of superior orders as separate defenses means that the statute contemplates that there may be some crimes within the jurisdiction of the Court involving superior orders, even superior orders that are manifestly unlawful, but which may, nevertheless, permit a defense of duress.

Perhaps the main legal flaw of the majority's analysis in the *Erdemovic* case was the assumption that the type of duress under which a soldier finds himself when issued a manifestly illegal order to kill civilians is always the

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121. *Rome Statute of the International Criminal Court*, art. 31, U.N. Doc. 32/A/CONF.183/9, *reprinted in* 37 I.L.M. 999 (1998).

122. It is clear from art. 31, para. 1(d)(ii) that the defense of necessity is also included in the ICC Statute.

123. *Id.* art. 33, paras. 1-2.

same or, if not the same, should be treated similarly by the Tribunal. While it is true that the defense of duress often accompanies the defense of superior orders, and that there are always elements of duress in superior orders, the levels of duress attached to superior orders may be of a fundamentally differing degree. In Erdemovic's case, if his commanding officer has simply said "Shoot those civilians" and had not threatened to kill Erdemovic if he disobeyed, there would have been some level of duress applied to Erdemovic. Soldiers certainly feel pressure to obey their commanding officers, but the duress involved would not have given rise to any separate defense of duress. On the other hand, when the manifestly illegal order is also accompanied with threats to kill (or maim, or rape, or cause other grievous bodily harm to the soldier or to someone for whom he could reasonably be expected to have special concern) then the separate defense of duress should be available even when the crimes alleged are the most heinous and committed against persons protected by international humanitarian law.

Judge Cassese carefully distinguished the defense of superior orders from the defense of duress and noted that "[s]uperior orders may be issued without being accompanied by any threats to life or limb."[124] He would have allowed Erdemovic a defense of duress but only in carefully limited circumstances as outlined above.[125]

The crucial question then is whether all duress in the context of superior orders should receive the same legal treatment. The majority thought that all levels of duress should be rejected as grounds for a defense to war crimes or crimes against humanity. The dissenters were prepared to distinguish levels of duress, and while dismissing some levels of duress as not giving rise to a defense would, nevertheless, preserve the defense of duress in the context of superior orders to commit a manifestly illegal order, provided certain stringent conditions were met. The dissenters' careful gradation of culpability ultimately seems fairer, especially in the peculiar factual circumstances of the Erdemovic case. The judges who will sit on the International Criminal Court will no doubt have to grapple with the inter-relationship of the defense of superior orders and the defense of duress. They should find the dissenting opinions of Judges Cassese and Stephen illuminating.

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124. Prosecutor v. Erdemovic, Case No.: IT-96-22, Appeals Chamber Judgement, 7 October 1997, Separate Dissenting Opinion of Judge Cassese, para. 15; *see also*, GEERT-JAN G. J. KNOOPS, DEFENSES IN CONTEMPORARY INTERNATIONAL CRIMINAL LAW, 166-168 (2001).

125. Prosecutor v. Erdemovic, Case No.: IT-96-22, Appeals Chamber Judgement, 7 October 1997, Separate Dissenting Opinion of Judge Cassese, paras. 43-46.

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Mens Rea and the International Criminal Tribunal for the Former Yugoslavia

William A. Schabas*

Mens Rea is derived from a maxim of legal Latin used to refer to the mental (or moral or psychological) element of crime: *actus non facit reum nisi mens sit rea.* Literally, it is said to mean "guilty mind." In one of the leading common law cases, Lord Goddard said that "the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind."[1] The requirement for a *mens rea* element of crimes is probably a general principle of law, as this term is understood in article 38 of the Statute of the International Court of Justice. Criminal law does not, as a general rule, address accidental behaviour, nor is it interested in vicarious forms of liability, matters that generally fall within regimes of civil liability or tort. Those who offend the criminal law are expected to intend the consequences of their acts. Most legal systems have treated the concept of *mens rea* as a presumption,[2] by which proof of guilty intent or knowledge is an element of any criminal offences, although like all presumptions it is subject to exceptions. Absent an indication to the contrary, law requires that a person who physically commits a crime do so intentionally. But "absolute liability" offences, where a person may be convicted of a serious offence absent any proof of intent or *mens rea*, are certainly far from unknown to national justice systems.

A common example of such an absolute liability offence is the crime that is often called statutory rape, namely, having sexual relations with a girl who is under some specified age, perhaps sixteen, or fourteen, or thirteen. Upon proof that the victim was below the age of consent, the crime is committed, irrespective of whether the accused believed she was older. Many legal systems simply refuse to entertain a defence of mistake

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1. Brend v. Wood, 175 L.T.R. 306, 307 (1946); *see also* Harding v. Price, 1 All E.R. 283, 284 (1948).

2. *See* Sherras v. de Rutzen, 72 L.T.R. 839 (1895); *see also*, JEAN PRADEL, DROIT PÉNAL COMPARÉ 251-53 (1995).

of fact in respect of such offences. Thus, an individual may commit what he believes to be the totally innocent act of having sexual relations with a consenting adult, but because of an honest mistake about her age he finds himself subject to punishment for a serious crime. Recently, the United Nations agreed to include such an "absolute liability" offence within the subject matter jurisdiction of its third *ad hoc* tribunal, the Special Court for Sierra Leone, which is supposedly designed to prosecute only "those who bear the greatest responsibility" for the atrocities committed during that country's civil war.[3]

The focus of international human rights law in the area of criminal justice is on procedural rather than substantive issues. This does not mean that international human rights law has nothing to contribute with respect to the issue of *mens rea.* For example, article 6(2) of the International Covenant on Civil and Political Rights limits the use of capital punishment in States where it has not been abolished to the "most serious crimes."[4] The "Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty," adopted by the Economic and Social Council in 1984 and subsequently endorsed by the General Assembly, declare that the ambit of the term most serious crimes "should not go beyond intentional crimes, with lethal or other extremely grave consequences."[5] In a recent finding, the United Nations Human Rights Committee said that mandatory imposition of the death penalty for crimes of murder was arbitrary, because it failed to take into account the individual circumstances of the offender.[6]

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3. *See* Statute of the Special Court for Sierra Leone, art. 5(a). For information on the Special Court see generally, Micaela Frulli, *The Special Court for Sierra Leone: Some Preliminary Comments*, 11 EUR. J. INT'L L. 857 (2000); Robert Cryer, *A 'Special Court' for Sierra Leone?*, 50 INT'L & COMP. L. Q. 435 (2001); Suzannah Linton, *Cambodia, East Timor and Sierra Leone: Experiments in International Justice*, 12 CRIM. L. F. 185 (2001); Avril McDonald, *Sierra Leone's Shoestring Special Court*, 84 INT'L REV. RED CROSS 121 (2002); Stewart Beresford & A.S. Muller, *The Special Court for Sierra Leone: An Initial Comment*, 14 LEIDEN J. INT'L L. 635 (2001); Melron C. Nicol-Wilson, *Accountability for Human Rights Abuses: The United Nations' Special Court for Sierra Leone*, AUSTRALIAN INT'L L.J. 159 (2001); Celina Schocken, *The Special Court for Sierra Leone: Overview and Recommendations*, 20 BERKELEY J. INT'L L. 436 (2002); Abdul Tejan Cole, *Legal Basis of the Special Court for Sierra Leone*, 14 INTERIGHTS BULL. 37 (2002).

4. International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171, 174.

5. *Safeguards Guaranteeing Protection of the Rights of Those Facing The Death Penalty*, ESC Res. 1984/50, Annex, para. 1 (1984); *Human Rights in the Administration of Justice*, U.N. GAOR, 39th Sess., GA Res. 39/118 (1984).

6. *See* Thompson v. St. Vincent and the Grenadines (Communication No. 806/1998), U.N. Doc. CCPR/C/70/D/806/1998, para. 8.2 (2000). These views were endorsed by the East Caribbean Court of Appeal in Spence v. The Queen, Hughes v. The Queen, Criminal Appeal Nos. 20 of 1998 and 14 of 1997, Judgement of 2 April 2001, *available at*

But it is certainly difficult to claim, as the law now stands and as it is interpreted by courts and treaty bodies, that international human rights standards dictate that *mens rea* be an essential element of all criminal prosecutions. In fact, some may argue that too demanding a standard can even stymie the enforcement of other norms in international human rights law, such as the obligation upon States to:

> declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.[7]

SOURCES OF THE PRESUMPTION AT THE ICTY

The *Statute of the International Criminal Tribunal for the former Yugoslavia* does not address the issue of *mens rea* directly, and the other relevant normative instrument, the *Rules of Procedure and Evidence*, does nothing to complete the picture.[8] Perhaps a few hints can be gleaned from the Report of the Secretary-General which was prepared prior to the establishment of the Tribunal by the Security Council. For example, it rejects the concept of guilt by association, whereby a member of a criminal association or organisation, by the fact of mere membership, could be made subject to the jurisdiction of the Tribunal. "The criminal acts set out in this statute are carried out by natural persons; such persons would be subject to the jurisdiction of the International Tribunal irrespective of membership in groups," said the Secretary General.[9]

The absence of any real guidance on the subject in the applicable law of the International Criminal Tribunal for the former Yugoslavia (ICTY) contrasts markedly with the law applicable to the International Criminal Court. The *Rome Statute of the International Criminal Court* declares, at article 30:

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http://www.ecsupremecourts.org.lc (last visited Apr. 9, 2003).

7. International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 12, 1969, 660 U.N.T.S. 195, art. 4(a).

8. The Rules of Procedure and Evidence create their own offences to deal with contempt of court, obstruction of justice and perjury. The applicable texts require proof of *mens rea*, using words like "contumaciously" and "with the intention of." Rule 77, U.N. Doc. IT/32/Rev.26. For application of the concept, see Prosecutor v. Aleksovski, Case No.: IT-95-14/1-AR77, Judgement on Appeal by Anto Nobilo against Finding of Contempt, 30 May 2001.

9. *Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, 22 Feb. 1993, U.N. Doc. S/25704, para. 56.

> Mental element
>
> 1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
>
> 2. For the purposes of this article, a person has intent where:
>
> (a) In relation to conduct, that person means to engage in the conduct;
>
> (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
>
> 3. For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' and 'knowingly' shall be construed accordingly.[10]

Nevertheless, from their very first decisions, the judges of the ICTY have simply assumed that *mens rea* is an essential element of the offences within their jurisdiction. The issue was central to the first conviction, that of Erdemovic, because the availability of the defence of duress had been raised. Erdemovic had confessed to killing a large number of defenceless prisoners at Srebrenica, but when asked to explain his actions he said he had been compelled to do so. This defence of duress amounts to a claim that the accused lacked a guilty mind, because the compulsion under which he acted amounted to something irresistible, leaving him no moral choice in the matter. When his guilty plea was accepted by the Trial Chamber, it examined the possible defence duress, noting that it "might go so far as to eliminate the *mens rea* of the offence and therefore the offence itself".[11] All of the judges of the Appeals Chamber, in their 1997 ruling rejecting the admissibility of a defence of duress, approached the issue as one of the presence or absence of *mens rea*.[12]

However, the first guilty verdict by the Tribunal following a full-blown

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10. *Rome Statute of the International Criminal Court*, 17 July 1998, art. 30, U.N. Doc. A/CONF.183/9 (entered into force 1 July 2002). *See* Roger S. Clark, *The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences*, 12 CRIM. L. F. 291 (2001); WILLIAM A. SCHABAS, INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 85-87 (2001).

11. Prosecutor v. Erdemovic, Case No.: IT-96-22-T, Sentencing Judgement, 29 Nov. 1996, para. 14; 108 I.L.R. 180, 186.

12. *See* Prosecutor v. Erdemovic, Case No.: IT-96-22-A, Sentencing Appeal, 7 Oct. 1997, para. 71; 111 I.L.R. 298, 362 (Separate and Dissenting Opinion of Judge Stephen); *see also id.* para. 27; 111 I.L.R. at 442 (Separate and Dissenting Opinion of Judge Cassese).

trial hardly addressed the issue. Only one paragraph in the *Tadic* judgement refers to this question, and it summarily considers existing case law on whether or not the perpetrator of crimes against humanity must have knowledge of the context within which the acts are committed.[13] The *mens rea* of the offences was not considered, most likely because Dusko Tadic offered an alibi defence, which does not raise questions about intent, and simply denies that the accused was present or involved when the crime was committed.

Mens rea was given considerable attention in the *Celebici* judgement of November 1998. Because some of the accused were charged as accomplices and not as principals, the Trial Chamber was concerned with the mental element applicable to such secondary participation. In the case of a principal perpetrator, courts, including the ICTY, generally presume that absent evidence to the contrary a person is deemed to intend the consequences of his or her acts. But in the case of secondary offenders or accomplices, the acts of assistance are often quite ambiguous, and it is not as easy to simply presume the guilty mind from the physical act. According to the judgement of Trial Chamber II *quarter*,

> [i]t is, accordingly, the view of the Trial Chamber that, in order for there to be individual criminal responsibility for degrees of involvement in a crime under the Tribunal's jurisdiction which do not constitute a direct performance of the acts which make up the offence, a showing must be made of both a physical and a mental element. The requisite *actus reus* for such responsibility is constituted by an act of participation which in fact contributes to, or has an effect on, the commission of the crime. Hence, this participation must have 'a direct and substantial effect on the commission of the illegal act.' The corresponding intent, or *mens rea*, is indicated by the requirement that the act of participation be performed with knowledge that it will assist the principal in the commission of the criminal act. Thus, there must be 'awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime.'[14]

The issue of *mens rea* was explained in the *Tadic Appeal Decision* of July, 1999. According to the Appeals Chamber:

[t]he basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle

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13. *See* Prosecutor v. Tadic, Case No.: IT-94-1-T, Opinion and Judgement, 7 May 1997, para. 657; 112 I.L.R. 2, 222.

14. Prosecutor v. Delalic et al., Case No.: IT-96-21-T, Judgement, 16 Nov. 1998, para. 326 (reference omitted), *available at*http://www.un.org/icty/celebici/trialc2/judgement/index.htm (last visited Mar. 19, 2003).

of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (*nulla poena sine culpa*)."[15]

In support, the Appeals Chamber referred to article 7(1) of the *Statute*, which recognises the principle of individual responsibility for criminal acts. Although perhaps only implied, it should be obvious that reference to "culpability" means that the crime must be committed by somebody with intent or knowledge, in other words, with *mens rea*.

MENS REA AND THE ELEMENTS OF THE CRIMES

Many of the crimes defined in Article 2 to 5 of the *Statute* include, either explicitly or implicitly, reference to specific mental elements. In other words, the judges are not merely applying a presumption in requiring proof of *mens rea* for a conviction, because *mens rea* is an integral component of the crime's definition. For example, article 2 of the *Statute* gives the Tribunal subject-matter jurisdiction over an exhaustive list of "grave breaches of the Geneva Conventions." According to the paragraphs in article 2, these include *wilful* killing, *wilfully* causing great suffering or serious injury to body or health and *wilfully* depriving a prisoner of war or a civilian of the rights of fair and regular trial, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and *wantonly*.

In the *Celibici case*, the Trial Chamber examined the scope of the term "wilful killing," and its relationship to "murder," which is the term used in many criminal justice systems to describe intentional homicide. If the term "killing" were to stand alone, without the adjective "wilful," it might be argued that the crime might also include non-intentional forms of homicide. The ICTY Trial Chamber referred to the ordinary meaning of the term "wilful," as defined in the Concise Oxford English Dictionary, which is "intentional, deliberate."[16]

> 420. The first question which arises is whether there is a qualitative difference between 'wilful killing' and "murder" such as to render the elements constituting these offences materially different. The Trial Chamber notes that the term 'wilful killing' has been incorporated directly from the four Geneva Conventions, in particular articles 50, 51, 130 and 147 thereof, which set out those acts that constitute "grave breaches" of the Conventions. In the French text of the Conventions,

15. Prosecutor v. Tadic, Case No.: IT-94-1-A, Judgement, 15 July 1999, para. 186, *available at* http://www.un.org/icty/tadic/appeal/judgement/index.htm (last visited Mar. 19, 2003).

16. Prosecutor v. Delalic et al., Case No.: IT-96-21-T, Judgement, 16 Nov. 1998, para. 433.

> this terminology is translated as '*l'homicide intentionnel.*'. On the other hand, "murder", prohibited by common article 3 of the Conventions, is translated literally in the French text of the Conventions as '*meurtre.*'
>
> 421. The Trial Chamber takes the view that it is the simple essence of these offences, derived from the ordinary meaning of their terms in the context of the Geneva Conventions, which must be outlined in the abstract before they are given concrete form and substance in relation to the facts alleged. With this in mind, there can be no line drawn between 'wilful killing' and 'murder' which affects their content.[17]

The Trial Chamber relied upon a teleological interpretation of the term "wilful," observing that the purpose of the grave breaches provision of the Geneva Conventions is proscribing "the *deliberate* taking of the lives of those defenceless and vulnerable persons who are the objects of the Conventions' protections."[18] The Trial Chamber said that the *mens rea* of the grave breach of wilful killing was "an intention on the part of the accused to kill, or inflict serious injury in reckless disregard of human life."[19] Another of the grave breaches, the crime of wilfully causing great suffering, has been interpreted as "an intentional act or omission which causes serious mental or physical suffering or injury, provided the requisite level of suffering or injury can be proven."[20]

But what of those grave breaches which do not include, in their definition, the words "willful," "wilfully" or "wantonly?" The Tribunal has nevertheless held that these must also be committed with intent. Thus, the grave breach of inhuman treatment consists of "an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental harm or physical suffering or injury or constitutes a serious attack on human dignity."[21]

The *chapeau* of article 2 requires that the grave breaches be committed against "protected persons." But must the offender *know* that the victim is a "protected person," as this term is meant by the *Geneva Conventions*. "Protected persons" are defined in article 4(1) of the fourth Geneva Convention as those "in the hands of a Party to the conflict or Occupying

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17. *Id.*

18. *Id.* para. 431. *See also* Prosecutor v. Blaskic, Case No.: IT-95-14-A, Judgement, 3 Mar. 2000, para. 153; Prosecutor v. Kordic & Cerkez, Case No.: IT-95-14/2-T, Judgement, 26 Feb. 2001, para. 229.

19. Prosecutor v. Delalic et al., Case No.: IT-96-21-T, Judgement, 16 Nov. 1998, para. 439.

20. Prosecutor v. Kordic & Cerkez, Case No.: IT-95-14/2-T, Judgement, 26 Feb. 2001, at para. 245.

21. Prosecutor v. Delalic et al., Case No.: IT-96-21-T, Judgement, 16 Nov. 1998, para. 348.

Power of which they are not nationals."[22] Wilful killing of a combatant during an armed conflict is not a crime, indeed it is the very essence of warfare. It is one of the "lawful acts of war" to which reference is made in article 15(2) of the *European Convention of Human Rights*.[23] If *mens rea* is taken to mean intent and knowledge, the combatant who kills a "protected person" in error, believing that person to be a combatant and a lawful target, ought to have a defence of mistake of fact.[24]

Article 3 of the ICTY *Statute* is the "umbrella rule"[25] encompassing a broad range of unenumerated serious violations of the "laws or customs of war" as recognised at customary international law, in addition to the brief list of punishable acts that actually appears in the text of the provision.[26] As is the case with grave breaches, some of the paragraphs in article 3 include words that indicate intent to be an element of the offense. Thus, it is a violation of the laws or customs of war to employ weapons "*calculated* to cause unnecessary suffering." In addition, "wanton destruction of cities, towns or villages, or devastation not justified by military necessity" is proscribed.

In the case of those offences not specifically listed as violations of the laws or customs of war, the Tribunal has also imposed a *mens rea* requirement, even where this is not part of the text of the infraction as defined by customary international law. For example, in *Aleksovski* it considered the mental element of the crime of "outrages upon personal dignity," which is drawn from common article 3 of the four *Geneva Conventions*. The Trial Chamber required, as an element of the offence, that the accused intend to humiliate the victim.[27]

In the case of genocide, the definition in article 4 of the *Statute* is drawn without significant change from article II of the 1948 *Genocide*

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22. Geneva Convention of August 12, 1949 Relative to the Treatment of Prisoners of War, (1950) 75 U.N.T.S. 135; *see also* Prosecutor v. Tadic, Case No.: IT-94-1-A, Judgement, 15 July 1999, para. s. 163-71; Prosecutor v. Aleksovski, Case No.: IT-95-14/1-A, Judgement, 24 Mar. 2000, para. 151.

23. Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221, E.T.S. 5 (entered into force 3 Sept. 1953).

24. *See* Clark, *supra* note 10, art. 32 (discussing a codification of the defence) Whether or not the perpetrator must know that the victim is a protected person is discussed by Roger Clark. *See id* at 330-31.

25. Prosecutor v. Furundzija, Case No.: IT-95-17/1-T, Judgement, 10 Dec. 1998, para. 133; Amended Statute of the International Tribunal, art. 3 [hereinafter ICTY Statute] *available at* http://www.un.org/icty/legaldoc/index.htm (last visited April 9, 2003).

26. Prosecutor v. Tadic, Case No.: IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, para. 137.

27. Prosecutor v. Aleksovski, Case No.: IT-95-14/1-T, Judgement, 25 June 1999, para. 57. *But see* Prosecutor v. Kunarac et al., Case. No.: IT-96-23-T and IT-96-23/1-T, Judgement, 22 Feb. 2001, paras. 164-166.

Convention, and has specific mental elements set out explicitly in the text. Genocide involves commission of one of five acts, "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." Furthermore, several of the five punishable acts have their own mental elements. In the *Jelisic* appeal, the Office of the Prosecutor argued that the concept of *dolus specialis*, which is a civil law term used to describe the *mens rea* of a crime, set too high a standard, and could not be equated with the common law concepts of "specific intent" or "special intent."[28] The Appeals Chamber dealt with the matter rather laconically, saying simply that the Trial Chamber had used the term *dolus specialis* as if it meant "specific intent."[29] The Appeals Chamber referred to "specific intent" to describe "the intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such" or, in other words, the normative requirement set out in the *chapeau* of the definition of genocide.[30] The *Sikirica* Trial Chamber criticised the Prosecutor for introducing a debate about theories of intent for the crime of genocide, noting that the matter should be resolved with reference to the text of the provision:

> The first rule of interpretation is to give words their ordinary meaning where the text is clear. Here, the meaning of intent is made plain in the chapeau to Article 4(2). Beyond saying that the very specific intent required must be established, particularly in the light of the potential for confusion between genocide and persecution, the Chamber does not consider it necessary to indulge in the exercise of choosing one of the three standards identified by the Prosecution. In the light, therefore, of the explanation that the provision itself gives as to the specific meaning of intent, it is unnecessary to have recourse to theories of intent.[31]

The text of article 5, crimes against humanity, has little to say on the subject of the mental element, with the exception of paragraph (h), which requires the existence of a discriminatory motive.[32] In *Kunarac*, the Trial Chamber held that the accused must have had the intent to commit the underlying offence or offences charged, and must have known "that there is

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28. Prosecutor v. Jelisic, Case No.: IT-95-10-A, Prosecution's Appeal Brief (Redacted Version), para. 4.22; *see also* Prosecutor v. Sikirica et al., Case No.: IT-95-8-I, Judgement on Defence Motions to Acquit, 3 Sept. 2001, para. 142.

29. Prosecutor v. Jelisic, Case No.: IT-95-10-A, Judgement, 5 July 2001, para. 51.

30. *Id.* para. 45.

31. Prosecutor v. Sikirica et al., Case No.: IT-95-8-I, Judgement on Defence Motions to Acquit, 3 Sept. 2001, para. 60.

32. *See* Prosecutor v. Kordic & Cerkez, Case No.: IT-95-14/2-T, Judgement, 26 Feb. 2001, paras. 211-12; Prosecutor v. Kvocka et al., Case No.: IT-98-30/1-T, Judgement, 2 Nov. 2001, para. 195; Prosecutor v. Krnojelac, Case No.: IT-97-25-T, Judgement, 15 Mar. 2002, paras. 435-36; Prosecutor v. Vasiljevic, Case No.: IT-98-32-T, Judgement, 29 Nov. 2002, para. 228.

an attack on the civilian population and that his acts comprise part of that attack, or at least *that he took* the risk that his acts were part of the attack."[33] But there is no requirement that the perpetrator have knowledge of the details of the attack.[34] In *Tadic*, the Appeals Chamber found that discriminatory intent is not, as a general rule, an element of crimes against humanity.[35] But as with the other three categories of crime, there has never been any doubt that intent or knowledge be a requirement for proof that an individual has committed crimes against humanity. With respect to the crime against humanity of rape, for example, it must be proven that the accused knew that the victim did not consent.[36]

There have been debates, of course, about the nature of the intent or knowledge that is required for specific offences. In *Krnojelac*, a Trial Chamber held that the *mens rea* of torture must aim at obtaining information or a confession or at punishing, intimidating or coercing the victim or third person or at discriminating on any ground against the victim or third person. It said that "although other purposes may come to be regarded as prohibited under the torture provision in due course, they have not as yet reached customary status."[37] This contrasted with the broader view taken in earlier judgements, holding that torture can also be carried out with the intent to "humiliate" the victim. In particular, it noted that "the purpose to 'humiliate' the victim" mentioned in the *Furundzija*[38] and *Kvocka*[39] judgements "is not expressly mentioned in any of the principal

33. Prosecutor v. Kunarac et al., Case. No.: IT-96-23-T and IT-96-23/1-T, Judgement, 22 Feb. 2001, para. 434.

34. *See id.* para. 102.

35. Prosecutor v. Tadic, Case No.: IT-94-1-A, Judgement, 15 July 1999, para. 305. *See also* Prosecutor v. Kordic & Cerkez, (Case No.: IT-95-14/2-T), Judgement, 26 Feb. 2001, at para. 186.

36. *See* Prosecutor v. Kunarac et al., Case. No.: IT-96-23-T, Judgement, 22 Feb. 2001, paras. 147, 460-64; *see also* Prosecutor v. Kunarac et al., Case No.: IT-96-23/1-A), Judgement, 12 June 2002, para. 127. Note, however, the very first version of Rule 96(ii) of the Rules of Procedure and Evidence, IT/32, which bluntly stated that consent was not a defence to rape. The judges quickly fixed this faux pas with an amendment. *See* William A. Schabas, *Le règlement de preuve et de procédure du Tribunal international chargé de poursuivre les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l'ex-Yougoslavie depuis 1991*, 10 REVUE QUÉBÉCOISE DU DROIT INTERNATIONAL 112 (1994).

37. Prosecutor v. Krnojelac, Case No.: IT-97-25-T, Judgement, 15 Mar. 2002, para. 186.

38. Prosecutor v. Furundzija, Case No.: IT-95-17/1-T, Judgement, 10 Dec. 1998, para. 162.

39. Prosecutor v. Kvocka et al., Case No.: IT-98-30/1-T, Judgement, 2 Nov. 2001, paras. 141, 152, 157.

international instruments prohibiting torture."[40] The Trial Chamber also observed that "[n]or is there a clear jurisprudential disposition towards its recognition as an illegitimate purpose."[41] It acknowledged that "[t]here may be a tendency, particularly in the field of human rights, towards the enlargement of the list of prohibited purposes" but reiterated that "the Trial Chamber must apply customary international humanitarian law as it finds it to have been *at the time when the crimes charged were alleged to have been committed.*"[42]

Thus, although not required within the text of the *ICTY Statute*, in contrast with the *Rome Statute*, the judges of the ICTY have treated *mens rea* as an element of all of the offences within the Tribunal's subject matter jurisdiction. Indeed, there are more or less systematic efforts by the judges to identify the specific mental element of each crime. Incidentally, this would suggest that article 30 of the *Rome Statute* is not only confusing and ambiguous, it is also superfluous, and that judges of the International Criminal Court, like their colleagues at the ICTY, would easily have understood the mental element of crimes without them having to be told.

SOME EXCEPTIONS TO THE PRINCIPLE IN THE CASE LAW OF THE TRIBUNALS

Although the Tribunal has presumed *mens rea* to be an element of the offences over which it has jurisdiction, it has also made exceptions to this principle. There are two types of situation in which a person may be convicted of a crime for which the offender lacked full knowledge or intent. The first is established in the *Statute* itself. Article 7(3) sets out the principle of superior responsibility, by which someone may be convicted of a crime committed by a subordinate when that person "knew or had reason to know that the subordinate was about to commit such acts."[43] The second has been devised by the judges, and in effect adds a form of criminal participation or complicity to the list that appears in article 7(1) that has been baptised "joint criminal enterprise."[44]

Command or superior responsibility is a form of criminal participation by which a person in a hierarchically responsible position may be held liable for the acts of subordinates. It differs from ordinary complicity, which exists upon proof that the commander ordered the act or otherwise aided and abetted its performance. A commander who actually knows that

40. Prosecutor v. Krnojelac, Case No.: IT-97-25-T, Judgement, 15 Mar. 2002, para. 186.

41. *Id.*

42. *Id.*

43. ICTY Statute, art. 7(3).

44. *Id.* art. 7(1)

troops under his or her command are about to commit an atrocity or are in the course of committing one, and who fails to intervene, can be prosecuted as an ordinary accomplice. But as the *Celibici* Trial Chamber explained, in the citation reproduced earlier in this article, to be an accomplice there must be some proof that the accused had knowledge of what the principal was doing.[45] Command responsibility takes this a significant step further, implicating the commander as an accomplice in the acts perpetrated by subordinates but in the absence of proof of such knowledge. Under command responsibility, it is only required that the commander had "reason to know" of the crimes, not that he or she actually knew of them.[46] The Secretary-General of the United Nations, in the report submitted prior to adoption of the *Statute of the International Criminal Tribunal for the Former Yugoslavia* by the Security Council, described superior responsibility as "imputed responsibility or criminal negligence."[47]

Superior or command responsibility developed in a military context and was applied, at least historically, to war crimes committed in international armed conflict.[48] It was later codified with respect to grave breaches of the Geneva Conventions in *Protocol Additional to the 1949 Geneva Conventions and Relating to the Protection of Victims of International Armed Conflicts.*[49] Command responsibility in the case of war crimes is closely related to issues of military discipline, and the fact that a commander had specific duties that he or she had failed to fulfil. In the leading post-Second World War case, a United States Military Commission

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45. Prosecutor v. Delalic et al., Case No.: IT-96-21-T, Judgement, 16 Nov. 1998, para. 326 (reference omitted), *available at*http://www.un.org/icty/celebici/trialc2/judgement/index.htm (last visited Mar. 19, 2003).

46. ICTY Statute, art. 7(3); ICTR Statute, art. 6(3).

47. Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808, UN Doc. S/25704, para. 56 (1993); *see also* M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 345-74 (1996); EDWARD M. WISE, GENERAL PRINCIPLES OF CRIMINAL LAW, Part 3, 13ter Nouvelles études pénales 39, 46-47 (1998).

48. *See* L.C. Green, *Command Responsibility in International Humanitarian Law*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 319, 320-27 (1995) (discussing early foundations of the principle of command responsibility); L.C. Green, *Superior Orders and Command Responsibility*, 27 CAN. YRBOOK INT'L L. 167 (1989); Hays Parks, *Command Responsibility for War Crimes*, 62 MIL. L. REV. 1 (1973).

49. Art. 86(2), 1125 U.N.T.S. 3 (entered into force Dec. 7, 1979):

> The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Id.

noted that General Yamashita "was an officer of long years of experience, broad in its scope, who has had extensive command and staff duty."[50] Although acknowledging it would be absurd to condemn a commander merely because one of his or her soldiers committed a crime, the Commission held that "where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops. . . ."[51] When Yamashita's *habeas corpus* petition was heard by the United States Supreme Court, dissenting Justice Rutledge voted to quash the conviction, believing it was impossible to determine whether the crime was a "wilful, informed and intentional omission to restrain and control troops *known* by petitioner to be committing crimes or was only a negligent failure on his part *to discover* this and take whatever measures he then could to stop the conduct."[52] But the conviction stood and Yamashita was executed.

The *Statute* of the Tribunals allows conviction of a commander or superior who "had reason to know" of crimes being committed by subordinates, and these words clearly indicate the possibility that a commander can be found guilty who did not, as a matter of fact, have such knowledge.[53] This is not to say that the commander's behaviour would be

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50. The Trial of General Tomoyuki Yamashita, IV L.R.T.W.C. 1, 36-37, U.S. Mil. Tribunal (Oct. 8, 1945 – Dec. 7, 1945); *In re* Yamashita, 327 U.S. 1 (1945). On the Yamashita case, see A. FRANK REEL, CASE OF GENERAL YAMASHITA (1949), RICHARD L. LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY (1982); LAWRENCE TAYLOR, A TRIAL OF GENERALS: HOMMA, YAMASHITA, AND MACARTHUR (1981); Ann-Marie Prévost, *Race and War Crimes: The 1945 War Crimes Trial of General Tomoyuki Yamashita*, 14 HUM. RTS. Q. 289 (1992); Major Bruce D. Landrum, *The Yamashita War Crime Trial: Command Responsibility Then and Now*, 149 MIL. L. REV. 293 (1995). The other major post-Second World War command responsibility case is Canada v. Meyer, 4 L.R.T.W.C. 98, Canadian Mil. Court 98 (1948). On the Meyer case, see PATRICK BRODE, CASUAL SLAUGHTERS AND ACCIDENTAL JUDGMENTS: CANADIAN WAR CRIMES PROSECUTION, 1944-1948 (1997); HOWARD MARGOLIAN, CONDUCT UNBECOMING: THE STORY OF THE MURDER OF CANADIAN PRISONERS OF WAR IN NORMANDY (2000).

51. The Trial of General Tomoyaki Yamashita, IV L.R.T.W.C. 1, 35, U.S. Mil. Tribunal (Oct. 8, 1945 – Dec. 7, 1945).

52. *Id.*; *see also* the comments on the case, *In re* Yamashita, 327 U.S. 1, 52 (1946).

53. On superior or command responsibility as applied by the Tribunal, see Daryl Mundis, *Crimes of the Commander: Superior Responsibility under Article 7(3) of the ICTY Statute*, *in* CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (Gideon Boas & William A. Schabas eds.) (forthcoming 2003); Sonja Boelaert-Suominen, *Prosecuting Superiors for Crimes Committed by Subordinates: A Discussion of the First Significant Case Law Since the Second World War*, 41 VA. J. INT'L L. 747 (2001); Kirsten M.F. Keith, *The Mens Rea of Superior Responsibility as Developed by ICTY Jurisprudence*, 14 LEIDEN J. INT'L L. 617 (2001).

entirely innocent. The whole concept of superior responsibility is built upon the premise that those who assume command positions must conduct themselves diligently and with proper respect for the dangerous weapons and life-threatened individuals over which they have control. Nevertheless, the culpable act of a commander under such a scenario may only amount to one of negligent or irresponsible command. But negligent or irresponsible command is not a crime within the jurisdiction of the Tribunal.

The Appeals Chamber examined the *mens rea* of command responsibility in the *Celebici* case. The judges dismissed an argument by the Prosecutor aimed at expanding the concept, noting that:

> a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates. This is consistent with the customary law standard of *mens rea* as existing at the time of the offences charged in the Indictment.[54]

Thus, although a literal reading of article 7(3) suggests the possibility of a superior being convicted who had no knowledge of the crimes, the Appeals Chamber has required that there be evidence that the superior have some amount of actual knowledge. This knowledge cannot simply be presumed because of the commander's position. Obviously sensitive to the charges of abuse that could result from an overly large construction of article 7(3) of the *Statute*, the Appeals Chamber said it "would not describe superior responsibility as a vicarious liability doctrine, insofar as vicarious liability may suggest a form of strict imputed liability."[55] Several of the judgements testify to this judicial discomfort with respect to the outer limits of superior responsibility, and reveal concerns among the judges that a liberal interpretation may offend the *nullum crimen sine lege* principle.[56]

According to the Appeals Chamber, the information available to the superior:

> does not need to provide specific information about unlawful acts committed or about to be committed. For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having

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54. Prosecutor v. Delalic, Case No.: IT-96-21-A), Judgement, 20 Feb. 2001, para. 241 (reference omitted); *see also* Prosecutor v. Galic, Case No.: IT-98-29-AR73.2, Appeals Judgement, 7 June 2002.

55. Prosecutor v. Delalic, Case No.: IT-96-21-A, Judgement, 20 Feb. 2001, para. 239.

56. See, for example, the opinion of Judge Bennouna, in Prosecutor v. Krajisnik, Case No.: IT-00-39, Separate Opinion of Judge Bennouna, 22 Sept. 2000. For a recent discussion of this point: Prosecutor v. Hadžihasanović et al., Case No.: IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 12 Nov. 2002.

the required knowledge.[57]

This certainly falls short of the concept of "wilful blindness", by which an offender in effect wishes to remain ignorant of the facts. In *Celibici*, Trial Chamber II said that it took as its starting point in an analysis of superior responsibility:

> the principle that a superior is not permitted to remain wilfully blind to the acts of his subordinates. There can be no doubt that a superior who simply ignores information within his actual possession compelling the conclusion that criminal offences are being committed, or are about to be committed, by his subordinates commits a most serious dereliction of duty for which he may be held criminally responsible under the doctrine of superior responsibility.[58]

In a contempt prosecution, the Appeals Chamber said:

> [p]roof of knowledge of the existence of the relevant fact is accepted in such cases where it is established that the defendant suspected that the fact existed (or was aware that its existence was highly probable) but refrained from finding out whether it did exist because he wanted to be able to deny knowledge of it (or he just did not want to find out that it did exist).[59]

In the view of the Appeals Chamber, wilful blindness is "equally culpable" as actual knowledge.[60]

But even "wilful blindness" should be treated with caution, as the great English criminal law specialist Glanville Williams has observed:

> The rule that wilful blindness is equivalent to knowledge is essential, and is found throughout the criminal law. It is, at the same time, an unstable rule, because judges are apt to forget its very limited scope. A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice. Any wider definition would make the doctrine of wilful blindness indistinguishable

57. Prosecutor v. Delalic, Case No.: IT-96-21-A, Judgement, 20 Feb. 2001, para. 238.

58. Prosecutor v. Delalic et al., Case No.: IT-96-21-T, Judgement, 16 Nov. 1998, para. 387.

59. Prosecutor v. Aleksovski (Case No.: IT-95-14/1-AR77), Judgement on Appeal by Anto Nobilo against Finding of Contempt, 30 May 2001, para 43.

60. *Id.*

from the civil doctrine of negligence in not obtaining knowledge.[61]

There is the very real possibility of a conflict between the superior responsibility provisions in article 7(3) and the subject matter jurisdiction provisions in articles 2 to 5. To the extent that certain definitions of crimes include specific reference to intent, it is impossible to reconcile this with the lower threshold established for superior responsibility in the *Statute* as interpreted by the Appeals Chamber in *Delalic*.[62] For example, the reference to subordinates with "a violent or unstable character" recalls the notorious behaviour of Goran Jelisic, a racist concentration camp official who went by the sobriquet "the Serbian Adolf." Describing him as "violent or unstable" is to understate the extent of his dysfunctional personality. The Appeals Chamber considered that it was, at least in theory, possible for Jelisic to have committed genocide acting alone and with no larger plan or policy or the involvement of others.[63] But is it conceivable that Jelisic's superior could be convicted of a crime specifically requiring an "intent to destroy" an ethnic group if, in reality, the superior simply underestimated the perversity of a fanatic over whom he exercised command and control?[64]

Superior responsibility is believed by many to offer the most effective way of convicting leaders when evidence is lacking that they have actually ordered the commission of atrocities. Recent judgements suggest that it may not be the panacea many had hoped, and that in its place is an even more effective mechanism that does not appear in the *Statute* at all, and that has been devised by judges. This is "joint criminal enterprise" complicity, a way of imputing guilt to a person who participates in a form of collective criminal activity. The accused can be convicted not only for the crimes that he or she actually committed, with intent, but for those committed by others that he or she did not specifically intend but that were a natural and foreseeable consequence of executing the crime that formed part of the

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61. GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 159 (2nd ed. 1961).

62. *See* Prosecutor v. Delalic et al., Case No.: IT-96-21-T, Judgement, 16 Nov. 1998, para. 389.

63. *See id.*

64. Although there have now been several convictions by the International Criminal Tribunal for Rwanda for genocide committed on the basis of superior responsibility, none of them really confronts this difficulty. In each case, the Trial Chamber accepted evidence that the superior had actual knowledge of the behaviour of the subordinate rather than mere "reason to know." Although the convictions rely upon the superior responsibility provision, in reality the crime looks more like one of complicity by omission. *See* Prosecutor v. Serushago, Case No.: ICTR-98-39-S, Sentence, 2 Feb. 1999; Prosecutor v. Kayishema & Ruzindana, Case No.: ICTR-95-1-T, Judgement, 21 May 1999, para. 473 (Kayishema only); Prosecutor v. Musema Case No.: ICTR-96-13-T, Judgement, 27 Jan. 2000, paras. 894, 899, 905, 914, 924.

collective or common purpose or enterprise.[65]

The Appeals Chamber first developed the theory in *Tadic*, building upon a discussion of complicity in the *Furundzija Trial Judgement*.[66] The Appeals Chamber conceded that "common purpose" or "joint criminal enterprise" liability is not included within the enumeration of forms of participation in article 7(1), but said that a purposive approach to the *Statute* indicates that "it is fair to conclude that the Statute does not confine itself to providing for jurisdiction over those persons who plan, instigate, order, physically perpetrate a crime or otherwise aid and abet in its planning, preparation or execution."[67] It considered the case where perpetrators share a common design to pursue a criminal course of conduct, but where one of them commits an act that was outside the common design yet "a natural and foreseeable consequence of the effecting of that common purpose." According to the Appeals Chamber:

> [a]n example of this would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect "ethnic cleansing") with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk. Another example is that of a common plan to forcibly evict civilians belonging to a particular ethnic group by burning their houses; if some of the participants in the plan, in carrying out this plan, kill civilians by setting their houses on fire, all the other participants in the plan are criminally responsible for the killing if these deaths were predictable.[68]

The Appeals Chamber found support for this type of accomplice liability in some of the post-Second World War jurisprudence of British, United States and Italian courts and military tribunals. It concluded with respect to

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65. Prosecutor v. Tadic, Case No.: IT-94-1-A, Judgement, 15 July 1999; *see also* Prosecutor v. Krnojelac, Case No.: IT-97-25-PT, Decision on Form of Second Amended Indictment, 11 May 2000; Prosecutor v. Brdjanin & Talic, Case No.: IT-99-36-PT, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, 26 June 2001; Prosecutor v. Krnojelac, Case No.: IT-97-25-T, Judgement, 15 Mar. 2002.

66. Prosecutor v. Furundzija, Case No.: IT-95-17/1-T, Judgement, 10 Dec. 1998, paras. 199-226.

67. Prosecutor v. Tadic, Case No.: IT-94-1-A, Judgement, 15 July 1999, para. 190.

68. *Id.* para. 204.

such cases:

> [I]t is appropriate to apply the notion of "common purpose" only where the following requirements concerning *mens rea* are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise; and (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose. Hence, the participants must have had in mind the intent, for instance, to ill-treat prisoners of war (even if such a plan arose extemporaneously) and one or some members of the group must have actually killed them. In order for responsibility for the deaths to be imputable to the others, however, everyone in the group must have been able to *predict* this result. It should be noted that more than negligence is required. What is required is a state of mind in which a person, although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk. In other words, the so-called *dolus eventualis* is required (also called "advertent recklessness" in some national legal systems).[69]

The Appeals Chamber referred to national practice as well, conceding, but only obliquely and in a footnote, that common purpose or joint criminal enterprise liability has in some countries been declared unconstitutional in the case of serious offences such as murder because conviction of a person for an offence that was not truly intended offends principles of fundamental justice.[70] Thus, as with superior responsibility, in the case of joint criminal enterprise the Tribunal recognises a form of liability or responsibility for acts where, as the Appeals Chamber says, "he did not intend to bring about" the result.

Since the theory of "joint criminal enterprise" was first mooted by the Tribunal, in *Tadic* in July 1999, it has become the magic bullet of the Office of the Prosecutor. For example, the May 1999 indictment of Slobodan Milosevic for crimes against humanity and war crimes committed in Kosovo was amended in 2001 so as to allege his participation in a joint criminal enterprise with Bosnian Serb military and civilian leaders.[71] In August 2001, Bosnian Serb leader General Radovan Krstic was convicted

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69. *Id.* para. 220; see also *id.* para 228.

70. *Id.* para. 224, fn. 288 (citing R. v. Logan, [1990] 2 S.C.R. 731, 735 and R. v. Rodney, [1990] 2 S.C.R. 687 .

71. *Compare* Prosecutor v. Milosevic et al., Case No.: IT-99-37-I, Indictment, 24 May 1999 *with* Prosecutor v. Milosevic et al., Case No.: IT-99-37-I, Amended Indictment, 29 June 2001 *and* Prosecutor v. Milosevic et al., Case No.: IT-99-37-PT, Second Amended Indictment, 29 Oct. 2001.

as part of a "joint criminal enterprise" to commit genocide with respect to the Srebrenica massacre of July 1995. The Trial Chamber was not prepared to conclude that there was an operational genocidal plan until the days immediately preceding the killings, when it said that "ethnic cleansing" become transformed into a full-blown plan to destroy physically the Bosnian Serbs in Srebrenica. It found that "General Krstic could only *surmise* that the original objective of ethnic cleansing by forcible transfer had turned into a lethal plan to destroy the male population of Srebrenica once and for all."[72]

Both of these forms of criminal participation, superior responsibility and joint criminal enterprise, involve a presumption that the offenders behave as "reasonable" people. They establish an objective rather than a subjective standard for the assessment of *mens rea.* The Tribunal can remain uncertain about what the offender actually believed, intended and knew, as long as it is satisfied with how a reasonable person in the same circumstances would have judged the situation and reacted.

Command responsibility requires that the offender "had reason to know," while joint criminal enterprise allows a conviction where acts are "natural and foreseeable." The use of objective criteria to measure knowledge and intent is well-accepted in criminal justice systems in the case of negligence-based offences. A negligent person is someone who does not act in the manner of a "reasonable" one, and who does not appreciate what is "natural and foreseeable." But negligence-type offences are not treated as the most serious crimes, and they do not attract the most serious penalties. It is a form of anti-social behaviour judged by a different yardstick than those who commit crimes with malice and premeditation.

Yet in the case of the International Criminal Tribunal for the former Yugoslavia, an offender may be convicted of the most serious crimes, and sentenced to lengthy terms in prison, on the basis of what can amount to a negligence-like standard of guilt. General Krstic was convicted of genocide, not manslaughter, and he was sentenced, as a man in his early fifties, to a term of forty-six years in prison, all on the basis of the joint criminal enterprise theory of criminal liability. The Trial Chamber never really concluded that he actually intended to commit genocide – a requirement of the chapeau to article 4(2) of the *Statute* – but only that genocide was a "natural and foreseeable" consequence of a criminal plan to ethnically cleanse Srebrenica, and that a reasonable person would have "surmised" such a development.

Dilution of the *mens rea* standard in the case of prosecutions that rely upon superior responsibility or joint criminal enterprise raises issues of a

72. Prosecutor v. Krstic, Case No.: IT-98-33-T, Judgement, 2 Aug. 2001, para. 622 (emphasis added).

policy nature. Granted, these two techniques facilitate the conviction of individual villains who have apparently participated in serious violations of human rights. But they result in discounted convictions that inevitably diminish the didactic significance of the Tribunal's judgements and that compromise its historical legacy.

At present, a conviction that relies upon either superior responsibility or joint criminal enterprise appears to be a likely result of the trial of Slobodan Milosevic.[73] The three indictments as amended, dealing with crimes in Kosovo, Croatia and Bosnia and Herzegovina, all place reliance on these techniques. However, if it cannot be established that the man who ruled Yugoslavia throughout its decade of war did not actually intend to commit war crimes, crimes against humanity and genocide, but only that he failed to supervise his subordinates or joined with accomplices when a reasonable person would have foreseen the types of atrocities they might commit, we may well ask whether the Tribunal will have fulfilled its historic mission. It is just a bit like the famous prosecution of gangster Al Capone, who was sent to Alcatraz for tax evasion, with a wink and a nod, because federal prosecutors couldn't make proof of murder.

If it cannot be established that leaders such as Milosevic actually intended the atrocities with which they are charged, the door is left ajar for future generations to deny the truth. As special Rapporteur Louis Joinet has written,

> The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future. Its corollary is a "duty to remember" on the part of the State: to be forearmed against the perversions of history that go under the names of revisionism or negationism, for the history of its oppression is part of a people's national heritage and as such must be preserved.[74]

Holocaust denier David Irving has made a career out of claiming that Hitler never actually intended to destroy the Jews of Europe. He generally concedes the involvement of Hitler's associates in racist atrocities, but attempts to rehabilitate the *fuhrer*, to the acclaim of neo-Nazis around the world.[75] But can it be a serious and credible answer to Irving's revisionism

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73. *See* MICHAEL P. SCHARF & WILLIAM A. SCHABAS, SLOBODAN MILOSEVIC ON TRIAL: A COMPANION 122-26 (2002) (discussing forms of criminal responsibility).

74. *The Administration of Justice and Human Rights of Detainees*, U.N. Commission on Human Rights, Sub-Commission on the Prevention of Discrimination and Protection of Minorities, 49th Sess., Agenda Item 9, at 4, U.N. Doc. E/CN.4/Sub.2/1997/20 (1997) (proposed by Mr. Joinet pursuant to Sub-Commission decision 1996/119).

75. Irving's revisionist views that centre around a denial that Hitler knew of the planned extermination of the Jews are well-documented, and well-demolished. *See* RICHARD J. EVANS, LYING ABOUT HITLER: HISTORY, HOLOCAUST, AND THE DAVID IRVING TRIAL 71-

to claim that even if Hitler did not really intend the Holocaust, he should be held accountable for the actions that he had "reason to know" his subordinates, like Heydrich and Eichmann, were committing, or that their acts were "natural and foreseeable" consequences of his plan to make Europe *judenfrei*? Is history served if we say, in effect, that we may not be able to prove that Hitler was personally involved in the final solution or even had knowledge of it, but that this doesn't matter because he ought to have known about it, and he was derelict in his duty as a superior or commander?

In this respect it may be worth recalling a warning from Trial Chamber III (Judges May, Bennouna and Robinson), in the *Kordic* judgement of 26 February 2001:

> The expansion of *mens rea* is an easy but dangerous approach. The Trial Chamber must keep in mind that the jurisdiction of this International Tribunal extends only to 'natural persons' and only the crimes of those individuals may be prosecuted. Stretching notions of individual *mens rea* too thin may lead to the imposition of criminal liability on individuals for what is actually guilt by association, a result that is at odds with the driving principles behind the creation of this International Tribunal.[76]

In its first Annual Report, the Tribunal warned of the dangers of "guilt by association," observing that suggestions of collective responsibility could frustrate its objectives.

> Far from being a vehicle for revenge, it is a tool for promoting reconciliation and restoring true peace. If responsibility for the appalling crimes perpetrated in the former Yugoslavia is not attributed to individuals, then whole ethnic and religious groups will be held accountable for these crimes and branded as criminal. In other words, "collective responsibility" - a primitive and archaic concept - will gain the upper hand; eventually whole groups will be held guilty of massacres, torture, rape, ethnic cleansing, the wanton destruction of cities and villages. The history of the region clearly shows that clinging to feelings of "collective responsibility" easily degenerates into resentment, hatred and frustration and inevitably leads to further violence and new crimes.[77]

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103 (2001). *See generally* D.D. GUTTENPLAN, THE HOLOCAUST ON TRIAL (2001).

76. Prosecutor v. Kordic & Cerkez, Case No.: IT-95-14/2-T, Judgement, 26 Feb. 2001, para. 219 (reference omitted).

77. *Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, U.N. GAOR/SCOR, 49th Sess., UN Doc. A/49/342 - S/1994/1007, para. 16 (1994).

Ultimately, it is for this reason that the concept of *mens rea* is so central to all of the prosecutions of the International Criminal Tribunal for the former Yugoslavia. Deviation from adherence to strict principles may augment the chances of conviction but it can also threaten the Tribunal's ability to fulfil its solemn goals.

Looking Up, Down and Across: The ICTY's Place in the International Legal Order

Mark A. Drumbl*

I. INTRODUCTION

A variety of institutions give effect to international law through third-party enforcement. The number of these institutions steadily has increased since the adoption of the Charter of the United Nations; so much so that international lawyers now speak of a "proliferation" of dispute resolution institutions.[1]

Regional and international dispute resolution institutions have been created in a variety of ways: as permanent entities by specific treaty (International Criminal Court (ICC)); as part of the Charter framework (International Court of Justice (ICJ)); by special understanding (the World Trade Organization (WTO) Dispute Settlement Body); by the Security Council as temporary entities (International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for the former Yugoslavia (ICTY)) or as a subsidiary organ (United Nations Compensation Commission (UNCC)); by specific reference in a general treaty (International Tribunal for the Law of the Sea (ITLOS)); by reference in regional trade agreements (NAFTA dispute resolution processes; European Union institutions); or by special treaty between the United Nations and a nation-state (Sierra Leone Tribunal). Arbitration and extrajudicial entities also contribute to the expanding number of transnational institutions called upon to resolve cross-border disputes. Furthermore, national courts also enforce international law; in fact, they are doing so with greater frequency.

International criminal law represents a particularly fertile area of institutional expansion. Here, the ICTY is an important player. Now

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1. *See* Benedict Kingsbury, *Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. INT'L L. & POL. 679, 680 (1999) (citing *Implications of the Proliferation of International Adjudicatory Bodies for Dispute Resolution*, AM. SOC'Y INT'L L. BULL. 9 (1995)).

celebrating its tenth anniversary, the ICTY is tasked with the adjudication of serious breaches of international humanitarian law – war crimes, genocide, crimes against humanity – that have taken place in the territory of the former Socialist Federal Republic of Yugoslavia (SFRY) since January 1, 1991.[2] The ICTY's jurisdiction is limited to natural persons.

The ICTY, however, is not the only legal institution that will adjudicate responsibility for these tragedies. It is, in fact, just one element of a much broader institutional constellation. For example, national courts are involved in both civil and criminal matters. There have been extraterritorial criminal prosecutions in Germany and national prosecutions in the Federal Republic of Yugoslavia (FRY, renamed on February 4, 2003 as Serbia and Montenegro) and Croatia. U.N.-assisted hybrid criminal tribunals operate in Kosovo; so, too, do ordinary domestic courts. Civil cases – for example, *Kadic v. Karadzic*[3] – have been adjudged in the U.S. Moreover, the ICTY recently adopted Rule 11*bis*, which permits the referral of a case under indictment to the authorities of a state of which the accused is a national or where the crime was committed, so that those authorities "should forthwith refer the case to the appropriate court for trial."[4]

The institutional constellation adjudging tragedy in the former Yugoslavia also includes the International Court of Justice (ICJ), which is involved in reparative claims invoking state responsibility in a number of matters involving the FRY, Croatia, and Bosnia and Herzegovina. There also is a chance that the new International Criminal Court (ICC) may become involved in the sad event that new breaches of international humanitarian law occur as of July 1, 2002, in the states emerging from the former Yugoslavia. It remains unclear how the ICTY shall interface with the ICJ or the ICC.

As such, a diverse array of institutions is involved – whether by design or by request – in dispensing justice for the former Yugoslavia. This Article posits that this diversity creates a need for the ICTY to assess its own place and role. In so doing, it needs to: (1) look downwards and contemplate its interface with proceedings, whether criminal or civil, undertaken by national courts; and (2) look across (or up?) to international institutions, in

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2. The ICTY can impose sentences of imprisonment. *See* Statute of the ICTY, U.N. Doc. S/RES/827 (1993), art. 24(1) *available at* http://www.un.org/icty/basic/statut/stat2000.htm (last visited Feb. 4, 2003). In addition to imprisonment only, the ICTY can order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners. *Id.*, art. 24(3).

3. 70 F.3d 232 (2d Cir. 1995), *cert. denied* 518 U.S. 1005 (1996).

4. *See* ICTY Rules of Procedure and Evidence, Rule 11*bis*(A), *available at* http://www.un.org/icty/legaldoc/index.htm (last visited on Feb. 21, 2003). In determining whether or not to refer, the ICTY Trial Chamber shall "consider the gravity of the crimes charged and the level of responsibility of the accused." *See* Rule 11*bis*(C).

particular the ICJ (which is being called upon to resolve state responsibility civil claims), with a view to crafting a healthy relationship.

The fact that the tragedy in the former Yugoslavia is being redressed through such a diverse palette of institutions raises a number of difficult questions. First among these is an inquiry regarding the effects of enforcing international law through a decentralized, horizontal pattern of diffuse institutions. There are strengths to decentralized enforcement, insofar as it can facilitate flexible, specialized, and contextual legal responses. It can increase the sheer number of legal institutions, thereby augmenting the extent to which the conflict in the former Yugoslavia is legalized. It can promote specialized adjudication, which develops expertise and professionalism that, in turn, appreciates respect for adjudicators among litigants. However, there may also be weaknesses, insofar as decentralized enforcement may lead to inconsistencies that arguably could weaken predictability and certainty in international criminal law.[5] Which is more germane to the legitimacy of international law: context or consistency? Breadth or depth?

Theodor Meron observes that the ICTY already has produced more precedent that all the previous international and domestic war crimes cases combined.[6] But how does this precedent fit within the universe of international criminal law and the cosmos of international law generally? Moreover, although the focus of this Article is limited to the ICTY specifically and international criminal law generally, it is relevant to claims for judicial harmonization in many other areas regulated by international law, including the law of the sea,[7] international human rights law,[8] and

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5. *See, e.g.*, Shane Spelliscy, *Note: The Proliferation of International Tribunals: A Chink in the Armor*, 40 COLUM. J. TRANSNAT'L L. 143 (2001) (discussing the "proliferation problem" arising from the "explosion" in the number of international dispute resolution mechanisms and suggesting this may undermine the certainty and credibility of international law).

6. Conference Program: "The ICTY at Ten," at the New England School of Law in Boston, Mass. (Nov. 9, 2002) (on file with the New England Center for International Law and Policy).

7. For discussion of fragmentation, judicial overlap, and possible forum shopping arising from the activity of ITLOS, *see* Tullio Treves, *Conflicts Between the International Tribunal for the Law of the Sea and the International Court of Justice*, 31 N.Y.U. J. INT'L L. & POL. 809, 809 (1999). *See also* Donald L. Morgan, *Implications of the Proliferation of International Legal Fora: The Example of the* Southern Bluefin Tuna Cases, 43 HARV. INT'L L. J. 541 (2002) (commenting on potentially divergent rulings regarding the evidence for a provisional measure and whether the precautionary principle has become part of customary international law).

8. *See generally* Monica Pinto, *Fragmentation or Unification Among International Institutions: Human Rights Tribunals*, 31 N.Y.U. J. INT'L L. & POL. 833 (1999); Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 285 (1999).

international trade law;[9] discussion also is relevant to foreshadow how the new ICC could interface with other legal institutions – in particular the ICJ – in a variety of areas, including the sharing of evidence.

II. LOOKING DOWNWARDS

As mentioned previously, criminal prosecutions are being heard at the national level in each of the states that have emerged from the SFRY. National authorities in the FRY also are proceeding through non-prosecutorial legal initiatives, such as a truth commission. Criminal prosecutions also have taken place in foreign national courts, for example in Germany. The German judgment for genocide, *inter alia,* was grounded on theories of universal jurisdiction.[10]

The Security Council contemplated how the ICTY should interface with national courts. Article 9(1) of the Statute of the ICTY provides that it "and national courts shall have concurrent jurisdiction [for the prosecution of] persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since January 1, 1991."[11] However, this concurrent jurisdiction sharply is qualified by the fact that the ICTY shall have primacy over national courts whose deference to the ICTY may be secured at any stage of the procedure.[12] The primacy of the ICTY further is preserved by article 10, on *non-bis-in-idem*, which provides that no person shall be tried before a national court if that person already has been tried by the ICTY, but a person who has been tried by a national tribunal subsequently may be tried by the ICTY if a number of conditions are met.[13] Accordingly, an acquittal by a national court may be reviewed by the ICTY whereas an acquittal by the ICTY is non-reviewable by any national court.

These are the basic rules. The practice, however, is less rigid. In fact, there is considerable evidence of a willingness by the ICTY to adjust its statutory position of primacy over national prosecutions to one of

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9. For discussion of the WTO, *see* John H. Jackson, *Fragmentation or Unification Among International Institutions: The World Trade Organization*, 31 N.Y.U. J. INT'L L. & POL. 823 (1999).

10. *See* State Attorney's Office v. Jorgic, Higher State Court of Dusseldorf, 2 StE 8/96 (1997) (applying F.R.G. Penal Code para. 220(a) on genocide). Jorgic was convicted on 30 counts of murder and 11 counts of genocide and was sentenced to life in prison. *See* DAMROSCH ET AL., INTERNATIONAL LAW: CASES & MATERIALS 1318 (4th ed., 2001). Maxim Sokolovic was convicted of complicity in genocide and sentenced to nine years imprisonment in November 1999. *Id.*

11. Statute of the ICTY, *supra* note 2, art. 9(1).

12. *See* Statute of the ICTY, *supra* note 2, art. 9(2); ICTY Rules of Procedure and Evidence, *supra* note 4, Rules 9-11 (on deferral of national proceedings).

13. *See* Statute of the ICTY, *supra* note 2, art. 10(2).

complementarity to national prosecutions.[14] In this sense, the creation of the ICC, for which the notion of complementarity is central, may well influence the practice of the ICTY.

To be sure, ICTY officials initially were skeptical of national legal intervention, particularly by national courts in the former Yugoslavia. This skepticism derived from a number of sources: the institutional limitations of those courts, concern regarding ethnic bias and neutrality, and also a desire to protect fledgling international processes. However, in the wake of comments by observers and some dissonance from local communities, ICTY officials progressively moderated their approach to national institutions.[15]

This moderation has given rise to some formalization. The ICTY Rules very recently were amended to permit the Trial Chamber to refer an indictment to national authorities.[16] Moreover, ICTY President Judge Jorda has demonstrated a particular interest in referring some cases to a special chamber in the State Court of Bosnia and Herzegovina created to try serious violations of international humanitarian law.[17] This would allow prosecutions to proceed through a multi-tiered structure. The most serious offenders (perpetrators who "most seriously violate international public order") would face the ICTY, intermediary level accused the State Court, and local courts would handle low-ranking accused.[18] The ICTY would oversee the trials of the State Court, and the State Court would oversee the local trials. The State Court – "a national institution accorded a limited and provisional international character in order to guarantee its impartiality"[19] – would only have jurisdiction over those cases referred by the ICTY.[20] Judge Jorda points out: "It is essential to work with the existing organs and judicial institutions – if only by assisting them – since they constitute essential reference points for all citizens . . . justice must be brought steadily closer to the people."[21] It is unclear when these reforms shall be

14. *See infra* note 16.

15. *See infra* notes 17-21.

16. *See* ICTY Rules of Procedure and Evidence, *supra* note 4, Rule 11*bis*. Rule 11*bis*(F) states that, at any time before a national court acquits or finds a defendant guilty, the ICTY Trial Chamber may revoke the referral and assert primacy over the national proceeding. *See id.*, Rule 11*bis*(F).

17. *See* ICTY Press Release JDH/P.I.S./690-e, Address By His Excellency, Judge Claude Jorda, President of the International Criminal Tribunal for the Former Yugoslavia, to the United Nations Security Council, (July 26, 2002) [hereinafter Jorda Address], *available at* http://www.un.org/icty/latest/index.htm (last visited Feb. 21, 2003).

18. *Id.*

19. *Id.*

20. *See id.*

21. *Id.*

implemented, as ICTY officials must first determine whether the State Court retains the requisite level of credibility.

Moreover, it must be underscored that control of the transfer process remains within the purview of the ICTY.[22] Accordingly, the ICTY will "oversee[] the proper conduct of the . . . trials."[23] Judge Jorda notes that:

> [The ICTY] should be authorised to ensure that the accused answer before the national courts for all of the crimes in the Prosecutor's indictments, that the victims and witnesses are duly protected and, in broader terms, that the national trials are conducted in accordance with the international norms regarding the protection of human rights.[24]

In sum, several rules have been developed regarding the relationship of the ICTY with local and national institutions when it comes to the adjudication of individual criminal responsibility for mass atrocity in the former Yugoslavia. Looking downwards, international tribunals formally have jurisdictional primacy over national or local courts in the criminal adjudication of such wrongdoing, although there is evidence that this primacy may be thawing.[25] There is, therefore, some jurisdictional ordering.

There also is some ordering regarding the specific interpretation of law that each entity is to formulate. By virtue of Rule 12 of the ICTY Rules of Procedure and Evidence, "determinations of courts of any State are not binding on the ICTY."[26] As such, the ICTY is not compelled to follow national decisions regarding important legal findings (for example, the existence of genocide in Bosnia and Herzegovina). In practice, though, the ICTY may take a less categorical approach, insofar as it may be influenced by a national court's important pronouncements in the area of international criminal law.[27] What about the other side of the coin, that is, to what extent are national courts to take judicial notice of ICTY findings? There is considerable evidence that national courts, even in the U.S., are making

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22. *See also* Rule 11*bis*.

23. Jorda Address, *supra* note 17.

24. *Id.*

25. There may be cause for concern about how complementary the notion of complementarity will prove to be. Although the ICC's approach to complementarity is sophisticated, it still may have a leveling effect on the uniqueness of national responses to mass tragedy. After all, national institutions will be encouraged to adopt prosecutions that look much like those at the ICC in order to minimize the risk of the ICC's finding that national approaches reveal an inability or unwillingness to investigate or prosecute, this being the trigger mechanism by which the ICC can oust national jurisdiction.

26. ICTY Rules of Procedure and Evidence, *supra* note 4.

27. For example, the German court's finding that genocide had been committed.

reference and relying upon ICTY decisions.[28] This may be particularly relevant for the Special Chamber for Bosnia and Herzegovina when it begins its work.

It should be emphasized that only in the area of criminal adjudication have special rules of co-existence been developed. Assuredly, civil claims are also heard in national courts.[29] Here, there is an absence of formalized hierarchy. The determination of responsibility therefore remains not only decentralized, but also uncoordinated. The lack of coordination triggered by civil suits in the U.S. federal courts has, in the past, prompted Anne-Marie Slaughter to query whether "plaintiff's diplomacy" was emerging: whereby individuals can, through the use of civil lawsuits, affect the conduct of foreign policy.[30] On another note, Slobodan Milosevic also has used Dutch courts and has endeavored to use the European Court of Human Rights in an attempt to review decisions regarding his extradition from the FRY to the Netherlands and his allegation that the ICTY has denied him certain due process rights.[31] It is unclear how such proceedings would stand in relation to the ICTY, or (had they been successful) what effect they would have on the ICTY's ability to carry out its work.

III. LOOKING ACROSS (OR UP?)

The parameters of the relationship between the ICTY and other international institutions, such as the ICC and ICJ, have not been defined. Linkages are at best sparse and hierarchies of appeal or review non-existent.

It is likely that ICC and ICTY will ultimately have an interface. In my

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28. *See* Ford v. Garcia, 289 F.3d 1283 (11th Cir. 2002); Doe v. Unocal, 2002 WL 31063976 (9th Cir. 2002); Regina v. Bartle, *ex parte* Pinochet, [1999] 2 W.L.R. 827, [1999] 38 I.L.M. 581 (1999) (U.K. House of Lords).

29. *See* Kadic v. Karadzic, 70 F.3d 232, 236 (1995). In that case, Newman C.J. referred to the campaign by the Bosnian-Serb forces as "genocidal." *Id.* at 237.

30. Anne-Marie Slaughter and David Bosco, *Plaintiff's Diplomacy*, FOREIGN AFFS. Sept./Oct. 2000 at 102-03.

31. *See, e.g.*, Milosevic v. The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *et al.*, Case No.: KG 02/105, Judgement in Interim Injunction Proceedings, (Hague District Court), 26 Feb. 2002, *at* http://www.asil.org/ilib/ilib0516.htm (last visited Feb. 22, 2003) (discussing the dismissal of Milosevic's application for provisional relief against the ICTY which alleges the ICTY has denied Milosevic the right to unhindered and confidential communication with his lawyers in the context of proceedings Milosevic has instituted before the European Court of Human Rights); Milosevic v. The Netherlands, App. No. 77631/01, EURO. CT. H. R. (Mar. 19, 2002), *at* http://www.asil.org/ilib/ilib0505.htm (discussing the dismissal of Milosevic's application for his failure to exhaust local remedies).

mind, this is not so much a question of jurisdictional overlap[32] as it is one of coordination regarding the substantive content of international criminal law. For example, will the ICC take ICTY decisions into account? If so, in what capacity? As precedent? Persuasive authority? Reference? On a normative note: *should* the ICC take these decisions into account? To be sure, there are statutory differences between the definitions of the crimes that fall within the compass of the ICC and those within the compass of the ICTY. Will these definitional discrepancies affect, or even void, the precedential value of the ICTY case-law? In many ways, the ad hoc tribunals fostered the creation of the ICC, so it would seem odd to disregard their judicial pronouncements in the ongoing pattern of accretion by which international criminal law is established.

The overlap between the ICTY and the ICJ is much more active. As is well known, a number of civil lawsuits have been filed with the ICJ, inter alia for declaratory relief and reparations arising out of alleged violations of the Genocide Convention committed on the territory of the former Yugoslavia.[33] Bosnia and Herzegovina filed such a claim against the FRY in 1993;[34] the FRY had filed a counter-claim in 1997, in which it requested

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32. Arguably, potential criminal law claims that arise following the entry into force of the ICC could be dealt with by the ICC or the ICTY. This depends in part on how long the ICTY stays in business and on the interplay between a specifically targeted ad hoc institution and a permanent general institution.

33. These are merely some examples of the increased number of humanitarian cases brought before the ICJ. These cases also include proceedings involving East Africa. *See* Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), 2002 I.C.J. (Feb. 14) (holding DRC successful in an application against Belgium regarding the quashing of an arrest warrant in Belgium against the incumbent Congolese Minister of Foreign Affairs for war crimes and crimes against humanity); *see also* Press Release 2002/37, I.C.J., The Republic of the Congo seises the International Court of Justice of a dispute with France (Dec. 9, 2002), *at* http://www.icj-cij.org/icjwww/ipresscom/ipress2002/ipresscom2002-37_xx_20021209.htm (announcing that the DRC has filed an application against France regarding proceedings commenced in France against the Congolese Minister of the Interior for crimes against humanity and torture); Press Release 2002/15 (May 28, 2002) (announcing that the DRC has filed a claim against Rwanda for massive, serious, and flagrant violations of human rights and of international humanitarian law resulting from alleged acts of armed aggression since 1998).

34. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), 1993 I.C.J. 3 (Apr. 8). This case remains at the stage of preliminary procedural matters. Proceedings on the merits have not yet begun. On November 7, 2002, the ICJ concluded public hearings related to the FRY's application to revise a judgment in this case dated July 11, 1996, in which the ICJ had held that it had jurisdiction to deal with Bosnia and Herzegovina's claims. *See* Press Release 2002/31, I.C.J., Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections

the ICJ adjudge that Bosnia and Herzegovina was responsible for the genocide of Serbs, but the FRY withdrew this counter-claim on September 10, 2001.[35] On July 2, 1999, Croatia filed a claim alleging that the FRY is liable for infringements of the Genocide Convention by virtue of the activities of its armed forces and paramilitary detachments on the territory of Croatia from 1991 to 1995.[36] Croatia requests reparations as a remedy, which the FRY is alleged to be obliged to pay in its own right and as *parens patriae* for its citizens. In a similar vein, the FRY has claimed for violations of international law triggered by the allegedly unlawful use of force by a number of NATO countries involved in the "humanitarian armed intervention" bombings of the FRY in 1999.[37] Thus far, the ICJ has not pronounced on the merits of these cases as they have been mired in jurisdictional and preliminary challenges. But, eventually, the ICJ will have

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(Yugoslavia v. Bosnia and Herzegovina) (Nov. 7, 2002) *at* http://www.icj-cij.org/icjwww/ipresscom/ipress2002/ipresscom2002-31_ybh_20021107.htm. The FRY's argument in favor of revision includes the question whether the FRY continued the international legal personality of the SFRY. On February 3, 2003, the ICJ denied the FRY's application for revision. *See* Press Release 2003/08, I.C.J., Application for Revision (Feb. 3, 2003).

35. *See* Order, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) 2001 I.C.J. General List No. 91 (Sept. 10) *at* http://www.icj-cij.org/icjwww/idocket/ibbyorders/ibby_iorder_20010910.htm (last visited Feb. 22, 2003).

36. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Yugoslavia) 1999 I.C.J. (July 2). This case, too, is at the stage of preliminary proceedings. The FRY presently is challenging the jurisdiction of the ICJ to adjudicate this dispute and the admissibility of the dispute. The ICJ has fixed April 29, 2003, as the time limit for Croatia to present its submissions in response to the FRY's preliminary objections. *See* Press Release 2002/34, I.C.J., Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Yugoslavia) (Nov. 19, 2002), *at* http://www.icj-cij.org/icjwww/ipresscom/ipress2002/ipresscom2002-34_cry_20021120.htm (last visited Feb. 22, 2003). Pursuant to Rule 79 of the ICJ Rules, the proceedings on the merits have been suspended in light of the jurisdiction and admissibility challenges. *See* Order, Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Yugoslavia) 2002 I.C.J. General List No. 118 (Nov. 14) *available at* http://www.icj-cij.org/icjwww/idocket/icry/icry_orders/icry_iorder_20021114.htm/ (last visited Feb. 20, 2003).

37. *See* Press Release 2002/10, I.C.J., Legality of the Use of Force (Mar. 22, 2002) *at* http://www.icj-cij.org/icjwww/ipresscom/ipress2002/ipresscom2002-10_yugo_20020322.htm (last visited Feb. 22, 2003). Claims against Spain and the United States were removed from the list when the ICJ held that it manifestly lacked jurisdiction. *See id.* On March 20, 2002, the ICJ extended until April 7, 2003, the time-limit originally fixed for the filing by Yugoslavia of written statements of its observations and submissions on the preliminary objections raised by the eight respondent states. *See id.*

to issue judgment.[38]

The ICTY Trial Chamber has convicted General Krstic of genocide for the 1995 Srebrenica massacre of Bosnian Muslim men and boys.[39] Krstic has appealed this conviction. The ICTY Prosecutor is prosecuting others for genocide, including – most famously – Slobodan Milosevic, the former leader of the FRY. Of the three sets of indictments against Milosevic, the only one charging the crime of genocide relates to atrocities committed during the Bosnian Wars of 1992-1995.[40] This specific indictment includes the Srebrenica massacre.[41] It therefore appears that findings of genocide will not arise in the context of crimes committed in Croatia or Kosovo. Accordingly, it may only be for the Bosnia and Herzegovina litigation that a finding of individual criminal responsibility for genocide may overlap with the work of the ICJ. This begs the central question: to what extent is the ICJ to abide by a finding by the ICTY that genocide took place in Bosnia and Herzegovina? To what extent does an acquittal in the Milosevic case – or a hypothetical overturning of the *Krstic* genocide conviction by the Appeals Chamber – oblige the ICJ to conclude that no genocide took place? Is the proof of "genocide" different for state-to-state reparative claims than for accusations of individual criminal responsibility?

Moreover, other disjunctures arise. What if the ICJ finds Croatia successful in its Genocide Convention claims? How would this interface

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38. Assuming discontinuances are not filed.

39. *See* Prosecutor v. Krstic, Case No.: IT-98-33-T, Judgement, 2 Aug. 2001, paras. 234, 239-40, *reprinted in* 40 I.L.M. 1346 (2001). This decision is not without controversy. *See, e.g.* William Schabas, *Was Genocide Committed in Bosnia and Herzegovina? First Judgments of the International Criminal Tribunal for the Former Yugoslavia*, 25 FORDHAM INT'L L.J. 23, 47 (2001) ("As 'crimes against humanity,' the atrocities of July 1995 in Srebrenica surely qualify. But categorizing them as 'genocide' seems to distort the definition unreasonably."). Prior to the *Krstic* decision, the ICTY had dismissed indictments against Jelisic and Sikirica, two individuals separately charged with genocide. *Id.* at 29.

40. *See* Prosecutor v. Milosevic, Case No.: IT-01-51-I, Initial Indictment, 22 Nov. 2001, para. 32. As regards Croatia, the Prosecutor amended the initial indictments to reduce the scope of the case and not seek to prove that genocide was committed in relation to the Bosnian Croat population. *See* Prosecutor v. Milosevic, Case No.: IT-02-54-T, Scheduling Order Concerning Amending the Croatia and Bosnia Indictments, 22 Nov. 2001, *available at* http://www.un.org/icty/indictment/english/mil-ii011122e.htm (last visited Feb. 22, 2003).

41. In the *Krstic* case, the Prosecutor established many of the facts central to the prosecution of Milosevic for the Srebrenica massacre. *See* Krstic, 40 I.L.M. at 1346. Important among these facts is that the massacres were perpetrated by the Drina Corps of the Bosnian Serb Army under Krstic's command. *See id.* at 1372-77. Although it may be more difficult to connect Milosevic to the commission of these atrocities in Bosnia where he was not in *de jure* control, the fact that these atrocities have been linked to the Bosnian Serb Army (found in the earlier *Tadic* case to be under the overall control of the FRY) creates a trail that may well implicate Milosevic. *See* Prosecutor v. Tadic, Case No.: IT-94-1, Judgement, 15 July 1999, *reprinted in* 38 I.L.M. 1518, 1546 (1999).

with the Prosecutor's decision not to proceed with genocide indictments against Milosevic for his involvement in the Croatian violence? Would the Prosecutor then be moved to reconsider her position? On a different note, if the FRY claims against the NATO countries at the ICJ are successful, does this mean that the Prosecutor's decision not to criminally investigate NATO is to be reconsidered?

Although it is unclear what precise weight the ICJ is to give to the jurisprudence of the ICTY,[42] if Slobodan Milosevic is convicted of genocide while the ICJ still remains seized of the matter, then it may be difficult for the ICJ to remain unaffected by the ICTY conviction, just as it will seem incongruous for the ICJ to ignore the *Krstic* conviction. After all, the ICJ is to apply judicial decisions as subsidiary means to determine rules of law and, within this process of application, it seems eminently reasonable for decisions of the ad hoc tribunals to be considered.[43] This triggers broader questions regarding the role of consistency and stability in international criminal law. Can the ICTY view what happened as genocide while the ICJ does not? Is that a desirable result? Should one judicial body trump the other; or can international institutions – assuredly, young institutions in a youthful area of law – remain viable by floating about heavily yet haphazardly, like Zeppelins?

Conceptual inquiries regarding the interface between the ICJ and ICTY emerge from these practice-oriented questions. The use of the ICJ invokes broader issues of state responsibility and reparative liability. This is important for those, such as I, who believe there is a place for diverse remedies for egregious human rights violations. However, shortcomings may inhere when these diverse remedies remain uncoordinated. Whereas the ad hoc tribunals impose penal sanction on individuals for individual criminal responsibility,[44] the reparative claims envisioned by the ICJ track more of a restorative approach that seeks to restitute the victimized societies for the harm they suffered and also oblige the aggressor group to disgorge benefits unjustly obtained. Nonetheless, ICJ decisions in matters

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42. More complicated: what effect should a finding of genocide by a national court have for the ICJ decisions? Given the civil responsibility nature of both claims, should the ICJ be influenced by the finding of the U.S. Second Circuit Court of Appeals in *Kadic* that the attacks of the Bosnian Serb army were "genocidal"? *See Kadic* 70 F.3d at 236-37; *see also* text accompanying *supra* note 29.

43. *See* Statute of the I.C.J., June 26, 1945, art. 38(1)(d), 59 Stat. 1055, 1060.

44. *See* Statute of the ICTY, *supra* note 2, art. 7. The ICTY does have the power to order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners. *See id.* art. 24(3). However, as the jurisdiction of the ICTY is limited to natural persons, this order can only be meted upon defendants. Moreover, any such order can only be made in addition to a sentence of imprisonment. *See id.*

of systemic human rights violations can be constructed as imposing collective punishment. This putatively would clash with a central goal of international criminal law, namely the avoidance of collective guilt. For example, the FRY is told by the ICTY that it can move on from the past if it cooperates in establishing Milosevic's individual guilt. But then it faces civil liability lawsuits at the ICJ which, if successful, could wipe out much of the resources needed to rebuild the country in the wake of the 1999 bombings and, thereby, affect all of its citizens collectively. This presents somewhat of a paradox. The FRY is instructed that the individual criminal guilt of a handful of people is necessary for the Serbs collectively to move forward but, if those findings of individual criminal guilt then establish legal elements of damage claims, then Serbs collectively will have to pay a heavy price. Inversely, would a finding by the ICTY that genocide was perpetrated by Bosnian Muslims put wind into the sails of the now discontinued counter-claim brought to the ICJ by the FRY against Bosnia and Herzegovina?

The Statute of the ICTY, along with its Rules of Procedure and Evidence, are silent on the interplay between ICTY findings of individual criminal responsibility and any subsequent findings of state responsibility. Article 25(4) of the Rome Statute of the International Criminal Court, however, specifies that individual criminal responsibility does not affect state responsibility.[45] State practice reflects the view that whereas individuals can commit criminal offenses, a state cannot (even though a state can face tortious liability). This may well be an attempt to insulate the entire state from the criminal activity of a few. But, this may construct a naive picture of the entire state as being held hostage by the criminality of a few. States do not incur additional responsibilities for committing a serious breach of a peremptory norm beyond that contemplated for any ordinary breach. Individuals may incur the additional responsibility of criminal punishment. Why should an entire state, which is after all the central actor in international law, be absolved of heightened responsibility through the prosecution of a handful of individuals, who are not traditionally recognized as actors under international law, because their conduct is egregiously criminal as opposed to just tortious (for which principles of state responsibility could render the entire state liable)?[46]

This quickly returns us to another important process question: Can the

45. *See* Rome Statute of the International Criminal Court, U.N. Doc. A/Conf. 183/9* (1999).

46. *See* Pierre-Marie Dupuy, *A General Stocktaking of the Connections between the Multilateral Dimension of Obligations and Codification of the Law of Responsibility*, 13 EUR. J. INT'L. L. 1053, 1060 n.22 (noting the reservation for the crime to the individual, most often at the cost of a destatalization of the action, which is nonetheless carried out on behalf of the state as its agent).

evidence proffered to secure Milosevic's individual guilt then be used to ground a damage award against the nation as a whole? Although the notion of state crimes is hotly disputed and largely eschewed by states,[47] it is unclear whether providing evidence of individual criminal responsibility in support of civil liability claims involving the state of which the criminal is an official equally would be eschewed. If the FRY cooperates with the ICTY and provides official documents subpoenaed by the ICTY, can these later be used as evidence by Bosnia and Herzegovina or Croatia in the ICJ claim? This would mean that cooperation with the ICTY could increase the likelihood of successful lawsuits against the FRY at the ICJ. Can the ICTY acquire evidence but then issue orders restricting other uses of that evidence? What would such an order mean for the ICJ? Given these considerations, the existence of the ICJ lawsuits may well serve as a disincentive for the FRY to cooperate with the ICTY. On a related note, could the FRY negotiate a discontinuance of the ICJ proceeding in exchange for enhanced cooperation with the ICTY in terms of documentary and testimonial evidence? This may raise difficult questions regarding the behavior actually incentivized by the decentralized structure of international adjudication. Initial appearances of increased legalization may only amount to smoke and mirrors, insofar as the scope of that legalization may be frittered away through sequential state bargaining and moral hazard.

Moreover, these questions operate not only on the bookends of practice and theory, but also the "in between," namely the substantive content of international criminal law. The notion that international legal institutions will never diverge from each other's pronouncements on matters of substantive law is belied by the fact that, on occasion the ICJ and ICTY have parted company.[48] The 2002 *Democratic Republic of Congo* v. *Belgium* majority opinion indicates that the ICJ is mindful of the contributions to international law made by the Statute of the ICTY and its

47. *See* Damrosch, *supra* note 10, at 968 (stating by way of example, that Article 19 of the 1996 ILC Draft Articles on State Responsibility, which had discussed international crimes, was strongly opposed by a number of governments in the Sixth (Legal) Committee, including the U.S.). This provision was dropped from the Draft Articles owing to this opposition. *See id.* at 701. One of the arguments raised against state criminal responsibility involves institutional redundancy, insofar as "existing international institutions and regimes already contain a system of law for responding to violations of international obligations which the [ILC] might term 'crimes.'" *Id.* at 699 (citing the U.S. position). Another concern is that "an individual criminal may be emboldened to attempt to shift a degree of responsibility away from himself and to the state by resort to a provision for state crimes." *Id.*

48. *See* Kingsbury, *supra* note 1, at 681; Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 R. DES COURS 101 (1998) (illustrating that while these partings exist, they are not rampant).

case-law.[49] However, it also is clear from that decision that the ICJ is not interpreting international criminal law in a manner as purposive as the ICTY.

Although differences constitute exceptions rather than the rule, they are important and influential. One oft-cited example involves the "effective control" test developed by the ICJ to assess when the conduct of a non-state paramilitary organization is to be attributed to a state actor. In the 1986 *Nicaragua* decision, the ICJ held that such attribution is to occur when the non-state actor falls under the "effective control" of the state actor.[50] In that case, the ICJ held that the conduct of the Nicaraguan *contras* was not under the effective control of the U.S. and, as such, the U.S. did not bear state responsibility for that conduct.[51] In 1999, in the *Tadic* decision, the ICTY Appeals Chamber critiqued this test, finding it to be "unconvincing . . . [given] . . . the very logic of the entire system of international law on State responsibility."[52] In fact, the ICTY suggested that a lower degree of control would be apposite in light of judicial and state practice (not to mention the purpose of the law of state responsibility), and offered an alternate formulation, which it called the "overall control" test.[53] The ICTY then applied this attenuated standard and held that the conduct of the Bosnian Serb armed forces in fact was attributable to the FRY as those forces were acting under the overall control and on behalf of the FRY.[54] Was it appropriate for the ICTY to make this criticism? The ICTY criticism of the fairly stringent ICJ test has not gone unnoticed in the discussion whether the acts of al-Qaeda were attributable to Afghanistan for the purposes of calling them an Afghan armed attack, thereby permitting the responsive use of self-defense. It appears that the more attenuated ICTY approach is attractive to many states in light of the national security threats posed by non-state terrorist actors. As such, this iterative development may facilitate the application of international law to new phenomena of international relations and national security; alternately, it may fritter away legalism in

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49. *See* Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium), 2002 I.C.J. (Feb. 14), *at* http://www.icj-cij.org/icjwww/idocket/iCOBE/icobejudgment/icobe_ijudgment_20020214.pdf (last visited Feb. 3, 2003).

50. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 at 108 (June 27).

51. *See id.* at 139.

52. Prosecutor v. Tadic, Case No.: IT-94-1-AR72, Judgement, 15 July 1999), paras. 115-16. Spelliscy argues that the ICTY Appeals Chamber "essentially overruled" the ICJ precedent which had been followed by the ICTY Trial Chamber. Spelliscy, *supra* note 5, at 166.

53. Prosecutor v. Tadic, Case No.:IT-94-1-AR72, Judgement, 15 July 1999, para. 120.

54. *Id.* para. 162.

international law as states can shop from a multiplicity of legal approaches depending on their immediate political or strategic needs.

To emphasize for clarity: the dispute about "effective" or "overall" control is aberrational, insofar as in most cases the ICTY follows or views as persuasive the holdings and *dicta* of the ICJ. But the question persists: can the ICTY pick and choose which doctrine it likes or dislikes? Is this level of judicial independence desirable within an international legal framework? If one goal of law is to deter bad behavior, then it is necessary for such bad behavior to be precisely defined. In a well-known lesson from municipal criminal law, penalties that are not prescribed with certainty may be open to voidability based on vagueness.

Another interesting question is whether the ICJ's adjudication of the genocide cases will be affected by the ICTY's critique of its effective control test. In other words, if the ICJ is called upon to assess the attributability of non-state militias to a state (and it is likely that it shall have to make such an assessment in the Bosnia and Herzegovina and Croatia claims),[55] is it bound to reconsider its prior effective control test in light of the critique enunciated by the ICTY? Or will the ICJ simply ignore that critique? The ICJ may well suggest that the ICTY reformulation is appropriate for the context of attribution to a state of non-state actor conduct for purposes of individual criminal responsibility, but is not appropriate in the context of attribution to a state of non-state actor conduct for purposes of the civil responsibility of that state.

Moreover, it is not only the relationships among international adjudicatory institutions that call out for critical review, but also the relationships between these institutions, and international political institutions. Of particular concern here is the doctrine of judicial review. A case in point is the ICTY Appeals Chamber's 1995 decision in the *Tadic* case, in which it addressed a preliminary objection that required it to consider the constitutionality of the Security Council Resolution that created the ICTY.[56] The ICTY held that it was within its inherent powers as a judicial organ to decide matters pertaining to it own competence.[57] Some have criticized this decision. For example, Shabtai Rosenne has suggested that the ICTY should have asked the Security Council to request an advisory opinion from the ICJ about the constitutionality of its decision

55. For example, in the Croatian claims a central element of liability involves the FRY's responsibility for the activities of the JNA (Yugoslav People's Army) and paramilitary groups in Croatia.

56. *See* Prosecutor v. Tadic, Case No.: IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, *reprinted in* 35 I.L.M. 32, 36 (1996).

57. *See id.*

to establish the ICTY.[58] Although Georges Abi-Saab posits that, under the circumstances, it would have been unlikely for the Security Council actually to have requested such an opinion, it may very well have been possible for the ICTY Statute to have been written to empower the ICTY itself to request opinions from the ICJ on "questions involving the interpretation of the Charter (or general international law)."[59] That this was not undertaken reinforces the fragmentary relationship among institutions and the reality that different institutions may be interpreting core documents in ways that are not necessarily coordinated.

IV. CENTRALIZATION OR DIFFUSION IN LEGAL INSTITUTIONS AND METHODS?

The international legal system, even in the narrow area of international criminal law, is grounded on a "horizontal engagement of ideas rather than a vertical engagement of authority."[60] The difficult question that arises is whether this grounding normatively is desirable.

ICJ President Judge Guillaume has called for hierarchy among institutions and has expressed reservations regarding the creation of future institutions; he also has expressed concerns regarding specialized tribunals working in their own fields without paying sufficient attention to the effects that such work might have on international law and international relations in general.[61] He calls for a leadership role for the ICJ. Joining him in the call for the promotion of unification and the development of "vertical engagement of authority" are Georges Abi-Saab[62] and Pierre-Marie Dupuy.[63] Another observer posits that the absence of such a hierarchy will

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58. *See* Georges Abi-Saab, *Fragmentation or Unification: Some Concluding Remarks*, 31 N.Y.U. J. INT'L L. & POL. 919, 928 (1999).

59. *Id.* at 928-29.

60. Spelliscy, *supra* note 5, at 155-56.

61. *See* Press Release, UN, GA/L/3157 17th Meeting (AM) (Oct. 27, 2000), *available at* http://www.un.org/News/Press/docs/2000/20001027.gal3157.doc.html (last visited Mar. 21, 2003); Spelliscy, *supra* note 5, at 156. President Judge Guillaume's concerns resonate in the approach of the ICJ to ministerial immunities in the *Democratic Republic of Congo v. Belgium* case, in which the ICJ broadly interpreted the scope of immunities so as to reduce the scope of judicial review of ministerial conduct by foreign national courts exercising universal jurisdiction. This case was filed in response to a Belgian court's issuance of an arrest warrant against the incumbent Congolese Minister of Foreign Affairs. *See supra* note 33. The issuance of this writ reflects a broader trend in which municipal courts are more actively engaging in prosecutions regarding extraterritorial human rights abuses through universal jurisdiction.

62. Abi-Saab, *supra* note 58, at 929 ("The ICJ has to play this central role and act as a higher court ....").

63. *See* Pierre-Marie Dupuy, *The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice*, 31 N.Y.U. J. INT'L L. &

prompt conflicting jurisprudence that will threaten the coherence of the international system.[64] Yet another commentator fears that fragmentation may induce and facilitate forum shopping, where "litigants well may conclude that substantially different outcomes could be reached from differing precedents and directives, and choose a forum accordingly."[65]

By and large, arguments in favor of stability, certainty, and predictability are familiar to and resonate quite well among lawyers, particularly common-law lawyers. To be sure, common-law lawyers have exerted considerable pull on international dispute resolution institutions, whether of the criminal ilk or involving other kinds of disputes (for instance, trade). There has been an injection of common-law methods into the methodologies of these institutions. One particular example is *stare decisis* (or, in the least, use of prior decisions involving similar facts to resolve present disputes). Usually the WTO Dispute Settlement Panels (and the Appellate Body) are guided by prior decisions, as are the ad hoc tribunals within their own Chambers and also *inter se*. Even though there is no formalized notion of *stare decisis* at the ICJ,[66] the ICJ frequently refers to and follows its prior decisions. Although one may speak of the use of precedent within a given society, it is quite another to expect precedent to apply across societies as necessarily would be the case in the application of one international decision to a subsequent dispute arising elsewhere in the world. But, as this discussion demonstrates, this in fact is the emerging pattern.

An even more ambitious reading of precedent intimates that the decisions of one institution may be used persuasively or precedentially among factually similar decisions adjudged by a different institution. This is not a case of precedent within an institution, but precedent within a system composed of different institutions. This takes us full circle to inquire what the ICJ ought to do with the findings of the ICTY, the ICTY with the findings of the ICJ and, down the road, what the ICC should do with ICTY findings and also with ICJ findings. This ambitious use of precedent arguably would promote the certainty of the international legal system at large and streamline international law such that it might be made more palatable to skeptical domestic audiences.

However, it is not altogether clear whether even a common-law lawyer would be uncomfortable with an absence of mandatory system-wide cross-

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POL. 791, 798 (1999).

64. *See* Spelliscy, *supra* note 5, at 143-45. Spelliscy is among the most adamant proponents for an organized international judicial system, and fears that the present "incoherence" will have "disastrous consequences." *Id.* at 171.

65. Morgan, *supra* note 7, at 548; *see also id.* at 550-51.

66. *See* Statute of the I.C.J., *supra* note 43, art. 59 ("The decision of the Court has no binding force except between the parties and in respect of that particular case.").

references in the diverse and cross-cultural domain of the international community. It is unclear whether different courts within common-law countries adhere to such cross-referencing, particularly in terms of the interface between civil liability and criminal responsibility.[67] A *civiliste* may be even less perplexed. By way of example, legal institutions in France do not operate in a strict hierarchy or web of mutual recognition.[68] Moreover, "[t]here exist multiple tribunals in horizontal systems without an overall hierarchy throughout the world's domestic legal systems, and these systems nevertheless maintain their legitimacy."[69]

It does seem ironic to speak of the need for consistency in the adjudication of systemic human rights abusers when the creation of ad hoc tribunals, as well as the determination of the "criminal" in international relations, seems to many to be anything but consistent. Also vexing in the predictability and certainty notion is the inevitable selectivity that tinges choices as to who is to be prosecuted in the already selective decisions of which tragedies should face judicial redress.

Nor are the benefits of hierarchy and certainty abundantly self-evident. In fact, religiously adhering to hierarchy and certainty may weaken the legitimacy of international legal intervention among local audiences by distancing those audiences from the locus of judicial decision-making. This particularly is the case in the "looking downwards" part of the analysis: in other words, the relationship between international and national or local institutions. Too rigid a hierarchy and too certain a precedent can create a uniformity that squashes local initiatives and may make it more difficult for international norms to be filtered through local cultures, which I posit (and have argued elsewhere with Rwanda and Afghanistan as case-studies) is a prerequisite for international norms to have meaning among local audiences.[70] In a very real sense, the merits of hierarchy and certainty are predicated on a perception that, following mass atrocity, uniform trials that look like meshed Anglo-American and Continental European (in all cases

67. "One might point to the American system of state courts that, when making decisions on state law, may be in conflict with one another without being able to appeal for clarification to the Supreme Court." Spelliscy, *supra* note 5, at 153.

68. "Non-uniformity is also tolerated in the French legal system where the *Cour de Cassation*, the *Conseil d'Etat*, *Conseil Constitutionnel*, and the *Tribunal des Conflits* operate independently of one another." *Id.* at 153-54.

69. *Id.* at 153.

70. *See generally* Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221 (2000); Mark A. Drumbl, *Juridical and Jurisdictional Disconnects*, XII FINNISH YEARBOOK OF INTERNATIONAL LAW 131 (Kluwer Academic Publishing, 2002) (gen. eds. Martti Koskenniemi and Jarna Petman, U. of Helsinki, symposium eds. Chandra Lekha Sriram and Brad Roth); Mark A. Drumbl, *The Taliban's 'Other' Crimes*, 23:6 THIRD WORLD QUARTERLY 1121 (2002).

Western) proceedings are the best way to achieve justice everywhere. This raises broader questions regarding the balance of determinacy and indeterminacy required for law to have maximal meaning among local audiences. Multiple proceedings alleging multiple causes of action that take place in multiple ways in multiple venues may well create more law addressing different aspects of a single tragedy which, in turn, may augment appreciation for law among afflicted peoples.

Religiously adhering to formalized structures also may inhibit the emergence of a greater number of institutions. From a strictly retributive point of view, the risks of disconnect may be outweighed by the benefits of a larger number of institutions that will be able to effect more justice in more ways in more places. Perhaps, for the moment, we simply should celebrate the fact that the expansion of the number of international tribunals evidences a growing willingness by states to settle their disputes peacefully through international law,[71] and be less anxious about conflicts regarding possible variance in the content of the international law that ends up being applied. In fact, these conflicts may reflect the diversity and vibrancy inherent in Oscar Schachter's "college of international lawyers," whose discussions and dissensus move the law incrementally (although perhaps occasionally in staccato fashion) toward a greater legitimacy than would top-down hierarchical *diktat*. As Jonathan Charney wisely reminded us, diversity is an inherent and valuable part of international law.[72]

Assuredly, in the determination of top-down *diktat* there persists one nagging question: which institution will be ensconced in the position of privilege? The answer is not clearly found in the UN Charter. In fact, the Charter does not foreclose a diffuse and diasporic approach to the adjudication of international disputes. Although Charter article 92 provides that the ICJ is to be the "principal judicial organ of the United Nations"[73] and Charter article 36(3) provides that legal disputes should as a general rule be referred to the ICJ,[74] Charter article 95 reminds us that this shall not "prevent Members of the United Nations from entrusting the solution of their differences to other tribunals by virtue of agreements already in existence or which may be concluded in the future."[75] The ICJ is not the exclusive judicial organ; nor was it intended to operate as some sort of

71. *See* Bernard H. Oxman, *The Rule of Law and the United Nations Convention on the Law of the Sea*, 7 EUR. J. INT'L L. 353, 370 (1996) (suggesting that more legal dispute resolution institutions might enhance the role of international law in resolving disputes).

72. *See* Jonathan Charney, *Comment, The Implications of Expanding International Dispute Settlement: the 1982 Convention on the Law of the Sea*, 90 AM. J. INT'L L. 69, 74-75 (1996).

73. U.N. CHARTER art. 92, para. 1.

74. *See id* art. 36, para. 3.

75. *See id.* art. 95, para. 1.

global supreme court.[76]

To be sure, the ICTY is a temporary institution and, as such, the challenges it poses also are temporary. However, it is unclear whether ad hoc tribunals will become extinct. After all, there may be cases where the ICC does not have jurisdiction and the international community elects to proceed through ad hoc institutions, special courts, or UN-assisted local initiatives. This appears to be the preferred approach of the United States. Accordingly, many of the concerns regarding institutional coordination will not disappear when the ICTY closes its doors. Moreover, international criminal proceedings will never replace national proceedings, nor is this even the intent of the ICC. Furthermore, the issues regarding the interplay between the ICTY and the ICJ foreshadow the interplay between the ICJ and ICC. Therefore, the question whether to connect the dots among the institutions adjudicating serious human rights abuses shall persist even in the age of the "permanent" ICC.

V. CONCLUSION

The purpose of this final panel of today's stimulating conference is to consider the "ICTY at Ten," with a view to the "Big Picture." From the perspective of the "Big Picture," the ICTY is one tree in a small grove of different species of trees. To some extent, some of these trees have developed rules of understanding as to how they operate in light of each other. These rules – whose content and effect should continue to be evaluated on an ongoing basis – cluster in the relationships between the ICTY and national or local courts. For their part, the international trees in this judicial grove have not formalized – let alone developed – formal ententes or memoranda of understanding *inter se*, nor is there much evidence of meaningful informal relationships. This is unsurprising, given that each of these entities "has its "own separate source of legitimization, or legal empowerment, which invests it with judicial power . . .."[77] In fact, it is difficult to envision a coordinated judicial approach, given the fact that each of these various institutions "exists as formally distinct from other mechanisms engaged in similar tasks and, often, interpreting the same body of law."[78] In some cases, this "same body of law" involves central notions of customary international law. Perhaps more importantly, these institutions each strive to promote justice for the same victims.

It is important to be mindful of the relative youth of international law, particularly international criminal law. Criticisms of fragmentation in the enforcement of international law must take this youthfulness into account.

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76. *See* Charney, *supra* note 72, at 72.

77. Abi-Saab, *supra* note 58, at 926.

78. Spelliscy, *supra* note 5, at 145.

In the halcyon days of the formulation of municipal law there were many institutions and many court systems enforcing norms in an often disconnected methodology. Over time, what grew out of this (for example in the old English courts) was a somewhat systematized construction of law applied through a bureaucratized, organized court system. Eventually this may come to international law. The process of iterative accretion may build regimented, hierarchical enforcement. On the other hand, it may not, given the importance of contextual enforcement to the meaning of international norms at the local level for local lives. After all, "law" may not require hierarchical enforcement in order to remain "law."

As part of this process of accretion, international lawyers may consider developing guidelines of understanding among international dispute resolution institutions. Such guidelines may mitigate the fragmentary effects of the proliferation of international dispute resolution institutions by offering some sort of structure that delineates the relationships of these institutions *inter se.* Guidelines of understanding could harmonize these relationships, or at least avoid the most pernicious effects of disharmony. At a minimum, they could create a forum – which presently is lacking – in which such discussions could occur. But, at the same time, these guidelines would not create a hierarchy, and their content could leave space for the diffusion and dissensus that may be important to the meaningful development and application of international law at the level where it matters most: that of the local community. The point is not to construct overnight a coherent international constitutional order. Accordingly, these guidelines should preserve the independence and discretion of each institution, as well as the ability of each institution to fashion law and remedies germane to the purpose of the institution and the needs of the population it is designed to serve. On the other hand, these guidelines could recognize that the work of each dispute resolution institution is part of a broader process of international legal "becoming" and, thus, each institution should explain why it chooses to depart from the approaches taken by others when it makes such a choice.

This is a task to which international legal academics may wish to turn. We have expended considerable creative energy and thought on how international criminal institutions should interface with national courts. This has given rise to the notion of complementarity. We now may wish to divert some of this energy – and lessons learned – to the context of the relationships among international and regional dispute resolution bodies *inter se.*

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The Relationship Between Hybrid Courts and International Courts: The Case of Kosovo

Laura A. Dickinson*

Hybrid domestic-international tribunals offer an important approach to transitional justice, the process by which societies provide accountability and reconciliation for mass atrocity. Hybrid courts are courts in which both the institution and the applicable law consist of a blend of the international and the domestic: foreign judges sit alongside their domestic counterparts to try cases prosecuted and defended by teams of local lawyers working with those from other countries; and at the same time, the judges apply domestic law that has been reformed to include international standards. These courts have developed in an ad hoc way, the result of on-the-ground innovation rather than grand institutional design. Typically, they have emerged in post-conflict situations to address cases involving mass atrocity, usually where no politically viable full-fledged international tribunal exists, as in East Timor or Sierra Leone, or where an international tribunal exists but cannot cope with the sheer number of cases, as in Kosovo. Yet despite a growing literature on transitional justice,[1] hybrid courts have received little attention so far, at least less attention than international tribunals such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Court (ICC).

Part of the reason these hybrid courts have received so little attention is that they have faced resistance from two sides. On the one hand, many of those who favor international justice appear to see hybrid tribunals as mere

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1. *See generally*, JASON ABRAMS & STEVEN RATNER, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY; ALEX BORAINE, A COUNTRY UNMASKED (1997); PRISCILLA HAYNER, UNSPEAKABLE TRUTHS (2001); MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE (1998); RUTI G. TEITEL, TRANSITIONAL JUSTICE (2000); TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz, ed. 1995).

second-best alternatives to international courts. Indeed, it is striking that even two government officials who played a key role in establishing such tribunals recently resisted the notion that such courts could serve as a model for the future.[2] Perhaps one reason for the resistance on this front is the concern that such courts might be supported as an alternative to, and perhaps as a means to undermine, international justice. On the other hand, those who are resistant to the idea of international justice for mass atrocities, such as Bush Administration officials who have opposed the ICC, may see mixed tribunals as carrying too many of the trappings of international courts. This dual resistance to hybrid courts is unfortunate, since they hold a good deal of promise and actually offer an approach that may address some of the concerns about purely international justice, on the one hand, and purely local justice, on the other.

In this Essay, I will look at one example of hybrid courts, those established in Kosovo to hear cases involving war crimes, genocide, and other mass atrocities. I will then address some of the advantages and disadvantages that such courts hold, and assess how well the Kosovo courts have fulfilled their promise. Finally, I will discuss ways in which hybrid courts might fit into the ICC's complementarity regime. I will argue that such courts are best seen not as alternatives to international or local justice, but rather as a complement to both.

I. HYBRID COURTS IN KOSOVO

In June of 1999, after a NATO-led bombing campaign had helped to halt ethnic cleansing and other mass atrocities committed primarily by Serb forces against the ethnic Albanian population in Kosovo, the United Nations Security Council issued a resolution establishing the United Nations Mission in Kosovo (UNMIK).[3] UNMIK's mandate required it to maintain peace and security in the territory: to perform basic civilian administrative functions including the establishment of civil law and order, coordinate humanitarian and disaster relief, facilitate the return of refugees, promote human rights, support the reconstruction of key infrastructure,

2. *See* discussion of David Scheffer, former U.S. Ambassador-at-Large for War Crimes Issues, and Hansjörg Strohmeyer, Director of the Office of Humanitarian Affairs at the United Nations, Panel on Hybrid Domestic-International Courts, International Law Association Annual Conference, Oct. 24, 2002. Amb. Scheffer helped establish the special court for Sierra Leone and was deeply involved in the efforts to create a hybrid court in Cambodia; Hansjörg Strohmeyer served as an assistant legal advisor to the U.N. transitional administrators in both Kosovo and East Timor, and in this role helped establish the hybrid courts in both places. Yet Scheffer and Strohmeyer rejected the notion that such hybrid courts might be touted as a model. *See id.*

3. *See* S.C. Res. 1244, U.N. SCOR, 54th Sess. 4011th mtg., U.N. Doc. S/RES/1244 (1999).

help to establish substantial autonomy and self-government in Kosovo, and facilitate a political process to determine Kosovo's future status.[4] UNMIK's responsibilities thus specifically entailed the institution of law and order, which included the apprehension, trial, and punishment of those who had committed past atrocities as well as those who committed crimes after the establishment of U.N. authority.[5]

This task was not easily fulfilled. Much of the physical infrastructure of the judicial system—court buildings, law libraries, and equipment—had been destroyed or severely damaged during the conflict.[6] Local lawyers and judges were scarce, and those available lacked experience, as most ethnic Albanians had been barred from the judiciary for many years and Serb judges and lawyers had mostly fled or refused to serve.[7] Detainees suspected of committing atrocities, once apprehended by U.N. security forces, were crowding prison facilities, with little prospect of trial.[8] Devastated by the conflict and by years of discrimination against the ethnic Albanian minority, the local judicial system did not have the capacity or the independence to conduct such trials. Yet the ICTY was also ill-equipped to handle such cases. The prosecutor for the ICTY made it clear that the international tribunal was only prepared to try those who had committed the worst atrocities on the widest scale.[9] As the detainees continued to languish in prison, many argued that the continued detention itself violated international human rights standards,[10] and ethnically motivated violence

4. *See id.*; *see also* United Nations Interim Administration Mission in Kosovo, *at* http://www.unmikonline.org/intro.htm (last visited Mar. 24, 2003). The United Nations divided these responsibilities into four groups, two of which are to be led by non-U.N. organizations, but all of which fall under U.N. jurisdiction: Police and Justice (United Nations); civil administration (United Nations); democratization and institution-building (OSCE); and reconstruction and economic development (European Union). *See id.*

5. For an overview of efforts to establish the rule of law in post-conflict Kosovo, see Wendy S. Betts, Scott N. Carlson, & Gregory Gisvold, *The Post-Conflict Transitional Administration of Kosovo and the Lessons Learned in Efforts to Establish a Judiciary and the Rule of Law*, 22 MICH. J. INT'L L. 371 (2001); Hansjörg Strohmeyer, *Making Multilateral Interventions Work: the United Nations and the Creation of Transitional Justice Systems in Kosovo and East Timor*, 25:2 FLETCHER FOR. WORLD AFF. 107 (2001) [hereinafter *Multilateral Interventions*]; Hansjörg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT'L L. 46 (2001) [hereinafter *Collapse*].

6. *See* Betts et al., *supra* note 5, at 376-77.

7. *See Collapse*, *supra* note 5, at 49-50, 53.

8. *See Multilateral Interventions*, *supra* note 5, at 114.

9. *See* Carla Del Ponte, Prosecutor of the ICTY, Statement on the Investigation and Prosecution of Crimes Committed in Kosovo, (Sept. 29, 1999), *available at* http://www.un.org/icty/latest/index.htm (last visited Mar. 20, 2003).

10. *See, e.g.*, OSCE LMS, Report No. 4, Update on the Expiration of Detention

remained widespread.[11]

To address what was rapidly becoming an accountability and justice crisis, support grew for the creation of a special court, to be called the Kosovo War and Ethnic Crimes Court, which was intended to have jurisdiction over war crimes, other serious violations of international humanitarian law, and serious ethnically motivated crimes.[12] The court was to have concurrent jurisdiction with the ICTY, but would focus on the less high-profile offenders that the ICTY did not have the capacity to try.[13] Yet due to a lack of resources and other political obstacles, the establishment of the court was subjected to repeated delay.[14] Quietly, and with little fanfare, in an effort to achieve similar results by different means, U.N. authorities issued a series of regulations allowing foreign judges to sit alongside domestic judges on existing local Kosovar courts, and allowing foreign lawyers to team up with domestic lawyers to prosecute and defend the cases.[15] The hope was that the infusion of foreign experts would jumpstart the judicial process, providing badly needed capacity and independence.[16]

And indeed, with foreign support, the trials proceeded.[17] As of June

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Periods for Detainees (Mar. 18, 2000), at 4, *available at* http://www.osce.org/kosovo/documents/reports/justice/report4.pdf (last visited Mar. 20, 2003). When the UNMIK issued a regulation allowing for longer pre-trial detention of suspects, the OSCE's Legal System Monitoring Section concluded that the new regulation was a "clear breach" of the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR). *See* OSCE LMS, Kosovo: Report No. 6: Extension of Time Limits and the Rights of Detainees: the Unlawfulness of Regulation 1999/26 (April 29, 2000), at 3, *available at* http://www.osce.org/kosovo/documents/reports/justice/report4.pdf (last visited Mar. 20, 2003).

11. *See* OSCE, Assessment of the Situation of Ethnic Minorities in Kosovo (Period Covering Nov. 1999 through January 2000), at 1, *available at* http://www.osce.org/kosovo/documents/reports/minorities/min_rep_04_eng.pdf (last visited Mar. 20, 2003).

12. *See* Betts et al., *supra* note 5, at 381.

13. *See id.*

14. *See Multilateral Interventions*, *supra* note 5, at 119.

15. *See* Betts et al., *supra* note 5, at 381.

16. *See* Organization for Security and Co-operation in Europe Mission in Kosovo, Department of Human Rights and the Rule of Law, Legal Systems Monitoring Section, *Report 9 – On the Administration of Justice*, Mar. 2002, at 5-6 [hereinafter March 2002 OSCE Report], *available at* http://www.osce.org/kosovo/documents/reports/justice/Report9_eng.pdf (last visited April 6, 2003).

17. For example, as of December, 2000, there were ten international judges and three international prosecutors serving in the five regions of Kosovo. They completed a total of 35 trials and investigations. *See United Nations Interim Administration Mission in Kosovo*, Report of the Secretary-General, U.N. Doc. S/2000/1196 (2000); *see also*, OSCE,

2002, Kosovo courts had held trials in seventeen war crimes cases.[18] Initially, international judges had minimal impact, as they did not comprise a majority on the trial panels.[19] A new UNMIK regulation enacted in December 2000 sought to rectify this problem, however,[20] and after that date all war crimes cases have been held in front of courts composed of a majority of international judges, with international prosecutors primarily in charge of prosecutions.[21] The courts have had difficulty in finding qualified international personnel to serve as judges and prosecutors, have been plagued by a lack of funding, and have issued decisions that commentators have criticized.[22] Yet at least one report, though critical of the tribunals in many respects, suggests that the presence of international actors has improved the quality of justice delivered in these cases.[23]

The substantive law applied in these cases was also a blend of the international and domestic. Initially, with little consultation with the local population, UNMIK authorities declared the applicable law in Kosovo to be Federal Republic of Yugoslavia (FRY)/Serbian law, modified to conform to international human rights standards.[24] This decision outraged many ethnic Albanian Kosovars, who identified FRY/Serbian law as the law of the oppressive Serb regime.[25] Kosovar Albanian judges refused to apply the law, resulting in widespread confusion.[26] In response, UNMIK issued new resolutions describing the applicable law to be the law in force

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Department of Human Rights and the Rule of Law, Report, Kosovo: A Review of the Criminal Justice Division, Sept. 1, 2000 to Feb. 28, 2001, *at* http://www.osce.org/kosovo/documents/reports/justice/criminal_justice2.pdf (last visited Feb. 3, 2003); OSCE, REPORT, Feb. 2000 to July 2000, *at* http://www.osce.org/kosovo/documents/reports/justice/criminal_justice.pdf (last visited Feb. 3, 2003).

18. OSCE, Department of Human Rights and Rule of Law, Legal Systems Monitoring Section, *Kosovo's War Crimes Trials: A Review*, at 12 (Sept. 2002), *at* http://www.osce.org/kosovo/documents/reports/justice/ (last visited Feb. 3, 2003) [hereinafter *Kosovo's War Crimes Trials*].

19. *See id.*

20. *See* UNMIK Regulation 2000/64, (Dec. 15, 2000) *at* http://www.unmikonline.org (last visited Feb. 3, 2003).

21. *See Kosovo's War Crimes Trials*, *supra* note 18, at 11.

22. *See generally id.* (describing deficiencies)

23. *See id.* at 10-11 (describing the need for international judges); *see also, e.g., id.* at 38 (discussing improvement, after the addition of international judges, in procedures for permitting defense testimony).

24. *See* UNMIK Regulation 1999/1, (July 25, 1999) *at* http://www.unmikonline.org (last visited Feb. 16, 2003).

25. *See Multilateral Transitions*, *supra* note 5, at 112-13.

26. *See id.*

in Kosovo prior to March 22, 1989.[27] But like the initial decision, the applicable law was to be a hybrid of pre-existing local law and international standards. Local law was only applicable to the extent that it did not conflict with international human rights norms.[28]

II. ADVANTAGES AND DISADVANTAGES OF THE HYBRID COURTS

The process leading to the establishment of the hybrid domestic-international courts in Kosovo, while somewhat improvised, nonetheless reveals a few potentially enduring positive attributes of this newly-emerging form of accountability. Of course, the success of any effort to confront past atrocities, whether through criminal trials, truth commissions, civil compensation schemes, vetting of public officials, or some combination thereof, will depend on the particular social, political, and cultural context. The need for such an effort to confront the past, and the role it might play in establishing peace and democratic institutions of governance likewise varies considerably depending on the unique circumstances of each case: there are no cookie-cutter solutions to these highly complex problems. The Kosovo case shares enough similarities with other potential post-conflict situations, however, that one can use it to draw a few tentative conclusions about the promise that mixed tribunals might hold in other settings.

Until recently, the primary mechanisms for imposing individual criminal responsibility for grave human rights abuses fell into two categories. Either new regimes attempted domestic trials, or the international community established international tribunals to hold wrongdoers accountable. Both of these approaches, however, have significant limitations. Such limitations can be conceptualized along two axes: first, problems of legitimacy, and second, problems of capacity-building. Focusing on the lessons learned from Kosovo, this Part first outlines the problems of both purely domestic and purely international tribunals, and then suggests ways in which hybrid domestic-international courts might address some of these problems.

A. Legitimacy Problems

In some circumstances, hybrid domestic-international courts may have greater legitimacy in the adjudication of serious human rights crimes than either purely domestic trials, on the one hand, or purely international processes on the other. In post-conflict situations, the legitimacy of

27. *See* UNMIK Regulation 1999/24, (Dec. 12, 1999) *at* http://www.unmikonline.org (last visited Feb. 16, 2003); *see also* UNMIK Regulation 1999/25, (Dec. 12, 1999) *at* http://www.unmikonline.org (last visited Feb. 16, 2003).

28. *See Multilateral Transitions*, *supra* note 5, at 112.

domestic institutions is often in question. Of course, the precise nature of the legitimacy crisis varies and is inseparable from the unique history and culture of a given society. In this brief Essay, I am not attempting to provide a comprehensive overview of the various types of legitimacy problems facing such societies. Nonetheless, in most cases, to the extent that domestic institutions exist at all, they typically have suffered severely during the conflict.

With respect to the judiciary, the physical infrastructure has often sustained crippling damage. In addition, the remaining available personnel is likely to be severely compromised by association with the prior regime or lacking in essential skills. Judges and prosecutors from the prior regime—who failed to prosecute or convict murderers, torturers, or ethnic cleansers—may remain in place, or, alternatively, the new regime may have replaced the old personnel almost completely, resulting in an enormous skills and experience deficit, as well as the danger of show trials and overly zealous prosecution for past crimes.

Kosovo represents one type of extreme case. After the period of conflict that produced mass atrocities, no fully functioning domestic institutions existed.[29] Indeed, the lack of domestic institutions led the international community, with the support of large segments of the local population, to establish an interim transitional administration, run by the United Nations.[30] The purpose of this interim governing entity was to restore peace and stability and to develop the democratic institutions, including a fully-functioning judiciary, necessary to pave the way for self-governance.[31] In such circumstances, there is no clear way to legitimize institutions through a normal political process. Not only is there no functioning court system, but there are no other political institutions, executive or legislative, to establish such a system. Moreover, if the lack of formal institutional legitimacy is difficult to confer on a fledgling justice system, the establishment of *informal* legitimacy—broad societal acceptance of institutions—is even more difficult to establish.

In Kosovo, not only was the physical infrastructure of the legal system severely damaged by the conflict, but the system was also tainted by the former oppressive regime, undermining public confidence in, and the broad societal legitimacy of, the system as a whole. Indeed, the justice system had been run by perceived oppressors, the Serbs;[32] and ethnic Albanians had been systematically excluded from the system.[33]

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29. *See supra*, text accompanying notes 6-11.
30. *See supra*, text accompanying notes 3-5.
31. *See id.*
32. *See Collapse*, *supra* note 5, at 49-50.
33. *See id.*

Even if a new local system can be established quickly after the conflict, over-correction for these imbalances can create new problems. In the case of Kosovo, for example, it was initially easier to appoint ethnic Albanian judges than ethnic Serb judges. Only a few Serb judges were willing to serve, and even those who were appointed subsequently stepped down, in response to pressure from Belgrade.[34] Yet without representation of Serbs within the judiciary, the independence of the decision-making, key to legitimacy among the entire local population, was severely in question.[35] In fact, due to concerns about lack of due process and insufficient evidence, several judgments imposed against Serb defendants by panels of ethnic Albanian judges were later thrown out by panels that included international judges.[36] Under these circumstances, there was little ability for the local justice system to deliver verdicts perceived to be legitimate in trials of those suspected of committing mass atrocities.

Yet at the same time, the legitimacy of purely international processes is often difficult to establish. In the case of Kosovo, an international tribunal—the ICTY—did exist as a forum to try those few individuals responsible for the most egregious atrocities. Yet this institution was ill-equipped to address more than a handful of cases, as international courts undoubtedly will always be. And establishing the legitimacy of an international institution such as the ICTY, within a country that does not support its creation, is quite difficult. The ICTY was established by Security Council resolution, without the consent of the Federal Republic of Yugoslavia.[37] In light of the continuing ethnic tensions within the region and the scale of the atrocities, the creation of an international court based in the Hague, removed from the scene of the crimes, and run by international judges and staff, may have been necessary to create the kind of independence required to impose individual criminal responsibility. Many segments of the local population, particularly the predominantly Muslim and Croat victims of the atrocities, have supported the work of the ICTY.[38]

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34. March 2002 OSCE Report, *supra* note 16, at 5.

35. *See generally* Andrew McKay, *Judicial Affairs: Delivering Effective Law and Order*, FOCUS KOSOVO, (Oct. 2001) *at* http://www.unmikonline.org/pub/focuskos/oct01/focusklaw1.htm (last visited Feb. 2, 2003).

36. *See* Susan Mangali, *Detentions: Tale of Two Prisoner Groups*, FOCUS KOSOVO, (Feb. 2002) *at* http://www.unmikonline.org/pub/focuskos/feb02/focusklaw1.htm (last visited Feb. 2, 2003).

37. *See* U.N. SCOR, 48th Sess., 3175th mtg. at 2, U.N. Doc. S/RES.808 (1993), *available at* http://www.un.org/docs/scres/1993/scres93.htm (last visited Feb. 2, 2003); U.N. SCOR, 48th Sess., 3217th mtg. at 1, U.N. Doc. S/RES.827(1993), *available at* http://www.un.org/docs/scres/1993/scres93.htm (last visited Feb. 2, 2003).

38. *See* The Human Rights Center and the International Human Rights Law Clinic, University of California, Berkeley, & the Centre for Human Rights, University of Sarajevo,

Yet support within the Serb population of any of the countries and regions that now comprise what was the former Yugoslavia has been more difficult to elicit.[39] And within all ethnic groups, the work of the court has often been misunderstood.[40] Moreover, some consider the ICTY an imposition of Western European powers and the United States and thereby tainted by imperialism.[41]

A recent empirical study of the perceptions of the ICTY within Bosnia and Herzegovina illustrates this point.[42] The study indicates that a wide cross-section of lawyers and judges from all ethnic groups, while playing different roles within Bosnian society, were similarly ill-informed about the ICTY's work and were often suspicious of its motives and its results.[43] Possible reasons for this lack of legitimacy include the location of the tribunal in the Netherlands, far from the local population, the failure of the ICTY to publicize its work within Bosnia, particularly within the legal community, the lack of participation of local actors, even as observers, and the use of predominantly common-law approaches to criminal justice that were unfamiliar to local legal professionals, trained in a civil law tradition.[44]

While no such study exists for Kosovo, similar problems might be expected there. Indeed, evidence suggests that a general mistrust of the ICTY took root within the Serbian Kosovar population. Further, even among Albanians in Kosovo the long delays in the proceedings and the limited number of prosecutions have resulted in serious criticism of the institution.

It would be too simple to say that international tribunals have legitimacy with respect to the international community, but not with respect to local populations. In fact, the story is always much more complicated. Many segments of the local population, as in the case of Kosovo, often strongly support international justice in the wake of mass atrocities. Likewise, the international community does not always support the establishment of such institutions. Moreover, it is misleading to say that there is one, monolithic international community. In truth there are multiple international communities, including, for example, communities of nation-states (such as U.N. members, Security Council members, NATO countries, the Council of Europe, and the Organization of American States), communities of non-

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Justice, Accountability, and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors, 18 BERKELEY J. INT'L L. 102, 127-36 (2000) [hereinafter Joint Study].

39. *See id.*

40. *See id.* at 136-39.

41. *See id.* at 143-45.

42. *See id.*

43. *See id.* at 153-55.

44. *See id.* at 144.

governmental organizations (NGOs) (such as human rights NGOs, humanitarian NGOs, or development NGOs), and communities of other actors such as corporations, academics, and on and on. Indeed, the division between the international and the local may make little sense in a globalized era, for example when international NGOs partner with local NGOs, foreign governments give aid to local civil society organizations, and public policy networks routinely bridge gaps between local and international actors. Nonetheless, despite these complexities, it does appear that international courts such as the ICTY do face greater obstacles in establishing local legitimacy in the places from which the accused perpetrators come than they do in establishing legitimacy within broader international communities.

B. Capacity-Building Problems

Purely domestic and purely international institutions also often fail to promote local capacity-building. In post-conflict situations, the need to develop local capacity in the justice sector is often an urgent problem. Kosovo again provides an extreme example of this problem. The conflict had virtually eliminated the physical infrastructure of the judiciary—court buildings and prisons were destroyed, equipment was virtually non-existent.[45] But even more devastating than the physical loss was the loss in human resources. In Kosovo, only Serbs had the experience and training to work as judges and prosecutors, yet these Serbs often refused to work in the new system because doing so would constitute a betrayal of their ethnic heritage.[46] Albanians had some training but little experience, as they had been excluded from the system for many years.[47] Under these circumstances, a domestic system cannot be established for a significant period of time, due to extreme lack of capacity in the local sector.

At the same time, a purely international process that excludes local participation does not help build local capacity. An international court staffed by foreigners, or a justice system run by the U.N. transitional administration, also staffed by foreigners, does little to train local actors in necessary skills. In short, local actors are incapable of running the system themselves, but a system run by the international community does not help improve capacity of the local population.

C. Advantages of Hybrid Tribunals

Hybrid tribunals, as suggested by their use in Kosovo, can offer at least partial solutions to both these legitimacy and capacity problems. The

45. *See Collapse*, *supra* note 5, at 49-50.

46. *See id.*

47. *See id.*

sharing of responsibilities among international and local actors in the administration of justice, particularly with respect to accountability for serious human rights crimes, helps to establish the legitimacy of the process as well as strengthen the capacity of local actors.

In Kosovo, the addition of international judges and prosecutors to cases involving serious human rights abuses enhanced the legitimacy of the process, both in the eyes of the local population and the international community. The initial failure of U.N. authorities to consult with the local population in making governance decisions generally, and decisions about the judiciary specifically, sparked public outcry. Of course, without normal political processes in place consultation is inherently difficult. When no elected officials exist to give advice, and civil society has been badly damaged by years of oppression and conflict, there is no easy answer to the question of who should be consulted, without creating an impression of bias. Nonetheless, the appointment of foreign judges to domestic courts to sit alongside local judges, and the appointment of foreign prosecutors to team up with local prosecutors, helped to create a degree of collaboration that generally enhanced the perception of the institution's legitimacy. By working together and sharing responsibilities, not only were perceptions enhanced, but international and local officials necessarily began consulting with each other.

At the same time, the appointment of international judges to the local courts in these highly sensitive cases helped to enhance the perception of the independence of the judiciary and therefore its legitimacy within a broad cross-section of the local population. In Kosovo the previous attempts at domestic justice had failed to win support among Serbs.[48] Indeed, Serbian judges had refused to cooperate in the administration of justice, and the verdicts in the cases tried by ethnic Albanians were regarded as tainted by the ethnic Serbian population.[49] In contrast, the verdicts of the hybrid tribunals have alleviated some impartiality concerns, even among Serbs.[50]

The sharing of responsibilities among local and international officials is, of course, not a complete cure for legitimacy problems. Indeed, such hybrid relationships can raise new questions about who is really controlling the process. When international actors wield more power than local officials—when the majority of judges on a given panel is international, for example, or when the local prosecutors merely serve as deputies to

48. *See* March 2002 OSCE Report, *supra* note 16, at 5-6 (describing resignation of Kosovo Serbian judges, low-level of participation by Serbs in courts, and resulting unrest prior to appointment of international judges).

49. *See id.* at 5-6.

50. *See id.*

international prosecutors—some may charge that the international actors control the process, and that such control smacks of imperialism. On the other hand, too little international control may lead to concerns about the independence and impartiality of overly locally-controlled processes.[51] And the devil is, of course, often in these details. Nonetheless, the shared arrangement does offer more promise of working out these difficulties than a purely international or a purely domestic process.

The hybrid process offers advantages in the arena of capacity-building as well. The side-by-side working arrangements allow for on-the job training that may prove more effective than abstract classroom discussions of formal legal rules and principles.[52] And the teamwork allows for sharing of experiences and knowledge in both directions. International actors have the opportunity to gain greater sensitivity to local issues, local culture, and local approaches to justice at the same time that local actors can learn from international actors.

To be sure, hybrid courts face difficulties in capacity-building. A lack of resources has proven to be the most serious problem so far. Hybrid courts are often given an enormous mandate without receiving sufficient funding to carry out that mandate. Court personnel lack even the most basic equipment necessary for them to do their jobs, translators and other administrative personnel are in short supply, and, perhaps most significantly, the courts have had trouble attracting and retaining qualified international personnel to serve as judges, prosecutors, and defense counsel.[53] To the extent that hybrid courts are touted as a means of doing justice on the cheap, and then deprived of even the most basic resources, they cannot fulfill their potential.

Nonetheless, such concerns about funding are issues more of implementation than conception. And, of course, lack of resources can be a problem regardless of the legal framework adopted. In the end, perhaps the greatest indication of the promise of hybrid tribunals is found in the fact that they are increasingly being used in post-conflict situations. After many years of efforts, an accord has been reached to create a hybrid

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51. *See, e.g., id.*, at 6. Efforts to establish a mixed tribunal in Cambodia stalled due to an inability to agree about the balance of international and local control. *See* Seth Mydans, *U.N. Ends Cambodia Talks on Trials for Khmer Rouge*, N.Y. TIMES, Feb. 9, 2002, at A4. Nevertheless, an accord has now been reached. *See* Seth Mydans, *U.N. and Cambodia Reach an Accord for Khmer Rouge Trial*, N.Y. TIMES, Mar. 18, 2003, at A5.

52. Joel C. Beauvais, *Benevolent Despotism: A Critique of U.N. State-Building in East Timor*, 33 N.Y.U. J. INT'L L. & POL. 1101, 1157-59 (2001).

53. *See, e.g., id.* at 1160; Laura A. Dickinson, *The Dance of Complementarity: Relationships Among Domestic, International, and Transnational Accountability Mechanisms in East Timor and Indonesia, in* AVENUES TO ACCOUNTABILITY: NATIONAL AND INTERNATIONAL RESPONSES TO ATROCITIES (Jane Stromseth ed., forthcoming 2003).

domestic/international court in Cambodia.[54] Meanwhile, the project to establish a free-standing hybrid court in Sierra Leone is well underway,[55] and hybrid courts are currently operating in East Timor. Even within the Bush Administration, which is quite often resistant to international justice, there is some support for hybrid domestic-international tribunals, such as the proposed special court for Sierra Leone.

III. THE RELATIONSHIP BETWEEN HYBRID COURTS AND INTERNATIONAL COURTS

Some critics have suggested that hybrid courts are a mere second-best alternative to international courts.[56] Yet the Kosovo case illustrates that such courts need not be a replacement for international justice (or indeed, for local justice, either). Rather, the use of hybrid courts in Kosovo suggests that such courts may be a necessary complement to international tribunals. Indeed, their use in Kosovo, in the shadow of the ICTY, may have implications for the relationship of such courts to the newly established ICC.

The U.N. established hybrid courts in Kosovo precisely because the ICTY could not handle the volume of atrocities cases from the region. The ICTY prosecutor made it clear that the ICTY would be reserved for only the highest profile cases from Kosovo, leaving many suspects without a forum for trial.[57] Because the ordinary Kosovo courts could not plausibly provide fair trials in these cases, provision was made for the hybrid courts to close this gap.

Similarly, the ICC will not be equipped to try more than a handful of cases arising from any given post-conflict situation. Yet local courts may not be able to try such cases either. In fact, it is highly likely that in any circumstance in which the ICC assumes jurisdiction, the number of cases crying out for some form of international adjudication, due to the inability of local courts to handle them, will vastly exceed the ICC's capacity. Apart from circumstances in which the Security Council determines that the court should exercise jurisdiction, the court's complementarity regime ensures that the court can only assume jurisdiction where national courts are unwilling or unable to investigate.[58] Yet it is precisely in these

54. *See* Mydans, *U.N. and Cambodia Reach an Accord for Khmer Rouge Trial, supra* note 51, at A5.

55. *See* U.N. SCOR, 4186th mtg. at 2, U.N. Doc. S/RES/1315 (2000), *available at* http://www.un.org/docs/scres/2000/sc2000.htm (last visited Feb. 20, 2003).

56. *See supra* note 2 and accompanying text.

57. *See supra* note 9 and accompanying text.

58. *See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Rome Statute of the International

circumstances that huge numbers of cases cannot be adequately resolved by local courts—and the number of the cases that cannot be resolved adequately will likely far outnumber the ones that might come before the ICC.

Under these circumstances, hybrid courts can play a useful role in shoring up the capacity and legitimacy of criminal proceedings to try those accused of committing mass atrocities. Their success will depend in part on whether they receive adequate material and human resources. Certainly, the Kosovo hybrid courts have suffered on these grounds. Nonetheless, failures in implementation should not lead to an indictment of the model itself. These courts hold considerable promise, even in a world after the ICC.

Criminal Court, art. 17, Annex II, U.N. Doc. A/CONF. 183/9 (1998), *available at* http://www.un.org/law/icc/index.html (last visited Feb. 20, 2003).

The Legacy of the ICTY: The International Criminal Court

Leila Nadya Sadat*

November 9, 2002

I would like to bring today's session to a close by turning from a discussion of the *current* activities and jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) to contemplating its legacy instead. Many speakers during this conference have wondered whether the ICTY has had any effect on the thinking of international leaders. The following colloquy suggests that it has. Last year, Foreign Minister Shimon Peres and Infrastructure Minister Avigdor Lieberman had a sharp exchange of views during an Israeli Cabinet meeting over what policy would best address the threat of Palestinian suicide bombers, as follows:

Mr. Lieberman: At 8am we'll bomb all the commercial centres . . .
at noon we'll bomb their gas stations . . .
at two we'll bomb their banks . . .

Mr. Peres (interrupting): And at 6pm you'll receive an invitation to the international tribunal in The Hague.[1]

Mr. Peres was incorrect, of course, as a matter of law, in suggesting there was a tribunal in The Hague with jurisdiction over Israel and the Occupied Territories. The jurisdiction of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) do not extend to Israel, and Israel is not a party to the International Criminal Court Statute (ICC Statute).[2]

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1. Paul Pecchey, *We Risk Charges of War Crimes, Peres Tells Cabinet*, THE INDEPENDENT (London), Mar. 7, 2002, *at* 13.

2. Although Israel signed the Statute on December 31, 2000, in June 2002 it sent a letter virtually identical to the letter sent by the U.S. government in April 2002, stating it

However, his remarks suggest that an extraordinary transformation in world opinion has occurred, largely as a result of the ICTY's operations. The Hague, this quiet, green city of some 450,000 inhabitants in the west of Holland, now looms large in the popular mind as the place to which the international war criminals of the world are to be sent to be tried and judged.

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This spring a new war crimes court will begin operations, the International Criminal Court (Court, ICC). This Court is the heir apparent of the ICTY. Its birth was not attended or brought about by a Chapter VII burst of lightning, but by the backbreaking work of diplomatic negotiations that took years to produce a treaty,[3] followed by the extraordinarily difficult task of obtaining the sixty ratifications required in order to bring the treaty into force. It is probably also fair to say that the Court would not have existed *but for* the successful creation and operation of the ICTY and the ICTR. Indeed, the ICC Statute, adopted by the Rome Diplomatic Conference on July 17, 1998, entered into force on July 1, 2002, decades earlier than projected. As of this writing, eighty-nine countries are party to the ICC Statute, and eighteen judges have just recently been elected to serve. Nominations for the position of Prosecutor are now open, and a special swearing-in ceremony will be held in The Hague on March 11, 2003, to install the Court's newly-elected personnel.

The International Criminal Court shares many characteristics with the ICTY. Like its predecessor, it will be headquartered in The Hague, and will, for the time being, encompass the same three crimes within its jurisdiction *ratione materiae* – genocide, crimes against humanity, and war crimes[4] – although the definitions of those crimes will vary, in some cases

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had no intention of ever ratifying the treaty. *See* ICC Country Report, *at* http://icc.igc.org/countryinfo/northafricamiddleeast/israel.html (last visited Mar. 24, 2003). Thus, the only means of bringing actions occurring in Israel or the Occupied Territories before the Court would be pursuant to a Security Council Resolution adopted under Chapter VII of the United Nations Charter, which, of course, the United States could veto if it wished.

3. *Rome Statute of the International Criminal Court, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998*, Annex II, U.N. Doc. A/CONF.183/9 (1998) *available at* http://icc.igc.org/romearchive/romestatute/rome-e.doc (last visited Mar. 24, 2003) [hereinafter *Rome Statute*].

4. Aggression is included, but not defined in the Rome Statute, and is therefore not within the Court's jurisdiction. *See Rome Statute*, *supra* note 3, art. 5. Efforts have been

considerably, from the definitions in the ICTY's Statute. It will also share similar, but not identical, institutional features. The Court's jurisdiction, like the jurisdiction of the ICTY, is largely premised on the universality principle, that is, that the law of the Rome Statute is applicable to all the human beings of the world, unbounded by geography, regardless of nationality or whether their state of nationality has ratified the ICC Statute or not, in cases referred to the Court by the Security Council.[5]

The International Criminal Court will also be quite different from its predecessor institutions. It will be permanent, not ad-hoc, and will be much more universal in character, being established not by Security Council Resolution but by multilateral treaty. At the same time, this increase in universality will be accompanied by a decrease in jurisdictional and enforcement power. For example, while the ICTY and ICTR have primacy over national courts under their statutes, the International Criminal Court is based upon the doctrine of complementarity, which requires the Court to function as a jurisdiction of last, not first, resort, able to hear cases only if no state is able or willing to provide a forum for a particular case. The complementarity principle will not affect the prescriptive jurisdiction of the Statute, but only its adjudicative jurisdiction. Indeed, because the framers did not provide any opt-out from the complementarity regime for Security Council referrals, it appears that complementarity may function as a limit on admissibility, even in cases that the Security Council attempts to refer to the Court.

Institutionally speaking, the Court is a fascinating mix of common law, civil law, and law *sui generis*. Its Prosecutor will be independent, but not completely so; for the most part his or her work will be supervised by the Pre-Trial Chamber. The Court's judiciary are highly qualified and independent but they will not be powerful; the Statute provides no equivalent of life tenure or other protection for the individuals who have been charged by the international community with adjudicating the guilt or innocence of those accused of committing the worst atrocities known to

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made to define it at the Preparatory Commission and Assembly of States Parties meetings held since the Statute's adoption, however no clear consensus has emerged from these discussions. Additionally, Resolution E to the Final Act of the Diplomatic Conference recommends that the inclusion of the crimes of terrorism and drug trafficking in the Statute be taken up by the Assembly of States Parties at a Review Conference. Pursuant to Article 123 of the Rome Statute, the earliest date upon which such a Conference could be held would be July 1, 2009, seven years after the entry into force of the Statute.

5. *See generally* LEILA NADYA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM 103-27(2002). In cases referred by a State Party or the Prosecutor, however, the Court may only exercise jurisdiction if one or more of either the State on the territory of which the conduct in question occurred, or the State of the accused's nationality, is either a Party to the Statute or has accepted the jurisdiction of the Court. *Rome Statute, supra* note 3, art. 12(2).

humankind.[6] The Court's Registry, like the Registry of the ICTY, will be a co-equal organ performing crucial tasks of administration for the Court, as well as maintaining the Victims and Witnesses Unit and facilities for defense counsel. Indeed, the Registrar is the one potentially "permanent" member of the Court.

The Rome Statute's extensive provisions on procedure should provide the Court with a procedural system well-suited to the needs of international criminal justice. Learning from both the problems and the successes of the ICTY, the framers attempted to avoid an often criticized bias in favor of common law procedures, choosing instead to blend aspects of the adversarial and inquisitorial systems and innovate where neither system had a rule that fit the Court's needs. They successfully crafted a statute that is rich in complexity without being overly verbose, sufficiently confining the Court's personnel to ensure fairness and consistency in the meting out of justice, but leaving enough flexibility to avoid excessive rigidity. Additionally, unlike the ICTY, the Rules of Procedure and Evidence will be adopted by the Assembly of States' Parties, rather than the Court's judges.

Much of the "law" of the Rome Statute will be supranational in character. *Déracinée* and *délocalisée*, the ICC will be independent from national orders, and even, at least partially, from the Security Council. This will be both a weakness and a strength – an Achilles' heel in terms of the actual investigation and prosecution of crimes which is almost completely dependent upon the good will of states; yet, perhaps, a tremendous moral virtue. As we are often reminded, *legitimacy* is something quite different than effectiveness, efficiency, or power. It is vital that the Court and its judgments be perceived as legitimate by the international community, and it is unlikely that edicts enforced by brute force would achieve such a result. Instead, the Court must be perceived as competent, fair, and universal.[7] This way, even if its judgments are too infrequent to work as general deterrents, the legitimacy of the judgments may help to establish norms that predispose rulers and citizens alike to conform their behavior to legal expectations even without the application of coercive sanctions.[8] Cognizant of this, the framers of the ICC Statute largely divorced the Court from questions of nationality, such that the nationality of the judges, prosecutors, victims, and defendants are virtually

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6. *Cf.* U S CONST. art. III, § 1.

7. *Cf.* THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 16 (1990). *See also* Adrian Bos, *The International Criminal Court: A Perspective, in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 463 470 (Roy S. Lee ed., 1999) (stating that "[t]he establishment of an International Criminal Court springs from a universal human desire for justice").

8. *See* FRANCK, *supra* note 7, at 16.

irrelevant to its proceedings. While at least some attention to local customs will no doubt be sacrificed in the process, this should permit the ICC to avoid the charges of "victor's justice" or regional or cultural bias which have been leveled at its predecessor institutions, such as the ICTY.

The law of the Rome Statute builds upon a century of incremental progress in constructing a normative framework for international criminal law, from the modest steps taken at The Hague in 1899 to the more powerful, albeit unenforced Conventions adopted after the second World War. The Statute defines the Crime Against Humanity for the first time in a widely accepted multilateral treaty, and reinforces the right, as well as the desire, of the international community to prohibit offenses committed against human beings anywhere, including internal atrocities, if they rise to a certain level of gravity and no state is able or willing to step in and prosecute the offenders. In addition to defining the crimes within the Court's jurisdiction, an entire system of general principles of law was elaborated to govern issues of legality, applicable law, individual responsibility for crimes, the elements of crimes, and the defenses thereto. The extraordinary nature of this achievement cannot be overstated; blending together elements of the civil and common law, as well as specific rules from a myriad of countries into one relatively coherent (even if not perfect) statute represents an enormous intellectual and creative endeavor. While the Rome Statute might have been even more consistent had the delegates taken more time in its elaboration,[9] given that many of the inconsistencies derive not from difficulties in drafting but from political compromises, it is possible, and perhaps even probable, that having more time would have made the Statute worse instead of better, at least from a systemic point of view. Indeed, the collection of political compromises contained in the definitions provisions, as well as Part 7 (on Penalties), caused the framers to insert language into the Rome Statute in an attempt to separate it from customary international law and national law. This suggests that at least the definitions of crimes may be seen as minimum rules of conduct, beyond which states may legislate freely.

The richness and complexity of the Rome Statute will undoubtedly give rise to difficulties in its interpretation, but these problems should not be insurmountable. The Rome Statute takes the form of an international treaty, but has the status of a constitution. Many of its provisions perform the function of international legislation, while others supply detailed procedural rules that address the Court's operation.[10] The judges will have

9. *See* Shabtai Rosenne, *Poor Drafting and Imperfect Organization: Flaws to Overcome in the Rome Statute*, 41 VA. J. INT'L L. 164, 166-72 (2000).

10. *See* GEORGE A. BERMANN, ET AL., CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 30 (1993).

the extraordinary task of interpreting these provisions, and although the strict rules of the Vienna Convention on the Law of Treaties will apply due to its status as an international treaty, other interpretative techniques will no doubt be needed as well. For example, teleological methods should be applied to constitutive aspects and provisions representing foundational principles of the Rome Statute,[11] while canons of strict construction are the appropriate guide to interpreting the "legislation within the Statute," – that is, the definitions of crimes, which should be narrowly interpreted in accordance with the legality principle and article 22(2)'s command that definitions of crimes shall be strictly construed and not extended by analogy. Between these two extremes lie most of the Statute's provisions that will guide the Court's general operation and govern proceedings before it. Despite the diversity of interpretive techniques appropriate to various components of the Statute, it will be important to the legitimacy and credibility of the Court for its decisions to nevertheless be consistent and coherent.

As I have noted in my earlier writings, several features of the Statute challenge the Westphalian model, and the unwritten "constitution" of international law premised upon it.[12] To begin with, the Court will exercise jurisdiction over individuals, including Heads of States. The three crimes currently defined within its jurisdiction will cover the internal, as well as the international, commission of atrocities on a wide scale. Their codification in the Rome Statute strains the current conception of international law as consensual and poses a challenge to the content and status of customary international law. Aggression is included, even if not defined, as a direct challenge to the prerogatives of States to use violence to advance national interests.

The Court was not established within the parameters of the existing United Nations system, although its genesis and creation was undertaken by that institution. Instead, through the Relationship Agreement between itself and the United Nations it has been brought into a "relationship" with the United Nations. This will have significant implications for its financing, bureaucratic structure and procedures, control over prosecutions, and enforcement of its commands. From a theoretical perspective, if the

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11. For example, general provisions such as article 86 ("States Parties shall . . . cooperate fully with the Court in its investigation and prosecution of crimes within [its] jurisdiction"), have a constitutional character and will need to be interpreted in such a manner so as to effectuate the Statute's object and purpose. A teleological or broad reading of provisions such as article 86 would therefore seem perfectly appropriate. Other provisions that the Court will need to interpret broadly in order to effectuate the Statute's purpose include article 21(3).

12. *See* Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L. J. 381, 457 (2000).

United Nations' Charter is a nascent constitution, it is not clear where the Rome Treaty fits in the existing structure. Indeed, one might ask whether the Statute's adoption represented a "constitutional moment" in international law – a decision to re-equilibrate the constitutional, organic law governing international relations, albeit *sotto voce*, by making an end run around, rather than a formal amendment to, the Charter.

If many features of the Rome Treaty and its adoption were revolutionary, "the Revolution," as I have argued elsewhere, is in no sense an easy one.[13] Indeed, the opposition has a very powerful champion in the guise of the United States of America, and as a matter of law, institutional structure and process, many prerogatives of sovereignty remain. Although the institution is permanent, its personnel generally are not. Fears of a powerful judiciary and an independent prosecutor caused states to substantially complicate the procedural regimes governing the bringing of cases to the Court, to the point that they may threaten the administration of justice. Where the framers were required to craft "new" law, as in the crimes against humanity provisions, the definitions are relatively restrictive, and the process of defining the elements of crimes has caused them to become even more so.

CONCLUSION

An advance team is now preparing the Court's premises and arranging other logistics for this new international institution, and it is even possible to apply for employment with the Court via its website.[14] This institution, that many thought would be established years, maybe decades in the future, will soon be operational. It will not be a panacea for the world's ills, nor should it become an excuse for inaction on the part of world leaders faced with international humanitarian crises. Punishing a few *génocidaires* will not, without more, make the world safer, saner, or more secure. Yet there is no doubt that changes in prevailing international orthodoxy are occurring and have occurred, and that the prevention and punishment of war crimes, crimes against humanity, and genocide are increasingly seen as required by world leaders.

The success of the ICTY and the rapid coming into force of the Rome Statute, however, does not mean that the road ahead is likely to be smooth or free from difficulties. State sovereignty remains the chief organizing principle of international law and relations, and the Court can only succeed if States want it to. States will be called upon to finance its operations, support its personnel, and assist in the conduct of investigations, the arrest

13. *See id.* at 458-59.

14. *See* International Criminal Court, *at* http://www.icc-cpi.int/index.php (last visited Mar. 13, 2003).

of suspects, the trial of the accused, and the imprisonment of convicts. The Court must also survive the relentless hostility of the world's only superpower, which has made the drive to undermine and weaken the ICC a centerpiece of its current foreign policy.[15] The dedication and effort that have made the ICTY the successful institution that it now is will have to be replicated and international efforts redoubled if the fledgling Court is to succeed. It is to be hoped, even dreamed, that the ideals of justice and the rule of law that were given form in the text of the Rome Treaty will be successfully brought to life by the Court's newly elected personnel. The world now has an historic opportunity to deliver on the promise of justice it has so often made to the victims of atrocities everywhere. Let us hope that it will not fail in that endeavor.

15. *See* The National Security Strategy of the United States of America, 31 (Sept. 2002), *at* http://www.whitehouse.gov/nsc/nss.pdf. (last visited Mar. 13, 2003).

COMMENTS

Becker v. FEC: Undermining the "Marketplace of Ideas"

I. INTRODUCTION

In November 2000, the United States Court of Appeals for the First Circuit decided *Becker v. Federal Election Commission.*[1] The case, brought by Green Party presidential candidate Ralph Nader, challenged corporate sponsorship of presidential debates.[2] Nader maintained that the Federal Election Commission's (FEC) regulations allowing corporate sponsorship of presidential debates[3] violated the prohibition in the Federal Election Campaign Act[4] (FECA) against the use of corporate money in connection with federal elections.[5]

Presidential debates have become "so institutionalized as to be a prerequisite for election"[6] and *Becker* is the most recent challenge to the exclusion of third-party candidates[7] from these debates. Although not explicitly designed to procure Nader's participation in the debates, the purpose of his lawsuit was to challenge the structure and validity of the Commission on Presidential Debates (CPD), which is the organization responsible for staging presidential debates.[8] Several statutes and

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1. *See* 230 F.3d 381 (1st Cir. 2000), *cert. denied, sub. nom.* Nader v. FEC, 532 U.S. 1007 (2001).

2. *See id.* at 383.

3. *See* 11 C.F.R. §§ 110.13, 114.4(f) (2000).

4. *See* 2 U.S.C. § 431(19) (2000).

5. *See Becker*, 230 F.3d at 384. For a case involving a third-party challenge to exclusion from a debate sponsored by a *public* broadcasting station, see Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998) (holding that television station's exclusion of independent candidate Ralph Forbes was consistent with First Amendment).

6. Johnson v. FCC, 829 F.2d 157, 159 (D.C. Cir. 1987).

7. The term "third-party" will be used throughout this Comment to identify candidates who are not affiliated with the Republican or Democratic parties.

8. *Give Us a Real Debate; Ralph Nader Files Lawsuit Against Commission on*

regulations governing campaign financing and broadcasting, and the case law interpreting these statutes and regulations, provide the CPD with the authority to exclude third-party candidates from presidential debates. The case law provides critical interpretations of First Amendment rights relating to broadcast entities and political candidates, and deference to agency regulations controlling the structuring and financing of presidential debates.

This Comment analyzes the relevant statutes, regulations, and judicial interpretations to provide background to third-party candidate exclusion from the presidential debates, as ultimately litigated in *Becker v. FEC*.[9] This Comment also provides justifications for the inclusion of third-party candidates in the presidential debates. Finally, this Comment points out the many defects in the regulatory framework and judicial interpretations that allow not only for the exclusion of third-party candidates from the debates, but also for corporate influence in the election process, which is prohibited by FECA.[10]

Part II of this Comment reviews the importance of the debates in American democracy and provides justifications for the inclusion of significant third-party candidates in the debates.[11] Part III discusses the relevant legislation, including FECA[12] and the Communications Act of 1934,[13] which was of central importance in *Becker*. Complementing the analysis of these topics, Part III also discusses the relevant case law and a challenge brought by a third-party candidate under the Communications Act of 1934.[14] Part IV discusses the CPD, whose acceptance of corporate funding was at issue in *Becker*.[15] Part V analyzes the issues addressed by the *Becker* court.[16] Finally, Part VI offers a solution to the perpetual exclusion of third-party candidates in the presidential debates.[17]

II. THIRD PARTIES, DEMOCRACY, AND THE "MARKETPLACE OF IDEAS"

Two vital qualities of a thriving democracy are the right to vote and the opportunity to engage in informed and uncensored public discussion of

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Presidential Debates Charging That it is Illegally Supported by Corporate Donations, THE NATION, July 10, 2000, at 3.

9. 230 F.3d 381 (1st Cir. 2000).
10. 2 U.S.C. § 441b (2000).
11. *See infra* notes 18-42 and accompanying text.
12. 2 U.S.C. §§ 431-32 (2000).
13. 47 U.S.C. § 315 (2000).
14. *See infra* notes 43-96 and accompanying text.
15. *See infra* notes 97-149 and accompanying text.
16. *See infra* notes 150-264 and accompanying text.
17. *See infra* notes 265-88 and accompanying text.

ideas.[18] The desire for a diverse and flourishing "marketplace of ideas" dates back to John Milton, and has been recognized by the Supreme Court as essential to American democracy.[19] Many commentators argue that a non-debating democracy is as ineffective as a non-voting democracy.[20] Increasing public participation in electoral discourse ensures a more informed electorate, and televised debates serve this purpose because they reach the largest number of voters.[21]

The first televised presidential debate was on September 26, 1960, featuring then-Vice President Richard Nixon and John F. Kennedy.[22] This

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18. *See* Stephen Coleman, *Meaningful Political Debate in the Age of the Soundbite, in* TELEVISED ELECTION DEBATES, INTERNATIONAL PERSPECTIVES 1 (Stephen Coleman, ed. 2000).

19. *See* Noaman Barkatullah, *Restricting the "Marketplace of Ideas": Third Parties, Media Candidates, and Forbes' Imprecise Standards*, 18 ST. LOUIS U. PUB. L. REV. 485, n.20 (1999) (quoting Oliver Wendell Holmes' dissent in Abrams v. United States, 250 U.S. 616, 629 (1919)):

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe ... that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market .... That at any rate is the theory of our Constitution.

Id.

20. *See, e.g.*, Coleman, *supra* note 18, at 1-2. Coleman takes the view that although quite a few people vote every few years, many barely take the time to think or discuss what they are voting for or against. *See id.* at 2. He writes:

> The illusion of non-deliberative democracy has inevitable consequences: a decline in public interest in election and the elite defined political agenda; an atrophying civic culture in which citizenship becomes a matter of confused obligation or resentful indifference rather than active participation; a descent into the abyss of negative campaigning ...; a sense of estranged disjunction between the voting public and the consequences of their actions as voters, as if they are half convinced that whoever they elect to power is bound to abuse the right to govern; and, ultimately, a deliberate avoidance of news and current affairs, with vast sectors of the mass media becoming reason free zones, devoid of explicit political content, though frequently pursuing their own populist agendas.

Id.

21. *See* Coleman, *supra* note 18, at 9-10.

22. *See* ALAN SCHROEDER, PRESIDENTIAL DEBATES, FORTY YEARS OF HIGH-RISK TV 4 (2000). The first televised presidential debate was moderated by Howard K. Smith and the issues discussed included "communism and national security; labor and farm problems; and candidates' leadership experience." *Id.* at 5. Before the debate, John F. Kennedy was by far the lesser known contender, but the debates had a decisive impact on his campaign. *See id.* at 14. Compared to Kennedy's "calm and nerveless" appearance, Nixon appeared "tense, almost frightened, at turns glowering and, occasionally, haggard-looking to the point of sickness." *Id.* at 5-6. "In no other mode of presentation ... does the candidate risk or reveal

debate attracted "the largest audience that had ever assembled for a political event; an estimated seventy million Americans watched" the hour-long debate on television, while millions more listened on the radio.[23] Sixteen years passed before another candidate from the White House, Gerald Ford, agreed to debate.[24] In each election since 1976, presidential debates have occurred in one form or another.[25] Televised presidential debates continue to draw record audiences.[26]

However, while debates may be desirable in theory, the practical reality is that televised presidential debates draw much criticism.[27] Some criticism is aimed at the formality and rigidity of the debate structure, with commentators asking whether meaningful discussion can be created in minute-long sound bites.[28] Some of the strongest criticism is aimed at the constraints placed on the debate format by the "narrowly conservative agenda, defined by the media elite and corporate America," which seeks to limit debates by the inclusion of only certain participants with limited policy interests.[29]

This is where the benefit of including third-party voices in the debates becomes apparent. These third-party voices "often air significant discontent, or [address] neglected issues."[30] A debate that "brings in a wider range of views" not only better informs voters, but can also improve the overall state of American democracy.[31] Third-party candidates play a crucial role as policy innovators who hold the major-party candidates accountable to concerns of the citizenry that might otherwise be ignored.[32]

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so much of his character." *Id.* at 15.

23. *Id.* at 5.

24. *See id.* at 14.

25. *See id.* at 15.

26. *See* THE JOAN SHORENSTEIN CENTER ON THE PRESS, POLITICS, AND PUBLIC POLICY, *Debates Get People Talking About Campaign*, *at* http://www.vanishingvoter.org/releases/10-12-00.shtml (last visited Mar. 25, 2003) (reporting that 40 to 50 million television sets were tuned in to each of the first two presidential debates in 2000).

27. *See* Coleman, *supra* note 18, at 11-13.

28. *See id.* at 12.

29. *Id.*

30. *Room at the Debate Table: Third Parties Are Not Spoilers*, CHRISTIAN SCI. MONITOR, June 15, 2000, at 8.

31. *Id.*

32. *See* Keith Darren Eisner, *Non-Major Party Candidates and Televised Presidential Debates: The Merits of Legislative Inclusion*, 141 U. PA. L. REV. 973, 983-87 (1993). Eisner points out that it was third-party candidates that first advocated for the "direct election of senators, women's suffrage, and the graduated income tax," and who have "occasionally shape[d] the course of American politics, [and] even alter[ed] the political agenda when the major parties have ignored issues and options." *Id.* at 983. In fact, the policy innovation characteristic of third-party candidates often "becomes the instrument of its demise. When a

Furthermore, third-party candidates serve as "conduits for the expression of discontent with the major parties"[33] and encourage electoral participation, especially by the disillusioned voter.[34]

The mass media offers the greatest opportunity for the inclusion of third-party candidates in the electoral process.[35] Televised presidential debates present the candidates with a unique opportunity to access the citizenry and voice their positions,[36] and television plays an important role in the election process.[37] For a majority of Americans, television is a

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minor-party attracts substantial backing, one or both major parties, anxious to capitalize on the third party's popularity and win over new supporters, seizes the minor party's ideas as its own." *Id.* at 984 & n.47 (discussing presidential candidates Bill Clinton and George H.W. Bush's attempts to capitalize on Ross Perot's platform after his withdrawal from candidacy in 1992).

33. *Id.* at 986-87. Third-party candidate Lenora Fulani was quoted as saying that she sees herself "running against the two-party system that is tremendously unresponsive to most American people ...." *Id.* at 988 (quoting Andrew Rosenthal, *Independent Candidate Plays a Spoiler's Role*, N.Y. TIMES, Oct. 26, 1988, at A23).

34. *See id.* at 986-87. The disillusioned are not few in number. In the 2000 presidential election, 105,586,274 people voted, out of 156,421,311 registered voters. *See* FEDERAL ELECTION COMMISSION, *Voter Registration and Turnout 2000*, *at* http://www.fec.gov/pages/2000turnout/reg&to00.htm (last visited Mar. 24, 2003). That means 50,835,037 eligible voters did not bother to cast a vote in the 2000 election. *See id.* Third-party candidate Ross Perot's 1992 presidential bid, for example, attracted "voters disillusioned with two-party politics, and encouraged their participation in the political process." Eisner, *supra* note 32, at 987 n.67.

35. *See* Coleman, *supra* note 18, at 9-10. Coleman argues that there are several reasons why televised debates enhance the democratic process. *See id.* at 9-11. One reason is that the debates act as a catalyst for seeking more information about the policies being discussed, and thus serve as an educational tool. *See id.* at 10. The debates also "help to equalise access to the mass media" because each candidate is on equal footing during the debate. *Id.* at 10. Televised debates also allow the public "close" contact with the candidates, and the "illusory intimacy" of television brings these politicians into the living rooms of those whose lives will be affected by the winner. *Id.* at 10-11. Finally, televised debates force political rivals to be challenged by each other's positions, forcing them to prepare responses to the opposition and further educating themselves. *See id.* at 11. *See also* Gregory P. Magarian, *Fighting Exclusion From Televised Presidential Debates: Minor Party Candidates' Standing to Challenge Sponsoring Organizations' Tax-Exempt Status*, 90 MICH. L. REV. 838, 838 (1992) (arguing that the mass media provides third-party candidates with "unique opportunities to boost their stature and project their messages").

36. *See* Magarian, *supra* note 35, at 838. Television emerges as an asset for third-party candidates because "the opportunities for dissenters to reach truly mass audiences are limited." E.J. Dionne, Jr., *Third Parties in Second Place*, WASH. POST, June 30, 2000, at A31.

37. *See generally* SIDNEY KRAUS, TELEVISED PRESIDENTIAL DEBATES AND PUBLIC POLICY (2000); TELEVISED ELECTION DEBATES, INTERNATIONAL PERSPECTIVES (Stephen Coleman, ed. 2000).

> primary source of election information, and debates are regarded as the "only occasion during a campaign when the attention of a large portion of the American public is focused on the election, as well as the only campaign information format which potentially offers sufficient time to explore issues and policies in depth in a neutral forum."[38]

Third-party candidate inclusion in these forums has the potential to expand the discussion beyond what the two major-party candidates and their corporate sponsors choose to address.[39]

Nevertheless, third-party candidates have routinely been excluded from televised presidential debates.[40] Between 1960 and 2000, "only two candidates from outside the two dominant parties have participated in the presidential debates."[41] While the debates clearly hold value in American democracy and play a critical role in the outcome of elections, they are being "drained of democratic value and constitutional legitimacy because of the pervasive phenomenon" of third-party exclusion by the two major parties and their corporate sponsors.[42] This Comment explores this phenomenon, discussing several third-party candidates' legal challenges to their exclusion from the debates, and the pertinent legislation and regulations governing the debate structure.

III. BACKGROUND: THE STATUTES, REGULATIONS, AND CASE LAW GOVERNING THIRD-PARTY EXCLUSION FROM PRESIDENTIAL DEBATES

The issues Nader presented in *Becker* involved not only a challenge to FECA and the FEC's regulations,[43] but also issues of third-party exclusion from American politics.[44] Third-party candidates have challenged their exclusion from political debates on various grounds: by arguing First Amendment violations, by arguing violations of the Communications Act of 1934, and by challenging the entity charged with staging the debates, the

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38. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 676 (1998) (quoting CONGRESSIONAL RESEARCH SERVICE, CAMPAIGN DEBATES IN PRESIDENTIAL GENERAL ELECTIONS, summ. (June 15, 1993)).

39. *See* Eisner, *supra* note 32, at 983. "Many third-party and independent candidates run not to win, but to draw attention to the single issue for which their candidacies stand." *Id.* at n.40. Nader, for example, runs in opposition to corporate control of our democracy. *See* RALPH NADER, *Statement of Ralph Nader Announcing His Candidacy for the Green Party's Nomination for President*, *in* THE RALPH NADER READER 3 (2000).

40. *See* Jeff Milchen, *Presidential Debates is Really Duopoly by Design*, S.F. CHRON., Aug. 22, 2000, at A21.

41. *Id. See also infra* notes 121-22 and accompanying text.

42. Jamin B. Raskin, *The Debate Gerrymander*, 77 TEX. L. REV. 1943, 1945 (1999).

43. *See* Becker v. FEC, 230 F.3d 381 (1st Cir. 2000).

44. *See Give Us a Real Debate*, *supra* note 8.

CPD.[45] The following sections provide an analysis of these issues, beginning with a discussion of FECA in order to illustrate Congress' intention in designing FECA—to "prevent corruption or the appearance of corruption" in federal elections.[46] This intention was a central issue in *Becker*.[47]

A. The Federal Election Campaign Act[48]

In 1971, Congress passed an "intricate statutory scheme" to regulate federal election campaigns.[49] FECA established five major reforms. First, it limited both individual and political committee contributions to candidates for federal office.[50] Second, it limited expenditures by candidates for federal office.[51] Third, the Act required "record keeping and disclosure by candidates," their committees, and individuals making independent expenditures in order to advocate for a candidate.[52] Fourth, it provided for "[p]ublic financing of both Presidential primary and general elections and of party nominating conventions for candidates who agreed to limited campaign expenditures."[53] Finally, FECA established an independent agency, the FEC, to "oversee the administration of the law."[54]

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45. *See infra* notes 85-96 & 142-49 and accompanying text.

46. Buckley v. Valeo, 424 U.S. 1, 25 (1976).

47. *See Becker*, 230 F.3d at 392.

48. Federal Election Campaign Act, Pub. L. 92-225, 86 Stat. 112 (1972) (codified as amended at 2 U.S.C. §§ 431-456 (2000)). In March 2002, the Bipartisan Campaign Finance Reform Act (more commonly known as the McCain-Feingold Bill) became law, further amending FECA. *See* Pub. L. 107-155, 116 Stat. 81 (to be codified at 2 U.S.C. §§ 438a, 439a, 441a-1, 444i, 441k and 36 U.S.C. § 510).

49. *Buckley*, 424 U.S. at 12. *See also* ANTHONY CORRADO, CAMPAIGN FINANCE REFORM 9 (2000).

50 *See* 2 U.S.C. § 441a(a) (2002). *See also* THE CONSTITUTION AND CAMPAIGN FINANCE REFORM, AN ANTHOLOGY xix (Frederick G. Slabach ed., 1998)

51 *See* § 441a(b). *See also* THE CONSTITUTION AND CAMPAIGN FINANCE REFORM, *supra* note 50, at xix.

52 THE CONSTITUTION AND CAMPAIGN FINANCE REFORM, *supra* note 50, at xx. *See also* § 434.

53 THE CONSTITUTION AND CAMPAIGN FINANCE REFORM, *supra* note 50, at xx. *See also* I.R.C. §§ 9001-13 (2002).

54. THE CONSTITUTION AND CAMPAIGN FINANCE REFORM, *supra* note 50, at xx. *See also* § 437c. The initial version of FECA was revised in 1974 in response to revelations of financial abuse, including the Watergate scandal. *See* CORRADO, *supra* note 49, at 9. "FECA created a comprehensive system to regulate the monies raised and spent in federal elections," including caps on campaign contributions and expenditures. *Id.* The 1974 version of FECA is the basis of the current law. *See id.* In 1976, the Supreme Court struck down FECA's limitations on expenditures, but upheld the statute's limitations on contributions. *See Buckley*, 424 U.S. at 20-21, 26-27. The Court held that campaign contributions and

FECA's primary purpose was "the prevention of corruption and the appearance of corruption" in federal campaigns.[55] Prior to the enactment of FECA, "the size and sources of candidate contributions were not publicly disclosed, and there were no effective limits on the amount of money that individuals or groups could contribute to federal campaigns."[56] FECA also sought to reduce "the emphasis on fundraising by creating a voluntary program of public financing" for presidential elections.[57] Congress hoped that this program would "expand public participation in the financing of campaigns, which would help safeguard the electoral process against any undue influence by a relatively small group of donors."[58]

Despite the changes sought through FECA, the current state of American politics may indicate that the initial goals of FECA have been undermined. For example, by July 31, 2000, George W. Bush had raised $94,466,341 in campaign contributions and Al Gore had raised $49,202,745.[59] Public opinion polls have found support for campaign finance reform to be as high as seventy-two percent and as many as eighty-six percent of the respondents believe "special interest contributors influence policy decisions."[60]

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expenditures were forms of political speech protected by the First Amendment. *See id.* at 16-18. *See also* CORRADO, *supra* note 49, at 11. Determining that FECA's provisions limiting campaign expenditures represented a "substantial ... restraint[] on the quantity and diversity of political speech," the Court struck them down. *Buckley*, 424 U.S. at 19. FECA's limitations on campaign contributions, however, were held to be constitutional because the government had a "sufficient justification" for limiting "the actuality and appearance of corruption resulting from large individual financial contributions." *Id.* at 26. That justification was articulated by the Court as a concern that when "large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined." *Id.* at 26-27. *See generally* Alan B. Morrison, *What if* Buckley *Were Overturned?*, 16 CONST. COMMENTARY 347 (1999); E. JOSHUA ROSENKRANZ, REPORT OF THE TWENTIETH CENTURY FUND WORKING GROUP ON CAMPAIGN FINANCE LITIGATION, *BUCKLEY* STOPS HERE: LOOSENING THE JUDICIAL STRANGLEHOLD ON CAMPAIGN FINANCE REFORM 31 (1998).

55. *Buckley*, 424 U.S. at 25.

56. CORRADO, *supra* note 49, at 9.

57. *Id.* at 10.

58. *Id.*

59. *See* FEDERAL ELECTION COMMISSION, *Receipts of 1999-2000 Presidential Campaigns Through July 31, 2000, at* http://www.fec.gov/finance/precm8.htm (last visited Mar. 25, 2003). In *Buckley*, the Supreme Court failed to recognize the substantial governmental interests of enhancing the candidate pool, restoring public confidence in the health of American democracy, equalizing the voices of the least and most influential speakers, and discouraging the undue influence of the wealthy on electoral outcomes. *See* ROSENKRANZ, *supra* note 54, at 61.

60. PUBLIC CITIZEN, *Campaign Finance Reform Polling Data, at* http://www.citizen.org (last visited Mar. 25, 2003).

The purposes of FECA are important because they reveal Congress' desire to prevent corruption and the undue influence of wealth on the political process. Another statute that has impacted political campaigning is the Communications Act of 1934.[61] The requirements of this Act long prevented the televising of presidential debates.[62] In 1975, the Federal Communications Commission (FCC) amended the Act to allow for televised candidate debates.[63] Since then, the courts have respected the balance between First Amendment rights of the various parties affected and the responsibilities of broadcasters to serve the public.[64] Third-party candidates have relied on the Communications Act and the First Amendment to challenge their exclusion from debates.

B. The Communications Act of 1934[65]

The Constitution prohibits Congress from making laws that abridge freedom of speech.[66] Because of limited access to broadcast media, the free use of the airwaves is not possible.[67] Thus, the federal government and the courts have had to strike a balance between regulating access to broadcast media and freedom of speech.[68] Federal regulations of the broadcasting industry have evolved under the Communications Act of 1934. There are many competing First Amendment interests affected by disputes over the control of and access to the airwaves.[69] In the Communications Act, Congress and the FCC have created a comprehensive system of regulation that "balances the potentially conflicting speech interests of individuals,

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61. 48 Stat. 1064 (1934) (codified as amended in scattered sections of 47 U.S.C.). *See also infra* notes 65-84 and accompanying text.

62. *See* discussion *infra* notes 65-84 and accompanying text. In 1960, Congress agreed to temporarily suspend the applicable section of the Communications Act to allow for the debate between Nixon and Kennedy. *See* SCHROEDER, *supra* note 22, at 15.

63. *See In re* Aspen Inst. Program on Communications and Soc'y, 55 F.C.C.2d 697 (1975). *See also* Kyo Ho Youm, *Editorial Rights of Public Broadcasting Stations vs. Access for Minor Political Candidates to Television Debates*, 52 FED. COMM. L. J. 687, 696-97 (2000).

64. *See* Chisholm v. FCC, 538 F.2d 349, 352 (D.C. Cir. 1976). *See also* Johnson v. FCC, 829 F.2d 157, 165 (D.C. Cir. 1987).

65. 48 Stat. 1064 (1934) (codified as amended in scattered sections of 47 U.S.C.)

66. U.S. CONST. amend. I.

67. *See* Johnson v. FCC, 829 F.2d 157, 161 (D.C. Cir. 1987) (citing Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 114-21 (1973)).

68. *See id.* at 160-61 (noting that "both broadcasters and the public have important First Amendment interests at stake in controversies over broadcast access" and "Congress ... in the Communications Act, and the [FCC] ... attempted to strike a balance that would satisfy the First Amendment interests of all concerned" (citing *Columbia Broad.*, 412 U.S. at 102, 110-14)).

69. *See id.* at 160.

broadcasters, and the general public."[70]

The evolution of the Communications Act illustrates the attempt to strike a balance between these competing interests.[71] At its core, the Communications Act requires licensing of radio and television stations, and imposes certain responsibilities and obligations upon broadcasters, as trustees of the public airwaves.[72] As the United States Court of Appeals for the District of Columbia Circuit explained:

> A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations .... A broadcast license is a public trust subject to termination for breach of duty.[73]

1. The Equal Opportunity Requirement

Section 315(a) of the Communications Act sets forth the "equal opportunity" rule, which obligates broadcasters to provide equal access to the broadcast station to all legally qualified political candidates.[74] Over the past fifty years, Congress and the FCC have changed this policy several times with respect to political debates and the requirements of the "equal opportunity" rule.[75] In 1959, for example, Congress amended the Act so that an appearance by a candidate on any one of four types of news programs would not be deemed to be a "use" of the station by that candidate.[76] The four categories of programs exempt from the equal opportunity requirement are as follows:

> bona fide newscast,
> bona fide news interview,
> bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or
> on-the-spot coverage of bona fide news events (including but not

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70. *Id.*

71. *See id.* at 160-61.

72. *See* Youm, *supra* note 63, at 691.

73. *Id.* at 693 (quoting Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966)).

74. *See* 47 U.S.C. § 315(a) (2000) (providing that "[i]f any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station"). *See also* Youm, *supra* note 63, at 693-94.

75. *See* Youm, *supra* note 63, at 694-97.

76. *See* Chisholm v. FCC, 538 F.2d 349, 352 (D.C. Cir. 1976).

limited to political conventions and activities incidental thereto).[77]

The amended section further states that nothing "shall be construed as relieving broadcasters ... from the obligation imposed upon them ... to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance."[78] Congress also provided broad discretion to the FCC in interpreting and implementing the new policy.[79]

In the years following these amendments, the FCC and Congress struggled with whether candidate debates qualified as "on-the-spot news coverage of bona fide news events" and thus could be exempt from the equal opportunity requirements under the Act.[80] Ultimately, it was decided that debates initiated by broadcast or non-broadcast entities were exempt from the equal time requirements of § 315.[81] This Comment is particularly concerned with the FCC's 1975 *Aspen Ruling*, which exempted debates

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77. § 315(a). *See also Chisholm*, 538 F.2d at 352.

78. § 315(a).

79. *See* § 315(d).

80. *See Chisholm*, 538 F.2d at 352-53.

81. *See In re* Aspen Inst. Program on Communications and Soc'y, 55 F.C.C.2d 697, 712 (1975); *In re* Geller, 95 F.C.C.2d 1236, 1237 (1983). *See also* Youm, *supra* note 63, at 696. Some commentators argue that the Communications Act has failed the public by handing over to corporate broadcasters the free use of public airwaves, without any solid obligation to allow candidate access. The Media Access Project (MAP), in comments made to the FCC, suggests that it is:

> the "paramount" First Amendment right of the public to receive access to information from diverse perspectives. There is no more important task the [FCC] faces than to ensure that the nation's broadcasters contribute to the development of a well-informed electorate which exercises its right of self-governance with as much knowledge as possible about the candidates appearing on the ballot. Section 315 is intended to implement this goal by assuring fair and full coverage of candidates and allowing direct communication between candidates and their fellow citizens. The [FCC] has not acquitted itself well in its interpretation of Section 315 over the last 20 years ....
>
> As to the most pressing issue now before the [FCC], MAP strongly supports the principle of affording candidates free, prime time to speak directly to the voters. This is something which the [FCC] has authority to, and should, *require* of every broadcaster as a condition of their exclusive license to use the public's airwaves. This requirement should extend to all federal offices as well as important state and local offices.

In the Matter of Issues Relating to Broadcaster Proposals to Provide Time to Presidential Candidates, Submission of Media Access Project to Federal Communications Commission (June 3, 1996), *at* http://www.mediaaccess.org/programs/civicdisc/freetime.htm (last visited Mar. 25, 2003).

from the equal opportunity requirement.[82] The United States Court of Appeals for the District of Columbia affirmed *Aspen* in *Chisholm v. FCC*.[83] *Chisholm* stands for the rule that:

> debates between qualified political candidates initiated by non-broadcast entities ... will be exempt from the equal time requirements of Section 315, provided they are covered live, based upon good faith determination of licensees that they are "bona fide news events" worthy of presentation, and provided further there is no evidence of broadcaster favoritism.[84]

This interpretation of the Communications Act allowed debates to be held between the two major-party candidates without the requirement that an equal opportunity to speak be given to any third-party candidate.[85] This was challenged by third-party candidate Sonia Johnson, who ran for President in 1984.[86]

2. *Johnson v. FCC*

In 1984, Johnson, running for president as the nominee of the Citizens Party, filed a complaint with the FCC alleging that the League of Women Voters, the three major networks (ABC, NBC, and CBS), the Democratic and Republican National Committees, and the major-party candidates were violating the Communications Act of 1934 and the First Amendment by excluding her from the debates.[87] Johnson was seeking an order that would prohibit the televising of any debates from which she was excluded.[88]

Johnson's claim rested on the premise that the "debates had become so institutionalized"[89] that "participation in ... [the] debates [was] now a prerequisite to election."[90] The Court of Appeals for the District of Columbia concluded that Johnson had no right under either the Communications Act or the First Amendment to be included in the debates.[91] The court based its decision on the desire to preserve the

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82. *See Aspen*, 55 F.C.C.2d at 712.

83. 538 F.2d 349 (D.C. Cir. 1976).

84. *Id.* at 351. In 1980, § 315 of the Communications Act was upheld on First Amendment grounds in *Kennedy v. FCC*, 636 F.2d 417, 430-32 (D.C. Cir. 1980).

85. *See* Johnson v. FCC, 829 F.2d 157, 158 (D.C. Cir. 1987).

86. *See id.*

87. *See id.* at 158-59.

88. *See id.* at 159. Following the FCC's denial of her complaint and refusal to review the case, the claim was ultimately rejected by the United States Court of Appeals for the District of Columbia. *See id.*

89. *Id.* at 159

90. *Id.* at 164.

91. *See Johnson*, 829 F.2d at 162, 165.

intricate regulatory framework developed to balance the various rights involved.[92] The plaintiff in *Johnson* relied on Supreme Court decisions that struck down actions that operated to foreclose political opportunities of candidates and voters.[93] Relying on this precedent, the *Johnson* court examined the plaintiff's claim of a First Amendment violation "in a realistic light to the nature and extent of their impact on voters."[94] However, the court viewed non-participation in the debates as a mere "disadvantage."[95] The *Johnson* court rejected the concern that third-party candidates' voices were being muffled by the superior resources of the major parties.[96]

As *Johnson* illustrates, third-party candidates have not been successful in their legal challenges to debate exclusion on First Amendment or Communications Act grounds. However, third-party candidates have not been at a loss for novel claims to challenge their exclusion. The following section introduces the organizing body that has been delegated the authority to stage the presidential debates, the CPD. After discussing the regulatory scheme governing the staging of the debates and the criteria the CPD uses to determine who will be invited to participate in the debates, this section will also examine criticism of the CPD.

IV. THE COMMISSION ON PRESIDENTIAL DEBATES

One of the FEC regulations at issue in *Becker v. FEC* was 11 C.F.R. § 110.13(a).[97] This regulation requires that the debates be staged by nonprofit organizations that "do not endorse, support, or oppose political candidates or political parties."[98] This task is performed by the CPD.[99]

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92. *See id.* at 160.

93. *See id.* at 164 (citing Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 114-21 (1973); Terry v. Adams, 345 U.S. 461, 469-70 (1953)).

94. *Id.* at 164 (quoting Anderson v. Celebreeze, 460 U.S. 780, 786 (1983)).

95. *Id.* at 165. The cases plaintiff relied on "were concerned with banishment of candidates and voters from the political arena, not with overcoming disadvantages in money and image frequently encountered by minor-party candidates." *Id.*

96. *See id.* at 161. Commentators have viewed *Johnson* as "clearly eliminat[ing] any further First Amendment claims for a right to access to debates televised by private sponsors." Youm, *supra* note 63, at 702.

97. *See* Becker v. FEC, 230 F.3d 381, 383 (1st Cir. 2000).

98. 11 C.F.R. § 110.13(a) (2000).

99. *See* Perot v. FEC, 97 F.3d 553, 555 (D.C. Cir. 1996). *See also* COMMISSION ON PRESIDENTIAL DEBATES, *Nonpartisan Candidate Selection Criteria for 2000 General Election Debate Participation*, *at* http://www.debates.org/pages/candsel.html#candidate%20selection%202000 (last visited Mar. 25, 2003).

A. The Background and Purpose of the CPD

From 1976 until 1987, the League of Women Voters, a national civic group, was in charge of staging presidential debates.[100] Then, the chairs of the Democratic National Committee, Paul Kirk, and the Republican National Committee, Frank Fahrenkopf, issued a joint statement declaring that "to better fulfill our parties' responsibilities for educating and informing the American public and to strengthen the role of political parties in the electoral process, future joint appearances [at presidential debates would] be principally and jointly sponsored and conducted" by their organizations, thus creating the CPD.[101] The League of Women Voters, announcing their withdrawal as the debate-staging organization, stated that "it has become clear to us that the candidates' organizations aim to add debate to their list of campaign-trail charades devoid of substance .... The league has no intention of becoming an accessory to the hoodwinking of the American Public."[102] The newly formed CPD was chaired by none other than Paul Kirk and Frank Fahrenkopf.[103]

The mission of the CPD is to "ensure, for the benefit of the American electorate, that general election debates are held every four years between the leading candidates for the offices of President and Vice President of the United States."[104] The goal of the debates is to "afford the members of the public an opportunity to sharpen their views, in a focused debate format, of those candidates from among whom the next President and Vice President will be selected."[105]

The CPD, in accordance with FEC regulations, has established criteria to determine which candidates will be invited to the debates.[106] The purpose of the criteria is to identify those candidates who have achieved a level of electoral support such that they realistically are considered to be among the principal rivals for the Presidency.[107] Prior to 2000, the CPD automatically invited the candidates from the two major parties, Democratic and Republican, and applied different criteria for non-major party

100. *See Perot*, 97 F.3d at 555.

101. Raskin, *supra* note 42, at 1982 (quoting Joint Memorandum of Agreement on Presidential Candidate Joint Appearances, signed by Paul G. Kirk, Democratic National Committee Chairman, and Frank J. Fahrenkopf, Jr., Republican National Committee Chairman (Nov. 26, 1985)).

102. *Id.* at 1983.

103. *See id. See also* Dionne, *supra* note 36.

104. COMMISSION ON PRESIDENTIAL DEBATES, *supra* note 99.

105. *Id.*

106. *See* 11 C.F.R. § 110.13(c) (2000). *See also* COMMISSION ON PRESIDENTIAL DEBATES, *supra* note 99.

107. *See* COMMISSION ON PRESIDENTIAL DEBATES, *supra* note 99.

candidates.[108] However, in 2000, the CPD changed its criteria.[109] In order to illustrate the techniques used by the CPD to determine which candidates are invited to debate, the following section first discusses the criteria used by the CPD for debates prior to 2000, and then discusses the criteria used by the CPD for the 2000 debate.

B. Criteria Used by the CPD to Determine Debate Participants

For the 1996 debate, the CPD determined that the "historical prominence of Democratic and Republican nominees warranted an invitation" to President Clinton and Senator Dole.[110] The criteria used by the CPD in 1996 to determine if anyone else should join them was justified as a way to "identify nonmajor party candidates, if any, who have a realistic (i.e., more than theoretical) chance of being elected the next President of the United States and who properly are considered to be among the principal rivals for the Presidency."[111] The CPD purported to employ a "multifaceted analysis of potential electoral success ... to determine whether a candidate had a sufficient chance of election to warrant inclusion in one or more of its debates."[112] This analysis included: a review of "evidence of national organization;"[113] "signs of national newsworthiness and competitiveness;"[114] and "indicators of national enthusiasm or concern."[115]

In 2000, the CPD announced new selection criteria.[116] Now, the CPD applies the same three criteria to each declared candidate, Democrat, Republican or third-party, to determine which candidates qualify to

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108. *See id.*

109. *See id.*

110. Perot v. FEC, 97 F.3d 553, 556 (D.C. Cir. 1996).

111. COMMISSION ON PRESIDENTIAL DEBATES, *supra* note 99. The CPD also states that "[t]he realistic chance of being elected need not be overwhelming, but it must be more than theoretical." *Id.*

112. *Id.*

113. *Id.* This involved an objective consideration of a candidate's constitutional eligibility, as well as "subjective indicators" that included "placement on the ballot in enough states to have a mathematical chance of obtaining an electoral college majority," and "eligibility for matching funds" from the FEC. *Id.*

114. *Id.* Data for this subjective criterion was to be found in sources such as "major newspapers, news magazines, ... broadcast networks ... and published views of prominent political commentators." *Id.*

115. *Id.* This criterion "assessed public support for a candidate" by examining factors including "the findings of significant public opinion polls ... and the [r]eported attendance at meetings and rallies across the country (locations as well as numbers) in comparison with the two major party candidates." *Id.*

116. *See* Natural Law Party v. FEC, 111 F.Supp.2d 33, 39 (D.D.C. 2000).

debate.[117] "The criteria are (1) constitutional eligibility,[118] (2) ballot access,[119] and (3) fifteen percent electoral support."[120]

These facts raise significant questions about the viability of the CPD and the implications of its policies. The following section examines criticism of the CPD by both commentators and in the context of a lawsuit brought by Ross Perot, third-party candidate for president in 1992 and 1996.

C. Analysis and Criticism of the CPD

1. Who Debates?

From 1960 to 2000, "only two candidates from outside the two dominant parties have participated in the presidential debates."[121] The first was John Anderson in 1980 and the second was Ross Perot in 1992.[122] Ross Perot provides a good example of the triviality of the CPD's debate participant criteria. In October of 1992, Perot, running as an independent, polled from seven percent to nine percent prior to the debates.[123] However, he captured nineteen percent of the popular vote after participating in the debates.[124] His seven percent to nine percent polling before the debates was well below the CPD's current fifteen percent requirement for debate participation, and had the CPD been using the 2000 criteria, Perot would not have been invited. Yet his inclusion in the 1992 debates helped boost

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117. *See* COMMISSION ON PRESIDENTIAL DEBATES, *supra* note 99.

118. *Id.* The constitutional requirements, from Article II, Section 1, require that a candidate be at least thirty-five years old and a natural born citizen of the United States or a resident for at least fourteen years. *See* U.S. CONST. art. II, § 1. *See also* COMMISSION ON PRESIDENTIAL DEBATES, *supra* note 99.

119. COMMISSION ON PRESIDENTIAL DEBATES, *supra* note 99. As far as ballot access, the CPD requires that "the candidate qualify to have his/her name appear on enough state ballots to have at least a mathematical chance of securing an Electoral College majority in the 2000 general election. Under the Constitution, the candidate who receives a majority of votes in the Electoral College (at least 270 votes), regardless of the popular vote, is elected President." *Id. See also* U.S. CONST., art. II, § 1.

120. COMMISSION ON PRESIDENTIAL DEBATES, *supra* note 99. The "third criterion requires that the candidate have a level of support of at least fifteen percent of the national electorate as determined by five selected national public opinion polling organizations, using the average of those organizations' most recent publicly reported results at the time of the determination." *Id.*

121. Milchen, *supra* note 40.

122. *See id.*

123. *See id.*

124. *See id. See also* FAIRNESS & ACCURACY IN REPORTING, THE APPLESEED CITIZEN'S TASK FORCE ON FAIR DEBATES, *A Blueprint for Fair and Open Presidential Debates in 2000*, *at* http://www.fair.org/articles/appleseed.html (last visited Mar. 25, 2003) [hereinafter FAIR].

voter turnout by twelve million from the previous presidential election.[125]

Perot was not invited to the 1996 debates because the CPD found he did not have a "realistic chance of winning" the election.[126] The fact that Perot "was on the ballot in fifty states and the District of Columbia, had won 19 percent of the vote in 1992 and had received nearly $30 million in public funds to run was deemed insignificant."[127] What the CPD did consider were factors such as the "professional opinions of the Washington bureau chiefs of major newspapers, news magazines, and broadcast networks" to determine Perot's eligibility as a debate participant.[128] "Without a dissenting voice to create real debate," the 1996 Clinton/Dole debates were watched by almost half as many viewers as watched the 1992 three-way debates.[129] The exclusive CPD forums seem destined to "further diminish public interest."[130]

2. Who is Sponsoring the Debates?

The Commission is regarded by some critics as a partisan body composed of members of the two major parties that work in conjunction with corporations to prevent the inclusion of third-party candidates for various reasons.[131] Not only does corporate sponsorship of the debates suggest that there may be corporate influence on the CPD regarding who participates, but it also threatens the validity and legitimacy of the CPD as independent and nonpartisan.[132] Writing for *The Nation*, Christopher Hitchens observed that:

> [t]he Commission on Presidential Debates ... is actually a sponsorship project, "brought to you" by a dozen or so major brand names. If I mention Ford, General Motors, AT&T, I.B.M., Prudential, Hallmark, Dow Corning, ... Kellogg's, Philip Morris and Upjohn, you might wonder at what meeting they secured the right to pay for the great gladiatorial contest .... I mention the corporations above because, in addition to subsidizing the debates, they also bankrolled the USA*NAFTA coalition four years ago. And it can't have escaped your attention that the two candidates excluded by definition from the debates are the same two—Ralph Nader and Ross Perot—who led the

125. *See* Milchen, *supra* note 40.

126. Perot v. FEC, 97 F.3d 553, 556 (D.C. Cir. 1996).

127. Jamin B. Raskin, *They've Become a Bipartisan Infomercial For Corporate America's Candidates. Let's Take Back the Debates!*, THE NATION, Feb. 7, 2000, at 21.

128. *Id.* (quoting COMMISSION ON PRESIDENTIAL DEBATES, *supra* note 99).

129. Milchen, *supra* note 40.

130. *Id.*

131. *See* Coleman, *supra* note 18, at 19.

132. *See id.*

opposition to that exquisitely bipartisan treaty.[133]

This issue of corporate sponsorship speaks directly to Congress' concern with "corruption and the appearance of corruption" when enacting FECA.[134] "[C]orporate sponsorship of debates may be the most insidious form of illegal corporate interference in federal elections because it tends to be invisible, meaning the public cannot determine for itself what impact the corporations have had on the framing of the candidates, the issues, and the dialogue."[135] Major corporations invest hundreds of thousands of dollars to sponsor the debates; for example, Anheuser-Busch paid $550,000 to underwrite the October 17, 2000 debate.[136] Corporate sponsors are likely to protest the inclusion of candidates that promote campaign finance reform or that challenge corporate influence on American society.[137] The 1992 debate sponsors included IBM, Ford Motor Company, and Prudential.[138] In 1996, the CPD allowed Anheuser-Busch, Lucent Technologies, Phillip Morris Companies, Sara Lee Corporation, Sprint, and Dun & Bradstreet to fund the debates.[139] The CPD allowed AT&T, 3Com, Anheuser-Busch, and US Airways, among others, to sponsor the 2000 debates.[140] At least three companies, US Airways, Anheuser-Busch, and 3Com received tax deductions and tickets to the debates, in addition to invitations to a private reception before the Boston debate, in return for their sponsorship.[141]

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133. Christopher Hitchens, *The Incorporated Debates*, THE NATION, Oct. 21, 1996, at 8.

134. Buckley v. Valeo, 424 U.S. 1, 25 (1976).

135. Raskin, *supra* note 42, at 1990.

136. *See* Becker v. FEC, 230 F.3d 381, 388 n.6 (1st Cir. 2000).

137. *See* Milchen, *supra* note 40. Nader's platform in 2000 eschewed the "control by the corporate government over our political government." NADER, *supra* note 39, at 3.

138. *See* COMMISSION ON PRESIDENTIAL DEBATES, *National Debate Sponsors*, *at* http://www.debates.org/pages/natspons.html (last visited Mar. 25, 2003).

139. *See id.*

140. *See id.*

141. *See* Jonathan D. Salant, *Corporations Sponsor Debates, Critics Say Companies Benefit from Access to Candidates*, THE ASSOCIATED PRESS, Oct. 3, 2000, *at* http://abcnews.go.com/sections/business/DailyNews/sponsoring_debates_001003.html (last visited Mar. 25, 2003). AT&T handled the Internet traffic for the CPD's web site for free, and 3Com helped run the web site. *See id.* Meanwhile, Anheuser-Busch provided "food, beverages and literature about their corporate-responsibility programs." *Id.* US Airways "cut-rate fares for campaigns, news media, and some members of the public" traveling to the debates. *Id.* Each of these corporations had their names "prominently mentioned in the literature for nationally televised events," while the corporations that helped with the web site had their logos displayed and links to their own web sites provided on the CPD's web site. *Id.* The corporations maintained that their donations to the debate commission exemplified their good citizenship. *See id.* However, at the time of these donations, US Airways was "awaiting federal approval to merge with United Airlines;" Anheuser-Busch was busily

Altogether, the CPD accepts millions of dollars from large corporations, which receive in return free tickets, access to candidates, and selective exposure to the American public.

3. A Third-Party Challenge to the CPD's Legitimacy

Perot v. FEC provides a glimpse of another avenue a third-party candidate has traveled to challenge the structure of the *status quo*.[142] This lawsuit originated when Ross Perot, the 1996 Reform Party presidential candidate, was not invited to debate President Clinton and Senator Dole.[143] Perot challenged the CPD's selection criteria, arguing that the FEC unlawfully delegated authority to the CPD, "a private, non-profit corporation, in violation of Article I of the Constitution."[144] The court agreed "that when Congress has specifically vested an agency [the FEC] with the authority to administer a statute [FECA], [the agency] may not shift that responsibility to a private actor such as the CPD."[145] However, the court found that the FEC had not delegated authority to the CPD, but rather that the FEC was regulating the CPD while allowing them some discretion; in this case, determining objective criteria to decide who may participate in the debates.[146] The court disagreed with Perot's claim that the FEC, by allowing the CPD to determine the objective criteria for choosing debate participants, was "delegating" authority to the CPD.[147]

The second issue raised in *Perot*, and subsequently dismissed by the court, was whether certain FEC regulations "carve[d] out an illegal

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working with the rest of the alcohol industry to oppose "efforts to make a 0.08 percent blood alcohol content a nationwide standard for drunk driving;" and AT&T was opposing "efforts to allow the regional Bell telephone companies to carry data on long-distance lines." *Id.*

142. *See* Perot v. FEC, 97 F.3d 553 (D.C. Cir. 1996). The plaintiffs in this case included Ross Perot and Pat Choate, presidential and vice-presidential nominees for the Reform Party, and Dr. John Hagelin and Dr. Mike Tompkins, nominees of the Natural Law Party. Perot raised the delegation issue and Hagelin argued that the CPD violated the "subjective criteria" required by 11 C.F.R § 110.13(c). *Id.* at 557. *See also* Natural Law Party v. FEC, 111 F. Supp. 2d 33 (D.D.C. 2000).

143. *See Perot*, 97 F.3d at 556.

144. *Id.* at 559. *See also* Fulani v. Brady, 935 F.2d 1324 (D.C. Cir. 1991). In *Fulani*, New Alliance Party 1988 presidential candidate Lenora Fulani unsuccessfully challenged her exclusion from the debates. *See id.* at 1325. She argued that the CPD did not fulfill the FEC's requirement in 11 C.F.R. § 100.13(a) mandating that only tax-exempt organizations stage televised debates. *See id.* at 1325. Fulani's suit requested that the Internal Revenue Service revoke CPD's tax-exempt status because, she alleged, that organization "presented a partisan political viewpoint [in contravention to IRS rules for tax-exempt status] by excluding her from the presidential debates." *Id. See also* I.R.C. § 501(c)(3) (2000).

145. *Perot*, 97 F.3d at 559.

146. *Id.* at 559-60.

147. *Id.* at 560.

exception to the corporate contribution and expenditure limits" of FECA.[148] The District Court for the District of Columbia "granted summary judgment on this claim, finding the regulations permissible," and because Perot did not fully brief this issue on appeal, the issue was left undecided.[149] This Comment focuses on *Becker v. FEC*, which allowed for a thorough investigation of this very question. The following section examines *Becker v. FEC*.

V. BECKER V. FEC

Becker was filed on June 19, 2000, in anticipation of the 2000 presidential debates,[150] in the Federal District Court for the District of Massachusetts.[151] The plaintiffs moved to preliminarily enjoin the FEC from implementing the challenged regulations, 11 C.F.R. §§ 110.13 and 114.4(f), alleging that these regulations were in violation of FECA.[152] Furthermore, the plaintiffs "requested that the district court order the FEC to enforce the FECA's prohibition on corporate contributions," thus preventing the "corporate sponsorship of the presidential debates."[153] The plaintiffs argued that, because of Nader's principled stand against accepting corporate contributions, and because he felt corporate sponsorship of the debates was illegal, Nader could not participate in corporately-sponsored debates, were he to be invited.[154] The FEC moved to dismiss the case for lack of jurisdiction, arguing that plaintiffs did not have standing to sue and had failed to exhaust their administrative remedies.[155] The district court rejected the FEC's motion but dismissed the plaintiffs' claims on the merits on September 14, 2000, finding that the challenged regulations were based on the FEC's reasonable interpretation of FECA.[156] On September 26, 2000, the United States Court of Appeals for the First Circuit granted the

148. *Perot*, 97 F.3d at 560. *See also* 11 C.F.R. §§ 110.13, 114.4(f) (2000).

149. *See id.* at 561.

150. The debates were held on October 3, 11 and 17, 2000. *See* COMMISSION ON PRESIDENTIAL DEBATES, *Debate History: 2000 Debates*, *at* http://www.debates.org/pages/debhis2000.html (last visited Mar. 25, 2003).

151. *See* Becker v. FEC, 230 F.3d 381, 383-84 (1st Cir. 2000).

152. *See id.* The plaintiffs included Ralph Nader, Green Party nominee for President of the United States; the Green Party USA; the Association of State Green Parties; Nader's campaign organization; the Nader 2000 Primary Committee; and individual voters, "both supportive and uncommitted." *Id.* at 383. "Heidi Becker [was] an independent voter who [wanted] Nader to participate in the debates." Shelly Murphy, *A Group Allied to Nader Sues to Thwart Bush-Gore Forums*, BOSTON GLOBE, Aug. 24, 2000, at A31.

153. *Becker*, 230 F.3d at 384.

154. *See id.* at 385.

155. *See id.* at 384. *See also infra* notes 165-94 and accompanying text.

156. *See Becker*, 230 F.3d at 383-84.

plaintiffs' motion for expedited review.[157] The First Circuit found that the plaintiffs had standing to sue but affirmed the district court's judgment dismissing the suit on the merits.[158]

Nader's case is the most recent in a line of cases brought by third-party candidates challenging their exclusion from the presidential debates. As Parts III and IV outlined,[159] various claims have been brought against the FEC, the CPD, and the FCC, among others, contesting the laws and regulations that work to bolster the two-party system at the expense of third-party voices. *Becker* is important because it illustrates a solid ground for third-party standing to challenge debate exclusion.[160] Although Nader lost on the merits, this Comment suggests that the *Becker* court erred in its analysis.[161] As discussed above, FECA was created by Congress to prevent corruption and the appearance of corruption in federal elections in order to bolster democracy.[162] Congress explicitly prohibited corporate contributions or expenditures in relation to "any election."[163] Despite protest, the FEC continues to shape its own policy in relation to the debates, allowing corporate sponsorship of and influence on a bipartisan organization endowed with the power to choose who the American people see debate in the campaign for President of the United States.[164] The following sections discuss why the plaintiffs in *Becker* had standing to sue and describe the analysis the court followed to decide the merits of the case.

A. Standing to Sue[165]

The standing doctrine involves a blend of constitutional requirements and prudential considerations.[166] The constitutional requirements stem directly from Article III of the Constitution, which limits judicial power to determining cases or controversies.[167] To establish standing, a plaintiff must show that they have a sufficiently personal stake in the issue; an "injury in fact," which is an injury both concrete and particularized, as well

157. *See id.*

158. *See id.* at 389 n.10, 397.

159. *See supra* notes 43-149 and accompanying text

160. *See infra* notes 165-94 and accompanying text.

161. *See infra* notes 245-64 and accompanying text.

162. *See supra* notes 48-64 and accompanying text.

163. 2 U.S.C. § 441b(a) (2000).

164. *See* Raskin, *supra* note 42, at 1993-94.

165. The issue of standing is a key factor in many of the lawsuits brought by third-party candidates challenging their exclusion from the debates. *See e.g.*, Fulani v. Brady, 935 F.2d 1324 (D.C. Cir. 1991); Natural Law Party v. FEC, 111 F. Supp. 2d 33 (D.D.C. 2000).

166. *See* Bennett v. Spear, 520 U.S. 154, 162 (1997).

167. *See* U.S. CONST. art. III, § 2.

as actual or imminent.[168] There must also be a causal connection between the injury and the conduct complained of, and it must be likely, as opposed to merely speculative.[169] The final standing inquiry is whether the injury can be redressed by a favorable decision.[170]

The prudential requirements for standing are judicially self-imposed and founded on a concern for the limited role of the courts in a democratic society.[171] The prudential requirements include a "zone of interests" test, which asks whether the interest sought to be protected "arguably fall[s] within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit."[172]

1. Nader's "Competitive Disadvantage"

In *Becker*, the FEC made no claim that the plaintiffs did not meet the prudential standing requirements.[173] However, the FEC argued that the injuries the plaintiffs alleged were not "fairly traceable" to the FEC regulations.[174] The FEC maintained that, although Nader's exclusion from the debates would put him at a "competitive disadvantage," Nader was not challenging his exclusion from the debates.[175] The plaintiffs' lawsuit was instead a challenge to the funding of the debates.[176] Moreover, even if the debates were funded by public sources, the plaintiffs had made no claim that Nader would have had a better chance of being invited.[177] The FEC maintained that the plaintiffs failed to show a causal nexus between corporate sponsorship of the debates and Nader's injuries.[178] The plaintiffs argued, however, that even if Nader was invited to the debates, "he would be forced to decline the invitation due to his principled stand against accepting corporate contributions."[179]

Accepting the plaintiffs' argument that Nader was put at a "competitive disadvantage," [180] the court found they did have standing because the FEC

168. Valley Forge Christian Coll. v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982).

169. *See id.*

170. *See id.*

171. *See Bennett*, 520 U.S. at 162.

172. *Id.*

173. *See* Becker v. FEC, 230 F.3d 381, 385 n.2 (1st Cir. 2000).

174. *Id.* at 385.

175. *Id.*

176. *See id.*

177. *See id.*

178. *See Becker*, 230 F.3d at 385.

179. *Id.*

180. *Id.* at 386 (citing Vote Choice, Inc. v. DiStefano, 4 F.3d 26, 36-37 (1st Cir. 1993)).

regulations allowing corporate sponsorship of the debates effectively barred him from participation due to his choice not to accept corporate contributions.[181] The court accepted the plaintiffs' argument that these FEC regulations injured Nader by making corporate contributions available to his opponents when such contributions were not available to him.[182] The corporate contributions, the plaintiffs argued, came in the form of free television exposure during the debates.[183] Thus, Nader was put at a competitive disadvantage and would have had to alter his campaign strategy and spend more on advertising in order to compensate for the disadvantage.[184] Rejecting the FEC's arguments that the plaintiffs' injuries

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In *Vote Choice*, a Rhode Island gubernatorial candidate challenged a state campaign finance law requiring all candidates, at the time they declared their candidacies, to choose whether to accept public funding for their campaigns. *See Vote Choice*, 4 F.3d at 29-30. Certain benefits inured from acceptance of public funding. *See id.* The plaintiff chose to decline public funding and thus forego the benefits. *See id.* at 36-37. Finding that the law put the plaintiff at a competitive disadvantage, the court recognized standing. *See id.* at 37. "[S]uch an impact on the strategy and conduct of an office-seeker's political campaign constitutes an injury of a kind sufficient to confer standing." *Id.* at 37.

181. *See Becker*, 230 F.3d at 386-87 (citing *Vote Choice*, 4 F.3d at 37 (1st Cir. 1993)). The First Circuit also found that Nader's interest in the case was "identical" to that of the Green Party USA, the Association of State Green Parties, and the Nader 2000 Primary Committee, and so the court found that they also had standing. *See id.* at 389 n.10. However, the court did not grant standing to the individual voters. *See id.* at 389-90. The voter plaintiffs argued that they were harmed by the corruption of the political process caused by the corporate sponsorship of the debates. *See id.* at 389. The court found that these were not sufficiently personalized injuries to establish standing. *See id.* In regard to the voter plaintiffs' arguments that they "suffered derivatively" from any injury the FEC regulations caused Nader, the court found that Nader's injury was not restrictive of voters' rights and that the purported injury "[swept] too broadly." *Id.* at 390 (citing Buckley v. Valeo, 424 U.S. 1 (1976)). For a similar holding regarding voters' standing to sue, see Crist v. Comm'n on Presidential Debates, 262 F.3d 193 (2d Cir. 2001).

182. *See Becker*, 230 F.3d at 385.

183. *See id.*

184. *See id.* The FEC also challenged Nader's position of being at a "competitive disadvantage." *Id.* at 387 n.5. The FEC cited several Second Circuit cases in which competitive disadvantage in a political race has only been recognized as a basis for standing where the plaintiff competes in "the same arena with the party to whom the government has bestowed the assertedly illegal benefit." *Id.* at 387 n.5 (quoting *In re* United States Catholic Conference, 885 F.2d 1020, 1029 (2d Cir. 1989)). The FEC argued that Nader was not competing in the same arena as the CPD, the debate-staging organization on which the FEC had bestowed the assertedly illegal benefit of accepting corporate funding. *See id.* The *Becker* court rejected this argument, pointing out that the corporate monies that the FEC allowed the CPD to accept funded the debates, and that Nader competes in the same arena as those participating in the corporately-funded debates. *See id.* Furthermore, the court observed, the FEC's analysis of the competitive disadvantage doctrine would allow only debate-staging organizations, who are beneficiaries of the regulations, to challenge the FEC

were self-imposed, the court found that "but for the regulations, Nader would not be coerced to make the choice" not to participate in the debates.[185] The court acknowledged that "Nader's choice is not wholly ideological; he objects to participating in corporate-sponsored debates not only because they offend his principles, but because, in his view, they are illegal."[186] Because the plaintiffs brought suit before the debates took place, and at that time Nader was "a significant candidate," it was "a genuinely open question whether he would be invited" to participate in the debates.[187]

2. Redressability and Mootness

The court also addressed redressability in its standing analysis.[188] Redressability analysis requires that standing be "assessed under the facts existing when the complaint is filed."[189] At the time the plaintiffs brought suit, relief would have prevented corporate sponsorship of the debates and preserved the possibility of Nader's participation.[190] Therefore, the claim was redressable.[191]

However, by the time the First Circuit heard the case, the 2000 debates were over, and such relief was no longer available.[192] The question for the court was one of mootness.[193] The court found that the case "qualifie[d] for the exception to mootness for disputes 'capable of repetition, yet evading review:' corporate sponsorship of the debates is sure to be challenged again in future elections yet ... the short length of the campaign season will make a timely resolution difficult."[194]

B. The *Chevron* Analysis

After determining that the plaintiffs had standing,[195] the *Becker* court

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regulations. *See id.*

185. *Id.* at 387.

186. *Id.* at 388 n.9.

187. *Id.* at 386.

188. *See Becker*, 230 F.3d at 389.

189. Lujan v. Defenders of Wildlife, 504 U.S. 555, 569-70 n.4 (1992).

190. *See Becker*, 230 F.3d at 389.

191. *See id.*

192. *See id.*

193. *See id.* "A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." BLACK'S LAW DICTIONARY 1008 (6th ed. 1990).

194. *Becker*, 230 F.3d at 389.

195. For a recent case in which a third-party candidate was found not to have standing, see Fulani v. Brady, 935 F.2d 1324 (D.C. Cir. 1991).

considered their challenge to the FEC regulations.[196] The parties in *Becker* disputed whether the case required deference to the FEC's regulations under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[197] In *Chevron*, the Supreme Court laid out a two-part analysis for courts to apply when determining the validity of an administrative agency's construction of a statute that it administers.[198] According to *Chevron*, the first question is "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear ... the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[199] If the court determines Congress has not directly addressed the precise question at issue, the court cannot construe the statute as it sees fit.[200] Rather, if there is ambiguity, "the question for the court is whether the agency's answer is based on a permissible construction of the statute;"[201] that is, is the agency's interpretation of the statute reasonable?[202]

In *Becker*, the court recognized that the FEC is the type of agency that is entitled to *Chevron* deference where Congressional intent is ambiguous and the agency's interpretation is reasonable.[203] Once this was determined, the *Becker* court went on to analyze the statutory provisions of FECA and the FEC regulations at issue.[204]

C. Applying *Chevron*: Step One

The *Becker* court first grappled with the issue of whether the FECA statutory scheme revealed Congress' clear intent to prohibit corporate sponsorship of the debates.[205] The plaintiffs argued that the provision in FECA making it unlawful for any corporation "to make a contribution or expenditure in connection with any election to any political office"[206]

196. *See Becker*, 230 F.3d at 390. The First Circuit defined the issue as "whether the FEC debate regulations allowing corporate funding of certain debate staging organizations ... violate, on their face, the FECA." *Id.*

197. 467 U.S. 837 (1984).

198. *See id.* at 842-43.

199. *Id.* at 842-43

200. *See id.* at 843.

201. *Id.*

202. *Chevron*, 467 U.S. at 844.

203. *See* Becker v. FEC, 230 F.3d 381, 390 (1st Cir. 2000).

204. *See id.* at 391.

205. *See id.* at 394.

206. 2 U.S.C. § 441b(a) (2000). This part of FECA also prohibits any corporation from making a contribution or expenditure in connection with any primary election, political convention or caucus held to select candidates for any political office. *See id.* It also stresses that the prohibition applies to activities in which presidential, vice-presidential, or members

revealed the unambiguous intent of Congress.[207] The First Circuit, however, disagreed, finding that several aspects of the statutory scheme "foster ambiguity."[208]

1. The Plaintiffs' Argument

"The plaintiffs challenged as ultra vires two FEC regulations, 11 C.F.R. sections 110.13 and 114.4(f)."[209] Section 110.13, "Candidate Debates," allows nonprofit organizations "which do not support, endorse, or oppose political candidates or political parties" to stage debates.[210] This section also requires such eligible nonprofit organizations to use "pre-established objective criteria to determine which candidates may participate in a debate."[211] The second regulation, 11 C.F.R. § 114.4(f), provides that a nonprofit organization may accept funds donated by corporations to "defray costs incurred in staging ... candidate debate[s]."[212] To complement this regulation, the FEC defined the terms "contributions" and "expenditures" to "expressly exempt the funds used in staging debates from the 'contributions' and 'expenditures' regulated in the FECA."[213]

There are two definitional sections of FECA dealing with "contributions and expenditures."[214] Section 441b of FECA prohibits corporations from making any contributions or expenditures "in connection with any federal election."[215] Section 441b defines "contribution or expenditure" to include:

> any direct or indirect payment ... or any services, or anything of value ... to any candidate, campaign committee, or political party or

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of Congress are to be elected. *See id.*

207. *See Becker*, 230 F.3d at 392.

208. *Id.* at 394.

209. *Id.* at 383-84.

210. 11 C.F.R. § 110.13(a)(1) (2000). This section also allows broadcasters to stage debates as long as "they are not owned or controlled by a political party, political committee or candidate." § 110.13 (a)(2).

211. § 110.13(c). The section also requires that at least two candidates are included in the debates and "[t]hat the staging organization(s) does not structure the debates to promote or advance one candidate over the other." § 110.13(b)(1)-(2).

212. § 114.4(f)(1) (permitting "[a] nonprofit organization described in 11 C.F.R. § 110.13(a)(1) [to] use its own funds and [to] accept funds donated by corporations ... to defray costs incurred in staging candidate debates held in accordance with 11 C.F.R. § 110.13").

213. Becker v. FEC, 230 F.3d 381, 391 (1st Cir. 2000) (citing 11 C.F.R. §§ 100.7(b)(21), 100.8(b)(23) (2002)). Contribution and expenditure do not include "[f]unds provided to defray costs incurred in staging candidate debates in accordance with the provisions of 11 C.F.R. 110.13 and 114.4(f)." §§ 100.7(b)(21), 100.8(b)(23).

214. 2 U.S.C. §§ 441b(a), 431 (2000).

215. § 441b(a).

> organization, in connection with any election ... but shall not include ... nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families."[216]

However, FECA also consists of a general definitional section, § 431, which defines "contributions" as including any payment made for "the purpose of influencing any election."[217] It also defines "expenditures" as any payment made for "the purpose of influencing any election."[218] The definition of "expenditures" provides an exception for "nonpartisan activity designed to encourage individuals to vote or to register to vote."[219] The definition for "contributions," on the other hand, does not include an exception for such nonpartisan activity designed to encourage voting.[220]

The plaintiffs argued that the "debate regulations permit corporate contributions to flow to candidates in violation of the general prohibition" of § 441b of FECA.[221] They also argued that the contributions and expenditures allowed by the FEC debate regulations did not fall within one of the limited exceptions of § 441b of FECA.[222] Under *Chevron*, the plaintiffs argued that § 441b of FECA was unambiguous in prohibiting corporate contributions and expenditures. Therefore, the FEC debate regulations violated the clear intent of Congress.[223]

While the plaintiffs acknowledged that § 431 contains a more general definition of "expenditures" that permits funding for "nonpartisan activity designed to encourage individuals to vote or to register to vote," they relied

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216. § 441b(b)(2).

217. § 431(8)(A). The general definitional section of FECA defines a contribution as including:

> (i) any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office; or (ii) the payment by any person of compensation for the personal services of another person which are rendered to a political committee without charge for any purpose.

Id. See also § 431(8)(B)(i)-(xv) (explaining what is not a "contribution").

218. § 431(9)(A)(i) (defining "expenditure" to include "(i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and (ii) a written contract, promise, or agreement to make an expenditure").

219. § 431(9)(B)(ii).

220. *See* § 431(8)(B). Neither party in *Becker* "attributed any significance to the failure to exclude this latter category from the definition of 'contribution'" Becker v. FCC, 230 F.3d 381, 391 n.11 (1st Cir. 2000).

221. *Becker*, 230 F.3d at 391-92.

222. *See id.* at 392 (discussing 2 U.S.C. § 441b(b)(2)(A)-(C) (2000)).

223. *See id.*

on the similar provision in § 441b that specifically narrows the exception to such "nonpartisan activity" that is "aimed at its stockholders and executive or administrative personnel and their families" in the context of corporate contributions and expenditures.[224] Thus, the plaintiffs contended, "the enactment of a [more] specific provision dealing with corporate contributions and expenditures and defining those terms for that purpose renders the general definition inapposite."[225]

2. The Court's Analysis

The court, however, found that FECA's statutory scheme was ambiguous in that it did not reveal clear Congressional intent to ban corporate sponsorship of the debates.[226] The court focused on the "imprecise definitional phrases" in both the generalized definition of "contributions" and "expenditures" in § 431 of FECA, and the more specific definitions provided in § 441b.[227] The court found that Congress left these definitions "flexible" and "inclusive" by defining the terms to "*include*" certain uses.[228] Furthermore, the court recognized that Congress intended to "delegate broad policymaking discretion to the FEC" in that it charged the FEC with the ability to "formulate policy" under FECA.[229] Because the general definitional § 431 provides an exemption to the definition of "expenditure" for any "nonpartisan activity designed to encourage individuals to vote or to register to vote," [230] the court believed that § 431 gave the FEC some "leeway to interpret the term 'activity' and to decide which activities so 'encourage' people."[231]

With regard to the definitions of "contributions" and "expenditures" in § 441b of FECA, the court could not determine if the definitions of "contributions" and "expenditures" covered corporate funding of a debate staging organization.[232] The court found that payments for corporate sponsorship of the debates were "not clearly 'in connection with any election,' nor [were] they clearly 'indirect payments . . . to any candidate,' nor [were] they clearly made 'for the purpose of influencing any election for Federal office.'"[233] Finally, the court could not determine how the

224. *Id.* at 392 (quoting §§ 431(9)(B)(ii), 441b(b)(2)(B)).
225. *Id.*
226. *See Becker*, 230 F.3d at 394.
227. *Id.*
228. *Id.* (emphasis added).
229. *Id.* (quoting 2 U.S.C. § 437 (2000)).
230. § 431(9)(B)(ii).
231. *Becker*, 230 F.3d at 394.
232. *See id.*
233. *Id.* (citations omitted).

specific corporate funding prohibition and definitions in § 441b were meant to operate with the general definition in § 431.[234] Thus the court could not determine if debate funding even fell within the scope of FECA.[235]

In summary, the *Becker* court, utilizing the first prong of the *Chevron* analysis, found that the regulations in question were ambiguous and, thus, they had to analyze the reasonableness of the FEC's interpretation under the second prong of the *Chevron* analysis. Under this second prong, the *Becker* court concluded that the FEC's interpretation was reasonable.

D. *Chevron*: Step Two

1. The Plaintiffs' Argument

The plaintiffs argued in the alternative that, even if § 441b of FECA was ambiguous and the second step of the *Chevron* analysis applied, the FEC regulations would still fail the test.[236] Because the FEC regulations were clearly inconsistent with FECA's purpose "to restrict the influence of corporate monies in political elections in order to protect the integrity of the electoral system," the plaintiffs argued that they could not be found to be reasonable under *Chevron*.[237] These FEC regulations instead promote corporate involvement in connection with political activity.[238]

2. The Court's Analysis

The First Circuit had to determine whether the FEC's debate regulations permitting corporate contributions to the CPD were reasonable, and thus

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234. *See id.* at 394-95. The FEC contended that Congress intended these provisions to work together, as evidenced by legislative history. *See id.* at 395. Citing this legislative history, the FEC argued that §§ 431 and 441b:

> should be read together to permit corporations both to take part in nonpartisan registration and get out the vote activities that are not restricted to stockholders and executive or administrative personnel, if such activities are jointly sponsored by the corporation and organization that does not endorse candidates and are conducted by that organization; and to permit corporations, on their own, to engage in such activities restricted to their stockholders and executive or administrative personnel and stockholders and their families.

Id. (citing H.R. CONF. REP. NO. 94-1057, at 63-64 (1976).

235. *See Becker*, 230 F.3d at 394. "[I]t is not clear from the face of the definitions of 'contribution' and 'expenditure' that corporate disbursements to nonpartisan debate staging organizations even fall within the scope of the Act's coverage." *Id.*

236. *See id.* at 393.

237. *Id.*

238. *See id.*

consistent with FECA, in order to satisfy the *Chevron* analysis.[239] Examining the FEC's rulemaking process, the court determined that the FEC's regulations "reflect a reasonable understanding of the purposes of the FECA."[240] The court examined the FEC's rulemaking, revealing the FEC's determination that:

> since the legislative policy behind the express exceptions [in § 441b] was to permit corporations ... to fund activity directed to the general public to encourage voter participation so long as the activity [was] conducted primarily by a nonpartisan organization, "permitting corporations .. . to donate funds to nonprofit nonpartisan organizations for debate staging is consistent with congressional intent and policy."[241]

The court also found that the FEC regulations were not inconsistent with the definitions of "contributions" and "expenditures" in § 441 of FECA because these definitions do not specifically address corporate payments to nonpartisan nonprofit organizations, such as the CPD.[242] Rather, the definitions of "contributions" and "expenditures" in § 441b address payments to "any candidate, campaign committee, or political party or organization."[243] Thus, under the *Chevron* analysis, the *Becker* court determined that the FEC regulations were both reasonable and consistent with the purposes of FECA.[244]

E. Analysis

It seems clear from the plain meaning of § 441b that corporate contributions and expenditures, defined as payments "in connection with any election," are prohibited.[245] The *Becker* court would not go so far as to recognize that a debate was an activity "in connection with any election."[246] Yet the court accepted the FEC's argument that "the educational purposes" of a debate are "similar to the purpose underlying nonpartisan voter registration and get-out-the-vote campaigns" included in

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239. *See id.* at 396. For a description of the second step of the *Chevron* analysis, see *supra* notes 197-202 and accompanying text.

240. *Becker*, 230 F.3d at 396. Although the court found that both the plaintiffs' and the FEC's interpretations of FECA were reasonable, the court deferred to the FEC's interpretation because "Congress gave the choice as to the preferred reasonable interpretation to the FEC, not to Nader." *Id.*

241. *Id.* (citing FEC, Explanation and Justification, Funding and Sponsorship of Federal Candidate Debates, 44 Fed. Reg. 74,734, at 76,736 (1979)).

242. *See id.* at 397. *See also* 2 U.S.C. § 441b(b)(2) (2000).

243. § 441b(b)(2).

244. *See Becker*, 230 F.3d at 397.

245. *See* § 441b.

246. *Becker*, 230 F.3d at 394.

the express exceptions to the definition of expenditure.[247]

How could debates have educational purposes similar to voter registration and get-out-the-vote campaigns and yet not be "in connection with any election[?]" "Debates are not only obviously 'in connection with' federal elections within the meaning of the statute, but are often the central organizing event of the campaign."[248] A debate is arguably an activity held "in connection with any election."[249] The debates provide free airtime to political candidates, and thus corporate sponsorship of the debates is an indirect payment to each participating candidate.[250] Furthermore, § 441b of FECA prohibits contributions and expenditures made to any "political party *or organization*."[251] This, too, implicates the CPD, the organization responsible for staging the presidential debates. It is unfortunate that an event as central to American political culture as the presidential debates cannot be devoid of corporate influence.

The FEC's contentions that the legislative policy behind the express exceptions to the definition of "expenditure" in § 441b was to permit corporations to fund activities directed to the "general public" to encourage voter participation is clearly erroneous.[252] The actual section of FECA prohibiting corporate contributions in connection with any election, § 441b, specifically provides an exception to the definition of "contributions and expenditures" for "nonpartisan registration and get-out-the-vote campaigns by a corporation *aimed at corporate stockholders and executive or administrative personnel and their families*."[253] This clearly is not the "general public."

Thus, the FEC disregarded the specific provision of § 441b of FECA that provided a definition of the terms used with § 441b, and instead focused on the general definitional section of FECA, § 431.[254] It is in § 431 that contributions are allowed for "nonpartisan activity designed to encourage individuals to vote or to register to vote."[255] It is only in § 431 that this exception exists without the specification, which exists in § 441b, that such activity must be directed at the "corporate stockholders and executive or administrative personnel and their families."[256] Even relying

247. *Id.* at 396 (quoting 44 Fed. Reg. 39,348 (1979)).

248. Raskin, *supra* note 42, at 1988 & n.204.

249. *Becker*, 230 F.3d at 394 (quoting 2 U.S.C. § 441b(a) (2000)).

250. *See id.* at 385. *See also* § 441b(b)(2) (defining the term "contribution or expenditure").

251. § 441b(b)(2) (emphasis added).

252. *See supra* notes 226-35 and accompanying text.

253. § 441b(b)(2)(B) (emphasis added).

254. *See Becker*, 230 F.3d at 394.

255. § 431(9)(B)(ii).

256. *Compare* § 431(9)(B)(ii) *with* § 441b(2)(A).

on the definition of "contributions" and "expenditures" in § 431 of FECA, it seems that corporate contributions made to the debate-staging organization would fall into the category of payments made "for the purpose of influencing any election for Federal office."[257] Furthermore, it is a "basic principle of statutory construction that a specific statute ... controls over a general provision ... particularly when the two are interrelated and closely positioned."[258] Thus, the general definitional section of FECA, § 431,[259] is clearly trumped by the specific definitions in § 441b that apply specifically to corporate contributions at issue there.[260]

The *Becker* court also considered the fact that the definitions for "contributions" and "expenditures" provided in FECA are inclusive; that is, the definitions begin: "[t]he term ... *includes* ...."[261] According to the court, this made the definitions "flexible."[262] This is a weak analysis because the example of "a contribution or expenditure made in connection with any election," *is* included in the text of § 441b of FECA.[263] Thus, such a contribution is illegal when made to an organization staging a political debate—an event held in connection with an election.[264]

In short, FECA prohibits corporations from making contributions or expenditures in connection with elections and FECA defines contributions and expenditures as payments made to any organization in connection with any election. The CPD is an organization that stages debates connected to the election of the President. Thus, the CPD is barred by FECA from accepting corporate monies. Ultimately, *Becker* is another failed attempt by a third-party candidate to tear down the barriers to third-party candidate inclusion in the presidential debates. The following section offers possible solutions to the obstacles in the path of third-party inclusion in the presidential debates.

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257. §§ 431(8)(A)(i), 431(9)(A)(i). *See also Becker*, 230 F.3d at 394.

258. HCSC-Laundry v. United States, 450 U.S. 1, 6 (1981) (citing Bulova Watch Co. v. United States, 365 U.S. 753, 761 (1961)). The plaintiffs made this argument but the *Becker* court found that it was not clear that corporate funding of debates was covered by the definitions in either § 431 or § 441b. *See Becker*, 230 F.3d at 392.

259. *See* 2 U.S.C. § 431(8)(A)-(9)(B) (2000).

260. *See* § 441b(b)(2).

261. §§ 431(8)(A), (9)(A) (emphasis added); Becker v. FEC, 230 F.3d 381, 394 (1st Cir. 2000).

262. *See Becker*, 230 F.3d at 394.

263. 2 U.S.C. § 441b(b)(2) (2000).

264. *But see Becker*, 230 F.3d at 394 (stating that it is not clear whether "corporate disbursements to nonprofit debate staging organizations fall within" FECA's list of prohibited contributions and expenditures).

VI. POSSIBLE REMEDIES

A. Remedy: Public Demand

As this Comment has demonstrated, third-party candidates have had little success challenging their exclusion from the presidential debates on First Amendment grounds or as a violation of the Communications Act. Nor have they had success contesting the validity of the CPD or the FEC's regulations interpreting FECA. Thus, it seems the federal agencies are aligned with Congress and the two major parties to ensure third-party voices are not heard in presidential debates; and the judiciary has supported them in this endeavor. Moreover, the CPD's considerable power and restrictive criteria results in candidates from only the two major parties being heard in the debates. "The operative definition of censorship accordingly shifts from government silencing what powerless people say, to powerful people violating powerless people into silence and hiding behind state power to do it."[265] But censorship has no place in American democracy. Although third-party candidates who have challenged their exclusion from the debates have been unsuccessful in securing a legally vindicated place at the debate table, the FEC, FCC, Congress, the Democratic and Republican parties and the judiciary could foreseeably change their position when the public demands to hear the voices of third-party candidates. It is not only these actors who have effectively silenced third-party candidates,

> [a] variety of other mechanisms exist that effectively silence [them]. These include self-restraint by speakers themselves, effective censorship by peers and superiors, a variety of market devices, social implementation of norms of unacceptability, and the systematic marginalization of groups of people who are discouraged from speaking their minds and feelings. These complex processes have nothing much to do with law and legal constraints; nonetheless, their impact on freedom of expression may be more pervasive and deeper than the effects of legal curbs.[266]

Thus, a possible solution may have to come not through legal means, but

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265. CATHERINE A. MACKINNON, ONLY WORDS 10 (1993) *as quoted in* Robert C. Post, *Censorship and Silencing*, *in* CENSORSHIP AND SILENCING: PRACTICES OF CULTURAL REGULATION 1-2 (Robert C. Post ed., 1998).

266. Ruth Gavison, *Incitement and the Limits of Law*, *in* CENSORSHIP AND SILENCING, *supra* note 265, at 43-44. In fact, Nader was physically excluded from even watching the October 3, 2000 debate held in Boston, even as a ticket-holder. *See* Press Release, DebateThis.org, Nader Wins Motion on Physical Exclusion from Boston Debates Lawsuit Against Presidential Debate Commission Will Go Forward (Feb. 8, 2001) *at* http://www.debatethis.org/debatelawsuit1.html (last visited Mar. 25, 2003).

by the demands of the American public.

B. Remedy: The CPD Should Change Its Selection Criteria

Many commentators argue that the rule promulgated by the CPD requiring a presidential candidate to receive at least fifteen percent support in national public opinion polls before being invited to the debates is problematic.[267] The fifteen percent requirement is too high a threshold.[268] "A candidate who stands at a disqualifying 14 percent at the polls commands the allegiance of more than 17 million registered American voters."[269] Many would argue that this type of candidate represents a significant portion of public opinion and deserves to have his or her voice heard.[270] With only the Democratic and Republican parties represented in the debates, none of the third parties' ideas (those of the Independents, Green Party, Reform Party, and Libertarians, for example) are debated. That constitutes the political affiliation of one-third of the voting public.[271]

The CPD could reasonably require a five percent polling level in order to be allowed into the debates.[272] Five percent is the required national electoral showing a presidential candidate must have in the popular vote in order to have his or her party qualify for public financing in the next election.[273] Thus, by requiring a five percent showing of electoral support, the CPD would be mirroring the national legislative standard regarding candidate seriousness.[274] By requiring the five percent showing in the polls before offering an invitation to debate, the CPD would not only increase the possibility of third-party candidate inclusion, but also bolster the CPD's reputation as a nonpartisan organization.[275]

The FEC regulation, section 110.13(b)(2), requires that the "debate

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267. *See, e.g.*, *Room at the Debate Table*, *supra* note 30, at 8; Milchen, *supra* note 40.

268. *See* FAIR, *supra* note 124.

269. *Id.* Furthermore:

> [t]he relevant question is not, "Whom do you think you would vote for today before the debate has even taken place?" It is, "Whom do you want to see included in the debate so you can decide what the important issues are and to help clarify your choices and thoughts?" Yet the CPD, which purports to act in the public interest, would never touch this approach. As much as 76 percent of the public said Perot should be invited to debate in 1996, which gives you a sense of how dangerous procedural democracy would be to the guardians of rigged debate.

Raskin, *supra* note 127, at 23.

270. *See* FAIR, *supra* note 124.

271. *See* Raskin, *supra* note 127, at 24.

272. *See* FAIR, *supra* note 124.

273. *See id.*

274. *See id.*

275. *See* Coleman, *supra* note 18, at 20.

staging organization does not structure the debates to promote or advance one candidate over another."[276] The present criteria set by the CPD create a debate structure that favors one candidate over another; a major-party candidate over a third-party candidate. In *Becker v. FEC,* the plaintiffs argued that "the debates in fact promote the campaigns of those invited to participate."[277] Lawrence Noble, General Counsel of the FEC, actually issued a report in 1998 finding "reason to believe" that in the 1996 debates, the CPD accepted what constituted illegal campaign contributions and that it was operating as an illegal "political committee" on behalf of the two major parties.[278] Noble wrote: "[t]he role played by Clinton/Gore and Dole/Kemp in the CPD's debate participant selection process and the role played by the [Democratic National Committee] and the [Republican National Committee] in the creation of CPD suggest that CPD's major purpose may be to facilitate the election of either of the major parties' candidates for president."[279]

With an average of one hundred or more declared presidential candidates in each election season, "limiting the number of debate participants is necessary."[280] "Regardless of one's views on the optimum number of debaters, an unaccountable private organization"—beholden to the two dominant political parties—"has no place controlling this vital part of our democratic process."[281] The CPD needs to either reform its policies or be replaced with a public body that will improve our democracy.[282] It is essential to end the perception that the "[p]residential debates are designed not as the focal point in a broad public dialogue among our divergent political forces—Democratic, Republican, Independent, Reform, Libertarian, Green—but as a ritual celebration of the two-party system and its incestuous marriage to corporate capital."[283]

In a democratic society, an election and events relating to an election should be democratically-organized and administrated.[284] That is why having a nonpartisan body to stage and structure the debates is essential.[285] The entity staging the debates should not be one dependent on corporate or

276. 11 C.F.R. § 110.13(b)(2) (2000).

277. 230 F.3d 381, 397 (1st Cir. 2000).

278. Raskin, *supra* note 127, at 23.

279. *Id.* The FEC commissioners unanimously voted to reject their own general counsel's conclusions. *See id.* In 2000, the CPD changed some of its selection criteria. *See supra* notes 108-21 and accompanying text.

280. Milchen, *supra* note 40. *See also* KRAUS, *supra* note 37, at 260.

281. Milchen, *supra* note 40.

282. *See* Raskin, *supra* note 127, at 24; Milchen, *supra* note 40.

283. Raskin, *supra* note 127, at 21.

284. *See* Coleman, *supra* note 18, at 18.

285. *See id.*

major-party support for its existence.[286] Transparent public accountability is essential to legitimizing the debates. It is also essential to the legitimacy of the election process and the candidacies of those running.[287]

There is hope that a change is coming. In fact, on November 6, 2001, a concurrent resolution was introduced in Congress:

> expressing the sense of Congress that any Presidential candidate should be permitted to participate in debates among candidates if at least five percent of respondents in national public opinion polls of all eligible voters support the candidate's election for President or if a majority of respondents in such polls support the candidate's participation in such debates.[288]

VII. CONCLUSION

The exclusion of third-party candidates from the presidential debates will undoubtedly continue to foster controversy. This Comment demonstrates how third-party candidate exclusion from the presidential debates has been made possible through statutes and regulations governing campaign financing and broadcasting, as well as case law interpreting them. The defects in the regulatory framework and judicial opinions that allow not only for third-party candidate exclusion from the debates, but also for corporate influence in the election process, are of paramount concern. Clearly, a debate that brings in a wider selection of viewpoints and issues results in a more informed electorate and encourages participation in American democracy.

Jennifer A. McKinnon

286. *See id.* at 20.

287. *See id.*

288. H.R. CON. RES. 263, 107th Cong. (2001). This resolution was referred to the House Committee on House Administration. *See* 147 CONG. REC. H 7852 (daily ed. Nov. 6, 2001). As of this writing, however, the resolution appears to have died in committee.

Bartnicki v. Vopper: Cell Phones and Throwing Stones

> Instantaneous photographs and newspaper enterprise have invaded the sacred precincts of private and domestic life; and numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops."[1]

I. INTRODUCTION

A. Purpose of Comment

This Comment examines the implications of the Supreme Court's decision in *Bartnicki v. Vopper*[2] as it relates to a news gathering agency's right to disseminate information that has been illegally obtained by a third party and then given to the media. The *Bartnicki* Court handed down a narrow victory to newsgathering outlets in deciding that a private action under the Federal Wiretap Act[3] for disseminating the contents of an

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1. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

2. 532 U.S. 514 (2001).

3. Omnibus Crime Control and Safe Streets Act of 1968 (codified as amended at 18 U.S.C. § 2520 (1994) [hereinafter the Federal Wiretap Act]. § 2520 provides, inter alia, that

> ... any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.
>
> ... (2) damages under subsection (c) and punitive damages in appropriate cases; and (3) a reasonable attorney's fee and other litigation costs reasonably incurred.
>
> ... (2) In any other action under this section, the court may assess as damages whichever is the greater of—
>
> the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

illegally intercepted cellular phone conversation violated the First Amendment. In analyzing the constitutionality of the statute's[4] provision for private relief, the Court applied strict scrutiny[5] to a purportedly content-neutral statute.[6] Moreover, the Court may have overruled, *sub rosa*, *Cohen v. Cowles Media Co.*,[7] which held that laws of general applicability do not warrant heightened First Amendment scrutiny.[8]

B. The Effects of *Bartnicki*

A week after the Supreme Court handed down its decision in *Bartnicki*, it vacated and remanded another appellate decision, *Boehner v. McDermott*,[9] dealing with the same provision of the Federal Wiretap Act.[10] That same day the Court also denied certiorari to another First Amendment challenge to the Federal Wiretap Act in *Peavy v. WFAA-TV, Inc.*[11] Although there are differences between the three cases, their similarities should give the media useful guidelines on how future cases that set First Amendment rights against privacy rights will be decided.[12] After a

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statutory damages of whichever is the greater of $100 a day for each day of violation or $10,000.

Id.

4. Plaintiffs based their action on both the Federal Wiretap Act and a parallel Pennsylvania statute. *See* 18 PA. CONS. STAT. § 5725 (1998); *Bartnicki*, 532 U.S. at 520. The Court recognized the similarity of the statutes, and accordingly addressed only the federal statute. *See id.* at 520 n.3.

5. *See Bartnicki*, 532 U.S. at 532 (requiring that the statute show a "need ... of the highest order" (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 87, 103 (1979)).

6. *See id.* at 521. *See also infra* note 170 and accompanying text.

7. 501 U.S. 663 (1991)

8. *Id.* at 670. For a discussion of the *Cohen* holding, see Alan E. Garfield, *The Mischief of* Cohen v. Cowles Media Co., 35 GA. L. REV. 1087 (2001). *See also* Bartnicki v. Vopper, 200 F.3d 109, 118-19 (3d Cir. 1999) (applying *Cohen's* holding that "a law of general applicability, which neither targets nor imposes disproportionate burdens upon the press, is enforceable against the press to the same extent that it is enforceable against individuals or organizations"). Following *Cohen*, the Court of Appeals for the Third Circuit in *Bartnicki* applied intermediate scrutiny to the Federal Wiretap Act and found that the statute was not narrowly tailored to accomplish an important governmental interest. *See id.* at 123, 129. *See also Bartnicki*, 532 U.S. at 521-22.

9. 532 U.S. 1050 (2001) (mem.).

10. *See id. See also infra* Part V.A.

11. 221 F.3d 158 (2000), *cert. denied*, 532 U.S. 1051 (2001) (mem.). *See also infra* Part V.B.

12. *See* Karen N. Frederiksen, *The Supreme Court, the Press, and Illegally Recorded Cellular Telephone Calls*, 28 HUM. RTS. 17 (2001). "As these three cases reveal, the legal landscape regarding the use and disclosure of illegally obtained telephone conversations remains unpredictable." *Id.* at 17.

thorough discussion of the cases that led up to *Bartnicki*, *Boehner*, and *Peavy*, this Comment will attempt to articulate the state of First Amendment jurisprudence in this area of law.[13] While the Supreme Court has not outlined a bright line test in this area, a close reading of the *Bartnicki* decision precisely demonstrates why the Court finally and correctly applied strict scrutiny to the competing rights of the parties.[14] Finally, some commentators have opined that *Bartnicki* gives the media carte blanche authority to obtain information illegally and publicize that information with impunity so long as it pertains to matters of public importance.[15] *Bartnicki*, however, is a much narrower holding which rested squarely on the specific facts of the case.[16]

II. BACKGROUND

A. Facts

The *Bartnicki* case arose out of the "repeated intentional disclosure of an illegally intercepted cellular telephone conversation about a public issue."[17] Petitioners Gloria Bartnicki and Anthony F. Kane, Jr. filed suit under the Federal Wiretap Act to recover damages against Frederick W. Vopper (a local talk radio host known to his listeners as Fred Williams), Vopper's employer (both WILK Radio and WGBI-AM Radio, and their respective parent companies) and Jack Yocum (the original recipient of the tape from its anonymous source).[18] As members of the Pennsylvania State Education Association, petitioners were "engaged in collective-bargaining negotiations with the [local] school board."[19] The negotiations were,

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13. *See infra* Part VII.

14. This Comment will also attempt to articulate how the *Bartnicki* test should be applied to *Boehner* on remand. *See* Boehner v. McDermott, No. 98-594 TFH, 1998 WL 436897 (D. D.C. Jul. 28, 1998), *rev'd by* 191 F.3d 463 (D.C. Cir. 1999), *vacated by* 532 U.S. 1050 (2001) (mem.), *on remand at* No. 98-7156, 2001 WL 1699420 (D.C. Cir. 2001) (per curiam); *infra* Part VII.E.

15. *See* Leading Case, *Freedom of Speech and Expression*, 115 HARV. L. REV. 406 (2001); Eric W. Tiritilli, Casenote: *You Never Call Me Anymore:* Bartnicki v. Vopper *and the Supreme Court's Abridgement of the Right of Privacy in Favor of the First Amendment Right of a Free Press*, 35 CREIGHTON L. REV. 729, 782 (2002) (asserting that *Bartnicki* gives the media "license to publish information, with impunity, no matter how private").

16. *See infra* notes 195-96 and accompanying text.

17. Bartnicki v. Vopper, 532 U.S. 514, 517 (2001).

18. *See* Bartnicki v. Vopper, 200 F.3d 109, 113 (3d Cir. 1999). Notably to defendants, plaintiffs did not name any other media outlets that also disseminated the information. *See* Brief for Respondents at 10, Bartnicki v. Vopper, 532 U.S. 514 (Nos. 99-1687, 99-1728) (2000 WL 1614392) [hereinafter Brief for Respondent Vopper].

19. *Bartnicki*, 532 U.S. at 518.

according to all parties, "contentious" and "received 'a lot of media attention.'"[20] Petitioner Bartnicki, the teachers' union's "'chief negotiator,' used the cellular phone in her car to call Kane and engage in a lengthy conversation about the status of negotiations."[21] During the conversation, Mr. Kane stated:

> If they're not going to move for three percent, we're gonna have to go to their, their homes ... to blow off their front porches, we'll have to do some work on some of those guys. ... Really, uh, really and truthfully, because this is, you know, this is bad news (undecipherable) The part that bothers me, they could still have kept to their three percent, but they're again negotiating in the paper. This newspaper report knew it was three percent. What they should have said, "we'll meet and discuss this." You don't discuss the items in public.[22]

This conversation was intercepted and taped by an unknown party.[23] Subsequently, Mr. Yocum, a member of a local taxpayer's organization "formed by local citizens for the sole purpose of opposing the Teachers' Union's proposals,"[24] "found the tape in his mailbox."[25] Mr. "Yocum played the tape for some members of the school board, and later delivered the tape itself to Mr. Vopper."[26] Mr. Vopper played the tape in its entirety "on his public affairs [radio] talk show"[27] and subsequently additional media outlets, including television news programs and the local daily newspaper, also disseminated the contents of the tape.[28]

B. Procedural History

Ms. Bartnicki and Mr. Kane's suit asserted that Mr. Yocum's disclosure and the subsequent repeated disclosures by Mr. Vopper entitled them to "actual damages, statutory damages, punitive damages, and attorneys' fees

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20. *Id. See also* Brief for Respondent Vopper, *supra* note 18, at 8 n.8. (noting that "[a] cinder block was thrown through the car window of one member of the teachers' negotiating team").

21. *Bartnicki*, 532 U.S. at 518.

22. *Bartnicki*, 200 F.3d at 113.

23. *See Bartnicki*, 532 U.S. at 518. Throughout the litigation the parties never identified the person who intercepted the conversation. *See id.* at 525. The district attorney declined petitioners' request for a criminal investigation into the source of the tape, stating that the time could "be better devoted to investigating 'murders and child abuse and other violent felonies.'" Brief for Respondent Vopper, *supra* note 18, at 10.

24. *Bartnicki*, 200 F.3d at 113.

25. *Bartnicki*, 532 U.S. at 519.

26. *Id.*

27. *Id.*

28. *See id.*

and costs" under the Federal Wiretap Act.[29] Both parties moved for summary judgment but the district court denied the motions, "specifically holding that imposing liability on the defendants would not violate the First Amendment."[30] The district court eventually "granted a motion for an interlocutory appeal" to certify to the circuit court of appeals

> (1) whether the imposition of liability on the media Defendants under the [wiretapping statutes] solely for broadcasting the newsworthy tape on the Defendant Fred Williams' radio news/public affairs program, when the tape was illegally intercepted and recorded by unknown persons who were not agents of the Defendants, violates the First Amendment; and (2) whether imposition of liability under the aforesaid [wiretapping statutes] on Defendant Jack Yocum solely for providing the anonymously intercepted and recorded tape to the media Defendants violates the First Amendment.[31]

A three-member panel of the Third Circuit Court of Appeals addressed the First Amendment arguments and found that the district court had erred in its earlier dismissal of the First Amendment defense.[32] Plaintiffs, Ms. Bartnicki and Mr. Kane, subsequently petitioned the Supreme Court for certiorari.

III. THE CONTROLLING CASE LAW

The Court of Appeals for the Third Circuit reached the same result in *Bartnicki* as the Supreme Court later would reach but through different reasoning. As a means of tracing the jurisprudential "tension between the First Amendment and the right to privacy," the court of appeals' decision provides a cogent road map of the Supreme Court cases that control this ambiguous area of law.[33] The following section traces the development of the case law in much the same way as the appellate court's opinion, and provides a useful approach to understanding the final result and meaning of *Bartnicki*.

A. From the *Pentagon Papers* to the *Daily Mail*

The Supreme Court has consistently held that the First Amendment generally prohibits "state action to punish the publication of truthful information."[34] This *Daily Mail* principle evolved through a series of cases

29. *Id.* at 520.
30. Bartnicki v. Vopper, 200 F.3d 109, 113 (3d Cir. 1999).
31. *Id.* at 113-14 (quoting App. at 388).
32. *See Bartnicki*, 200 F.3d at 109, 113.
33. *Id.* at 116.
34. Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 102 (1979).

in which the Supreme Court protected the publication of truthful matters of public concern.[35]

1. The *Pentagon Papers*: Public Concern vs. Illegality

The *Pentagon Papers* case arose out of the *New York Times'* intent to publish the contents of stolen military documents relating to the Vietnam War.[36] Attempting to keep the documents private, the government argued both the Troopship Doctrine[37] and the right to punish the newspaper because of the fact that the documents had been stolen.[38] In holding that such punishment would effectively be an unconstitutional prior restraint, "neither the majority nor the dissenters placed any weight" on the fact that the documents had been stolen.[39] Instead, the Court "focused on the character of the stolen documents' contents and the consequences of public disclosure."[40] Thus, the Court "raised, but did not resolve the question 'whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well.'"[41] This issue has yet to be resolved,[42] although the progeny of cases tend to progressively raise the bar against punishment.[43]

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35. *See* Florida Star v. B.J.F., 491 U.S. 524 (1989) (protecting publication of a rape victim's name because the information was made available to a reporter, albeit inadvertently); *Daily Mail*, 443 U.S. at 103 (protecting publication of juvenile offender's name when reporter obtained the information from witnesses at crime scene); Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) (protecting publication of information divulged by third party who was sworn to secrecy); Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975) (protecting publication of rape/murder victim's name obtained from judicial proceedings). *See also* Butterworth v. Smith, 494 U.S. 624 (1990) (protecting publication of reporter's own grand jury testimony); New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam) (protecting publication of documents stolen from government agency).

36. *New York Times*, 403 U.S. at 716 (Black, J., concurring).

37. *See* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931) (stating that under the Troopship Doctrine, the First Amendment is not offended in instances where prior restraint of publication is necessary to protect military secrets and/or plans). "No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops." *Id.* at 716 (Black, J., concurring).

38. *See New York Times*, 403 U.S. at 750 (Burger, C.J., dissenting).

39. Bartnicki v. Vopper, 532 U.S. 514, 528 (2001).

40. *Id.*

41. *Id.* (quoting Florida Star v. B.J.F., 491 U.S. 524, 535 n.8 (1989)).

42. *See Bartnicki*, 532 U.S. at 529.

43. *See* Terry Francke, *Press Rights, Human Rights, and Cryptocracy*, 28 HUM. RTS. 11 (2000). "The Supreme Court has steadfastly refused categorically to close the door on

2. *Cox Broadcasting*: Public Records vs. Privacy

Four years later, in *Cox*, the Supreme Court addressed the question of whether a state may punish the publication of truthful information obtained from public records.[44] The statute at issue was a Georgia prohibition on publishing the names of rape victims.[45] In *Cox*, the father of a deceased rape victim brought an action for invasion of privacy against the defendant media outlet after his daughter's name was published in connection with a news story about the trial of his daughter's assailants.[46] The reporter obtained the name of the victim from "an examination of the indictments which were made available for his inspection in the courtroom."[47]

The Court grappled with the competing interests of the father's right to privacy and the press and public's right to newsworthy information.[48] Ultimately, the Court held that since the information had been made available to the public by the government,[49] the statute's stated purpose to protect the privacy of victims could not be reconciled with the state's action of "placing the information in the public domain."[50] The Court noted that such reconciliation would "make it very difficult for the media to inform citizens about the public business and yet stay within the law."[51] Additionally, the Court noted the importance that public scrutiny of trials plays in ensuring fairness in the "administration of justice."[52] Most importantly, the Court stated that "[o]nce true information is disclosed ...

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prior restraint or subsequent civil or criminal liability in all situations. But in actuality it has incrementally ruled against prevention or punishment." *Id.* at 13.

44. *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 472-73 (1975).

45. *See id.* at 472-73.

46. *See id.*

47. *Id.*

48. *Compare* "powerful arguments can be made, and have been made, that however it may be ultimately defined, there is a zone of privacy surrounding every individual, a zone within which the State may protect him from intrusion by the press, with all its attendant publicity," *id.* at 487, *with* "[t]he commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, however, are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government," *id.* at 492.

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

50. *Cox*, 420 U.S. at 495. "[T]he interests in privacy fade when the information involved already appears on the public record." *Id.* at 494-95.

51. *Id.* at 496.

52. *Id.* at 492. What the Court failed to recognize, according to one commentator, is that "avoidance of 'public documentation' would require that criminal proceedings against alleged rapist be conducted in secret, ... a constitutional problem at least as serious as the one the Court believed itself to be resolving." Alfred E. Hill, *Defamation and Privacy Under the First Amendment*, 76 COLUM. L. REV. 1205, 1267 (1976). Despite this "dubious" oversight, *Cox* continues to be good law. *Id.* at 1255.

the press cannot be sanctioned for publishing it."[53]

3. *Landmark Communications:* Estoppel Not a Bar to Publication

Three years after *Cox*, in *Landmark*, the Supreme Court addressed the issue of publication of truthful information that had been divulged by a third party who had been sworn to secrecy.[54] Here, based on information purportedly received from a member of a private review board, a newspaper published a story alleging that a state judge was under investigation by the Virginia Judicial Inquiry and Review Commission.[55] Relying on a statute that required confidentiality in such proceedings, the state brought criminal charges against the paper.[56] Ultimately, the Supreme Court held that "[the] government may deny access to information and punish its theft, [but] government may not prohibit or punish the publication of that information once it falls into the hands of the press, unless the need for secrecy is manifestly overwhelming."[57] While the confidentiality requirement estopped members of the review board from disclosing information, and provided a means for the government to punish anyone who disclosed such information, that estoppel could not be applied to the newspaper once the information was divulged.[58]

In *Landmark*, the defendant newspaper urged the Court to hold that "truthful reporting about public officials ... [would] always [be] insulated ... by the First Amendment."[59] The Court, however, found it "unnecessary to adopt this categorical approach,"[60] and instead considered only Virginia's interest in maintaining confidentiality of the proceedings.[61] The Court ultimately found Virginia's interest against the third party newspaper "insufficient to justify the actual and potential encroachments on freedom of speech and of the press," and thereby prohibited the government from punishing the press for disclosing information that had been lawfully

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53. *Cox*, 420 U.S. at 496.

54. *See* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 830 (1978).

55. *See id.* at 831.

56. *See id.* at 830 & n.1.

57. *Id.* at 849 (Stewart, J., concurring) (citation omitted). The Court also noted that "a total of 49 jurisdictions" have similar confidentiality requirements in judicial oversight statutes. *Id.* at app. at 846

58. *See id.* at 849-51.

59. *Id.* at 838.

60. *Landmark*, 435 U.S. at 838. *See also* Florida Star v. B.J.F., 491 U.S. 524, 532 (1989). "Our cases have carefully eschewed reaching this ultimate question, mindful that the future may bring scenarios which prudence counsels our not resolving anticipatorily." *Id.* (citation omitted).

61. *See Landmark*, 435 U.S. at 838.

obtained, albeit from a source who breached a confidentiality requirement.[62]

4. *Daily Mail:* Publication of Lawfully Obtained Information

The following term, the Supreme Court was presented with an issue similar to that in *Landmark* in *Smith v. Daily Mail Publishing Company.*[63] Here, the Court asked whether a state could punish the publication of truthful information regarding a judicial proceeding related to a murder.[64] The defendant newspaper had published the name of a juvenile arrested for allegedly murdering another youth.[65] A grand jury subsequently indicted the newspaper for violating a West Virginia statute prohibiting the disclosure of such information about minors.[66] Unlike *Cox*, where the information was originally disclosed through court documents,[67] in *Daily Mail* the reporters "obtained the name of the alleged assailant simply by asking various witnesses, the police, and an assistant prosecuting attorney."[68]

In its prosecution, the State maintained it had a significant interest in prohibiting the disclosure of names of juvenile offenders.[69] The State argued that protecting the anonymity of such offenders promoted their rehabilitation, whereas publication "may encourage further antisocial conduct ...."[70] The Court rejected this argument as insufficient "to justify application of a criminal penalty,"[71] noting that "if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."[72] While such a proclamation appears to place the publication of truthful information within the realm of strict First Amendment scrutiny, Justice Rehnquist cautioned in a prescient concurrence that the Court "eschew[s] absolutes in favor of a

62. *Id.*

63. 443 U.S. 97 (1979).

64. *See Daily Mail*, 443 U.S. at 98.

65. *See id.* at 99.

66. *See* W. VA. CODE § 49-7-3 (1976). "[N]or shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court[.]" *Id.*

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

68. *Daily Mail*, 443 U.S. at 99. Interestingly, the Court gave no deference to the fact that state actors had divulged the information. *See, e.g.*, Cox Broad. Corp. v. Cohn, 420 U.S. 469 (1975); Florida Star v. B.J.F., 491 U.S. 524 (1989).

69. *See Daily Mail*, 443 U.S. at 101.

70. *Id.* at 104.

71. *Id.*

72. *Id.* at 103.

more delicate calculus that carefully weighs the conflicting interests to determine which demands the greater protection under the particular circumstances presented."[73] The majority noted that its holding in the case was "narrow,"[74] and ten years later in *Florida Star* directly rebuffed an attempt to create a categorical rule that "truthful publication may never be punished consistent with the First Amendment."[75]

5. *Florida Star*: The Clear Enunciation of the *Daily Mail* Principle

Both the *Florida Star* and *Cox* cases involved violations of statutes prohibiting the publication of the names of rape victims.[76] The reporter in *Cox*, however, obtained the information through court documents,[77] while the Florida Star's reporter received his information through the "inadvertence" of the police.[78] In *Florida Star*, a "reporter-trainee" merely copied information from a publicly available police report and published the story.[79]

In analyzing the Florida statute, the Supreme Court distinguished the facts of *Florida Star* from *Cox* based on the inadvertence of the police department.[80] In *Cox*, the Court noted the information was obtained from courthouse records; thus, the First Amendment protection was based on the press' "important role ... in subjecting trials to public scrutiny."[81] The Florida Star newspaper, by comparison, obtained and published information that it had reason to know "was meant by state law to be withheld from public release."[82] Nonetheless, the majority applied its

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73. *Id.* at 106 (Rehnquist, J., concurring) (disagreeing with Court's ruling that protecting anonymity of juvenile offenders does not meet strict scrutiny, but nonetheless concurring in result because statute itself was not narrowly tailored to achieve that state interest). "The West Virginia statute prohibits *only newspapers* from printing the names of youths charged in juvenile proceedings." *Id.* at 110 (emphasis added).

74. *Daily Mail*, 443 U.S. at 105.

75. Florida Star v. B.J.F., 491 U.S. 524, 532 (1989).

76. *See id.* at 524; Cox Broad. Corp. v. Cohn, 420 U.S. 469, 471 (1975).

77. *See Cox*, 420 U.S. at 472-73.

78. *See Florida Star*, 491 U.S. at 538. While the Florida law, FLA. STAT. § 794.03 (1987), made it a crime to "publish or broadcast information identifying [a] sexual offense victim[,]" it did not explicitly prohibit a newspaper from receiving such information through a police report. *Florida Star*, 491 U.S. at 536. *See also supra* note 47 and accompanying text.

79. *Florida Star*, 491 U.S. at 527.

80. *See id.* at 546 (White, J., dissenting).

81. *Id.* at 531 (citing *Cox*, 420 U.S. at 492-93).

82. *Id.* at 543 (White, J., dissenting). "The Star's reporter indicated that she understood that she '[was not] allowed to take down that information' (i.e., B.J.F.'s name)

holding in *Daily Mail* and announced the formulation of the *Daily Mail* Principle.[83]

Under the *Daily Mail* Principal, the *Florida Star* Court explained, "three separate considerations" support the constitutional protection of "lawfully obtain[ed] truthful information about a matter of public significance."[84] First, the government is not prohibited from "safeguarding significant interests" by keeping the information private.[85] In *Landmark*, for example, the Court noted with approval that a number of states required confidentiality in judicial inquiry proceedings.[86] In *Cox* and *Daily Mail*, however, the Court chided the respective states for applying statutes' that had the stated purpose of protecting privacy interests although in both instances it was the government that initially disclosed the information to the press.[87] The *Florida Star* Court noted that "[w]here information is entrusted to the government, a less drastic means than punishing truthful publication almost always exists for guarding against the dissemination of private facts."[88]

The second consideration the *Florida Star* Court put forth was that "punishing the press for its dissemination of information which is already publicly available is relatively unlikely to advance the interests in the service of which the State seeks to act."[89] In other words, the press is merely fulfilling its purpose to widely publicize information when it reports news that it gathered from public records, and therefore, to punish the press ignores the point of the states' primary interest in keeping the information confidential.[90]

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and that she '[was] not supposed to take the information from the police department.'" *Id.* at 546 (White, J., dissenting).

83. *See id.* at 533-39.

84. *Id.* at 533.

85. *Id.* at 534.

86. *See supra* note 57 and accompanying text.

87. *See* Cox Broad. Corp. v. Cohn, 420 U.S. 469, 472-73 (1975); Smith v. Daily Mail Publ'g Co., 443, U.S. 97, 104 (1979). *But see* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 835 (1978); *supra* note 57 and accompanying text (noting the right of government to keep certain information from the public).

88. *Florida Star*, 491 U.S. at 534.

89. *Id.* at 535.

90. *See Cox*, 420 U.S. at 495. In noting the need for a free press, the Court wrote:

> Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.

Lastly, the Court noted that the press relies upon the "government's implied representations of the lawfulness of dissemination" when receiving news items from government agencies.[91] Therefore, requiring the press to "sift[] through government press releases, reports, and pronouncements to prune out material arguably unlawful for publication" would create an "onerous" burden on the press.[92] The "timidity and self-censorship"[93] that would ensue, the Court noted, places an unreasonable burden on the press that is inconsistent with the purpose of the First Amendment.[94]

Applying all of the considerations of the *Daily Mail* principle, the Court concluded that the Florida statute violated the First Amendment because (1) the information had been lawfully obtained, (2) the statute failed to achieve its purported purpose,[95] and (3) it was not the duty of the press to second-guess the lawfulness of publishing information provided to it by the government.[96] The Court made it clear, though, that it was not creating a blanket protection for the publication of truthful information lawfully obtained:

> The *Daily Mail* principle does not settle the issue whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, government may ever punish not only the unlawful acquisition, but the ensuing publication as well. This issue was raised but not definitively resolved in *New York Times Co. v. United States*, and reserved in *Landmark Communications*. We have no occasion to address it here.[97]

Thus, the Court continued to rebuff the invitation "to hold broadly that truthful publication may never be punished."[98]

The Supreme Court consistently applied strict scrutiny to the statutes at issue in these cases that lead to the development of the *Daily Mail*

Id.

91. *Florida Star*, 491 U.S. at 536.

92. *Id.*

93. *Cox*, 420 U.S. at 496.

94. *See generally* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (stating that First Amendment jurisprudence relies upon a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open").

95. *See Florida* Star, 491 U.S. at 536. Aside from the fact that the information was provided by the government, the Court took serious issue with the fact that the statute applied only to "instrument[s] of mass communication," a term undefined in the statute. *Id.* at 540. *See also id.* at 542 (Scalia, J., concurring) (noting that the Florida statute "has every appearance of a prohibition that society is prepared to impose upon the press but not upon itself").

96. *See id.* at 536.

97. *Id.* at 535 n.8 (citations omitted).

98. *Id.* at 532.

Principle.[99] In doing so, the Court required that the government show (1) a compelling need ("interest of the highest order")[100] to prohibit the speech, and (2) a statute narrowly tailored to restrict only as much speech as necessary to accomplish that interest.[101] The Court based its application of strict scrutiny on the fact that each of the cases involved statutes prohibiting specific types of speech—that is, content-based restrictions.[102]

6. *Cohen v. Cowles*: Estoppel Revisited

In 1991 the Supreme Court revisited the estoppel theory of *Landmark* which held that third parties could not be held to the confidentiality requirements imposed upon members of governmental oversight committees.[103] In *Cohen*, the court held that the First Amendment did not protect publication of an informant's name when the newspaper had promised confidentiality "in exchange for information."[104] Dan Cohen, a political operative, attempted to smear an opponent in a gubernatorial race.[105] Newspaper reporters promised Mr. Cohen anonymity in exchange for "copies of two public court records" documenting misdemeanor charges against Marlene Johnson, the candidate running against Mr. Cohen's candidate.[106] Upon inspecting the records and finding the charges petty, both newspapers "independently decided to publish Cohen's name as part

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99. *See id.* at 534 (requiring that statute at issue further an "interest of the highest order") (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979); *Daily Mail*, 443 U.S. at 102 (noting that "[p]rior restraints have been accorded the most exacting scrutiny in previous cases"); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 842 (1978) (stating that the "interest sought to be protected ... is entitled to no greater weight in the constitutional scales"); Cox Broad. Corp. v. Cohn, 420 U.S. 469, 495 (1975) (holding that public's right to be informed of judicial proceedings is "compelling" as against an individual's privacy interests); New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam) (declaring that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity" (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).

100. *Daily Mail*, 443 U.S. at 103.

101. *See generally* Boos v. Barry, 485 U.S. 312 (1998) (holding that "a content-based restriction on political speech in a public forum must be subjected to the most exacting scrutiny"). "[T]he State [must] show that the 'regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.'" *Id.* at 321 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

102. *See supra* note 99 and accompanying text. *See also supra* note 35 and accompanying text.

103. *See supra* notes 57-58 and accompanying text.

104. Cohen v. Cowles Media Co., 501 U.S. 663, 665 (1991).

105. *See id.*

106. *Id.*

of their stories."[107] In essence, the editorial staffs of the newspapers found Mr. Cohen's attempt to smear Ms. Johnson a more newsworthy story.[108] Mr. Cohen sued the newspapers under a theory of promissory estoppel, claiming the newspapers' breach of the confidentiality agreement created a cause of action entitling him to actual and reputational damages.[109] The Supreme Court eventually decided the case in Mr. Cohen's favor.[110]

In finding for Mr. Cohen, the Court rejected the applicability of the *Daily Mail* principle to the facts and instead relied upon the "well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news."[111] However, those cases were arguably not about the First Amendment: in defining laws of general applicability, the Court relied upon precedent that holds that "the press, like other citizens, [is] obliged to respond to grand jury subpoenas, obey copyright, labor and antitrust laws, and pay taxes."[112] The Court apparently ignored the value of the speech in finding that the First Amendment did not shield the newspapers in this case.[113] Moreover, it has been argued that the Court created a rule that whenever laws of general applicability are at issue, there need be no "further First Amendment analysis."[114] Justice Souter denounced this rule in his dissent[115] reasoning that it is always better to "articulate, measure, and compare the competing interests involved in any given case to determine the legitimacy of burdening constitutional interests."[116] Nonetheless, this

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107. *Id.* at 666.

108. *See id.*

109. *See id.* at 665.

110. *Cohen*, 501 U.S. at 665.

111. *Id.* at 669. *See generally* Branzburg v. Hayes, 408 U.S. 665 (1972) (holding that First Amendment does not immunize a reporter from answering to grand jury).

112. Garfield, *supra* note 8, at 1093. *See also Cohen*, 501 U.S. at 678 (Souter, J., dissenting). "[T]his case does not fall within the line of authority holding the press to laws of general applicability where commercial activities and relationships, not the content of the publication, are at issue." *Id.*

113. *But see Cohen*, 501 U.S. at 676-77 (Souter, J., dissenting). "[T]he publication was thus of the sort quintessentially subject to strict First Amendment protection." *Id.*

114. Garfield, *supra* note 8, at 1095

115. *See Cohen*, 501 U.S. at 677 (Souter, J., dissenting). "[T]here is nothing talismanic about neutral laws of general applicability." *Id.* (quoting Employment Div., Dep't of Human Res. of Ore. v. Smith, 494 U.S. 872, 901 (1990) (O'Connor, J., concurring in judgment)).

116. *Cohen*, 501 U.S. at 677 (Souter, J., dissenting). *See also* Rex S. Heinke & Seth M. M. Stodder, *Punishing Truthful, Newsworthy Disclosures: The Unconstitutional Application of the Federal Wiretap Statute*, 19 LOY. L.A. ENT. L. REV. 279. "The [*Cohen*] majority's formulation approving generally applicable laws is also entirely undercut by the Supreme Court's application of First Amendment limits to defamation cases, which also involve

rule of general applicability lasted another ten years, at least until *Bartnicki* in 2001, often providing courts with an easy out from a conducting a "searching First Amendment analysis" in cases where general statutes purportedly encroach on First Amendment protections.[117] This is precisely the erroneous route the district court took in *Bartnicki* and what the appellate court attempted to correct.

IV. *BARTNICKI* IN THE THIRD CIRCUIT

After tracing the development of the *Daily Mail* Principle, the Third Circuit Court of Appeals in *Bartnicki* refused to apply that principle to the facts of the case.[118] Instead, the Court was persuaded by the government's argument[119] that the Federal Wiretap Act was a content-neutral law of general applicability.[120] In analyzing the statute and the requirements for the proper level of scrutiny, the court noted that:

> the distinction between permissible and impermissible regulation of speech depends on whether the law at issue regulates the substantive content of the speech (what is said) or whether it merely regulates the time, place or manner of the speech (when, where, at what volume, and through which medium it is said). The former regulations are content-based while the latter are content-neutral. The essence of the distinction lies in the fact that, if regulations were content-based, it would not be possible to determine whether a particular speech is prohibited without referring to the substantive import of that expression.[121]

The Third Circuit determined that the Federal Wiretap Act was content-neutral by looking to the intent of the regulation, namely to prohibit "the use of illegally intercepted communication."[122] Accordingly, the court asked whether the statute was "narrowly drawn ... without unnecessarily interfering with First Amendment freedoms."[123] The court found that the government already had the means to effectuate the statute through

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generally applicable laws. Thus, the majority's formulation in *Cohen* is wrong." *Id.* at 304.

117. Garfield, *supra* note 8, at 1088. "[*Cohen*] is the case courts cite when laying the groundwork for dismissing a party's First Amendment defenses." *Id.*

118. *See* Bartnicki v. Vopper, 200 F.3d 109, 117 (3d Cir. 1999).

119. Pursuant to 28 U.S.C. § 2403, the government intervened on behalf of the plaintiffs' to argue the constitutionality of the Federal Wiretap Act. *See Bartnicki*, 200 F.3d at 114.

120. *See Bartnicki*, 200 F.3d at 121.

121. *Id.*

122. *Id.* at 123 (quoting Brief for United States at 33, Bartnicki v. Vopper, 200 F.3d 109 (3d Cir. 1999)).

123. *Id.* at 126 (citing Hynes v. Mayor of Oradell, 425 U.S. 610, 620 (1975); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978)).

criminal prosecution of the person conducting the illegal interception of the cellular phone call.[124] Therefore, the court concluded, "the government's desired effect can be reached by enforcement of existing provisions against the responsible parties rather than by imposing damages on these defendants."[125] Since even content-neutral regulations of speech must prohibit no "more speech than is necessary to serve the government's asserted interest," the court held that the criminal and civil penalties of the Federal Wiretap Act failed "the test of intermediate scrutiny and may not constitutionally be applied to penalize the use or disclosure of illegally intercepted information where there is no allegation that the defendants participated in or encouraged that interception."[126]

At the same time the *Bartnicki* litigation was wending its way through the Third Circuit to the Supreme Court, another case involving disclosure of an illegally intercepted cellular phone call was being contested in the District of Columbia[127] and a Texas television station was appealing a decision by the Court of Appeals for the Fifth Circuit dealing with the disclosure of illegally intercepted cordless telephone conversations.[128]

V. *BOEHNER & PEAVY*

In the year leading up to the *Bartnicki* decision, both the Third and Fifth Circuits had addressed First Amendment challenges to the Federal Wiretap Act.[129] The results of each case differ because of the Supreme Court's fact-specific balancing test between privacy concerns and the need for dissemination of information on matters of public concern.[130]

A. *Boehner*

In *Boehner*, one congressman filed suit under the Federal Wiretap Act[131]

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124. *See* Bartnicki, 200 F.3d at 126.

125. *Id.*

126. *Id.* at 129.

127. Boehner v. McDermott, No. 98-594 TFH, 1998 WL 436897 (D. D.C. Jul. 28, 1998), *rev'd by* 191 F.3d 463 (D.C. Cir. 1999), *vacated by* 532 U.S. 1050 (2001) (mem.), *on remand at* No. 98-7156, 2001 WL 1699420 (D.C. Cir. 2001) (per curiam).

128. Peavy v. WFAA-TV, Inc., 221 F.3d 158 (5th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001) (mem.).

129. *See Boehner*, 191 F.3d at 463, *vacated by* 532 U.S. 1050 (2001) (mem.); Peavy v. WFAA-TV, Inc., 221 F.3d 158 (5th Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001) (mem.). Both Peavy and WFAA-TV petitioned the Supreme Court for certiorari and both petitions were denied in the same memorandum opinion. *See* WFAA-TV, Inc. v. Peavy, 532 U.S. 1051 (2001) (mem.); Peavy v. WFAA-TV, Inc., 532 U.S. 1051 (2001) (mem.).

130. *See infra* Part VI.B.

131. Like Ms. Bartnicki, Rep. Boehner also sought relief under a parallel state statute. *See supra* note 4 and accompanying text.

against another congressman who had provided to the media a tape of a phone conversation.[132] In the phone conversation, the plaintiff, Representative Boehner, discussed with then-Speaker of the House Newt Gingrich and others "potential responses to the House Ethics Committee probe" of the Speaker.[133] A couple monitoring a police scanner "intercepted and taped [Rep. Boehner's] cellular transmission" and eventually turned the tape over to Representative McDermott, then the leading Democratic member of the House Ethics Committee.[134] Rep. McDermott subsequently gave copies of the tape to *The New York Times*, *The Atlanta Journal-Constitution*, and *Roll Call* and all three papers "ran a story on the party leaders' conversation," including at least one "verbatim transcript of a portion of the conversation."[135]

As a defense to Rep. Boehner's suit, Rep. McDermott claimed protection under the First Amendment.[136] The district court judge grudgingly dismissed the complaint on First Amendment grounds, stating that *Florida Star* and the *Daily Mail* principle created a "loophole" protection for the defendant because the court was required to apply strict scrutiny to the Federal Wiretap Act.[137] Accordingly, the district court held that the statute could not survive strict scrutiny because the court could not see "how the government interest in protecting privacy of wire, electronic or oral communication is of any higher order than the protection of privacy for rape victims."[138] On appeal, however, the Federal Wiretap Act was subjected only to intermediate scrutiny and the appellate court held that the

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132. *See Boehner*, 191 F.3d at 465.

133. Boehner v. McDermott, No. 98-594, 1998 U.S. Dist. LEXIS 11509, at *1 (D. D.C. Jul. 28, 1998).

134. *Id.*

135. Boehner v. McDermott, 191 F.3d 463, 465 (D.C. Cir. 1999). "Because the tape revealed Gingrich engaging in conduct that might have violated the terms of the agreement [between Gingrich and the House Ethics Committee], it had great news value." *Id.*

136. *See Boehner*, 191 F.3d at 466; *Boehner*, 1998 U.S. Dist. LEXIS 11509, at *4. Rep. Boehner also pressed the Department of Justice to seek stiff criminal penalties against the couple who taped the conversation. Each was charged under the Federal Wiretap Act's criminal provision and each paid a $500 fine, although § 2511(1) provides for fines of up to $10,000, five years in prison, or both. *See Boehner*, 1998 U.S. Dist. LEXIS 11509, at *4. *See also* 18 U.S.C. § 2511 (1994).

137. *Boehner*, 1998 U.S. Dist. LEXIS 11509, at *12. The district court judge did not try to hide his contempt for either party's behavior: His opinion begins: "This case arises out of the unfortunate acrimony, absence of civility, and shortage of honor, that pervades the partisan sniping between some members of Congress and their supporters." *Id.* at *1. The opinion also states: "the plaintiff seeks less to strike a blow for his personal privacy rights than he does to fire a salvo in the partisan battle between rival groups in the House of Representatives." *Id.* at *22.

138. *Id.* at *21 (referring to *Cox* and *Florida Star*).

statute furthered an important governmental interest while burdening no more speech than necessary.[139]

The Court of Appeals for the District of Columbia rejected the district court's "'illogical' interpretation of the First Amendment," noting that such reasoning would always allow criminal eavesdroppers the ability to "launder illegally intercepted information."[140] Essentially, the court wrote, the district court's reasoning would render law enforcement "powerless to prevent disclosure of private information" once the information is in the hands of a third party.[141] Moreover, the court highly doubted that Rep. McDermott's act of giving the tape to the media was speech at all.[142] Instead, the court viewed Rep. McDermott's handing over of the tape as conduct, and therefore subject to the *O'Brien* intermediate scrutiny test.[143]

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139. *See Boehner*, 191 F.3d at 468 (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)):

> The oft-repeated test laid down in *O'Brien* is as follows:
>
> > [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. *O'Brien* is the landmark case distinguishing speech from conduct and laying out the intermediate scrutiny test for First Amendment cases. *See id.* In *O'Brien*, the Supreme Court upheld a conviction for burning a draft card in violation of a federal law. *See O'Brien*, 391 U.S. at 376. The Court noted that the government had an important interest in maintaining the integrity of Selective Service registration cards and that O'Brien's act of burning the card, while expressive, was not pure speech subject to strict First Amendment scrutiny. *See id.*

140. *Boehner*, 191 F.3d at 471.

141. *See id.*

142. *See id.* at 466. Justice Sentelle's dissent correctly took strong exception to the court's distinction between McDermott acting in an individual capacity and a publisher acting in its corporate (i.e. publishing) capacity:

> Judge Randolph's repeated attempt to distinguish between "newspapers" on the one hand and "sources" (apparently meaning all those who are not newspapers but might communicate information to a newspaper) on the other is without substance or force. His attempt to extend to newspapers some First Amendment protection not available to all those others who might communicate ... creates a hierarchy of First Amendment protection for a publishing aristocracy nowhere suggested in the Amendment, its history, or the cases applying it. As I noted above, the Framers' use of the expression "the press" does not connote a protected entity, but rather a protected activity.

Id. at 484 (Sentelle, J., dissenting).

143. *See id.* at 477. "In all of this, it is important to keep McDermott's defense firmly in mind—he claims that § 2511(1)(c) unconstitutionally burdens *his* speech in this case. One

The appellate court found that the Federal Wiretap Act imposed only "incidental burdens on speech" in serving its narrow purpose of prohibiting "the disclosure of all illegally intercepted communications, without regard to the substance of the communication or the identity of the person who does the disclosing."[144] Thus, the court found the Federal Wiretap Act constitutional despite a strong dissent that, in some ways, presaged the Supreme Court's decision in *Bartnicki*.[145]

B. *Peavy*

The *Peavy* case began as a quarrel between neighbors.[146] Carver Dan Peavy, a trustee of the Dallas Independent School District who "controlled purchases of insurance for [the school district's] employees,"[147] had ongoing disputes with his neighbors, Charles and Wilma Harman.[148] After buying a police scanner "to monitor police activity in his neighborhood,"[149] Mr. Harman realized he could listen in on Mr. Peavy's cordless telephone conversations.[150] The Harmans continued to monitor and record Mr. Peavy's conversations, claiming that the conversations contained threats to their safety as well as evidence of public corruption.[151] After the Harmans reported both the threats and the public corruption claims to the police and received no response, they brought the information to the attention of a

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cannot possibly evaluate that claim without making the effort to identify precisely what McDermott said, or wrote, or did to incur liability." *Id.* at 478. *See also supra* note 135 and accompanying text.

144. *Boehner*, 191 F.3d at 467.

145. *Boehner*, 191 F.3d at 480-85 (Sentelle, J., dissenting):

> I can envision felonious eavesdroppers ... obtaining not marginally embarrassing information about congressmen but information of critical public importance .... Even if those hypothetical felons dumped information of that critical nature not into the hands of politicians but of a newspaper publisher ... the public could never know of the wrongdoing, because under today's ruling, those news media would be barred from further publication of that information.

Id. at 484.

146. *See* Peavy v. WFAA-TV, Inc., 221 F.3d 158, 163-64 (5th Cir. 2000) (citing Peavy v. Harman, 37 F. Supp. 2d 495, 502 n.2 (N.D. Tex. 1999), *aff'd in part, rev'd in part, vacated in part and remanded*).

147. *Peavy*, 221 F.3d at 163.

148. *See id.* at 163-64.

149. *Id.* at 164.

150. *See id.*

151. *See id.* Mr. Peavy and a business associate "were indicted for bribery and other offenses related to [Dallas Independent School District] insurance" but "were acquitted of all charges." *Id.* at 166.

reporter.[152]

Robert Riggs, the WFAA-TV investigative reporter contacted by the Harmans, met with the Harmans to obtain one tape already made *and* instructed the Harmans on how to make further recordings.[153] After obtaining a total of eighteen tapes constituting at least 188 telephone conversations of Mr. Peavy's, WFAA-TV "broadcast three reports on Peavy's alleged wrongdoing in connection with" the school district's insurance.[154]

Mr. Peavy filed actions against WFAA-TV and Riggs under the Federal Wiretap Act and a similar Texas statute.[155] In granting the defendants' summary judgment motion, the district court applied strict scrutiny to the statutes and held that the First Amendment shielded WFAA-TV and Mr. Riggs from liability.[156]

On appeal, the Fifth Circuit referred to the appellate decisions in *Bartnicki* and *Boehner* in holding that the Federal Wiretap Act should be subjected only to intermediate scrutiny.[157] Although the Fifth Circuit court noted the "obviously, quite different" facts of *Bartnicki*, a telling quote addresses the dispositive difference between *Bartnicki* and *Peavy*: The *Bartnicki* court—wrote the *Peavy* court—held that the Federal Wiretap Act "fails the test of *intermediate scrutiny* and may *not* constitutionally be applied to penalize the use or disclosure of illegally intercepted information *where [, unlike here,] there is no allegation that the defendants participated in or encouraged that interception.*"[158] As such, the Fifth Circuit distinguished both *Bartnicki* and *Boehner*, stating that the

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152. *Peavy*, 221 F.3d at 164.

153. *See id.* at 164. Mr. Riggs "instructed the Harmans *not* to turn the tape recorder on and off while recording intercepted conversations, and *not* to edit them, so that the tapes' authenticity could *not* be challenged." *Id.* (citing Peavy v. Harman, 37 F. Supp. 2d 495, 503 (N.D. Tex. 1999)). While much of the Fifth Circuit's decision addressed the issue of whether WFAA-TV and Riggs "procured" or "obtained" Peavy's communications, and whether the Federal Wiretap Act clearly prohibits such procurement or obtainment, *see id.* at 167-74, those issues are irrelevant with respect to the First Amendment inquiry. What is relevant to this Comment as it relates to the decision in *Bartnicki* is the defendants' instructions to the Harmans.

154. *Peavy*, 221 F.3d at 165-66 (citing *Peavy*, 37 F. Supp. 2d at 504).

155. *See Peavy*, 221 F.3d at 165.

156. *See id.* at 167.

157. *See id.* at 186-88, 190-91. "For the foregoing reasons, ... we REVERSE the summary judgment insofar as it (1) applied strict scrutiny and (2) held that the First Amendment precludes, under the Federal and Texas Acts, holding defendants civilly liable for 'use' and 'disclosure.'" *See id.* at 194. *See also* Bartnicki v. Vopper, 200 F.3d 109, 129 (3d Cir. 1999); Boehner v. McDermott, 191 F.3d 463, 480 (D.C. Cir. 1999).

158. *Peavy*, 221 F.3d at 188 (quoting *Bartnicki*, 200 F.3d at 129 (emphasis added by Court of Appeals for the Fifth Circuit)).

defendants in those cases, "*unlike Riggs and WFAA,* were *not* in any way involved with the interceptors, or the interceptions, but instead received the interceptions from a third party ...."[159]

After distinguishing *Bartnicki* and *Boehner*, the *Peavy* court then asked whether the *Daily Mail* Principle applied.[160] Since, the court noted, the statutes at issue did not prohibit speech based on content, "the use and disclosure provisions, *as applied to Riggs and WFAA*, must satisfy 'the intermediate level of scrutiny applicable to content-neutral restrictions that impose an incidental burden on speech.'"[161] Accordingly, the court applied the *O'Brien* intermediate scrutiny test and found that the statutes did not "burden substantially more speech than necessary to further governmental interests in protecting the privacy of communications."[162] Further, the court noted that "[t]he use and disclosure proscriptions are directed *only* at the *means* by which information is acquired. They apply *only* if the targeted actor *knows, or has reason to know,* of the illegal means of acquisition."[163] Although this statement, as well as the level of scrutiny the court applied, contradict the Supreme Court's eventual holding in *Bartnicki*, as will be seen infra Part VI, the result appears to fit based upon the ad hoc balancing test that the Supreme Court ultimately crafted.[164]

VI. *BARTNICKI* IN THE SUPREME COURT

The Court began its *Bartnicki* opinion by noting that the case "present[s] a conflict between interests of the highest order"—between freedom of speech and individual privacy, which indeed fosters speech.[165] The Court noted that it granted certiorari specifically to resolve the split between the Third Circuit's finding in *Bartnicki* of the Federal Wiretap Act as unconstitutional and the District of Columbia Circuit's opposite finding in *Boehner*.[166] However, the Court also stated that the "constitutional question before us concerns the validity of the statutes as applied to the specific facts of [this] case[]."[167] Upon this framework, the Court then began its analysis.

The *Bartnicki* decision rests on four preliminary assumptions: (1) the

159. *Id.* at 190.

160. *See id.* at 188-90. For a discussion of the *Daily Mail* principle as it evolved, see *supra* Part III.

161. *Peavy*, 221 F.3d at 190-91 (citation omitted).

162. *Id.* at 192. For a discussion of the *O'Brien* test, see *supra* note 139 and accompanying text.

163. *Peavy*, 221 F.3d at 192.

164. *See infra* Part VI.B.

165. Bartnicki v. Vopper, 532 U.S. 514, 518 (2001).

166. *See id.* at 522.

167. *Id.* at 524.

defendants knew "or had reason to know" that the interception of Ms. Bartnicki and Mr. Kane's conversation "was intentional, and therefore unlawful," (2) the defendants "played no part in the illegal interception," (3) the defendants' obtained the tapes lawfully, and (4) "the subject matter of the conversation was a matter of public concern."[168] Additionally, the Court agreed that the Federal Wiretap Act was a content-neutral regulation that did not "distinguish favored speech from disfavored speech on the basis of the ideas or views expressed."[169] With these premises, the Court then looked to the purpose of the Federal Wiretap Act and the effects of its application to the defendants.

A. The Majority's Two-Part Test

In deciding whether a statute survives strict First Amendment scrutiny, the Court must look to the legislature's purpose for enacting the law. If the purpose meets a compelling state interest "of the highest order," and is narrowly tailored to suppress as little speech as necessary to achieve that interest, then the statute will withstand First Amendment strict scrutiny.[170] The government[171] put forth two purposes for the civil penalty provisions of the Federal Wiretap Act.[172] First, the government argued that the purpose of the Federal Wiretap Act is to remove incentives for someone to intercept communications and disclose the contents.[173] By allowing both criminal and civil punishment of offenders, the government reasoned, the legislature intended to "dry up the market" of illegally intercepted communication.[174] Although the dissenters found this a legitimate and

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168. *Id.* at 525.

169. *Id.* at 526 (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642-43 (1994)). *But see id.* at 528 (citing the *Daily Mail* "need ... of the highest order" standard of review (i.e., strict scrutiny)). *See also id.* at 544 (Rehnquist, C.J., dissenting). The Court "nonetheless subjects [the Federal Wiretap Act] to the strict scrutiny normally reserved for governmental attempts to censor different viewpoints or ideas." *Id.*

170. Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 103 (1979).

171. *See supra* note 119 and accompanying text.

172. *See Bartnicki*, 532 U.S. at 529.

173. *See id.*

174. *Id.* at 550-51 (Rehnquist, C.J., dissenting). As discussed by the Supreme Court, the legislative purpose of the Federal Wiretap Act is based in preventing industrial espionage and private extortion. *See id.* at 531 n.16. *See also* Brief for Respondent Vopper, *supra* note 18, at 3 n.3 & n.5, 9. This is the so-called market theory that applies particularly to misappropriation of trade secrets and insider securities information, as well as to domestic relations, because the intent of the legislation is to dry up the market for such information. This theory operates similarly in statutes that prohibit the possession of stolen goods. For example, if the "fence" can face prosecution simply for possessing the stolen goods, then the demand for such goods will diminish. "Without such receivers, theft ceases to be profitable. It is obvious that the receiver must be a principal target of any society anxious to stamp out

narrowly tailored means,[175] the majority pointed to the lack of "empirical evidence" supporting the "assumption that the prohibition against disclosures reduces the number of illegal interceptions."[176] The majority argued that since "[t]he normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it[,]"[177] the statute was not narrowly tailored to target only those involved in illegal interceptions.[178] In this case, the media was not involved in the illegal activity the Federal Wiretap Act purported to prevent, so there was but a tenuous connection between "suppressing one party's speech"—the media's—and preventing illegal interception.[179] Thus, the Court rejected the government's first argument because the Federal Wiretap Act could not be shown to be the least restrictive means of preventing disclosure of illegally intercepted communications.[180] However, the majority did find the government's second argument more compelling.[181]

The government next argued that the Federal Wiretap Act was intended

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theft in its various forms." *Bartnicki*, 532 U.S. at 550 (Rehnquist, C.J., dissenting) (quoting 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW § 8.10(a), at 422 (1986)). *But see* Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Pennsylvania in Support of Respondents at 20, Bartnicki v. Vopper, 532 U.S. 514 (2001) (Nos. 99-1687, 99-1728) (2000 WL 1634972) [hereinafter ACLU Brief].

> The flaw in the government's logic is that its market rationale is inextricably tied to its overlapping concern about revealing the contents of an illegally intercepted conversation. Society cares about preventing the initial interception of confidential communications in significant measure because we do not want the content of those communications to be made public. A market in stolen conversations is therefore fundamentally different than a market in stolen jewelry, and the difference lies squarely in our concern about the communicative impact of the unauthorized disclosure.

Id.

175. *See Bartnicki*, 532 U.S. at 551-52 (Rehnquist, C.J., dissenting). "The law against interceptions, which the Court agrees is valid, would be utterly ineffectual without these antidisclosure provisions." *Id.* at 551.

176. *Id.* at 531. The Court noted that an appendix provided by the defendants identified "only 5 of the 206 cases ... [where] the identity of the interceptor [was] wholly unknown." *Id.* at 530 n.15. The dissent, however, agreed with Congress' finding that intercepts often go undetected, and moreover, the dissent would have applied the same blanket enforcement of the Federal Wiretap Act that Congress recommended: "Only by striking at all aspects of the problem can privacy be adequately protected.'" *Id.* at 549 (Rehnquist, C.J., dissenting) (quoting S. REP. NO. 99-1097, at 69 (1986)).

177. *Bartnicki*, 532 U.S. at 529.

178. *See id.* at 530.

179. *Id.*

180. *See id.* at 532.

181. *See id.* at 532-33.

to protect "[p]rivacy of communication."[182] The Court considered this an "important interest,"[183] necessarily requiring a balance of "constitutional calculus" between the right to publish "truthful information of public concern"[184] and the "right to be let alone."[185] The Court noted the government's position that the Federal Wiretap Act encouraged "the uninhibited exchange of ideas and information among private parties."[186] However, the Court concluded that since the private parties in this case were discussing an issue of public importance, their individual privacy concerns were outweighed by the public's interest in the union negotiations.[187] Essentially, the Court held that the government's desire to protect the privacy of individuals' communications was not a need "of the highest order" if the contents of the communication involve a matter of public concern.[188] This seemingly broad holding, however, is rigidly tempered by Justice Stevens' emphasis on the respondent's lack of involvement in the original illegal activity.[189] The majority opinion seems to create a simple two-part test based on the following questions: (1) did the media engage in unlawful conduct "other than the ultimate publication of the information?"[190] and (2) "is the information private in nature?"[191] If either question can be answered in the affirmative, the First Amendment will not provide a defense. However, Justice Breyer's concurring opinion attempts to create a much more fluid test.[192]

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182. *Bartnicki*, 532 U.S. at 516.

183. *Id.*

184. *Id.* at 534.

185. *Id.* at 536 (Breyer, J., concurring) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

186. *Bartnicki*, 532 U.S at 532 (quoting Brief for United States at 27, Bartnicki v. Vopper, 532 U.S. 514 (Nos. 99-1687, 99-1728) (2000 WL 1344079)).

187. *See Bartnicki*, 532 U.S. at 533-34. "One of the costs associated with participation in public affairs is an attendant loss of privacy." *Id.* at 534.

188. *Id.* at 528 (quoting Smith v. Daily Mail Publ'g Co., 443 U.S. 97, 102 (1979)).

189. *See Bartnicki*, 532 U.S. at 529-32. However, the majority never addresses the issue of "laundering" discussed by the appellate court and the dissenters. *See supra* note 145 and accompanying text. *See also* Peavy v. WFAA-TV, Inc., 221 F.3d 158, 188 (5th Cir. 2000), discussed *supra* Part V.B (noting that the defendants not only had knowledge of the illegality of the interceptions, but also participated in the interceptions).

190. *Bartnicki*, 532 U.S at 538 (Breyer, J., concurring). "No one claims that [the media] ordered, counseled, encouraged, or otherwise aided or abetted the interception, the later delivery of the tape by the interceptor to an intermediary, or the tape's still later delivery by the intermediary to the media." *Id.*

191. *Id.* at 533. "[T]he subject matter of the conversation was a matter of public concern. If the statements about the labor negotiations had been made in a public arena ... they would have been newsworthy." *Id.* at 525.

192. *See* Paul M. Smith & Nory Miller, *When Can the Courts Penalize the Press Based*

B. The Concurrence's Ad Hoc Test

While the majority opinion attempts to create "rigid constitutional rules"[193] that may seem to give the media broad freedoms,[194] Justice Breyer's concurrence creates a balancing test that uses Justice Stevens' two-part test in an ad hoc fashion.[195] Justice Breyer's concurrence urges a totality of the circumstances approach that looks at the actions of the media, the reasonable privacy expectation of the plaintiffs, and the subject matter of the conversation.[196] Under this approach, Justice Breyer found that Ms. Bartnicki and Mr. Kane had no legitimate expectation that their conversation would remain private because their threat of violence raised "a significant concern for the safety of others."[197] Moreover, Justice Breyer

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on Newsgathering Misconduct? 19 COMM. LAWYER 1, 29 (2001).

193. *Bartnicki*, 532 U.S. at 541 (Breyer, J., concurring).

194. *See* Leading Case, *supra* note 15, at 412. "[T]he media can publish information that they themselves steal." *Id.*

195. *See* Smith & Miller, *supra* note 192, at 29.

196. *See Bartnicki*, 532 U.S. at 540 (Breyer, J., concurring).

197. *Id.* at 539. *But see* Jeffrey Rosen, *The Purposes of Privacy: A Response*, 89 GEO. L.J. 2117 (2001). "Of course Kane was not serious when he talked about blowing off the front porches of his opponents; he was engaging in the kind of hyperbole that many of us use in private to shock or amuse friends with our heretical thoughts, and so forth." *Id.* at 2136-37. *But cf. supra* note 20. *See also supra* notes 151-52 and accompanying text (noting that in *Peavy*, the Harmans recorded telephone conversations partly because of perceived threats to their safety). *But see* Oral Argument at 25-27, Bartnicki v. Vopper, 532 U.S. 514 (2001) (Nos. 99-1687, 99-1728) (2000 WL 1801619):

> QUESTION: Well, I think—I think that the other side would have acknowledged that if it was indeed [] a clear threat to blow off somebody's porches there might have been an exception to the statute. I don't want to decide this case on the assumption that this was a threat to blow off somebody's porch. It's at least ambiguous in the record and if all you want is a decision that you can disseminate it if it's a threat to blow off somebody's porch, I'll give you that, that's an easy case. But you want us to go beyond that and you want us to say even if it wasn't a threat to blow off somebody's porch, it can't be disseminated; isn't that correct?
>
> MR. LEVINE: So long as—
>
> QUESTION: Okay. So let's forget about blowing up the porch.
>
> MR. LEVINE: Your Honor, I—
>
> QUESTION: Well, I think your argument is that blowing off—the willingness to blow off porches is a matter of some public concern in viewing the labor crisis.
>
> MR. LEVINE: That is correct, Your Honor, and that is why I gave the context to explain why this speech that was disseminated by the respondents here was truthful and involved a matter of public concern.
>
> QUESTION: Now, I don't understand there to be any exception in the statute for speech that threatens to blow off somebody's porch.

reasoned, the petitioners "subjected themselves to somewhat greater public scrutiny" because of their status as "limited public figures" in the local debate about teachers' union contracts.[198] Under Justice Breyer's approach, it seems that the media's involvement, or lack thereof, in the illegal interception might not be dispositive in defeating a First Amendment defense, as it is in Justice Steven's framework.[199] For example, direct illegal interception by the media could perhaps be outweighed by the fact that the contents of the communication reveal egregious acts or plots by "all-purpose"[200] public figures (e.g., congressmen).[201] Regardless, the

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> MR. LEVINE: That is correct Justice Stevens. On its face, the statute applies to any information concerning the content of an intercepted communication. And content is defined in the statute as any information concerning the substance, purport or meaning of that communication.
>
> QUESTION: And you would be content for a holding that says that a statute that does not contain such an exception is unconstitutional; is that what you're asking us for?
>
> MR. LEVINE: I'm asking Your Honors to apply the principle.
>
> QUESTION: You want us to decide this case on the basis that this statute does not have any exception for threatened criminal action?
>
> MR. LEVINE: No, Your Honor.
>
> QUESTION: I didn't think so.

Id.

198. *Bartnicki*, 532 U.S. at 539. *See also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974) (holding that persons who thrust themselves into the vortex of a public issue are deemed public figures for purposes of applying *New York Times* actual malice standard in defamation cases). *Id. See generally* New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (creating "actual malice" standard for public officials claiming defamation). *See also* Kelly O. Wallace, Bartnicki v. Vopper: *The First Amendment versus Privacy and the Ghost of Louis Brandeis*, 53 MER. L. REV. 893, 909 (2002) (arguing that "the 'actual malice' requirement from *Sullivan* ... directly contradicts Brandeis and Warren's assertion that the truth of the published information or absence of 'malice' in the publisher do not provide a defense"). However, this argument is misplaced because the information published in *Bartnicki* was unquestionably truthful, thus the malice standard was inapplicable. *See Bartnicki*, 532 U.S. at 528-29.

199. *See supra* notes 190-91 and accompanying text.

200. *Gertz*, 418 U.S. at 345.

201. "[T]he Court does not create a 'public interest' exception that swallows up the statutes' privacy-protecting general rule. Rather, it finds constitutional protection for publication of intercepted information of a *special kind*." *Bartnicki*, 532 U.S. at 540 (Breyer, J., concurring) (emphasis added). In *Defamation and Privacy Under the First Amendment*, *supra* note 52, Professor Hill poses the following hypothetical:

> Assume that a pair of intrepid reporters, by means of a "ruse," infiltrate the innermost councils of the Mafia; employ hidden cameras and other surreptitious

underpinning of Justice Breyer's concurrence is the Supreme Court's long-standing tradition of fashioning extremely narrow rulings in cases pitting the First Amendment against privacy.[202] Indeed, Nadine Strossen, President of the American Civil Liberties Union (ACLU), a champion of both free speech and privacy rights, argues against ever creating bright-line tests "when it comes to conflicts between [these] two compelling sets of rights."[203]

C. The Dissent

In his dissenting opinion, Chief Justice Rehnquist, joined by Justices Scalia and Thomas, excoriated the majority for striking down a law that "prevent[s] some of the most egregious violations of privacy."[204] The dissent further chastised the majority by arguing that protecting disclosure of private conversations "diminishes, rather than enhances, the purposes of the First Amendment, and thereby chills the speech of the millions who rely upon electronic technology to communicate each day."[205] Lastly, the dissent questioned the majority's, and even more so the concurring Justice's, reliance on a "matter of 'public concern'" exemption, calling it "an amorphous concept that the Court does not even attempt to define."[206]

Chief Justice Rehnquist agreed with the appellate court that, because the "antidisclosure provision [of the Federal Wiretap Act] is based solely upon the manner in which the conversation was acquired, not the subject matter

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> devices that may or may not violate the anti-bugging provisions of the Omnibus Crime Control Act; obtain conclusive proof of major criminal activity involving not only the mafiosi but also the police, the prosecutors, and other officials at the highest levels of government; and then publish all this for the edification of the public. The notion that the persons thus exposed may have a recovery for invasion of their *privacy* is, to this writer, somewhat disorienting ....

Id. at 1278. *But cf.* Dietemann v. Time, Inc., 284 F. Supp. 925 (C.D. Cal. 1968) *aff'd*, 449 F.2d 245 (9th Cir. 1971) (holding reporters liable for civil damages when they posed as patients and secretly photographed an unlicensed doctor practicing medicine).

202. *See* Nadine Strossen, *Protecting Privacy and Free Speech in Cyberspace*, 89 GEO L.J. 2103 (2001). "[E]ach of the pertinent Supreme Court rulings concerning press versus privacy is intensely fact-specific, carefully limited to the particular circumstances, and an ad hoc weighing of the competing privacy and free speech concerns under those specific circumstances." *Id.* at 2104. *See also* Heinke & Stodder, *supra* note 116, at 284. "[T]he Court has continually refused to establish a bright line rule, stating that it is only deciding the particular case before it." *Id.*

203. Strossen, *supra* note 202, at 2111. "When it comes to civil liberties, I—and the ACLU—usually oppose ad hoc balancing tests because they can easily degenerate into letting the rights be balanced out of existence." *Id.*

204. *Bartnicki*, 532 U.S. at 541 (Rehnquist, C.J., dissenting).

205. *Id.* at 542.

206. *Id.*

of the conversation or the viewpoints of the speakers ... the concerns motivating strict scrutiny are absent."[207] He therefore concluded that the Federal Wiretap Act "need pass only intermediate scrutiny."[208] In applying intermediate scrutiny, the dissent found that the government's interest in drying up the market for illegally intercepted communications created only an "incidental restriction on alleged First Amendment freedoms [that] is no greater than essential to further the interest of protecting the privacy of individual communications."[209] "Indeed," Justice Rehnquist added, "demand for illegally obtained private information would only increase if it could be disclosed without repercussion."[210] As such, the dissenters found the Federal Wiretap Act "would be utterly ineffectual without [the] antidisclosure provisions" and therefore, in their opinion, the Federal Wiretap Act satisfied the *O'Brien* test.[211]

Most compelling in the dissent is Chief Justice Rehnquist's assertion that using the First Amendment to shield disclosure of private conversations will create timidity and self-censorship among private individuals who may be discussing matters of public concern.[212] In tandem with that assertion and thus compounding the complexity of the issue is the problem that "what constitutes a matter of public concern is difficult—if not impossible—to define with any precision."[213] While the majority and concurring opinions in *Bartnicki* may create more questions and subsequent litigation over the definition of matters of public concern, the Court's application of strict scrutiny creates a better precedent for future cases involving the privacy rights of individuals and the media's First Amendment rights to report on issues that concern the public.

VII. ANALYSIS

A. Is the Court's Strict Scrutiny Really Anything New?

The Supreme Court may have broken new ground in applying a need "of the highest order" standard to a content-neutral restriction on speech.[214] If

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207. *Id.* at 545. *See also supra* notes 120-22.

208. *Bartnicki*, 532 U.S. at 541 (Rehnquist, C.J., dissenting).

209. *Id.* at 542 (paraphrasing the intermediate scrutiny test of United States v. O'Brien, 391 U.S. 367 (1968)). *See also supra* note 139 (discussing *O'Brien* test).

210. *Bartnicki*, 532 U.S. at 551 (Rehnquist, C.J., dissenting). The dissent notes that the "'dry up the-market' theory ... is a time-tested theory that undergirds numerous laws, such as the prohibition of the knowing possession of stolen goods." *Id.* at 550.

211. *Id.* at 551.

212. *See id.* at 557.

213. Leading Case, *supra* note 15, at 414.

214. Bartnicki v. Vopper, 532 U.S. 514, 528 (2001) (quoting Smith v. Daily Mail

so, however, that new ground is not much more than a semantic change that recognizes the true nature of the scrutiny the Court must use when balancing equally important fundamental rights.[215] In the cases leading up to *Bartnicki*, the Court always relied "on limited principles that sweep no more broadly than the appropriate context of the instant case."[216] And since the *Pentagon Papers*,[217] the Court has been invited to settle the issue many times but has always refused to "answer categorically whether truthful publication may ever be punished consistent with the First Amendment."[218] The Court has instead always looked to the nature of the published information in balancing the public's need to know against the privacy concerns of the individual's involved.[219] Indeed, although some would call the balancing test a troublesome "ad hockery,"[220] the test is more than one hundred years old and co-authored by one of the Court's most resolute defenders of privacy—Justice Brandeis.[221] Writing about the then-current trend of newspapers to publish what Justice Brandeis considered stories written "[t]o satisfy a prurient taste,"[222] this defender of both privacy and the First Amendment delineated matters of public interest from matters that should remain purely private:

> In general, then, the matters of which the publication should be repressed may be described as those which concern the private life, habits, acts and relations of an individual, and have no legitimate connection with his fitness for a public office which he seeks or for which he is suggested, or for any public or quasi public position which he seeks or for which he is suggested, and have no legitimate relation to or bearing upon any act done by him in a public or quasi public capacity.[223]

Publ'g, 443 U.S. 97, 103 (1979).

215. *See* Strossen, *supra* note 202, at 2110. *Cf.* Matthew A. Whitlow, *The Electronic Communications Privacy Act Protects Individual Privacy but not at the Expense of the Media's Free Press Right:* Bartnicki v. Vopper, 27 UNIV. DAYTON L. REV. 339, 340 (2002) (arguing that the Court should have used intermediate scrutiny in *Bartnicki*).

216. Florida Star v. B.J.F., 491 U.S. 524, 533 (1989). *See also* Strossen, *supra* note 202, at 2104 n.5.

217. New York Times Co. v. United States, 403 U.S. 713 (1971) (per curiam). *See also supra* Part III.A.1.

218. *Bartnicki*, 532 U.S. at 529. *See also infra* Part III.A.

219. *See supra* Part III.A.

220. Leading Case, *supra* note 15, at 415.

221. *See* Warren & Brandeis, *supra* note 1, at 216.

222. *Id.* at 196. "The press is overstepping in every direction the obvious bounds of propriety and of decency. Gossip is no longer the resource of the idle and of the vicious, but has become a trade which is pursued with industry as well as effrontery." *Id.*

223. *Id.* at 216.

Justice Brandeis correctly recognized that "no fixed formula can be used to prohibit obnoxious publications," and that "[a]ny rule of liability adopted must have in it an elasticity which shall take account of the varying circumstances of each case."[224] This is precisely the approach the Court took in *Bartnicki*.

B. There is No Bright-Line Test (Nor Should There Be)

While the majority opinion *seems* to draw a bright line that protects publication when the information is on a matter of public concern, the two concurring justices blurred that line with their vehement reliance upon the "particular factual setting" of the case.[225] Additionally, as Smith and Miller point out, "Justice Stevens' test suggests, at least by negative implication, that any form of press involvement in the illegal intercept is enough, by itself, to justify holding the press liable."[226] Of course, this negative implication is somewhat frustrated by the undisputed fact in *Bartnicki* that the defendants "knew or had reason to know that the recording ... had been obtained" illegally.[227] One the other side of the debate, commentators have opined that regardless of illegality in obtaining the information, the media will never be liable if the information disclosed pertains to a matter of public importance.[228] No such simple bright line, however, can be drawn because commentators on both sides seem to ignore that the Supreme Court denied WFAA-TV's petition for certiorari.[229]

First, rumors of the death of the lawful acquisition doctrine have been greatly exaggerated.[230] The most obvious inference to be drawn by the denial of certiorari in *Peavy* is that the defendants' direct involvement in the illegal interceptions precluded their First Amendment defense.[231] Therefore, the statement that "the lawful acquisition doctrine is dead, replaced solely by a 'matter of public concern' test" misses the importance

224. *Id.* at 215.

225. Smith & Miller, *supra* note 192 at 28-29.

226. *Id.* at 29.

227. Bartnicki v. Vopper, 532 U.S. 514, 518 (2001).

228. *See* Leading Case, *supra* note 15, at 412; Tiritilli, *supra* note 15, at 785-86.

229. WFAA-TV, Inc. v. Peavy, 532 U.S. 1051 (2001) (mem.). *See also Bartnicki*, 532 U.S. at 522 n.5.

230. *See generally* Leading Case, *supra* note 15. *See also* Wallace, supra note 198, at 909 (asserting that "[t]he 'anonymous source' ... is now empowered to violate almost any law ... in the search for information").

231. *See also Bartnicki*, 532 U.S. at 522 n.5. *See also supra* notes 150-53 and accompanying text; *Newsgathering: In* "Bartnicki," *Supreme Court Diverts from Classic 1st Amendment Analysis*, MEDIA L. REP. (BNA) Vol. 29, No. 30 (Jul. 30, 2001). "[T]he reporter's involvement in the taping [in *Peavy*] is the 'factual nugget [that] clearly distinguishes it" from *Bartnicki*. *Id.* ¶ 14.

of the denial of certiorari to WFAA-TV.[232] Clearly, evidence of an alleged insurance kick back scheme carried on by an elected trustee of a school district[233] would qualify as a "matter of public concern,"[234] as would threats of violence against neighbors.[235] Therefore, if the "matter of public concern test" is the only test left for courts to apply,[236] then WFAA-TV could not have been held liable and the Supreme Court could have easily dealt with WFAA-TV's petition for certiorari by vacating and remanding the decision, as it did with *Boehner*.[237]

The denial of certiorari alone, of course, neither proves nor disproves the abandonment of the lawful acquisition doctrine.[238] However, a careful reading of *Bartnicki* shows how heavily the Court relied upon the fact that the defendants took no part in the illegal interception.[239]

Second, commentators on the other side who believe that any illegal involvement on the part of the media will categorically render subsequent disclosure indefensible seem to ignore the two important votes of Justices O'Connor and Breyer.[240] Smith and Miller note that Justice Breyer's ad hoc balancing test, to which Justice O'Connor signed on, may provide more protection for the press than Justice Stevens' more rigid test.[241] However, Smith and Miller also state that the Court "would not say whether the Constitution would allow punishment of the press if it had participated in the original illegal interception."[242] Again, the denial of certiorari in *Peavy* seems to answer this question, at least with respect to the majority opinion.[243] Since WFAA-TV was directly involved with the

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232. Leading Case, *supra* note 15, at 412.

233. *See Peavy*, 221 F.3d at 164. Although Mr. Peavy was acquitted of wrongdoing, there was enough evidence to warrant indictment and prosecution. *See id.* at 166.

234. *Bartnicki*, 532 U.S. at 525.

235. *See Peavy*, 221 F.3d at 164. *See also supra* note 197 and accompanying text. *But see* discussion *infra* Part VIII.

236. *See* Leading Case, *supra* note 15, at 412. *See also supra* note 213 and accompanying text.

237. *Compare* WFAA-TV, Inc. v. Peavy, 532 U.S. 1051 (2001) (mem.) (denying certiorari), *with* Boehner v. McDermott, 532 U.S. 1050 (2001) (mem.) (vacating and remanding case "for further consideration in light of *Bartnicki v. Vopper*," 532 U.S. 514 (2001)). Most notably, the *Bartnicki* Court clearly recognized the fundamental distinction between *Bartnicki* and *Peavy*: "In another similar case involving a claim for damages under [the Federal Wiretap Act], the media defendant in fact participated in the interceptions at issue." *Bartnicki*, 532 U.S. at 522 n.5 (citation omitted).

238. *See* Leading Case, *supra* note 15, at 413.

239. *See Bartnicki*, 532 U.S. at 517, 520, 522 n.5, 525 & 538.

240. *See id.* at 535-41 (Breyer, J., concurring).

241. *See* Smith & Miller, *supra* note 192, at 29.

242. *Id.* at 28.

243. *See, e.g.*, James M. Hilmert, *The Supreme Court Takes on the First Amendment*

illegal interception, the Court found no reason to alter the Fifth Circuit's ultimate holding of liability, despite that court's use of intermediate scrutiny.[244]

C. What the *Bartnicki* Court Didn't Decide

Several issues left open by the *Bartnicki* decision remain troubling: first is the concurring opinion's ad hoc balancing between private matters and matters of public concern.[245] As noted by other commentators[246] and the *Bartnicki* dissent, public concern is "an amorphous concept."[247] For Justice Breyer, the fact that the disclosed conversation contained "threats to public safety" removed any privacy expectation of the speakers, with the threat itself making the conversation a matter of public concern.[248] However, Justice Breyer also concluded that a speakers' involvement in a public controversy further limited her expectations of privacy.[249] By holding such, Justice Breyer has left open the possibility that any private conversation about matters of public concern is afforded lower privacy protection.[250]

Privacy Conflict and Stumbles: Bartnicki v. Vopper, *the Wiretapping Act, and the Notion of Unlawfully Obtained Information*, 77 IND. L.J. 639, 655 (stating, incorrectly, that the *Bartnicki* concurrence "prevails as the law of the case"). However, *Bartnicki* was *not* a plurality decision. *See Bartnicki*, 532 U.S. at 516. "STEVENS, J., delivered the *opinion* of the Court, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG and BREYER, J.J., *joined*." *Id.* (emphasis added). "I join the Court's *opinion*." *Id.* at 535 (Breyer, J., concurring) (emphasis added).

244. *See supra* notes 160-61 and accompanying text.

245. *See Bartnicki*, 532 U.S. at 539-40 (Breyer, J., concurring).

246. *See supra* note 230 and accompanying text.

247. *Bartnicki*, 532 U.S. at 542 (Rehnquist, C.J., dissenting). One commentator has correctly noted that the matter of public concern concept is essentially an issue of the tail wagging the dog:

> If a newspaper publishes the transcript of an intercepted cellular phone call between a married congressman and his mistress, for example, it might ... argue that the story is not about a man's private life, but rather about the trustworthiness of elected officials. ... In short, once people have begun to discuss a matter that might have been thought private, that matter—perhaps tautologically, perhaps illogically—might become a matter of public concern simply by being discussed.

Leading Case, *supra* note 15, at 415.

248. *Bartnicki*, 532 U.S. at 539 (Breyer, J., concurring) (noting that "[w]here publication of private information constitutes a wrongful act, the law recognizes a privilege allowing the reporting of threats to public safety").

249. *See id.*

250. Although Justice Breyer points out that public figures do not "give up entirely the right to private communication," he finds the "subject matter of the conversation at issue here ... far removed from that in situations where the media publicizes truly private matters." *Bartnicki*, 532 U.S. at 540. Justice Breyer lists examples of types of information

With no bright line between public and private matters, future cases will necessarily depend upon an ad hoc balancing test. As professor Zimmerman points out, though, in an article discussing questionable newsgathering techniques and the First Amendment, "[m]essiness and mendacity are as much a product of a free press as are its valiant crusades and mind-opening revelations, and a mature society probably has to learn to live with that tension, if not exactly to love it."[251] This advice applies equally to those cases involving unscrupulous reporters disclosing the contents of private conversations: in some cases the information disclosed will be of no legitimate concern to the public and in other cases the disclosures will inspire "valiant crusades."[252] The *Bartnicki* Court did not close the courthouse doors to victims in the former case, but it did make the distinction between private matters and public matters an important element in their case. This is in line with Justice Brandies' view enunciated more than one hundred years ago of the tension between individual privacy, public figures, and the First Amendment.[253] There will be simple cases where the media's right to publish the information far outweighs *any* privacy interests of the individuals involved,[254] and likewise there will be cases where the media has "overstepp[ed] in every direction the obvious bounds of propriety and of decency."[255] Since the cases that lay in between

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that are "not a matter of legitimate public concern," such as "sexual relations between famous actress and rock star," the "portrayal of ... intimate private characteristics or conduct," and "the divorce of [a] wealthy person." *Id.* (citations omitted). He then simply returns to Justice Brandeis' subjective, yet seminal test that "[i]t is the *unwarranted* invasion of individual privacy which is reprehended, and to be, so far as possible, prevented." Warren & Brandeis, *supra* note 1, at 215 (emphasis added). *See also supra* notes 222-23 and accompanying text.

251. Diane Leenheer Zimmerman, *I Spy: The Newsgatherer Under Cover*, 33 U. RICH. L. REV. 1185, 1231 (2000).

252. *Id. See also* Brief Amicus Curiae of Dow Jones & Company Inc. in Support of Respondents at 17, Bartnicki v. Vopper, 532 U.S. 514 (2001) (Nos. 99-1687, 99-1728) (2000 WL 1597803) [hereinafter Brief of Dow Jones]. "[N]umerous courts have recognized that the 'right of privacy does not include protection from publication of matter of legitimate public or general interest, and that the 'right to be let alone' 'must be accommodated to the need for reasonable latitude for the selection of topics for discussion in newspapers.'" *Id.* (citation omitted)

253. *See generally* Warren & Brandeis, *supra* note 1.

254. *See, e.g.*, *supra* note 201 (noting Professor Hill's hypothetical).

255. Warren & Brandeis, *supra* note 1, at 196. *See also* ACLU Brief, *supra* note 174, at 6-7. Amici ACLU argued that the Federal Wiretap Act "impermissibly interfere[d] with the editorial autonomy of the press" and therefore, "should be subject to the most exacting scrutiny." *Id.* Editorial autonomy, the ACLU Brief argued, is a bedrock of the First Amendment "[b]ecause the legitimacy of our political institutions depends to a large extent on the existence of a free press. *Id.* at 7.

these extremes *depend* upon that "amorphous"[256] definition of matters of public concern, the *Bartnicki* Court correctly applied a searching constitutional analysis that should be followed in future cases.[257]

Finally, with respect to the troubling distinction between public and private matters, what seems to trouble many commentators, as well as the dissenters, is the following quote from the majority opinion:

> If the statements about the labor negotiations had been made in a public arena—during a bargaining session, for example—they would have been newsworthy. This would also be true if a third party had inadvertently overheard Bartnicki making the same statements to Kane when the two thought they were alone.[258]

However much Justice Breyer may have tempered this sweeping statement in focusing on the threats in the conversation, the dissent correctly noted that the speakers "had no intention of contributing to a public 'debate' at all."[259] This leads to the second troubling point in *Bartnicki*, that the protection afforded the press may actually inhibit speech.[260]

In striking a balance in the "constitutional calculus"[261] between privacy and the First Amendment, the *Bartnicki* Court followed the well-established tenet proposed by Warren and Brandeis that "[t]he right to privacy does not prohibit any publication of matter which is of public or general interest."[262] As applied to the facts of *Bartnicki*, however, this rule does indeed encroach upon one of the primary purposes of the First Amendment. As the Chief Justice succinctly noted:

> At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. By protecting the privacy of individual thought and expression, [the Federal Wiretap Act] further[s] the uninhibited, robust, and wide-open speech of the private parties.[263]

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256. *Bartnicki*, 532 U.S. at 542 (Rehnquist, C.J., dissenting).

257. *See id.* at 533. *See also* Brief of Dow Jones, *supra* note 252, at 16. "To provide the greatest latitude to free speech and the free press, the concept of what is viewed as 'newsworthy' or of 'public significance' has always been viewed extremely broadly." *Id.* "Once a fact is deemed newsworthy, First Amendment interests in speaking the truth about it are held universally to override the attendant incursion into to the plaintiff's privacy rights." Jonathan D. Mintz, *The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. 425, 442 (1996).

258. *Bartnicki*, 532 U.S. at 525.

259. *Id.* at 554 (Rehnquist, C.J., dissenting).

260. *See id.* at 542 (Rehnquist, C.J., dissenting).

261. *Id.* at 533.

262. Warren & Brandeis, *supra* note 1, at 214.

263. *Bartnicki*, 532 U.S. at 553-54 (Rehnquist, C.J., dissenting) (citing Turner Broad.

Taken to its illogical conclusion, the *Bartnicki* opinion would prohibit punishment for the disclosure of a private conversation between political operatives discussing *purely legal* political strategies.[264] Nevertheless, this is clearly neither the intent nor the ultimate holding of *Bartnicki*. There appears inherent in the distinction of public and private matters a nexus between discussions of legal activity and discussions of illegal activity.[265] The First Amendment and the *Bartnicki* opinion indeed continue to animate the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[266] What the *Bartnicki* decision does not do is allow the discussion of alleged criminal activity to be protected under the rubric of privacy: that, to paraphrase the Chief Justice, would be a "perverse" reading of the First Amendment's commitment to fostering speech.[267]

D. Is *Cohen* Still Good Law?

Since the *Bartnicki* Court applied strict scrutiny to a content-neutral law of general applicability, perhaps it is time to toll the greatly anticipated death knell of *Cohen v. Cowles*.[268] As discussed *supra* Part III.B, the most troubling jurisprudence left over from *Cohen* was the Court's unquestioning belief that a law of general applicability did not warrant heightened First Amendment scrutiny. In an article discussing the inherent problem created by *Cohen*, Professor Garfield notes that "[s]imply because a law is generally applicable does not mean that it is automatically immune from First Amendment scrutiny when applied to the press."[269] While the *Cohen* Court ended its First Amendment inquiry in holding that the equitable doctrine of promissory estoppel barred a First Amendment defense, the *Bartnicki* Court found the Federal Wiretap Act to be content-neutral, and correctly realized that the inquiry must not end at a conclusion

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Corp. v. FCC, 512 U.S. 622, 641 (1994); United States v. United States Dist. Ct. for the E. Dist. of Mich., 407 U.S. 297, 302 (1972); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (internal quotations and citations omitted)).

264. *But cf.* Boehner v. McDermott, No. 98-594 TFH, 1998 WL 436897 (D. D.C. Jul. 28, 1998), *rev'd by* 191 F.3d 463 (D.C. Cir. 1999), *vacated by* 532 U.S. 1050 (2001) (mem.), *on remand at* No. 98-7156, 2001 WL 1699420 (D.C. Cir. 2001) (per curiam). At issue in *Boehner*, and what made the contents of the illegally intercepted conversation a matter of public importance, is the fact that the conversation allegedly violated an order of the House Ethics Committee prohibiting Speaker Gingrich from discussing the Committee's probe. *See supra* note 132 and accompanying text.

265. *See Bartnicki*, 532 U.S. at 535-36 (Breyer, J., concurring).

266. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

267. *Bartnicki*, 532 U.S. at 554 (Rehnquist, C.J., dissenting).

268. 501 U.S. 663 (1991). *See supra* Part III.B.

269. Garfield, *supra* note 8, at 1104.

that laws of general applicability need only satisfy intermediate scrutiny.[270] Although the *Bartnicki* Court never directly addressed *Cohen*, the Third Circuit Court of Appeals, in addressing what it perceived to be a misapplication of *Cohen* by the district court,[271] "correctly noted that even if a law is generally applicable in the sense that it doesn't target the press, it can still require close judicial scrutiny if its application to any party would warrant heightened scrutiny."[272] Additionally, in an article written prior to the Third Circuit's opinion, two commentators noted the district court judge's "flawed" application of the *Cohen* rule,[273]stating that "[t]o interpret *Cohen* in such a fashion would undercut not only *Landmark*, but also decades of First Amendment jurisprudence."[274]

While the Supreme Court makes no mention of *Cohen* in the *Bartnicki* decision, in future cases the Court may be more inclined to undertake a searching inquiry when confronted with laws that, on their face create only "incidental restriction[s]"[275] on speech, yet in practice actually "interfere with free expression."[276] In finding the "proper fit,"[277] as Justice Breyer calls it, the Court:

> [should] ask whether the statutes strike a reasonable balance between their speech-restricting and speech-enhancing consequences. Or do they instead impose restrictions on speech that are disproportionate when measured against their corresponding privacy and speech-related benefits, taking into account the kind, the importance, and the extent of these benefits, as well as the need for the restrictions in order to secure those benefits?[278]

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270. 501 U.S. 663, 669.

> This case, however, is not controlled by [the *Daily Mail*] line of cases [invoking strict scrutiny] but, rather, by the equally well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news.

Id.

271. *See Bartnicki*, 200 F.3d at 118-19.

272. Garfield, *supra* note 8, at 1103.

273. *See* Heinke & Stodder, *supra* note 116, at 304.

274. *Id.* "*Cohen* merely stands for the proposition that the media must play by generally applicable rules. *Cohen* does not hold that the government may suppress speech or disclosures concerning matters of public concern simply on the ground that it does so pursuant to a law of general applicability." *Id.*

275. *Bartnicki*, 532 U.S. at 551 (Rehnquist, C.J., dissenting).

276. *Id.* at 536 (Breyer, J., concurring).

277. *Id.* (quoting Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 227 (1997)).

278. *Id.*

This "fit" fortunately seems to be something more than the intermediate scrutiny applied in *Cohen*.[279] While *Cohen* is not overruled per se, perhaps courts will heed the example of the Third Circuit Court of Appeals in limiting future use of the fundamentally flawed *Cohen* reasoning.

E. Boehner on Remand

As noted above, the *Bartnicki* decision does leave open a few questions. These questions may best be answered by looking to the *Boehner* case on remand. One of the questions to be resolved in *Boehner* is whether defendant Rep. McDermott acted illegally in giving a tape to the media that he knew to be illegally intercepted under the Federal Wiretap Act.[280] Under the *Bartnicki* majority, the answer to that question might be dispositive. Under Justice Breyer's balancing test, however, the result may be different. As of this writing, the Court of Appeals for the District of Columbia Circuit has remanded the case to the district court.[281] The appellate court's opinion requests that the district court revisit the issue of "whether, in light of *Bartnicki*, Boehner's complaint states a claim upon which relief can be granted."[282]

The district court should find that Rep. McDermott's act of disclosing the tape to the media is protected by the First Amendment. Like Mr. Yocum in the *Bartnicki* case, Rep. McDermott took no part in the illegal interception, and as the district court originally noted, it was not illegal for Rep. McDermott to receive a copy of the taped conversation.[283] Rep.

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279. Some commentators doubt that the result in *Cohen* would have been different under strict scrutiny because "in Cohen, the newspapers voluntarily accepted a limitation on their right to publish newsworthy information." Heinke & Stodder, *supra* note 116, at 303. This is most likely correct because the case would still turn on the newspapers inequitable breach of their promise not to publish Cohen's name, despite their "pre-existing, independent" duty of confidentiality. *Id.*

280. *See* Boehner v. McDermott, No. 98-594 TFH, 1998 WL 436897, at *3 (D. D.C. Jul. 28, 1998), *rev'd by* 191 F.3d 463 (D.C. Cir. 1999), *vacated by* 532 U.S. 1050 (2001) (mem.), *on remand at* No. 98-7156, 2001 WL 1699420 (D.C. Cir. 2001) (per curiam). *See also supra* note 142 and accompanying text (discussing the differing interpretations of McDermott's actions in the District of Columbia Court of Appeals' majority and dissenting opinions).

281. *See Boehner*, 2001 WL 1699420, at *1.

282. *Id.* at *1.

283. *See Boehner*, 1998 WL 436897, at *4.

> [F]ederal and state statutes give no indication that the taped conversation is considered unlawfully obtained by defendant. Although the wiretap statutes prohibit the Martin's interception, and the Martin's disclosure of the tape to Reps. Thurman and McDermott, they do not prohibit Rep. McDermott's *receipt* of the tape. Because defendant did not break any laws in taking possession of the tape, he lawfully obtained that information, in a literal sense.

McDermott's disclosure to the *New York Times* and other media outlets then, should fall directly within the ambit of *Bartnicki*.[284] Moreover, since the contents of the disclosure seem to be on matters of public importance, namely, the possible illegal conduct of the Speaker of the House,[285] the disclosure is not only protected under *Bartnicki* but necessary under the principles of the First Amendment.[286]

VIII. CONCLUSION

When viewed within the narrow facts of the case, the *Bartnicki* decision may not seem to stand for much more than that disclosure of an illegally intercepted cellular phone conversation cannot be punished when the subject conversation contains a threat to the public safety. However, *Bartnicki* stands for the broader requirement that disclosure of illegally intercepted communications be viewed under a facts and circumstances rubric.[287] The facts and circumstances that will be dispositive include the "nature of the perceived newsgathering misconduct, the degree of the media's involvement in that misconduct, and the importance and sensitivity of the information at issue."[288] For our republican form of governance to work properly, the electorate must necessarily be informed about matters of public importance. The media fulfills that important goal recognized by the Framers and codified in the First Amendment. In pursuing the media's goal, zealous reporters can and often do invade individual privacy—one need look no further than any supermarket tabloid—but the choices seem to be either allowing the government to make editorial decisions for the media or living with the improprieties of an industry that often appeals only to "prurient tastes."[289]

Clearly, "there is no alternative consistent with constitutional values: It is a disorderly situation surely. But if we ordered it we would have to sacrifice one of two contending values—privacy or public discourse—which are ultimately irreconcilable."[290] In balancing the fundamental, yet

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Id.

284. *See supra* note 139 (discussing appellate court's perceived difference between an individual and a publishing entity).

285. *See supra* note 135 and accompanying text.

286. *See, e.g. supra* notes 48 & 51 (discussing the importance of the media as a check on the government).

287. *See Bartnicki*, 532 U.S. at 532. (Breyer, J., concurring).

288. Smith & Miller, *supra* note 192, at 29.

289. Warren & Brandeis, *supra* note 1, at 196.

290. Brief of Dow Jones, *supra* note 252, at 7-8 (paraphrasing ALEXANDER BICKEL, DOMESTICATED CIVIL DISOBEDIENCE: THE FIRST AMENDMENT, FROM *SULLIVAN* TO THE *PENTAGON PAPERS*, THE MORALITY OF CONSENT 57, 80 (1975)). *See also* James E. Stewart & Laurie J. Michelson, *Don't Blame the Messenger*, 81 MICH. BAR J. 46, 47 (2002).

often competing, interests of the need for debate on public issues and the need for protection of privacy, the *Bartnicki* Court correctly recognized that such balancing requires the utmost judicial scrutiny. The Federal Wiretap Act still provides for punishing the illegal interceptor, but when the media's hands are clean, and the information is on a matter of public concern, there is no compelling reason to prohibit the media from disclosing that information to the public.

Daniel P. Paradis

(cautioning the media to ask, before disseminating the illegally obtained information: "who are the speakers, what are they speaking about, why is it important to the public, what are the speakers' expectations of privacy compared with the importance of the disclosure, and were we involved at all in the interception").

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Dahill v. Police Department of Boston: How the Massachusetts Supreme Judicial Court Provided Handicap Discrimination Protection to Half of the State's Population

I. INTRODUCTION

In *Dahill v. Police Department of Boston*,[1] the Supreme Judicial Court of Massachusetts (SJC) decided that in determining whether a person is considered handicapped under the Massachusetts antidiscrimination statute,[2] any mitigating measures or prosthetic devices he uses may not be considered.[3] This was the first time that the issue had been raised in a case brought under the Massachusetts antidiscrimination statute.[4] In making its decision, the SJC refused to follow the lead of the United States Supreme Court.[5] In *Sutton v. United Air Lines*, the Supreme Court ruled that mitigating measures or corrective devices should be considered when determining whether someone is eligible to bring an action under the Americans with Disabilities Act (ADA).[6]

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1. 748 N.E.2d 956 (Mass. 2001).

2. *See* MASS. GEN. LAWS ch. 151B (2001). The Massachusetts antidiscrimination statute was amended by the State Legislature in 1983 to protect handicapped people from being discriminated against in employment situations. *See* Skoler, Abbott, & Presser, *Disability Discrimination: Not Disabled Doesn't Mean Not Handicapped—At Least in Massachusetts*, 12 No. 4 MASS. EMP. L. LETTER 1 (July 2001).

3. *See Dahill*, 748 N.E.2d at 962-63.

4. *See id.* at 957-58. The question decided was presented to the SJC on certification from Judge Douglas P. Woodlock of the United States District Court for the District of Massachusetts pursuant to the Massachusetts Uniform Certification of Questions of Law Rule. SUP. JUD. CT. R. 1:03.

5. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

6. *See id.* at 475; 42 U.S.C. §§ 12101-12213 (2000). The Americans with Disabilities Act was passed by the 101st Congress in 1990 for, among others, the express purposes of

There are enough similarities between the Massachusetts antidiscrimination statute and the ADA - as well as the respective definitions of "handicapped" contained within each - to expect that they would both be interpreted similarly.[7] However, the different approaches the courts took in determining the legislatures' intended definitions of handicap led them to opposite conclusions on the issue of mitigating measures.[8]

This analysis will show how the SJC deferred to the judgment of an administrative agency, whose policy goes against the plain language of the statute, in order to broaden the reach of protection offered by the statute to a point where it covers half of the population of Massachusetts.[9] Obviously, that number seems too high, and it is unlikely that the legislature intended to label that many people as handicapped under the statute.[10]

Part II of this Comment consists of a discussion of the relevant background information necessary to fully understand the issue.[11] Part II.A is a short exploration of the Federal Rehabilitation Act.[12] Part II.B is a discussion of the history of the Massachusetts antidiscrimination statute, including an examination of its similarities to the Federal Rehabilitation Act.[13] Part II.C is an analysis of the Americans with Disabilities Act, focusing on what it has in common with the Massachusetts antidiscrimination statute.[14] Part II.D is a recap of *Sutton*, focusing on how and why the Court arrived at its decision.[15] Part III is a recitation of the background, facts and holding of the *Dahill* case.[16]

Part IV of this Comment is a thorough analysis of *Dahill*, including the effect the decision will have on the people of Massachusetts.[17] Part IV.A discusses the reasons that the SJC found itself bound to defer to the existing administrative guidelines in defining disability, and suggests alternative

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"provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities, ... [and] provid[ing] clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities ...." § 12101(b)(1), (2).

7. *See* § 12102(2) (defining "disability"); MASS. GEN. LAWS ch. 151B § 1(17) (2001) (defining "handicap").

8. *See Dahill*, 748 N.E.2d at 963; *Sutton*, 527 U.S. at 475.

9. *See infra* notes 240-69 and accompanying text.

10. *See id.*

11. *See infra* notes 23-91 and accompanying text.

12. *See infra* notes 23-34 and accompanying text.

13. *See infra* notes 35-45 and accompanying text.

14. *See infra* notes 46-52 and accompanying text.

15. *See infra* notes 53-91 and accompanying text.

16. *See infra* notes 92-151 and accompanying text.

17. *See infra* notes 152-311 and accompanying text.

ways in which that court could have explained its dismissal of those guidelines.[18] The next sub-part, Part IV.B, discusses how the SJC's ruling in *Dahill* unnecessarily extended protection under the Massachusetts antidiscrimination statute to people who already enjoy protection under other sections of the statute.[19] Part IV.C focuses on how the decision in *Dahill* could lead to an incredible increase in the number of disability discrimination cases brought before the Massachusetts courts, and how this could create a potentially devastating strain on administrative resources.[20] Part IV.D is a discussion of how two other states have dealt with the issue and what the future holds for the question of mitigating measures in the rest of the country.[21]

Part V of this Comment, the conclusion, reiterates why the SJC should have ruled on the issue of mitigating measures using the same reasoning as the Supreme Court, thereby reaching the same result. The impact of the decision on Massachusetts' citizens and employers is also summarized.[22]

II. BACKGROUND

A. The Federal Rehabilitation Act

The Federal Rehabilitation Act[23] was enacted by the federal government in 1973 for the express purpose of "empower[ing] individuals with disabilities to maximize employment, economic self-sufficiency, independence and inclusion and integration into society, through ... the guarantee of equal opportunity."[24] The Act guarantees that no "otherwise qualified individual" with a disability can be discriminated against by any state or federal department or agency or any private organization that receives federal funding.[25]

The term "disability," in regard to the language of the statute reading "otherwise qualified individual with a disability," is defined in the Federal Rehabilitation Act, as amended in 1974, as "any person who — (i) has a physical or mental impairment that substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."[26]

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18. *See infra* notes 157-206 and accompanying text.
19. *See infra* notes 207-39 and accompanying text.
20. *See infra* notes 240-69 and accompanying text.
21. *See infra* notes 270-311 and accompanying text.
22. *See infra* notes 312-16 and accompanying text.
23. 29 U.S.C. § 701 (2000).
24. § 701(b)(1).
25. § 794(a).
26. § 705(20)(B).

When courts first applied this statute, the issue of whether the term "disabled" included reference to a person's condition in its mitigated or corrected state was not considered relevant.[27] In these early employment discrimination cases, the courts held that people with controlled hearing impairments, as well as people with controlled epilepsy, were handicapped within the meaning of the statute and, thus, protected.[28] However, as the years passed, the question emerged as an issue in disability discrimination cases and court decisions would split regarding the correct resolution of the issue.[29]

The language of the statute, depending on one's interpretation of it, may or may not provide guidance in answering the question of whether mitigating measures are included in the definition of disabled.[30] However, there is simply nothing in the statute that expressly states whether to include mitigating measures in a disability analysis.[31] A recent amendment to the statute may provide some illumination on the situation.[32] Section 794(d) states that in order to determine if illegal employment

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27. *See* Dahill v. Police Dep't of Boston, 748 N.E.2d 956, 960 (Mass. 2001). An example of a handicap that would be considered corrected is the case of a person with 20/400 vision who can see perfectly—20/20—when wearing glasses. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 475 (1999). The poor vision would be the handicap and the glasses would be the corrective device. When the glasses are worn, the vision, which would then be normal, would be considered to be in its corrected state. An insulin dependent diabetic would be considered a person with a mitigated handicap. The diabetes would be the handicap and the insulin would be the mitigating factor that controls the effect of the disability on the person's life. *See* Arnold v. United Parcel Serv., Inc., 136 F.3d 854, 857 (1st Cir. 1998).

28. *See Dahill*, 748 N.E.2d at 961 n.9 (citing as examples Strathie v. Dep't of Transp., 716 F.2d 227, 228-30 (3d Cir. 1983) (hearing impairment); Davis v. Ohio Barge Lines, Inc., 535 F. Supp. 1324, 1325 (W.D. Pa. 1982) (controlled epilepsy)).

29. *See Dahill*, 748 N.E.2d at 961 (citing as examples Chandler v. Dallas, 2 F.3d 1385, 1390-91 (5th Cir. 1993) (correctable vision not handicap); Davis v. Meese, 692 F.Supp 505, 517 (E.D. Pa. 1988) (insulin dependent diabetic is handicapped); Wallace v. Veterans Admin., 683 F. Supp. 758, 761 (D. Kan. 1988) (rehabilitated drug addict is handicapped)).

30. *See* 29 U.S.C. § 701 (2000). As will be seen below, the identical language in the ADA and the Massachusetts antidiscrimination statute has been interpreted in opposing ways. *See infra* notes 119-24 and accompanying text. The difference in interpretations is based on the fact that one way to look at the language is to assume that "substantially limits" a major life activity means that an actual objective limitation must exist. *See infra* notes 125-28 and accompanying text. The other way to interpret the language is to ignore the fact that the person is not objectively substantially limited and base your reasoning on a hypothetical analysis of how the person would be affected by the impairment if they did not mitigate it. *See infra* notes 133-39 and accompanying text.

31. *See* § 701.

32. *See* § 794(d).

discrimination has occurred, the standards to be used in this section are the same as the standards used in Title I of the Americans with Disabilities Act.[33] Since the Supreme Court has decided in *Sutton* that the definition of disabled to be used in Title I of the ADA includes consideration of mitigating or corrective measures, the Federal Rehabilitation Act must, according to Section 794(d), also include consideration of mitigating measures or corrective devices when determining whether someone is to be considered disabled.[34]

B. The Massachusetts Antidiscrimination Statute

In 1983, Massachusetts amended its antidiscrimination statute[35] to protect handicapped[36] people from employment discrimination.[37] The amended statute makes it illegal for an employer to discriminate in the hiring or firing of a person, alleging to be a qualified handicapped person, on the basis of the handicap alone.[38] A qualified handicapped person is defined in the statute as a "person who is capable of performing the essential functions of a particular job, or who would be capable of performing the essential functions of a particular job with reasonable accommodation to his handicap."[39]

The statute was modeled after the Federal Rehabilitation Act and some of the language, including the three-pronged definition of handicapped, is nearly identical.[40] Similar to the Federal Rehabilitation Act, the language of the Massachusetts statute does not explicitly state whether mitigating measures should be considered in determining handicap, even if the effects

33. *See id.* Title I of the Act includes the sections that deal with handicap discrimination in relation to employment. *See* 42 U.S.C. §§ 12111-12117 (2000).

34. *See* § 794(d).

35. *See* MASS. GEN. LAWS ch. 151B (2001).

36. Federal legislation has stopped using the term "handicap" and has replaced it with the term "disability." Massachusetts, however, continues to use the word "handicap." This was not intended to change the meaning of the federal statutes, only an attempt by Congress to use the "currently acceptable terminology." *Dahill*, 748 N.E.2d at 959 n.7. For the remainder of this Comment, the two words will be used interchangeably and no significance should be read into the use of one word over the other.

37. *See Dahill*, 748 N.E.2d at 959; MASSACHUSETTS BAR INSTITUTE, MCAD'S NEW DISABILITY GUIDELINES: THE FINAL VERSION (1998), *available at* http://www.state.ma.us/mcad/disability.html (last visited Jan. 20, 2003) [hereinafter MCAD GUIDELINES].

38. *See* MASS. GEN. LAWS ch. 151B, § 4(16) (2000). The Massachusetts statute applies equally to State and private discrimination. *See* § 1(5).

39. § 1(16). The statute states that for an accommodation to be considered unreasonable, the employer must show that it would impose an undue hardship on his business. *See* § 4(16).

40. *See Dahill*, 748 N.E.2d at 961 n.8. *See also supra* note 26 and accompanying text (defining disability under the federal statute).

of the handicap are completely mitigated by a prosthetic device or some other corrective measure.[41] At the time the Massachusetts legislature adopted the changes to its statute to protect handicapped individuals, the question of mitigating measures was still not an issue under the federal statute.[42] It was not until after the adoption of the Massachusetts antidiscrimination statute that federal courts began to split on the issue of the effect of mitigating measures under the Federal Rehabilitation Act.[43] Though it was clearly an issue in the federal courts, the Massachusetts legislature never changed or clarified the law on this issue.[44] It was fifteen years after the passage of the statute that the Massachusetts Commission Against Discrimination (MCAD) included a provision in its guidelines expressly authorizing the consideration of mitigating measures.[45]

C. The Americans with Disabilities Act

The Americans with Disabilities Act (ADA) was enacted by Congress in 1990.[46] The purpose of the statute was "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[47] Congress saw a need to address the continuing pervasive discrimination against handicapped people in a wide variety of areas including employment.[48] The three-pronged definition of disability used in the ADA is nearly identical to the one that was used in both the Federal Rehabilitation Act and the Massachusetts antidiscrimination statute.[49]

As is the case with both the Federal Rehabilitation Act and the Massachusetts antidiscrimination statute, the ADA makes no express reference to mitigating measures or corrective devices.[50] This lack of express language again resulted in a jurisdictional split of authority regarding whether to consider mitigating measures or corrective devices when determining if an individual is to be considered disabled as defined in

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41. *Compare* MASS. GEN. LAWS ch. 151B, § 1(17) (2001) *with* 29 U.S.C. § 705(20)(B) (2000). *See also supra* note 26 and accompanying text.

42. *See Dahill*, 748 N.E.2d at 960.

43. *See id.* n.9.

44. *See* MASS. GEN. LAWS ch. 151B, § 1(17).

45. *See* MCAD GUIDELINES, *supra* note 37 § II.A.7.

46. *See* 42 U.S.C. §§ 12101-12213 (2000).

47. § 12101(b)(1).

48. *See* § 12101(a)(3). Other areas addressed in the ADA include housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services. *See id.*

49. § 12102(2). *See also supra* notes 26 & 40 and accompanying text.

50. *See* §§ 12101-12213.

the statute.[51] Given the lack of consistency in the circuit courts' decisions, it was only a matter of time before the Supreme Court stepped in to decide the issue.[52]

D. *Sutton v. United Air Lines*[53]

In 1999, in *Sutton*, the United States Supreme Court ruled that when determining whether someone is disabled under the ADA, mitigating measures should be considered.[54] The Court looked at the issue as, among other things, one of simple statutory interpretation.[55] The decision was widely criticized as severely limiting the ability of disabled people to make use of the ADA.[56] The Court put to rest the question of mitigating measures under the ADA, but in the process also stirred controversy.

The *Sutton* case involved twin sisters, Karen and Kimberly Sutton, both of whom had vision in the 20/200 to 20/400 range.[57] Visual impairment at this level prevents a person from being able to drive a car or watch television.[58] However, with corrective lenses, both Karen and Kimberly

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51. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 476-77 (1999) (citing Bartlett v. N.Y. State Bd. of Law Exam'rs, 156 F.3d 321, 329 (2d Cir. 1998) (holding accommodations cannot be considered)); Baert v. Euclid Beverage, Ltd., 149 F.3d 626, 629-30 (7th Cir. 1998) (holding mitigating measures should not be considered); Matczak v. Frankford Candy & Chocolate Co., 136 F.3d 933, 937-38 (3d Cir. 1997) (holding mitigating measures should not be considered); Arnold v. United States Postal Serv., Inc., 136 F.3d 854, 859-66 (1st Cir. 1998) (holding mitigating measures should not be considered); Washington v. HCA Health Services. of Tex., Inc., 152 F.3d 464, 470-71 (5th Cir. 1998) (holding only some impairments should be considered in their unmitigated state); Sutton v. United Air Lines, Inc., 130 F.3d 893 (10th Cir. 1997), *aff'd* 527 U.S. 471 (1999) (holding fully correctable impairments are not disabilities).

52. *See Sutton*, 527 U.S. at 471.

53. 527 U.S. 471 (1999).

54. *See id.*

55. *See id.* at 477-89.

56. *See, e.g.*, Wendy E. Parmet, *Plain Meaning and Mitigating Measures: Judicial Interpretations of the Meaning of Disability*, 21 BERKELEY J. EMP. & LAB. L. 53, 54 (2000) (arguing that Court could have easily reached an opposite outcome in case, thus allowing far more people access to courts through the ADA); Debra Burke & Malcom Abel, *Ameliorating Medication and ADA Protection: Use It and Lose It or Refuse It and Lose It?*, 38 AM. BUS. L.J. 785, 805 (2001) (questioning if a disabled person would be protected under the ADA if she chose not to use readily available means to mitigate her disability); Vicki Limas, *Of One Legged Marathoners and Legally Blind Pilots: Disabling the ADA on a Case-By-Case Basis*, 35 TULSA L.J. 505, 505 (2000) (accusing Supreme Court of using "contrived" reasoning in embracing "disturbing trend ... of narrowing the definition of disability").

57. *See Sutton*, 527 U.S. at 475.

58. *See id.*

could "function identically to individuals without a similar impairment."[59]

In 1992, both sisters applied for positions as airline pilots with United Air Lines.[60] The Court noted that the two women met all of the requirements for the job and were invited for interviews and testing in a flight simulator.[61] However, once they arrived for their interviews both women were told that a mistake had been made and that they were actually not eligible to become pilots since their uncorrected eyesight was not 20/100 or better.[62]

The sisters brought suit against the airline alleging discrimination based on their disability.[63] They claimed that their impaired vision was a "substantially limiting impairment" or, alternatively, that they had been "regarded as having such an impairment."[64] The district court dismissed their claims, holding that since their disability was fully corrected it did not actually substantially limit any major life activity and therefore did not qualify as a disability under the ADA.[65] The United States Court of Appeals for the Tenth Circuit affirmed,[66] as did the United States Supreme Court.[67]

The decision was based on several important factors, one of which was that the ADA expressly grants authority to various administrative agencies to issue regulations to implement particular sections of the Act.[68] However, no administrative agency has been given the authority to issue guidelines regarding the unassigned remaining sections of the Act.[69] The disputed term "disability" falls within one of these unassigned sections.[70]

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59. *Id.* (quoting Appellant's Brief at 23).

60. *See id.*

61. *See id.* at 475-76. The other requirements to be eligible for the job included age, education, experience, and Federal Aviation Administration certification. *See id.*

62. *See Sutton*, 527 U.S. at 476.

63. *See id.*

64. *Id. See* 42 U.S.C. § 12102(2) (2000). These are two of the three ways to fall under the definition of disabled in the statute, the third is having a record of such an impairment. *See also supra* note 49 and accompanying text.

65. *See Sutton*, 527 U.S. at 476. *See also* Sutton v. United Air Lines, Inc., No. 96-S-121, 1996 U.S. Dist. LEXIS 15106, at *1 (D. Colo. Aug. 28, 1996).

66. *See* Sutton v. United Air Lines, Inc., 130 F.3d 893 (10th Cir. 1997), *aff'd* 527 U.S. 471 (1999).

67. *See Sutton*, 527 U.S. at 477.

68. *See id.* at 478. The Equal Employment Opportunity Commission has an affirmative obligation to issue guidelines regarding Title I of the ADA. *See id.* The Attorney General and the Secretary of Transportation have obligations to issue guidelines regarding Title II of the ADA. *See id.* The Secretary of Transportation alone has an obligation to issue guidelines regarding Title III of the ADA. *See id.* at 478-79.

69. *See id.* at 479.

70. *See id.* (citing 42 U.S.C. § 12102(2) (1994)).

Both the Equal Employment Opportunity Commission (EEOC) and the Department of Justice (DOJ) had established guidelines requiring the interpretation of the term "disability" to not include mitigating measures.[71] Regardless, the Supreme Court ruled that the guidelines were impermissible interpretations of the ADA.[72] Since the agencies were not given the power to define the term, the Court had no obligation to defer to their interpretations,[73] and thus looked to the intent of the legislature.[74] The Court found the intent by examining the text of the statute.[75]

The Court used textualism[76] to determine exactly what the legislature's intent was when it wrote the statute.[77] Three provisions of the ADA, when read together, led the Supreme Court to its decision.[78] First, the term disability was defined in the ADA as "a physical or mental impairment that

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71. *See Sutton*, 527 U.S. at 479. The EEOC guideline in place before this case, stated that "the determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, *without* regard to mitigating measures such as medicines, or assistive or prosthetic devices." *Id.* (citing 29 C.F.R. § 1630.2(g) (1998) (emphasis added)). However, this guideline has since been replaced by one reflecting the holding in *Sutton*. *See* Christopher A. Parlo, *The Americans With Disabilities Act: An Update on the Evolving Law Concerning Major Components of the Act*, *in* LITIGATION, at 501, 512 (PLI Litig. & Admin. Practice Course, Handbook Series No. 663, 2001) (citing 29 C.F.R. pt. 1630). The DOJ guideline states that "[t]he question of whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable modification or auxiliary aids and services." *Id.* (citing 28 C.F.R. § 35.104 (1998)).

72. *See Sutton*, 527 U.S. at 479-83. In *Chevron U.S.A., Inc., v. Natural Res. Def. Council, Inc.*, the Court stated that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. 837, 843 (1984). If it is not, the court is under no obligation to follow the recommendation of the administrative agency. *See id.*

73. *See Sutton*, 527 U.S. at 479-80.

74. *See id.* at 482-83. Since the Court made its decision in *Sutton*, the EEOC has issued revised guidelines concerning mitigating measures. *See* Parlo, *supra* note 71, at 512. The new guideline, codified at 29 C.F.R. § 1630, "emphasizes that the determination of whether an individual has an ADA disability must be made on a case-by-case basis *with* regard to all mitigating and corrective measures." *Id.* (emphasis added). However, mitigating measures do not automatically disqualify someone from eligibility under the ADA if the person is still, even after mitigation, substantially limited in a major life activity. *See id.*

75. *See Sutton*, 527 U.S. at 487.

76. *See* Parmet, *supra* note 56, at 68-70. Textualism is a method of statutory interpretation that involves relying almost exclusively on the plain meaning of the words in the statute. *See id.* at 69. When a word is unclear, its "meaning may be discerned by analysis of the statute's text as a whole, dictionaries, grammar books, and the traditional common law canons of statutory construction." *Id.*

77. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 482-89 (1999).

78. *See id.* at 482.

substantially limits one or more of the major life activities of an individual."[79] Employing the textualist tool of grammatical construction, the Court noted that the term "substantially limits" is in the present indicative verb form.[80] According to the Court, this meant that for someone to be considered disabled under the ADA, they must be presently and substantially limited in a major life activity; potential or hypothetical limitation is not enough.[81]

Second, the Court noted that the definition of disability in the statute required disabilities to "be evaluated 'with respect to an individual' and to be determined based on whether an impairment substantially limits the 'major life activities of such individual.'"[82] This requires an individualized inquiry, on a case by case basis, to determine if a person has a disability that substantially limits one or more life activities.[83] In contrast, according to the Court, the agency guidelines suggest an approach that could force employers to look at how particular disabilities usually affect people in their unmitigated state—that is required under the Act—rather than the individualized inquiry, of how this person is currently being affected.[84]

Third, the Court looked to language in the "findings" section of the Act, which states that, "43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a

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79. *Id.* (quoting 42 U.S.C. § 12102(2)(A) (1994)).

80. *See id.*

81. *See id.* at 482-83. If the disability is indeed fully mitigated, the Court would have nothing to base its decision on regarding whether the disability substantially limits a life activity other than conjecture and hypothesis based on how most people with that disability are affected. *See id.* This goes against the intent of the Act, which was to evaluate the disability with respect to the individual person. *See id.* This is the reason the Court found the EEOC regulation impermissible. Under the *Chevron* doctrine two questions must be answered: First, did Congress directly address the statutory question?; and second, if not, did Congress delegate authority to the agency to create the regulation? *See* Chevron U.S.A., Inc., v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984). A further analysis is required under the second step that asks if the agency's guideline is a permissive interpretation of the issue in the statute. *See id. See also* Limas, *supra* note 56, at 520. Though the Court decided that the guideline would fail the second step of the test, it went on to analyze the guideline and determined it would fail there as well. *See Sutton*, 527 U.S. at 482-84.

82. *Sutton*, 527 U.S. at 483 (quoting 42 U.S.C. § 12102(2) (1994)).

83. *See id.*

84. *See id.* at 483-84. The statute states that the disabilities are to be evaluated "with respect to [a particular] individual." § 12102(2). Therefore, according to the Supreme Court, both the effects of the disability on the person's major life activities, and the effects of any mitigating measures, must be considered as they objectively exist. *See* Parmet, *supra* note 56, at 79-81. Otherwise the individualized inquiry would be no more than hypothesizing and guess work. *See id.*

whole is growing older."[85] The Court, basing its decision on many cited studies, ruled that if disabilities were intended to be measured without considering mitigating measures, the number in the statute would have to be significantly higher.[86] Thus, it was concluded that Congress had not intended to protect those individuals whose disabilities were mitigated to the point where they were no longer significantly limited in a major life activity.[87]

Under this reading of the Act, the Court concluded that the Sutton twins could not bring suit based on the first prong of the definition of disability as provided in the ADA.[88] Since their vision in its corrected state was normal, their disability did not significantly limit their ability to see, a major life activity contemplated in the statute.[89] The issue was settled as far as the federal statutes were considered; however, this holding was not binding on any state handicap discrimination statute.[90] Massachusetts became the first state to address the issue in its highest court.[91]

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85. *Sutton*, 527 U.S. at 484 (quoting § 12101(a)(1)).

86. *See id.* at 484-88. The Court suggests, based on studies performed by various government agencies, that if the number were intended to include people with unmitigated disabilities, it would have been closer to 160 million. *See id.* at 487. The number of people that wear corrective lenses that would be able to claim protection under the Act, if mitigating measures were not allowed to be considered, is over 100 million and the number of people that need hearing aids is over 28 million. *See id.*

87. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 487 (1999).

88. *See id.* at 488-89. The Court agreed with the defendant's claim that "an impairment does not substantially limit a major life activity if it is corrected." *Id.* at 481.

89. *See id.* at 488-89. The Court did not decide whether working is considered a major life activity under the Act. *See id.* at 490-94. However, the Court seemed to be leaning toward the position that it was not, noting that even the EEOC would not consider it a major life activity unless there were no other major activity that the party could base their claim on. *See id.* at 492. At least one court after *Sutton* held that even if working in general is considered a major life activity, working at the job of your choice may not be what is meant by the term major life activity. *See* Bolton v. Scrivener, Inc., 36 F.3d 939, 942 (10th Cir. 1994) (citing Welsh v. City of Tulsa, 977 F.2d 1415 (10th Cir. 1992)). The Supreme Court put an end to the dispute in January, 2002 with its decision in *Toyota Motor Mfg., Ky, Inc. v. Williams*, 534 U.S. 184 (2002). The Court decided that "[w]hen addressing the major life activity of performing manual tasks, the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job." *Id.* at 200-01.

90. *See Federal Judge Certifies Disability Question to Massachusetts Court*, 14 No. 17 ANDREWS EMP. LITIG. REP. 9 (July 25, 2000). State and federal statutes are separately enacted and may be interpreted differently, providing citizens different protections. *See id.*

91. *See* Dahill v. Police Dep't of Boston, 748 N.E.2d 956, 964 n.15 (Mass. 2001). *See also infra* notes 272-313 and accompanying text.

III. *DAHILL v. POLICE DEPARTMENT OF BOSTON*

A. Facts and Procedure

"Richard Dahill was born with a severe hearing impairment."[92] When he was three years old he started to receive medical care for his condition and also began wearing hearing aids.[93] His hearing continued to worsen until he reached the age of thirteen.[94] When he wears hearing aids, his hearing is corrected to within the normal range.[95] Without the hearing aids his hearing is substantially impaired.[96]

Mr. Dahill has achieved much in his life in spite of his hearing impairment.[97] He was a successful student in school, graduating from both college and law school.[98] In addition, he was a certified high school English teacher and held jobs in a health club and as a lifeguard.[99]

In 1996, Mr. Dahill applied for a job with the Boston Police Department as a police officer.[100] In February 1997, he received an offer of employment conditioned on his successfully meeting the State imposed medical standards for the job.[101] After a physical examination by the department's physician, Dr. Luther Arnold, it was determined that he would meet all of the standards put forth by the state, as long as he wore his hearing aids.[102]

Mr. Dahill then entered the Boston Police Academy for a twenty-six week training program that is mandatory for all new police officers.[103]

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92. *See Dahill*, 748 N.E.2d at 958.

93. *See id.*

94. *See id.* Mr. Dahill's hearing impairment had been diagnosed as "bilateral stable congenital sensorineural hearing loss." *Id.* at 958 n.3.

95. *See id.* at 958.

96. *See id.*

97. *See* Dahill v. Police Dep't of Boston, 748 N.E.2d 956, 958 (Mass. 2001).

98. *See id.*

99. *See id.*

100. *See id.*

101. *See id. See also* COMMONWEALTH OF MASSACHUSETTS HUMAN RESOURCES DIVISION, *Physicians Guide to Conducting Medical Examinations*, *at* http://www.state.ma.us/hrd/PhysiciansGuide.htm#III. (last visited Feb. 23, 2003) [hereinafter HUMAN RESOURCES DIVISION].

102. *See Dahill*, 748 N.E.2d at 958. The department's physician determined that Mr. Dahill had a "Category B Condition," which did not automatically disqualify him from eligibility to be a police officer. *See id.* A Category B Condition is one which, "based on its severity or degree, may or may not preclude an individual from performing the essential job functions of a municipal police officer, or present a significant risk to the safety and health of that individual or to others." HUMAN RESOURCES DIVISION, *supra* note 101, § III(5)(b).

103. *See* Dahill v. Police Dep't of Boston, 748 N.E.2d 956, 958 (Mass. 2001).

While at the academy, his instructors observed several incidents, which they believed were related to his hearing impairment, that raised serious questions about his ability to safely perform the duties of a police officer.[104] One incident involved Mr. Dahill not responding to a command from an instructor after a training run to get water bottles.[105] Another incident involved Mr. Dahill not responding to a radio call.[106] A third incident involved Mr. Dahill not hearing a gunshot during a training exercise.[107]

Mr. Dahill was again examined by Dr. Arnold, who subsequently sent him to a specialist for further auditory testing.[108] A report based on the findings of Dr. Arnold and the hearing specialist, as well as the reports of the Academy instructors, was forwarded to the commissioner of the Boston Police.[109] The report stated that there remained a question of safety regarding Mr. Dahill's ability to perform the functions of a police officer.[110] Based on this report, Mr. Dahill's employment with the Department was terminated.[111] The official reason given for his termination was that his auditory deficiencies would not enable him to safely and effectively perform the essential duties of a police officer.[112]

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104. *See id.*

105. *See id.* Mr. Dahill claims to have heard the order to retrieve the water bottles but failed to respond. *See* Memorandum and Order at 7, Dahill v. Boston Police Dep't, No. 98-11441-DPW (D. Mass. June 2, 2000) (on file with author). When asked by his instructor why he did not respond, he answered that he was not wearing his hearing aids. *See id.*

106. *See id.* at 6. The incident occurred during a foot chase drill, during which Mr. Dahill received a radio call and failed to respond. *See id.* The proper response would have been for Mr. Dahill to respond to the call on his radio that he was involved in a pursuit. *See id.*

107. *See Dahill*, 748 N.E.2d at 958. This incident involved a training procedure using a Firearms Training Simulator. *See Dahill*, No. 98-11441-DPW, at 7. The simulator projects sounds and images that the recruit has to immediately recognize as being threatening or non-threatening. *See id.* The object is to test the recruit's ability to exercise proper judgment in firing his weapon. *See id.*

108. *See Dahill*, 748 N.E.2d at 958. The hearing specialist determined that Mr. Dahill's level of hearing loss would make it difficult to engage in communication with another person unless he was looking directly at the other person and it was occurring in a quiet setting. *See id.* at 958 n.4.

109. *See id.*

110. *See id.*

111. *See id.* at 958-59.

112. *See id.* This reasoning is justified based on the definition of Category B Medical Conditions put forth by the Commonwealth of Massachusetts Human Resources Division. *See* HUMAN RESOURCES DIVISION, *supra* note 101, § IV(6)(c)(2) (explaining that Category B Conditions include: "a. perforated tympanum, b. auditory canal–atresia, severe stenosis, or tumor, c. severe extermal otitis, d. mastoid–severe mastoiditis or surgical deformity, e. Meniere's syndrome or labyrinthitis, f. otitis media, e. [sic] any other ear condition that

Mr. Dahill brought suit against the Boston Police Department in the United States District Court for the District of Massachusetts,[113] claiming violations of the Massachusetts antidiscrimination statute,[114] the Massachusetts equal rights statute,[115] the Federal Rehabilitation Act[116] and the Americans with Disabilities Act.[117] Since the SJC had never decided whether the Massachusetts antidiscrimination statute requires consideration of mitigating devices when determining whether a person is handicapped, the district court certified the question to the SJC.[118]

B. Holding

The SJC held that the Massachusetts antidiscrimination statute does not require a court to consider "mitigating or corrective devices [when] determining whether a person has a handicap."[119] In coming to its decision, the court employed principles of statutory interpretation, legislative history, public policy and administrative deference to help determine what it believed to be the intended definition of handicap as applied in the statute.[120]

The SJC refused to follow the lead of the United States Supreme Court, which had previously decided in *Sutton v. United Airlines, Inc.*[121] that mitigating measures must be considered in determining whether someone has a disability under the Americans with Disabilities Act (ADA).[122] Both the ADA and the Massachusetts antidiscrimination statute have nearly identical definitions of handicap.[123] However, the SJC ruled that it was not

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results in an individual not being able to perform as a police officer.").

113. *See* Dahill v. Boston Police Dep't, No. 98-11441-DPW (D. Mass. June 2, 2000), *certifying questions to* 748 N.E.2d 956, 957-59 (Mass. 2001).

114. *See Dahill,* No. 98-11441-DPW, at 11. *See also* MASS. GEN. LAWS ch. 151B, § 4 (1996).

115. *See Dahill,* No. 98-11441-DPW, at 11; MASS. GEN. LAWS ch. 93, § 103 (1996).

116. *See Dahill,* No. 98-11441-DPW, at 11; 29 U.S.C. § 794 (1994).

117. *See Dahill,* No. 98-11441-DPW, at 11; 42 U.S.C. §§ 12101-12213 (1994).

118. *See Dahill,* No. 98-11441-DPW, at 25; Dahill v. Police Dep't of Boston, 748 N.E.2d 956, 956-57 (Mass. 2001).

119. *Dahill*, 748 N.E.2d at 963.

120. *See id.* at 959-64.

121. 527 U.S. 471 (1999).

122. *See Dahill*, 748 N.E.2d at 963. *See also Sutton*, 527 U.S. at 475.

123. *See Dahill*, 748 N.E.2d at 959. Both the Massachusetts antidiscrimination statute and the ADA have similar definitions of handicap to the one contained in the Federal Rehabilitation Act. *See supra* note 26 and accompanying text. The only significant difference being that the Massachusetts Statute does not include, in its definition of handicapped, people currently using controlled substances illegally. *See* MASS. GEN. LAWS ch. 151B, § 1(17)(c) (2000).

compelled to follow the Supreme Court's interpretation of the definitional language in the ADA, and justified its decision several different ways.[124]

First, the SJC ruled that "[t]he language of the Massachusetts statute [was] not dispositive."[125] The statute protects only those people whose handicap "substantially limits" a "major life" activity,[126] yet, according to the court, the act does not define whether a handicap must be determined with or without consideration of mitigating or corrective measures.[127] This lack of clarity led the court to explore other devices to interpret the statute.[128]

The SJC next turned to the legislative history of the statute.[129] The court held that since the Massachusetts antidiscrimination statute was modeled after the Federal Rehabilitation Act,[130] the Massachusetts legislature must have intended the language in the statute to be interpreted just as the language in the federal statute.[131] Prior to the time when the Massachusetts statute was enacted, mitigating measures were either not considered to be relevant or just not considered at all in the analysis of cases based on the Federal Rehabilitation Act.[132]

The SJC then proceeded to address the administrative agency's

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124. *See Dahill*, 748 N.E.2d at 963-64. The SJC has noted that, though it is not bound to follow federal precedent analyzing similar statutes, it "may look to those decisions for guidance." Cox v. New England Tel. & Tel. Co., 607 N.E.2d 1035, 1039 (1993).

125. *Dahill*, 748 N.E.2d at 960.

126. *Id. See also* MASS. GEN. LAWS ch. 151B, § 1(17)(a) (2000). The term major life activity is defined in the Massachusetts antidiscrimination statute as "functions, including, but not limited to, caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." § 1(20). Based on the SJC's decision in *Dahill*, the recent United States Supreme Court decision in *Toyota* may have no effect on the SJC's application of chapter 151B, § 1(20) in regard to considering working as a major life activity. *See Toyota Motor Mfg., Ky, Inc. v. Williams*, 534 U.S. 184, 201 (2002) (holding that the proper analysis requires determining whether the impairments prevent or restrict the individual from performing tasks that are of central importance to most people's daily lives).

127. *See Dahill*, 748 N.E.2d at 960.

128. *See id. See also* Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999) (holding that, according to provisions in the ADA, mitigating measures "must be taken into account when judging whether [a] person is 'substantially limited in a major life activity and thus disabled under the Act'").

129. *See Dahill*, 748 N.E.2d at 960.

130. *See id. See also* 29 U.S.C. § 701 (2000).

131. *See Dahill*, 748 N.E.2d at 960. The language of the Federal Rehabilitation Act was clearly the model for both the Massachusetts antidiscrimination statute and the ADA. *See supra* note 26 and accompanying text.

132. *See Dahill*, 748 N.E.2d at 960-61. However, in Federal Rehabilitation Act cases since the enactment of the Massachusetts statute, courts have been split "as to whether that statute requires consideration of mitigating measures." *Id.* at 961 n.9. *See also supra* notes 28-29 and accompanying text.

interpretation of the statute's language.[133] The Massachusetts Legislature explicitly delegated to MCAD the power to "formulate policies to effectuate the purposes" of the statute.[134] MCAD issued guidelines in 1998 "that provide that '[t]he existence of an impairment is generally determined without regard to whether its effect could be mitigated by measures such as medication, auxiliary aids or prosthetic devices.'"[135] According to the MCAD guidelines,[136] a deaf person, whose hearing can be corrected with hearing aids, could still be considered handicapped because his hearing impairment would interfere with the major life activity of hearing.[137] The court ruled that the MCAD interpretation of the statute, as put forth in its guidelines, was due substantial deference.[138] The SJC not only believed that the MCAD had the appropriate power to implement the guidelines, but also believed that the guidelines were a reasonable interpretation of the language and the intent of the statute.[139]

Finally the court looked to issues of public policy.[140] The statute was enacted to protect handicapped people from discrimination in employment situations, while at the same time allowing employers to protect the safety of their other employees and the public.[141] The court decided that determining whether someone is handicapped, without consideration of mitigation or corrective devices, is consistent with these public policies.[142] The court noted that if mitigating measures were considered, the analysis would exclude "numerous persons who may mitigate serious physical or mental impairments to some degree, but who may nevertheless need reasonable accommodations to fulfill the essential functions of the job."[143]

Overall, both the Massachusetts Supreme Judicial Court in *Dahill* and the United States Supreme Court in *Sutton* found sufficient evidence to

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133. *See Dahill*, 748 N.E.2d at 960.

134. *Id.* at 961 (quoting MASS. GEN. LAWS ch. 151B, § 2 (2001)).

135. *Id.* at 961 (quoting MCAD GUIDELINES, *supra* note 37, § II.A.7).

136. *See* MCAD GUIDELINES, *supra* note 37, § II.A.7. If the SJC used the "plain language of the statute" reasoning employed by the Supreme Court in *Sutton*, the guideline at issue would have been determined an impermissible interpretation of the statute. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 481-82 (1999).

137. *See Dahill*, 748 N.E.2d at 961.

138. *See id.* The *Dahill* court made no reference to the *Sutton* decision, which held that the language "substantially limits" cannot mean "has the potential to substantially limit" or "would possibly substantially limit if it was not corrected." *Sutton*, 527 U.S. at 482-83.

139. *See Dahill*, 748 N.E.2d at 961.

140. *See id.*

141. *See id.* at 961-62 (citing Cox v. New England Tel. & Tel. Co., 607 N.E.2d 1035 (1993) (quoting Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 287 (1987))).

142. *See Dahill*, 748 N.E.2d at 962.

143. *Id.*

come to their conclusions regarding their respective handicapped discrimination statutes.[144] However, the decision of the SJC is a far broader interpretation of the identical language contained in both statutes regarding the definition of handicap.[145]

Serious questions arise when analysis of the broad reading of the statute is undertaken. One question is why the SJC unnecessarily broadened the definition of handicapped under the first prong when there was sufficient protection under the other two prongs.[146] Another question raised by the decision is whether the court had to give such strict deference to the MCAD guidelines as it claims that it did.[147] There appears to be several reasons why the guidelines could have been given less deference.[148]

Another concern the SJC dismissed as unlikely was the possibility of a significant increase in litigation resulting directly from its decision in this case, both at the judicial and administrative levels.[149] A final problem with the SJC's decision is the fact that under its analysis, no consideration is given to whether the person is actually limited in their ability to perform a major life activity.[150] This type of individualized inquiry is required under both the Massachusetts antidiscrimination statute and the ADA.[151] The answers to these questions and solutions to the problems remain, as yet, unanswered and unsolved, however the following analysis suggests some potential answers and explanations.

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144. *See Sutton*, 527 U.S. at 475. *See also Dahill*, 748 N.E.2d at 963-64.

145. *See Mass. High Court Says Corrective Devices Need Not Be Considered*, 18 ANDREWS AIDS LITIG. REP. 5 (June 18, 2001).

146. *Cf. Sutton*, 527 U.S. at 487-94 (discussing an analogous situation under the ADA).

147. *See Dahill*, 748 N.E.2d at 961. *See also Case Law Development, Employment: Disability Defined*, 25 MENTAL & PHYSICAL DISABILITY L. REP. 581, 581-82 (2001) [hereinafter *Disability Defined*].

148. *See infra* notes 157-209 and accompanying text.

149. *See Dahill*, 748 N.E.2d at 964. *But cf. infra* notes 241-70 and accompanying text.

150. *See Disability Defined*, *supra* note 147, at 581-82. *See also* Jack Sullivan, *SJC Ruling on Disability Contradicts High Court*, BOSTON HERALD, May 26, 2001, at 4; Brief of Defendant-Appellee Boston Police Department at 7-11, Dahill v. Police Dep't of Boston, 748 N.E.2d 956 (Mass. 2001) (on file with author) [hereinafter Brief of Defendant-Appellee].

151. *See* Cox v. New England Tel. & Tel. Co., 607 N.E.2d 1035, 1045 (Mass. 1993) (Liacos, C.J., Abrams, J. dissenting) (citing Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 287 (1987). The court noted that when looking to "construe and apply" the Massachusetts statute, decisions construing and applying the analogous federal statutes may be looked to for guidance. *Id.* at 1039 (citing White v. Univ. of Mass. at Boston, 574 N.E.2d 356 (1991)). Since an individualized inquiry is required under the federal statutes, by analogy an individualized inquiry must be required under the Massachusetts statute. *See id.*

IV. ANALYSIS

The SJC's decision in *Dahill* will have far reaching effects on employment discrimination cases in Massachusetts. By deferring to the MCAD's interpretation of the definition of handicap in the Massachusetts antidiscrimination statute, the court ignored several important factors that the Supreme Court considered in *Sutton*.[152] The most important factor was the plain language of the statute, which clearly requires consideration of mitigating measures in making the determination of whether someone is handicapped.[153] Another consideration that was ignored by the SJC was the individualized inquiry, required by prior precedent but made impossible to perform due to the ruling in *Dahill*.[154]

Further, the SJC may have misjudged the impact its ruling will have on both the judicial system and the administrative agency charged with screening all claims before they are ever looked at judicially.[155] Finally, the court did not adequately address the fact that the people to which it was extending coverage under this part of the definition of handicapped are already covered under the other two parts of the definition in the statute.[156] All of these factors considered together point to the likelihood that the SJC made the wrong decision in *Dahill* and it will only be a matter of time before this becomes evident.

A. The SJC Used Administrative Deference to Avoid the Plain Language in the Statute Requiring Individualized Inquiry of Actual Substantial Limitation of a Major Life Activity

In making its decision in *Dahill*,[157] the SJC gave substantial deference to the MCAD Guidelines regarding the Massachusetts antidiscrimination statute.[158] The guidelines state that determination of whether a person is considered handicapped under the Massachusetts antidiscrimination statute is generally made without regard to whether the handicap can be mitigated or corrected.[159] Just as the Supreme Court in *Sutton*[160] could have used the

152. *See Sutton*, 527 U.S. at 482.

153. *See infra* notes 173-80 and accompanying text.

154. *See infra* notes 181-87 and accompanying text.

155. *See infra* notes 241-70 and accompanying text.

156. *See infra* notes 208-40 and accompanying text.

157. Dahill v. Police Dep't of Boston, 748 N.E.2d 956 (2001).

158. *See id.* at 961. *See also* MCAD GUIDELINES, *supra* note 37, § II.

159. *See Dahill*, 748 N.E.2d at 961 (citing MCAD GUIDELINES, *supra* note 37, § II.A.7). An example given in the Guidelines states that "an employee who is legally blind, but whose vision is correctable with glasses, *may* be considered 'handicapped' because his impairment substantially limits his ability to perform the major life activity of seeing." MCAD GUIDELINES, *supra* note 37, § II.A.7 (emphasis added).

Chevron doctrine[161] to justify its decision that the EEOC's guidelines did not need to be followed,[162] the SJC used Massachusetts case law to reach its own, opposite conclusion, which was that the MCAD guidelines should be followed.[163]

Unlike Congress and the EEOC, the Massachusetts legislature, in enacting the antidiscrimination statute, gave the MCAD wide discretion in "formulating policies to effectuate the purposes of G.L. c. 151B."[164] Based on its prior decisions, including *Berrios v. Department of Public Welfare*,[165] the SJC found that the MCAD guidelines were entitled to substantial deference.[166] A significant number of cases have contributed to what has become an administrative deference rule in Massachusetts.[167]

The rule states that regulations *properly adopted* by government agencies should be regarded as equal to statutes and that "all rational presumptions are to be made in favor of their validity."[168] Further, the guidelines cannot be declared void by a court unless it is clear that there is no reasonable way to interpret the guideline in accordance with the reasoning behind the statute.[169] Additionally, "enforcement of such regulations should be refused only if they are plainly in excess of

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160. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

161. *See id.* at 477.

162. *See Sutton*, 527 U.S. at 480. The Court found no need to determine what deference the guidelines were due, based on the fact that the EEOC was not granted authority to promulgate the guidelines. *See id.*; 29 C.F.R. § 1630 (1998). *See also* Limas, *supra* note 56, at 520.

163. *See Dahill*, 748 N.E.2d at 961-62. *See also* MCAD GUIDELINES, *supra* note 37, § II.

164. *Dahill*, 748 N.E.2d at 961 (quoting MASS. GEN. LAWS ch. 151B, § 2 (2001)).

165. 583 N.E.2d 856 (Mass. 1992). This case concerned homeless plaintiffs who brought suit against the Department of Public Welfare claiming that the Department did not make available to them emergency funds in violation of chapter 18, section 2(D) of the Massachusetts General Laws. *See id.* at 858-59. The SJC determined that the administrative agency's interpretation of the term "shelter" was acceptable based on prior regulations, past practices of the legislature, and the dictionary definition of the word. *See id.* at 862.

166. *See Dahill*, 748 N.E.2d at 961 (citing Berrios v. Dep't of Pub. Welfare, 583 N.E.2d 856, 861 (Mass. 1992); Bynes v. Sch. Comm. of Boston, 581 N.E.2d 1019, 1022 (Mass. 1991); Rock v. Mass. Comm'n Against Discrimination, 424 N.E.2d 244, 248 (Mass. 1982)).

167. *See Berrios*, 583 N.E.2d at 861 (citing, for example, Consol. Cigar Corp. v. Dep't of Pub. Health, 364 N.E.2d 1202 (Mass. 1977); Cleary v. Cardullo's, Inc., 198 N.E.2d 281 (1964); Mass. Nurses Ass'n v. Bd. of Registration in Nursing, 465 N.E.2d 1238, 1244 n.19 (Mass. App. Ct. 1984); Druzik v. Bd. of Health of Haverhill, 85 N.E.2d 232 (Mass. 1949)).

168. *Berrios*, 583 N.E.2d at 861 (citations omitted).

169. *See id.* (citations omitted).

legislative power."[170]

Here, the court decided that the guidelines, which stated that mitigating measures should not be considered, were valid since they could rationally be interpreted as employing the means to achieve the purpose for which the statute was enacted.[171] According to the court, that purpose is "to protect 'handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of [employers] as avoiding exposing others to significant health and safety risks.'"[172]

However, the court ignored the plain language of the statute, which, clearly cannot be read as being consistent with the MCAD guidelines.[173] As a result, the MCAD guidelines should have been ruled an impermissible interpretation of the language of the statute, since it is not tenable that "substantially limits" can be reasonably read to mean "does not actually substantially limit, but it possibly could," as the SJC believes.[174]

The language of the statute expressly states that "[t]he term 'handicap' means ... a physical or mental impairment which *substantially limits* one or more major life activities of a person."[175] This language, when read literally, requires the handicap to substantially limit that person in a major life activity.[176] To be substantially limited in a major life activity means that one's daily life is affected because of this handicap.[177] A person who

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170. *Id.* (citing *Druzik*, 85 N.E.2d at 237).

171. *See Dahill*, 748 N.E.2d at 961 (citing Cox v. New England Tel. & Tel. Co., 607 N.E.2d 1035, 1040-41 (Mass. 1993)).

172. *Id.* at 961.

173. *See id.* at 960 (finding language of the statute inconclusive). *See also* Sutton v. United Air Lines, Inc., 527 U.S. 471, 482-83 (1999); Burke & Abel, *supra* note 56, at 805 (discussing how the Supreme Court interpreted the term "substantially limits" to eliminate the possibility that the legislature intended to include mitigating measures). The *Dahill* court made sure it was known that the statute was clearly intended to protect only "handicapped individuals" from discrimination, not everyone suffering from any form of physical limitation. *See Dahill*, 748 N.E.2d at 961-62. *See also infra* notes 174-80 and accompanying text.

174. *See Dahill*, 748 N.E.2d at 960-61; MCAD GUIDELINES, *supra* note 37, § II.A.4. *See also Sutton*, 527 U.S. at 482-83.

175. MASS. GEN. LAWS ch. 151B, § 1(17) (2000) (emphasis added).

176. *See* Parmet *supra* note 56, at 81-82 (noting that most courts that have decided to determine whether someone is disabled without regard to mitigating measures have looked outside the plain language of the applicable statute to find support for their decisions).

177. *See* Edward G. Kramer & David G. Oakley, *Escaping Common ADA Traps*, 37 TRIAL 27, 27 (Oct. 2001). To be substantially limited in a major life activity, "the person must be: (1) unable to perform a major life activity that the average person in the general population can perform: or (2) significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared

successfully mitigates a handicap to the point where it does not affect his daily life should no longer be considered substantially limited in that major life activity.[178] For example, consider a person who is legally blind, but can see normally while wearing glasses. That person is no more substantially limited in his major life activity of seeing while he is wearing the glasses than someone with naturally normal vision.[179] Without the glasses he is handicapped for the purposes of the Massachusetts antidiscrimination statute, but since he is not substantially limited while he is wearing them, based on the plain language of the statute, he should not be considered handicapped.[180]

The courts in Massachusetts, similar to the Supreme Court, have emphasized that an individualized inquiry is required when determining whether someone is covered under the antidiscrimination statute.[181] The decision in *Dahill* runs contrary to this requirement due to the reality that if a handicap is mitigated, it is impossible to know whether the person would be substantially limited by it.[182] The result is the SJC defining broad groups of people who suffer from the same impairment, whether individuals within the group are substantially limited or not, as handicapped within the meaning of the statute.[183]

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to ... the general population ...." *Id.* (citing 29 C.F.R. § 1630.2(j)(3)(i)-(ii) (2000)).

178. *See Sutton*, 527 U.S. at 482-83. For the same reasons, a person is not covered by the statute if he does not mitigate his condition, because the condition does not rise to the level of being substantially limiting. *See Dahill*, 748 N.E.2d at 960.

179. *See Sutton*, 527 U.S. at 482-83. Under the reasoning of the SJC however, the fact that his vision is corrected is not relevant. *See Dahill*, 748 N.E.2d at 960. It is the person's condition that is being considered in the determination, and not the actual impact of the condition itself on his ability to see. *See id.* at 960-61.

180. *See* MASS. GEN. LAWS ch. 151B, § 1(17) (2000); *see also Dahill*, 748 N.E.2d at 960; *Sutton*, 527 U.S. at 482-83; MCAD GUIDELINES, *supra* note 37, § II.A.6.

181. *See* Cox v. New England Tel. & Tel. Co., 607 N.E.2d 1035, 1040 (Mass. 1993) (noting that SJC has looked to how the Federal Rehabilitation Act has been interpreted by the federal courts as guidance on how to interpret the Massachusetts antidiscrimination statute).

182. Of course, with mitigating measures such as eye-glasses and hearing aids, a determination of the effect of the mitigating measure can be made by simply removing the device. However, in the case of medications or more permanent devices, such as pacemakers, this determination would be much harder to make. *See infra* notes 203-04 and accompanying text.

183. *See Dahill*, 748 N.E.2d at 960. The court stated that "a person with a hearing impairment might experience a 'substantial limit' of a 'major life activity,' when not using his hearing aids, but not experience any such 'substantial limit' while the corrective devices were in use." *Id.* This question was answered by the court's holding. *See id.* at 963. In effect, the court ruled that while not actually substantially limited, the person would be covered by the statute because he had an impairment that could be substantially limiting. *See id.*

The SJC, by its decision in *Dahill*, is encouraging labeling of people and disparate treatment due to physical characteristics. The word "handicap" should not be used to describe a person, it should be used to describe a condition that afflicts a person.[184] When the person no longer suffers the effects of the handicap, the label should be removed.[185]

This argument makes sense when considering the case of someone who is suffering from a debilitating disease. While suffering the effects of the disease, the person may be considered handicapped based on the definition in the statute.[186] However, if the person's disease is cured, there is no understanding of the term "substantially limited" that could lead one to consider that person handicapped.[187] Likewise, someone who cures their handicap by mitigating the effects of it, even if only temporarily, is in the same situation as the person who has benefited from a more long-term cure.

Taking this comparison one step further shows the inconsistency in both the SJC's and the MCAD's position on mitigating measures more clearly. If the disease returned, the patient would again be considered handicapped, even though he was not the day before.[188] However, the person who puts on and takes off his glasses is considered disabled the whole time.[189] The permanence of the mitigating measure should not be the yardstick against which disability is measured when both of the people in the example would be in the same position with or without the use of mitigating measures except for the presence of an underlying, undetectable, non-affecting impairment.[190]

The fact that the mitigating measure is artificial versus one that is natural should not be the benchmark either. Surely a person who had their hand

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184. *See* 29 C.F.R. app. § 1630.2(j) (2002). "The determination of whether an individual has a disability is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of that impairment on the life of the individual." *Id. See also* Melissa Cole, *The Mitigation Expectation and the* Sutton *Court's Closeting of Disabilities*, 43 HOW. L.J. 499, 506-10 (2000) (explaining how the categorization of people with disabilities based on nothing more than a medical diagnosis places them in a "closet" in which many of them do not belong).

185. *See Sutton*, 527 U.S. at 482.

186. *See* MASS. GEN. LAWS ch. 151B, § 1(17) (2000). This is true as long as that person is substantially limited in a major life activity. *See id.*

187. *See* Cormier v. Littlefield, 112 F. Supp.2d 196 (D. Mass. 2000) (holding disability from which plaintiff fully recovered was not a handicap under Massachusetts antidiscrimination statute). *See also* Hallgren v. Integrated Fin. Corp., 679 N.E.2d 259 (Mass. App. Ct. 1997) (holding disability from which plaintiff fully recovered was not a disability under either the federal or state statutes).

188. This is true as long as the disease substantially limits a major life activity. *See Dahill*, 748 N.E.2d at 961; ch. 151B, § 1(17).

189. *See Dahill*, 748 N.E.2d at 961.

190. *See Sutton*, 527 U.S. at 488.

amputated at the wrist would be considered handicapped under either the ADA or the Massachusetts antidiscrimination statute.[191] Their claim of disability could be based on the fact that the major life activity of performing manual tasks is substantially limited by only having one hand.[192] Under Massachusetts law, even if that person obtained a robotic prosthetic hand[193] that enabled him to do almost everything that he could do before he lost his hand, thus reducing his actual limitation to below the subjective level of "substantially limited," he would still be considered handicapped.[194] However, if that same person received a hand transplant,[195] and functioned identically to the person with the prosthetic, it would be interesting to see whether he would be covered under the Massachusetts statute. The mitigating measure—the transplanted hand—is unlike a prosthetic hand, since a prosthetic can be removed. The effects of the impairment would be mitigated to the point where they no longer substantially limit a major life activity, but what if the hand was later rejected by the body?[196] This mitigating measure may not be permanent and, in Massachusetts, the person with the transplanted hand would likely be considered handicapped.[197] However, it is difficult to justify treating one person who has the hand with which he was born differently than a person with one natural hand and one transplanted hand. If both people function identically, then both should be treated similarly under the state law, as they would be under the ADA.[198]

If the basis for a decision on a handicap relies on whether the mitigating

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191. *See* 42 U.S.C. § 12102(2) (2000); MASS. GEN. LAWS ch. 151B, § 1(17) (2000).

192. *See* MCAD GUIDELINES, *supra* note 37, § II.A.6.

193. *See* Faye Flam, *Dexterity In His Grasp*, PHILA. INQUIRER, Feb. 25, 2002, at E1, *available at* 2002 WL 14964494 (discussing the new "bionic hand," which holds promise to grant full relief of impairments to hand amputees).

194. *See Dahill*, 748 N.E.2d at 964; MCAD GUIDELINES, *supra* note 37, § II.A.7.

195. The first hand transplant in history occurred in September 1998. *See World's First Double-Hand Transplant Making Good Progress*, AGENCE FRANCE-PRESSE, Jan. 14, 2002, *at* 2002 WL 2316424. The first hand transplant in the United States occurred on January 24-25, 1999 at Jewish Hospital in Louisville, Kentucky. *See Information for Potential Hand Transplant Patients: The Procedure*, *at* http://www.handtransplant.org/procedure/criteria.html (last visited Jan. 20, 2003) [hereinafter *Hand Transplant*].

196. Hand transplant patients receive immunosuppressive drugs after the surgery to keep their bodies from rejecting the new hand. *See Hand Transplant*, *supra* note 195. The drugs must be taken for the life of the hand. *See id.* This drug treatment could be considered a mitigating measure under the ADA but would not be considered in an analysis under the Massachusetts antidiscrimination statute. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 482-83 (1999); *Dahill*, 748 N.E.2d at 964.

197. *See Dahill*, 748 N.E.2d at 964 (assuming that state would find the new hand to be a mitigating measure).

198. *See Sutton*, 527 U.S. at 482.

measure is natural, then consider a person suffering from debilitating arthritis in his hip. If that person was substantially limited in his major life activity of walking, due to his condition, he would be considered handicapped.[199] However, if that person had surgery to receive an artificial hip, which consists of metal and plastic, and after the surgery was no longer substantially limited in his major life activity of walking, he should no longer be considered handicapped under the statute.[200] However, after the decision in *Dahill*, there does not appear to be any way to classify a person with an artificial hip other than as handicapped.[201] It would be unreasonable to think that the legislature intended everyone who has had hip replacement surgery to be covered by the substantially limited prong of the statute.[202] This result, under the Massachusetts analysis, seems inevitable.

A similar analytical problem involves pacemakers. There are several cases interpreting the ADA that contemplate the use of pacemakers and whether someone who has one is considered disabled.[203] However, there is no case law in Massachusetts on the issue. It would seem that based on the analysis above, a pacemaker would be considered a mitigating measure for the purposes of the Massachusetts antidiscrimination statute, and the pacemaker could not be considered in determining whether the user is handicapped, even though a pacemaker would be considered a permanent cure.[204]

By ignoring the plain language, the SJC was not able to overcome the

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199. *See* MASS. GEN. LAWS ch. 151B, § 1(17) (2000); MCAD GUIDELINES, *supra* note 37, § II.A.5-6.

200. *See supra* notes 173-80 and accompanying text (defining substantial limitation).

201. Since the Massachusetts antidiscrimination statute does not require consideration of mitigating measures, a person would be considered to be in the condition he was in before the mitigating measure was implemented, in other words, before the surgery. *See Dahill*, 748 N.E.2d at 963.

202. *See id.* at 960-61 (discussing reliance on federal courts' interpretations of Federal Rehabilitation Act only up to the time when Massachusetts antidiscrimination statute was enacted as relevant). There is no state or federal case law discussing hip-replacement surgery and whether someone who has had it is covered under the definition of disability provided in the Federal Rehabilitation Act.

203. *See* Foreman v. Babcock & Wilcox Co., 117 F.3d 800, 805-06 (5th Cir. 1997) (holding that a man with a pacemaker is not disabled within the meaning of the ADA due to lack of evidence showing he was substantially limited in the major life activity of working); Gilday v. Mecosta County, 124 F.3d 760, 763-64 (6th Cir. 1997) (discussing, in a pre-*Sutton* case, that a person with a pacemaker that corrects a substantially-limiting heart defect is disabled within the meaning of the ADA, but basing its reasoning on the fact that mitigating measures are not to be considered in the determination).

204. *See Gilday*, 124 F.3d at 763-64; *Dahill*, 748 N.E.2d at 963.

major hurdle of administrative deference as the Supreme Court did.[205] The SJC desired a broader definition of handicapped than that contained in the ADA and by its less-than-strict interpretation of the statutory language and bypassing the individualized inquiry required under federal law and prior Massachusetts precedent, it achieved this goal.[206]

B. The SJC Extended Protection Under the Statute to Include Someone in One Prong of the Definition of Handicapped, When He Was Already Covered Under the Other Two Prongs

Another question raised by the decision in *Dahill*[207] is whether the SJC had to reach the decision that it did. Several factors seem to point to the conclusion that it did not. Most prominent among them is the fact that even if the court ruled in accord with the Supreme Court that mitigating measures must be considered when determining whether a person is handicapped under the Massachusetts antidiscrimination statute,[208] many people, most likely including Richard Dahill, would still be covered under one of the two remaining prongs of the definition of handicapped.[209]

To warrant the protections created by the statute, a person's disability only needs to fit one of the three definitions of "handicaped" contained therein.[210] The first one, chapter 151B, section 1(17)(a), is the definition that was at issue in *Dahill*.[211] Under this section a "handicap" is identified as a "physical or mental impairment which substantially limits one or more major life activities of a person."[212] The SJC ruled that any measures that a person takes to reduce the effects of their handicap should not be considered in the analysis of whether they are substantially limited in a major life activity.[213] The result under this analysis would be easier to

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205. *See Dahill*, 748 N.E.2d at 960 (stating that "[b]ecause the language of the statute does not end our inquiry, we turn to other sources to discern the Legislature's intent"); Sutton v. United Air Lines, Inc., 527 U.S. 471, 482 (1999) (stating that "[b]ecause we decide that, by its terms, the ADA cannot be read in this manner, we have no reason to consider the ADA's legislative history").

206. *See Dahill*, 748 N.E.2d at 960, 962; *Sutton*, 527 U.S. at 483; Cox v. New England Tel. & Tel. Co., 607 N.E.2d 1035, 1039-40 (Mass. 1993).

207. Dahill v. Police Dep't of Boston, 748 N.E.2d 956 (Mass. 2001).

208. *See supra* notes 53-71 and accompanying text (discussing the decision of the Supreme Court in *Sutton*).

209. *See* MASS. GEN. LAWS ch. 151B, § 1(17)(b)-(c) (2000). *See also supra* note 40 and accompanying text.

210. *See* § 1(17). *Cf.* Burke & Abel, *supra* note 56, at 800-01 (discussing the analogous provisions of the ADA).

211. *See* § 1(17)(a); *Dahill*, 748 N.E.2d at 959.

212. § 1(17)(a).

213. *See Dahill*, 748 N.E.2d at 963-64.

justify if many of the people the SJC intended to protect were not already covered by one, if not both, of the other two prongs of the definition of handicapped contained in the statute.[214]

Under the Massachusetts antidiscrimination statute, section 1(17)(c), the third prong of the definition of "handicapped" includes "being regarded as" having an impairment that substantially limits a major life activity.[215] According to the statute, someone regarded as "handicapped" has the same ability to sue as someone who is actually handicapped.[216] Under this prong of the definition, an individual would be covered by the statute if the employer discriminates based upon a perceived disability, when in fact the person is not disabled.[217]

Examples of this type of discrimination would include discrimination against people who have high blood pressure or are morbidly obese, but who have no substantially limiting impairments.[218] Under the third prong of the definition, a person would be considered to have a handicap if an employers regarded the conditions as such and consequently did not hire the person.[219] A person would also be covered under this prong if the employer mistakenly believes that the person has a disability that he does not, in fact, have.[220] An example of this would include a person who bruises his knee in a touch-football game the day before a job interview, and is left with a temporary limp. If the employer who notices the limp

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214. An example of this overlap is shown in the trial after the *Dahill* question was certified. The United States District Court for the District of Massachusetts tried the case and a jury awarded $847,000 in damages to Richard Dahill. *See* John O. Cunningham, *Shift in Disability Law Key to $800k Verdict: Cop's Bias Case Cements Earlier SJC Ruling*, MASS. LAW. WKLY., Feb. 19, 2002. However, the verdict was based on the fact that "police officials and experts made erroneous conclusions about Mr. Dahill's hearing capacity and ability to perform his job." *Id.* This decision would have to be based on chapter 151B, section 1(17)(c), because the police department regarded Mr. Dahill as being handicapped and discriminated against him on that basis. Under that prong of the definition, whether or not Mr. Dahill was handicapped under section 1(17)(a) is irrelevant. *See infra* notes 215-28 and accompanying text.

215. MASS. GEN. LAWS ch. 151B, § 1(17)(c) (2000).

216. *See* SCOTT C. MORIEARTY ET AL., 45 MASS. PRAC. L. SERIES: EMP. L. § 8.14 (SUPP. 2002).

217. *See* Burke & Abel, *supra* note 56, at 801. "The rationale for the 'regarded as prong' is to protect persons from the discriminatory reactions of others based upon myths, fears, and stereotypes." *Id.* (citing 28 C.F.R. app. § 1630.2(1) (2000)).

218. *See* MCAD GUIDELINES, *supra* note 37, § II.A.4.

219. *See id.* The reason could be either: (a) that the employer regards the condition as a health risk; or (b) that the employer fears that hiring a "handicapped" person will raise group insurance rates raised. *See id.*

220. *See* Burke & Abel, *supra* note 56, at 801 (citing Sutton v. United Air Lines, Inc. 527 U.S. 471, 489 (1999)).

thinks it was due to some disability, and bases his decision to deny employment on this belief, the person would be covered under this section of the statute.[221] The person does not actually have a disability, since such short-term temporary injuries are not considered disabilities for the purposes of the statute.[222] But this would not preclude protection since the discrimination was based on a mistaken belief regarding a disability.[223]

If corrected hearing was not considered a disability, as was the case with corrected vision in *Sutton*,[224] Richard Dahill would still be able to claim protection under the third prong of the definition of disability in the statute since his termination was based on the Police Department's belief that he had a disability, which in fact he did not have.[225] The Boston Police regarded him as being substantially limited in the life activity of hearing, when in reality he claims that with his hearing aid he was not.[226] In order to succeed on his handicap discrimination claim, it makes no difference whether he claims to be actually disabled or is only regarded as such; the remaining requirements of the statute are not dependent upon which prong of the definition of disability the claimant depends.[227]

Under 151B, section 1(17)(b), protection is offered under the statute to people who have a record of an impairment that substantially limits a major

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221. *See* MASS. GEN. LAWS ch. 151B, § 1(17)(c) (2000). An employer would be unlikely to ask why the person was limping due to the MCAD's strict prohibition on pre-employment inquiries regarding a potential employee's disabilities. *See* MCAD GUIDELINES, *supra* note 37, § IV.

222. *See* MORIEARTY ET AL., *supra* note 216, § 8.14 n.14 (citing Hallgren v. Integrated Fin. Corp., 679 N.E.2d 259, 260-61 (Mass. App. Ct. 1997) (holding that a temporary knee injury from which the plaintiff fully recovered in one month was not a handicap under the state statute)). The Appeals Court looked to the similar interpretations of the ADA in reaching their conclusion. *See id. But cf.* Dartt v. Browning-Ferris Indus., Inc., 691 N.E.2d 526, 536 (Mass. 1998) (ruling that two-year temporary disability may be considered a disability for the purposes of the state statute).

223. MORIEARTY ET AL., *supra* note 216, § 8.14.

224. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 475 (1999).

225. *See supra* notes 215-17 and accompanying text; MASS. GEN. LAWS ch. 151B, § 1(17)(c) (2000).

226. *See Dahill*, 748 N.E.2d at 958-59.

227. *See* ch. 151B, § 4(16). In order to bring a successful handicap discrimination case in Massachusetts the claimant must first prove that he is a qualified handicapped person. This is accomplished by first falling under one of the three prongs of the test in section 1(17) of chapter 151B to prove a handicap. *See id.* Next, it must be shown that the claimant would have been able to perform the essential functions of the position with reasonable accommodation, unless the accommodation would have imposed an undue hardship on the business. *See id.* Finally, it must be proven that an employer or an agent of the employer terminated, refused to hire, rehire or advance in employment the claimant on the basis of the discriminatory belief. *See id.*

life activity.[228] This prong of the definition would protect someone who previously had a substantially limiting impairment, but no longer suffers from the effects of the disability.[229] People mitigating their disabilities can often claim protection under this prong as well.[230]

For example, if a person's hearing was tested and fell below the requirements for a job, but the person was not re-tested after acquiring more powerful hearing aids, he would be considered handicapped under this prong of the definition if the record of the failed hearing test was used by the employer to deny that person employment.[231] This prong, the "record of" prong, would also cover someone who suffered from cancer five years before, but after successful treatment no longer has cancer and was refused employment based on the unfounded belief of the employer that the person was handicapped based on their medical history.[232]

Under the SJC's interpretation of the statute, disregarding mitigating measures in the analysis of what constitutes a handicap, the "record of" prong of the definition becomes almost entirely irrelevant. Anyone who has had a handicap and mitigated it, and who has a medical record of having the handicap is covered under the "record of" prong.[233] However, all of these same people are now covered by the substantially limited prong because anyone who had a handicap—yet mitigated the limitations of the handicap—is now still considered to have the handicap.[234] This is exactly the type of situation that the "record of" prong of the test is designed to cover, and because of it, there was no reason for the court to broaden its definition under the first prong.[235]

Since the mitigation issue is already covered by both the "regarded as" and the "record of" prongs in the definition of handicapped, it is hard to understand why the SJC would go out of its way to include the definition of handicapped in the first prong to include disabilities that are mitigated

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228. ch. 151B, § 1(17)(b). The scope of this Comment is confined to the first requirement.

229. *See* Burke & Abel, *supra* note 56, at 800-11. *See also* MCAD GUIDELINES, *supra* note 37, § II.A.3.

230. The Sutton sisters did not claim protection under this prong of the definition. *See Sutton*, 527 U.S. at 476. However, Richard Dahill did claim such protection in both his ADA and state law claims. *See* Memorandum and Order at 14, 22, Dahill v. Police Dep't of Boston, No. 98-11441-DPW (D. Mass. June 2, 2000). His ADA claim failed to make it past summary judgment. *See id.* at 14.

231. *See* MCAD GUIDELINES, *supra* note 37, § II.A.3.

232. *See id.*

233. *See id.*

234. *See Dahill*, 748 N.E.2d at 959, 964.

235. *See* MCAD GUIDELINES, *supra* note 37 § II.A.3; Burke & Abel, *supra* note 56, at 800-01.

when they would be clearly covered by the other two prongs of the definition.[236]

If Richard Dahill were to claim that he was regarded as being disabled by the Boston Police Department, when in fact he was not, he would be covered by the second prong of the test.[237] If he was to claim that even if his mitigated hearing condition was not considered a disability, and the Police Department regarded him as being disabled and discriminated against him based on their mistaken belief, he would be covered under the third prong of the test.[238] Either way, there appears to be no compelling policy reason that forced the SJC to go to the lengths it did to broaden the definition of handicapped when less drastic alternatives were available.[239]

C. The Decision in *Dahill* Will Create a Flood of Litigation

Another argument made to the SJC in *Dahill* was that if the court allowed handicaps to be considered in their unmitigated state, the result would be a flood of litigation.[240] The court was correct in noting that the question of whether someone is considered a "handicapped person" is only a threshold inquiry.[241] After it is shown that the plaintiff is handicapped, there are several more elements that must be proven in order to succeed.[242]

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236. *See* Burke & Abel, *supra* note 56, at 800-01; *Dahill*, 748 N.E.2d at 959, 964.

237. *See supra* notes 218-25 and accompanying text (discussing the "record of" prong of the definition).

238. *See supra* notes 206-17 and accompanying text (discussing the "regarded as" prong of the definition).

239. *See Dahill*, 748 N.E.2d at 961-62. The only public policy reasons that the court claimed were behind its decision requiring a broad reading of the definition of handicap were: (1) to protect handicapped people from prejudice; and (2) to encourage people to overcome their handicaps by mitigating them. *See id.* The next two prongs of the definition adequately fulfill the first policy desire. *See supra* notes 206-25 and accompanying text. It is hard to imagine how an employer could be prejudiced against someone who needs to wear contact lenses to a job interview to be able to see, without even knowing the person is wearing the contact lenses. *See* MCAD GUIDELINES, *supra* note 37, § IV. (employers during pre-employment screening may not ask whether the interviewee is disabled, or whether he has any limitations that would prevent him from performing the job for which he is applying). For the second policy consideration, the court notes that its decision is more fair because two people with the same condition will be treated the same under the law, regardless of whether they can afford mitigating measures. *See Dahill*, 748 N.E.2d at 962 n.11. However, the court again failed to notice that though the two people may have the same condition, they are in different situations if one mitigates the effects of the condition and the other does not.

240. *See Dahill*, 748 N.E.2d at 964.

241. *See id.*

242. In order to prove handicap discrimination under the Massachusetts anti-discrimination statute, the plaintiff has the burden of proving not only that he has a

The plaintiff faces an uphill battle to prove his case and remedy is by no means certain.[243] However, the court did not adequately address the issue of the impact of its ruling on eliminating the possibility that the amount of litigation under the newly declared rule could increase significantly.[244]

The court claimed in its decision that it, in fact, did not change the law that has been applied since the statute was enacted.[245] "Since 1983, when the Legislature made the relevant amendment to G.L. c. 151B, judges and litigants in Massachusetts have assumed that a person with a significant physical or mental impairment met the threshold definition of 'handicap,' whether the person used corrective devices or took other mitigating measures."[246] However, many of the cases cited, including *Labonte v. Hutchins & Wheeler*, include no discussion of mitigation at all.[247] The Boston Police noted this fact in *Dahill* and argued that if the defendant in those cases did not dispute the fact that the plaintiff is covered under the statute, lack of discussion on the issue by the court should not be seen as the court making any kind of statement on the issue.[248]

Similarly, in *Handrahan v. Red Roof Inns*, the issue of whether the plaintiff was a qualified handicapped person was not argued until after the

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handicap, but also that he is qualified and capable to fulfill the essential functions of the job, as well as proving that the reason he was denied the job, or fired from it, was based solely on his handicap. *See* Talbert Trading Co. v. Mass. Comm'n Against Discrimination, 636 N.E.2d 1351 (Mass. App. Ct. 1994). "Once the plaintiff has established a prima facie case, the burden shifts to the employer to articulate a legitimate reason for its actions." Handrahan v. Red Roof Inns, Inc., 680 N.E.2d 568, 571 (Mass. App. Ct. 1997) (citing Tardanico v. Aetna Life & Cas. Co., 671 N.E.2d 510 (Mass. App. Ct. 1996)).

243. *See Dahill*, 748 N.E.2d at 964 (citing Arnold v. United Parcel Serv., Inc. 136 F.3d 854, 861 (1st Cir. 1998)). Though no numbers were available for Massachusetts cases, plaintiffs in ADA cases have a success rate of only between 2% and 7%. *See* Kramer & Oakley, *supra* note 177, at 28 (citing Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 109 (1999)). *But see* SCOTT C. MORIEARTY ET AL., REPRESENTING CLIENTS BEFORE THE MCAD IN EMPLOYMENT CASES, PART 2, § 9 (2001). "In the discrimination context, experience suggests that state courts may be more receptive to discrimination claims and less likely to grant summary judgment to employers." *Id.*

244. *See generally Dahill*, 748 N.E.2d at 959-64.

245. *See id.* at 963.

246. *Id.* at 964. (citing as examples Labonte v. Hutchins & Wheeler, 678 N.E.2d 853 (Mass. 1997) (no discussion of mitigation); Wooster v. Abdow Corp., 709 N.E.2d 71 (Mass. App. Ct. 1999) (controlled asthma); Handrahan v. Red Roof Inns, Inc., 680 N.E.2d 568, 571-72 (Mass. App. Ct. 1997) (controlled epilepsy)).

247. *See* Labonte v. Hutchins & Wheeler, 678 N.E.2d 853, 859 n.12 (Mass. 1997). There was "no disagreement between the parties that the plaintiff suffers from multiple sclerosis and is therefore handicapped. Thus the first prong is fulfilled." *Id.*

248. *See* Brief of Defendant-Appellee, *supra* note 150, at 14 n.5.

decision in the case had been made.[249] The issue was not properly preserved for appeal, and therefore was not a consideration in the determination of the outcome of the case.[250]

Additionally, the SJC in *Dahill* did not address the likelihood of a substantial increase in cases filed with the Massachusetts Commission Against Discrimination (MCAD), which could lead to a strain on administrative resources.[251] Under current Massachusetts law, in all cases of unlawful employment discrimination based on the Massachusetts antidiscrimination statute, a complaint must first be filed with the MCAD.[252] After the complaint is filed a formal investigation takes place.[253] Upon a finding of probable cause the MCAD will seek to eliminate the problem through conciliation.[254] If this process does not work, the next step initiated by the MCAD is a public hearing.[255] Before the public hearing begins, the plaintiff must either agree to proceed with the public hearing or remove the case to the court system.[256] It is obvious that this process consumes both time and resource. The greater the number of complaints filed, the greater the stress on the system.

Because persons suffering form a correctable hearing loss are protected by the Massachusetts statute, a court's pronouncement of this protection serves to enhance the public's awareness of this statute to not only hearing loss sufferers, but also, for example, persons with correctable vision. Additionally, if the numbers used by the Supreme Court in *Sutton* are correct,[257] over one-half of the population of the United States could be considered as suffering from some form of disability if mitigation is not considered.[258] If that number is correlated to Massachusetts figures, what

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249. *See* Handrahan v. Red Roof Inns, Inc., 680 N.E.2d 568, 572 n.7 (Mass. App. Ct. 1997).

250. *See id.*

251. *See* Mass. Comm'n Against Discrimination R. P. 804 CMR §§ 1.00-1.25 (2002) [hereinafter MCAD Rules]. It should be clear from the MCAD Rules of Procedure that the disposition of each complaint filed will entail significant allocation of administrative resources. *See id.*

252. *See* MASS. GEN. LAWS ch. 151B, § 5 (2001); MCAD Rules, *supra* note 251, § 1.10. *See also* Carter v. Comm'r of Correction, 681 N.E.2d 1255, 1256 (Mass. App. Ct. 1997).

253. *See* MCAD Rules, *supra* note 251, § 1.13.

254. *See id.* § 1.18.

255. *See id.* §§ 1.20-1.21.

256. *See id.* § 1.10.

257. *See* Sutton v. United Air Lines, Inc., 527 U.S. 471, 484-87 (1999) (citing several studies suggesting the number of people with disabilities in the United States is anywhere from an "underinclusive" 37.3 million to an "overinclusive" 160 million).

258. This statistic is based on a United States population estimate of approximately 280 million people in 1999, as well as using the "overinclusive" estimate of 160 million people

the court did, in effect, was invite 3.6 million people[259]—many of whom surely did not consider themselves to be handicapped, nor eligible to make use of the antidiscrimination statute—to initiate complaints based on their new-found handicaps if they are denied employment.[260] The ADA was enacted to provide protection to individuals with disabilities who were seen as a "discrete and insular minority" in society.[261] If the Massachusetts Legislature sought to protect handicapped people for the same reason, it is hard to justify the court's defining half of the population of the state as a "discrete and insular minority."[262]

The court in *Dahill* stated that its decision will not "open the floodgates of litigation."[263] But, what it failed to address was the potential for a flood of complaints being filed with the MCAD.[264] While many of the claims will be dispensed with at the investigation stage, many more than before will make it through to the hearing stage or to trial.[265] It appears quite possible that the SJC's prophecy may not become a reality. A more accurate characterization of the effect of its decision would have been to say it will not open the floodgates of *successful* litigation.[266] The court has declared that people with hearing loss, similar to Richard Dahill, are eligible to sue under the Massachusetts antidiscrimination statute.[267] By

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cited in *Sutton*. *See id.* *See also* U.S. CENSUS BUREAU, *Geographic Comparison Table: Population Estimates*, *at* http://factfinder.census.gov (last visited Jan. 20, 2003).

259. *See* U.S. CENSUS BUREAU, *supra* note 258.

260. This increase may or may not become a reality. It could be a few years before the increase in cases filed at the MCAD is significant enough to be notices. *See* J.M. Lawrence, *Jury Awards Ex-Cop Cadet $1M for Ban Over Hearing*, BOSTON HERALD, Feb. 7, 2002, at 27; Thomas Cambanis, *Ex-Cadet Wins Lawsuit Over Hearing Problem*, BOSTON GLOBE, Feb. 7, 2002, at B10.

261. 42 U.S.C. § 12101(a)(7) (2000).

262. Sutton v. United Air Lines, Inc., 527 U.S. 471, 494 (1999) (Ginsberg, J. concurring).

263. Dahill v. Police Dep't of Boston, 748 N.E.2d 956, 964 (Mass. 2001).

264. All cases must proceed through the MCAD before reaching the court system, if at all. This is sure to filter out many of the less-than-legitimate complaints, but the cost to the MCAD could be extraordinary. *See supra* notes 251-56 and accompanying text.

265. *See id.* This will be true if the number of cases filed actually does increase as predicted. *See supra* notes 246-51 and accompanying text.

266. "[T]he determination of whether an individual has a handicap is a threshold inquiry. He or she must still prove that he can perform his or her essential job functions with or without reasonable accommodation." *Disability Defined*, *supra* note 147, at 582. In addition, the plaintiff must also prove that the employer discriminated against him because of his handicap. *See* MASS. GEN. LAWS ch. 151B, § 4(16) (2001). Also, the employer can defend against the charge by proving that the accommodation required is not reasonable, as defined in the statute. *See* § 4(16)(1)-(3).

267. *See* Dahill v. Police Dep't of Boston, 748 N.E.2d 956, 963-64 (2001).

doing so, the court has not eased the burden of those trying to prove a discrimination case based on a disability, but it has dramatically increased the number of people in Massachusetts who are expressly covered by the statute.[268]

Massachusetts has extended protection to more people under its antidiscrimination statute, and in doing so, has provided an example to other states that may have similarly worded statutes of how to avoid the plain language in their antidiscrimination statutes.[269] However, this is not the only way to exclude consideration of mitigating measures.

D. The Outlook for Other States

Massachusetts has provided an example of how state antidiscrimination laws do not have to follow their federal counterparts, even when both contain identical language.[270] The SJC used legislative history to explain away the inconsistencies between the language of the statute and the result that it wanted to impose.[271] The court also used public policy arguments to rationalize its decision to ignore the plain language of the statute in honoring what it thought was the legislature's intent.[272]

At least two other states, New York and Rhode Island, have reached the same decision as Massachusetts, albeit by employing different methods.[273] Rhode Island used a statutory amendment to reach its decision,[274] while New York was able to make use of language in its statute that was much more explicit than the language in the Massachusetts statute.[275] By employing either of these two methods, both of which would have amounted to a legislative amendment in Massachusetts, the decision to not include mitigating measures in determining whether a person is handicapped would have stood on much firmer ground than the judicial interpretation resulting from *Dahill*.[276]

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268. *See id. See also supra* notes 241-51 and accompanying text.

269. *See Dahill*, 748 N.E.2d at 963-64.

270. *See* Parlo, *supra* note 71, at 511.

271. *See Dahill*, 748 N.E.2d at 960-62.

272. *See id.* at 961-62.

273. *See* Parlo, *supra* note 71, at 511.

274. *See* R.I. GEN. LAWS § 11-24-2.1 (2000); Parlo, *supra* note 71, at 511.

275. *See* Epstein v. Kalvin-Miller Int'l, Inc., 100 F. Supp.2d 222, 229-31 (S.D.N.Y. 2000); Parlo, *supra* note 71, at 511.

276. *See Dahill*, 748 N.E.2d at 963. Whenever a subjective opinion as to legislative intent is involved there is a substantial risk of bias. *See* Parmet, *supra* note 56, at 69. "Legislative history is to be used sparingly, if at all, and reliance upon such lofty notions as 'statutory goals' is condemned as an illegitimate imposition of a judge's own values and policy preferences into the supposedly 'neutral' task of applying the law as written by the legislature." *Id.* (citations omitted).

A year before the Massachusetts Supreme Judicial Court made its decision in *Dahill*,[277] the Rhode Island Legislature responded to the Supreme Court's decision in *Sutton*.[278] In 2000, the legislature added language to both its antidiscrimination statute[279] and to its Fair Housing Practices Act[280] regarding the definition of a disabled person. The statutes state that, "whether a person has a disability shall be determined without regard to the availability or use of mitigating measures, such as reasonable accommodations, prosthetic devices, medications or auxiliary aids."[281]

This action by the Rhode Island Legislature, while still retaining the public policy problems that are present in the Massachusetts standard,[282] at least settles all of the confusion and possible misunderstandings that led the SJC to its decision in *Dahill*.[283] By clearly defining disability in the statute, there is no question regarding whom the legislature intended to include in its definition of disabled. The fact that the statute still states that the disability must "substantially limit" a major life activity, rather than "has the potential to substantially limit" or "could hypothetically limit" becomes irrelevant with regard to mitigating measures due to the fact that we know exactly what the legislature intended because they have spelled it out for us.[284]

If the Massachusetts Legislature thought that the SJC had misinterpreted its intent on mitigating measures, or if it was unhappy with the MCAD guidelines prior to the decision in *Dahill*,[285] a statutory amendment, similar to that enacted by the Rhode Island Legislature in 2000, but with wording reflecting the current EEOC guidelines concerning the definition of disability regarding mitigating measures,[286] would be the best way to resolve the issue.

The State of New York is the only other state that has addressed the issue since the Supreme Court's decision in *Sutton*, and they have done so only indirectly.[287] In *Epstein v. Kalvin-Miller Int'l, Inc.*,[288] the District

277. *See* Dahill v. Police Dep't of Boston, 748 N.E.2d 956 (Mass. 2001).

278. *See* Parlo, *supra* note 71, at 511.

279. *See* R.I. GEN. LAWS § 11-24-2.1 (2000).

280. *See* § 34-37-3(5)(ii).

281. §§ 11-24-2.1, 34-37-3(5)(ii).

282. *See supra* notes 140-43 and accompanying text.

283. *See supra* notes 157-270 and accompanying text.

284. R.I. GEN. LAWS §§ 11-24-2.1, 34-37-3(5)(ii) (2000). *See also supra* notes 129-32 and accompanying text.

285. *See* MCAD GUIDELINES, *supra* note 37.

286. *See supra* note 71.

287. *See* Epstein v. Kalvin-Miller Int'l, Inc., 100 F. Supp. 2d 222, 229-31 (S.D.N.Y. 2000).

288. See id. at 222. In *Epstein*, the plaintiff suffered from type 2 diabetes and a heart

Court for the Southern District of New York held that the New York Human Rights Law[289] (NYHRL) is analytically different from the ADA and therefore the reasoning behind the *Sutton* decision, concerning mitigating measures among other things, should not be applied to a NYHRL.[290] The court stated that the "New York Court of Appeals has made it extremely clear that the NYHRL definition of disability is to be construed more broadly than the federal definition."[291]

The result of this decision is to justify treating the ADA and the NYHRL as two separate and distinct pieces of legislation, each with its own separate history and intent.[292] This is the same effect that the *Dahill* decision had on the interpretation of the Massachusetts antidiscrimination statute in the shadow of the ADA.[293] However, where the language of the Massachusetts antidiscrimination statute and the ADA are nearly identical, the language in the NYHRL is quite different from the language contained in the ADA.[294]

NYHRL section 292(21) states that the term disability is defined as, "a physical, mental or medical impairment resulting from anatomical, physiological, genetic or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques ...."[295] Though the word "prevents" is written in the present indicative verb form, as is "substantially limits" in the ADA and the Massachusetts antidiscrimination

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condition, however, both conditions were mitigated by medication resulting in no substantial limitation of any major life activity. *See id.* at 224. The court held that the plaintiff had no cause of action under the ADA, but ruled that the New York statute did not require a substantial limitation, only a medical diagnosis of the condition. *See id.* at 224, 229-30.

289. *See* N.Y. EXEC. LAW §§ 290-296 (McKinney 2001).

290. *See Epstein*, 100 F. Supp. 2d at 229.

291. *Id.* (citing State Div. of Human Rights v. Xerox Corp., 480 N.E.2d 695 (N.Y. 1985)). The court ignored the express legislative purpose of the statute, which was "to enact a definition of disability coextensive with comparable federal statutes" and instead followed the broader reading of the statute as applied by the New York Court of Appeals. *Id.*

292. *See id.* at 230. *See also* Parlo, *supra* note 71, at 511.

293. *See* Dahill v. Police Dep't of Boston, 748 N.E.2d 956, 963-64 (Mass. 2000); *Mass., U.S. High Courts Part Company on Definition of "Disabled Person"* 15 No. 16 ANDREWS EMP. LITIG. REP. 4 (June 12, 2001).

294. *Compare* MASS. GEN. LAWS ch. 151B, § 1(17) (2001), *and* 42 U.S.C. § 12102(2) (2000), *with* N.Y. EXEC. LAW § 292 (21) (McKinney 2001).

295. N.Y. EXEC. LAW § 292 (21). The statute also contains the familiar "record of such an impairment" and "regarded by others as such an impairment" prongs of the definition that both the ADA and the Massachusetts antidiscrimination statute borrowed from the Federal Rehabilitation Act. § 292 (21)(b)-(c); 42 U.S.C. § 12102(2)(b)-(c); MASS. GEN. LAWS ch. 151B, § 1(17)(b)-(c); 29 U.S.C. § 706(8) (2000).

statute, requiring actual present prevention,[296] there is an escape hatch built into the statute.[297] As long as the impairment can be shown in a laboratory or through testing, actual adverse effect on the claimant's life is irrelevant.[298] Thus, under the New York statute mitigating measures would have to be considered irrelevant since it is the presence of the physical, mental or medical condition that is the basis of the determination of disability, not the effect that the condition has on the person.[299]

It is clear that out of these three states that have examined the issue post-*Sutton*, Massachusetts has reached its outcome by the method that is most open to criticism and second-guessing.[300] While it can be said that the Rhode Island Legislature made unnecessary amendments to its statutes because the people who would be protected by the amended section were already protected by other sections of the statute,[301] the Legislature has the authority to amend the laws it has enacted, in the name of providing more protection to the people of the State than the federal government provides them.

Similarly, the New York courts have been giving broad meaning to the term disability in the NYHRL since 1985, well before the ADA decisions of the Supreme Court in 1999, including *Sutton*.[302] The court's interpretation of the NYHRL is based on wording that has clear meaning and obvious intent, unlike the language in the Massachusetts antidiscrimination statute and the ADA, which requires in depth textual analysis before a decision can be made as to the statute's true meaning.[303]

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296. *See* 42 U.S.C. § 12102(2)(a); MASS. GEN. LAWS ch. 151B, § 1(17)(a); Sutton v. United Air Lines, Inc., 527 U.S. 471, 482-83 (1999).

297. *See* Kramer & Oakley, *supra* note 177, at 31.

298. *See* N.Y. EXEC. LAW § 292(21). Just as in the ADA or the Massachusetts antidiscrimination statute, the person only needs to fall into one of the categories of "disabled" in the statute, due to the use of the word "or," in order to be able to claim protection under the statute. *See* § 292(21)(a)-(c).

299. *See* § 292(21).

300. Massachusetts was the only state of the three that engaged in any type of interpretation that could be open to criticism. *See* Dahill v. Police Dep't of Boston, 748 N.E.2d 956, 960-63 (Mass. 2000). New York applied the plain language of its statute as it was written, and Rhode Island simply added to the language of its statute. *See* R.I. GEN. LAWS §§ 11-24-2.1, 34-37-3(5)(ii) (2000); Epstein v. Kalvin-Miller Int'l, Inc., 100 F. Supp. 2d 222, 229-30 (S.D.N.Y. 2000). Courts in these two states could not be criticized since it was not the courts that decided that mitigating measures should be ignored. *See id.*

301. *See supra* notes 216-40 and accompanying text.

302. *See Epstein*, 100 F. Supp. 2d at 229 (citing State Div. of Human Rights v. Xerox Corp., 480 N.E.2d 695 (N.Y. 1985)); Sutton v. United Air Lines, Inc., 537 U.S. 471 (1999).

303. *See* Parmet, *supra* note 56, at 71-81. By using the textualist approach, the Supreme Court reached a decision that is more objective than subjective. Giving the words in the text of the statute their true meanings leaves the decision resting on much firmer

The SJC, in making its decision, has left itself open to criticism and claims of judicial activism.[304] A statutory amendment would have been the least controversial way for Massachusetts to address the issue of mitigating measures post-*Sutton*.[305] This action would have cleared up any misleading language in the statute regarding mitigating measures and immediately given a definitive answer to the question.[306]

Another way in which the problem could have been solved without getting the judiciary involved would have been for the MCAD to adopt guidelines similar to those adopted by the EEOC after the decision by the Supreme Court in *Sutton*.[307] This would have had the same effect as a legislative amendment, except that the court must still determine whether the guidelines were a reasonable interpretation of the language of the statute.[308]

The SJC made its decision in *Dahill*, and unless the legislature now makes an amendment to the Massachusetts antidiscrimination statute it will have to be assumed that the court correctly interpreted the intent of the legislature.[309] Whether the court was correct or not does not change the fact that the statute, as shown in this analysis, may be used broadly to cover people with impairments that do not actually limit a major life activity.[310] This result could have been avoided by simply limiting the plaintiff's

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ground than if the Court used the intentionalist approach, which, being entirely subjective, would have left the decision open to far more interpretive criticism. *See id.* at 67-70.

304. *See supra* note 287.

305. *See id.*

306. *See, e.g.*, R.I. GEN. LAWS §§ 11-24-2.1, 34-37-3(5)(ii) (2000). Under these statutes there are no questions of whether mitigating measures are covered or what power the administrative agency had in order to issue the particular guidelines that it did, and thus no judicial interpretation is necessary. *See also* Parmet, *supra* note 56, at 88-90 (discussing the recent rise in textualist/plain language statutory interpretation in the courts).

307. *See* 29 C.F.R. § 1630 (1998) (stating that mitigating measures must be considered when determining whether someone is substantially limited in a major life activity under the first prong of the definition of disability in the ADA).

308. This is an easier question to answer. The analysis can be accomplished by looking no deeper than the plain language of the statute and the guideline. *See supra* notes 157-207 and accompanying text. If they are consistent, then they stand. *See id.* If not, then they could be disregarded and the plain meaning of the statute would govern. *See id.*

309. *See* Knight-Ridder Broad., Inc. v. Greenberg, 511 N.E.2d 1116, 1119 (N.Y. 1987) "[I]t is a recognized principle that where a statute has been interpreted by the courts, the continued use of the same language by the Legislature subsequent to the judicial interpretation is indicative that the legislative intent has been correctly ascertained." *Id.* (citations omitted). *But see* Alfone v. Sarno, 432 A.2d 857, 862-63 (1981) (quoting C. DALLAS SANDS, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION, § 49.10 at 261 (4th ed. 1973). "Legislative silence [is] a 'weak reed upon which to lean.'" *Id.*

310. *See supra* notes 152-270 and accompanying text.

options to suing under one of the other sections of the definition in the statute, under which most, if not all, would certainly be covered.[311]

V. CONCLUSION

The Supreme Judicial Court of Massachusetts decided in *Dahill* that it would protect a broader group of people under the Massachusetts antidiscrimination statute than the federal government protects under the Americans with Disabilities Act.[312] This decision will result in increased strain on precious judicial and administrative resources.[313] The decision was unnecessary because the people protected by the new ruling are not actually substantially limited in any major life activity.[314] The United States Supreme Court decided the same issue in the opposite manner in *Sutton*.[315] Though that decision received substantial criticism, it is truer to the intent of the legislature and to the statutory language.[316] The SJC has missed an opportunity to follow suit, and it will now be up to the state legislature to set the record straight as to whether it intended to include people with mitigated disabilities in its definition of handicapped.

Kevin J. Romano

311. *See supra* notes 208-40 and accompanying text.
312. *See* Dahill v. Police Dep't of Boston, 748 N.E.2d 956, 963-64 (Mass. 2000).
313. *See supra* notes 241-70 and accompanying text.
314. *See supra* notes 168-80 and accompanying text.
315. *See* Sutton v. United Air Lines, Inc., 537 U.S. 471, 481-82 (1999).
316. *See supra* notes 157-240 and accompanying text.

NOTES

Transsexual Prisoners: How Much Treatment is Enough?

SONNY: You said to me that you needed money, and I knew that you needed money! I saw you there lying in the hospital like that ... and I said, shit, man, I got to get this guy some money.

LEON: But I didn't ask you to go rob a bank.

—Bank robber Sonny (Al Pacino) to his preoperative transsexual "girlfriend" Leon (Chris Sarandon) on stealing money for a sex change.[1]

I. INTRODUCTION

Michelle Kosilek is serving a life sentence in a Massachusetts maximum security prison for strangling her wife.[2] When she was convicted in 1993 for first-degree murder with extreme atrocity or cruelty, her name was Robert Kosilek.[3] Soon after entering the prison system in 1993, Kosilek told prison officials he was a woman trapped in a man's body and wanted professional help and treatment.[4] More than thirty-five years ago, thirty years before being incarcerated, Robert Kosilek had been treated briefly with female hormones.[5] In 1992, after legally changing his name to Michelle, Kosilek brought suit against prison officials alleging deliberate

1. DOG DAY AFTERNOON (United Artists 1975).

2. *See generally* Commonwealth v. Kosilek, 668 N.E.2d 808 (Mass. 1996).

3. *See id.* at 808.

4. *See* Kosilek v. Maloney, 221 F. Supp. 2d 156, 158 (D. Mass. 2002). Robert Kosilek legally changed his name to Michelle Kosilek between the time of his indictment and the time of final disposition of the criminal case. *See Kosilek*, 668 N.E.2d at 808 n.1. *See also Kosilek*, 221 F. Supp. 2d at 158 n.1 (recognizing that "it is painful for Kosilek to be referred to as 'he,'" but for the sake of clarity, uses the male pronoun in its opinion).

5. *See Kosilek*, 221 F. Supp. 2d at 163.

indifference to her condition.[6] Kosilek sought to force the Commonwealth of Massachusetts to pay for sex-reassignment surgery (SRS),[7] and if successful, she will be the first prisoner to have done so in the face of almost decades of evolving national precedent.[8]

Kosilek is not alone. Over the last 20 years, numerous lawsuits have been brought addressing a problem few would imagine: the civil rights of transsexuals while in prison.[9] The very specific issue of incarcerated persons claiming they are and should be recognized as belonging to the opposite gender takes on new meaning. Many of the cases involve inmates who want the state to pay for continuing treatments begun before incarceration or for starting treatment when they "discover," upon or after incarceration, that they are "transsexual."[10] There are no easy solutions and neither side in the debate is likely to be satisfied with any resolution.

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6. See *generally* Kosilek v. Nelson, No. 92-12820-MLW, 2000 U.S. Dist. LEXIS 13355 (D. Mass. Sept. 12, 2000) (dismissing plaintiff's suit for money damages against Michael T. Maloney, Commissioner of the Department of Corrections, in his individual capacity, based on doctrine of qualified immunity, and dismissing plaintiff's claims against David R. Nelson, Sheriff of Bristol County, in his official capacity based on lack of sufficient evidence and in his individual capacity based on doctrine of qualified immunity), *aff'd per curiam*, 29 Fed. Appx. 621 (1st Cir. 2002). Kosilek's case went forward on her claim against Commissioner Maloney in his official capacity. *See Kosilek*, 221 F. Supp. 2d at 159.

7. *See Kosilek*, 221 F. Supp. 2d at 159.

8. *See Kosilek*, 2000 U.S. Dist. LEXIS 13355, at *8. As the United States District Court pointed out, "at least since 1996, it has not been clearly established that a transsexual has a constitutional right to any therapy or treatment while incarcerated." *Id.* (citing Maggert v. Hanks, 131 F.3d 670, 671 (7th Cir. 1997)).

9. *See, e.g.*, Cuoco v. Moritsugo, 222 F.3d 99 (2nd Cir. 2000); South v. Gomez, No. 99-15976, 2000 U.S. App. LEXIS 3200 (9th Cir. Feb. 25, 2000); Farmer v. Hawk-Sawyer, 69 F. Supp. 2d 120 (D.D.C. 1999). These cases often garner widespread publicity, likely due to both the public's fascination with sexual issues and its ambivalence over prisoner issues. Newspaper accounts about Kosilek's most recent suits appeared in such places as Salt Lake City, Edinburgh, Bombay, and Winnipeg. *See Convict Files Lawsuit to Demand Money for Sex-Change Operation*, SALT LAKE TRIB., Jan. 9, 2000, at A6, *available at* 2000 WL 3742450; *Jailbird Sues for Sex-Change*, SUNDAY MAIL (Edinburgh), Jan. 9, 2000, at 20, *available at* 2000 WL 2927581; *Man Who Killed Wife Fighting to be Female*, TIMES of INDIA (Bombay), Jan. 10, 2000, *available at* 2000 WL 2551340; *Killer Says He's a Woman Trapped in a Man's Body*, WINNIPEG FREE PRESS, Jan. 9, 2000, at A2, *available at* 2000 WL 2349062.

10. *See, e.g.*, *Cuoco*, 222 F.3d at 99 (holding that refusal to provide estrogen treatment was an objective medical decision); *Gomez*, 2000 U.S. App. LEXIS 3200, at *2 (holding that prisoner receiving female hormones before incarceration should continue to receive them in prison); *Farmer*, 69 F. Supp. 2d at 121 (holding that officials were justified in refusing to continue a transsexual inmates' hormone treatments).

II. THE PROBLEM OF SEXUAL DIFFERENCES AND PRISONERS

A. Transsexuals and Prisoners

In 2001, over 1.4 million American adults were incarcerated in prisons.[11] For better or for worse, transsexuals have limited rights under many federal, state and local laws.[12] When the two issues—the rights of prisoners and the rights of transsexuals—come together, few simple answers exist. This Note will look at the conflict between the rights of transsexual prisoners and the rights of non-incarcerated Americans and how the courts—and society—are dealing with the problems of accommodating two diverse groups with different rights and expectations.

One of the biggest difficulties in any discussion of transsexuals is that, even within the transsexual community and in the literature growing around it, there is no consensus on a single definition of who is a "transsexual."[13] However, over the last twenty years, in the context of the criminal justice system, the issue has arisen at least a dozen times in the United States[14] and it has even been given the name "the jurisprudence of transsexualism."[15] This raises questions about how far prison authorities—

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11. *See* PAIGE M. HARRISON & ALLEN J. BECK, PH.D., U.S. DEPARTMENT OF JUSTICE, PRISONERS IN 2001, at 1, *at* http://www.ojp.usdoj.gov/bjs/pub/pdf/p01.pdf (last visited Mar. 28, 2003). In early 2002, the Commissioner of Correction for Massachusetts said his state had at least three self-identified transsexuals in its prison system. *See* Thanassis Cambanis, *Doctor: Transsexuals in Women's Prison*, BOSTON GLOBE, Feb. 9, 2002, at B1. This may be a case of sensationalism by the newspaper because once a person has SRS, he or she is generally considered to be a member of the opposite gender and not a cross-gender interloper, as the article implies. *See* Reid, *infra* note 13.

12. However, these rights do not appear in many of the most important areas of federal law. For example, the Americans with Disabilities Act specifically excludes transsexuals from its list of protected people. *See* 42 U.S.C. § 12211(b) (2000). "Under this [Act], the term 'disability' shall not include[:] (1) transvestism, *transsexualism*, pedophilia, exhibitionism, voyeurism, [and] gender identity disorders not resulting from physical impairments ...." *Id.* (emphasis added).

13. *See* Dr. Russell Reid, *Psychiatric and Psychological Aspects of Transsexuals*, *in* COUNCIL OF EUROPE, XXIIIrd COLLOQUY ON EUROPEAN LAW 25 (1993).

14. *See, e.g.*, Cuoco v. Moritsugo, 222 F.3d 99 (2nd Cir. 2000); South v. Gomez, No. 99-15976, 2000 U.S. App. LEXIS 3200 (9th Cir. Feb. 25, 2000); Farmer v. Hawk-Sawyer, 69 F. Supp. 2d 120 (D.D.C., 1999). This does not include cases of non-incarcerated transsexuals' rights. *See* James v. Ranch Mart Hardware, 881 F. Supp. 478 (D. Kan. 1995) (finding that employer did not discriminate against transsexual employee); Dobre v. Nat'l R.R. Passenger Corp., 850 F. Supp. 284 (E.D. Pa. 1993) (holding that employer's refusal to pay for treatments is proper).

15. Debra Sherman Tedeschi, *The Predicament of the Transsexual Prisoner*, 5 TEMPLE POL. & CIV. RTS. L. R. 27 (1995). Ms. Tedeschi, like many other commentators on this topic, takes the side of the transsexual prisoners in arguing that prison officials owe

and by extension society itself—have to go in treating inmates for legitimate, but rare, medical conditions.[16]

Although the circuits ruling on this issue have consistently refused to force prison officials—and therefore taxpayers—to pay for costly treatments, lawsuits by transsexual inmates (or those wishing to be classified as such) demanding treatment have not stopped.[17] Moreover, the issue is not confined to the United States. In certain other countries, particularly those with socialized health care systems such as Great Britain and Canada, some inmates have been authorized to receive gender-reassignment surgery.[18]

Prison officials have to deal with many factors in deciding how to treat transsexual prisoners, especially when it comes to weighing the rights of the few transsexual prisoners against the rights of other inmates and the public at large.[19] But, as this Note will show, the arguments of the transsexual prisoners and their supporters are countered by the realities of running prisons, protecting the public, and meting out justice.[20] Most of the self-proclaimed transsexual inmates argue that the refusal of prison officials to treat their condition is an unconstitutional violation of the Eighth Amendment through the concept of "deliberate indifference," an argument that generally fails and which, this Note will argue, deserves to fail.[21]

This Note also argues that in most cases prison officials should be given the same wide latitude in treating transsexuals that they receive in determining the course of ordinary medical treatment for other, non-transsexual inmates. While incarcerated transsexuals have rights, these rights must be weighed against an overriding fact: they are in prison, often for heinous acts, and should not be treated with any more sympathy or concern than any other convicted killer or thief.[22]

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more to transsexuals than the basic standard of care. *See id.* at 28.

16. *See, e.g.*, *Cuoco*, 222 F.3d 99; *Gomez*, 2000 U.S. App. LEXIS 3200; *Farmer*, 69 F. Supp. 2d at 120.

17. *See, e.g.*, Kosilek v. Nelson, No. 92-12820-MLW, 2000 U.S. Dist. LEXIS 13355 (D. Mass Sept. 12, 2000).

18. *See* Dene Moore, *Prison Sex Change Policy on Way: Jailed Transsexual Filed Complaint*, WINNIPEG FREE PRESS, Feb. 16, 2000, at B1, *available at* 2000 WL 2352120.

19. *See infra* Parts V.A. and V.B.

20. *See infra* notes 120-122 and accompanying text.

21. *See, e.g.*, Cuoco v. Moritsugo, 222 F.3d 99 (2nd Cir. 2000); South v. Gomez, No. 99-15976, 2000 U.S. App. LEXIS 3200 (9th Cir. Feb. 25, 2000); Farmer v. Hawk-Sawyer, 69 F. Supp. 2d 120 (D.D.C. 1999).

22. *See, e.g.*, Turner v. Safley, 482 U.S. 78 (1987) (noting that legitimate penal concerns come first when determining whether prison officials' regulations are rational and constitutional).

B. Gender Confusions

Any discussion of transsexuals in prison must start with an overview of the issue of transsexualism. The question of *how* to treat an incarcerated transsexual is not easily resolved because the question of *who* is a transsexual is often difficult to answer.

It is worth examining the sometimes confusing terminology of sex and gender. A transsexual has been defined by one expert as someone who "suffers from a deep and persistent dissatisfaction with his or her anatomical sex."[23] This person, starting as early as childhood, often "repeatedly stated the desire to be, or insistence that he or she is, the other sex."[24] This is not to be confused with a transvestite, who is an individual who dresses in the opposite sex's clothing "primarily for erotic arousal or sexual gratification."[25] Transvestites generally have no gender issues and are typically "heterosexual, married and well-educated males."[26] Transvestites are not to be confused with "drag queens," homosexual men who dress as women for erotic pleasure or for entertainment, but who have no desire to change their genders.[27] The prisoner cases, for the most part, involve men who consider themselves transsexuals or have been diagnosed by a doctor as such and who would like prison officials to pay for them to change their genders, either through hormone treatments or SRS.[28]

Few statistics exist for the number of transsexuals in the United States, let alone the number incarcerated. Reasons for the lack of numbers are that many transsexuals are self-defined, without medical or psychiatric diagnoses, and because of the different types of transsexuals, it is difficult to define the condition with any certainty.[29] To add to the confusion, some

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23. Reid, *supra* note 13, at 25. Even the term "sex" is complicated to define, as medical professionals and courts have used at least seven factors in determining a person's sex: (1) chromosomal makeup, (2) sex organs or gonads, (3) hormones, (4) reproductive organs, (5) external genitalia, (6) secondary sex characteristics (breasts, body hair), and (7) sexual identity or the way a person behaves. *See* Maffei v. Kolaeton Indus., Inc., 626 N.Y.S.2d 391, 394 (N.Y. Gen. Term. 1995).

24. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 537 (4th ed. 1996) [hereinafter MANUAL]. Despite increasing criticism, DSM-IV, as this book is called, is considered the "bible" of mental health professionals, including psychologists and psychiatrists. *See, e.g.*, HERB KUTCHINS & STUART A. KIRK, MAKING US CRAZY: DSM: THE PSYCHIATRIC BIBLE AND THE CREATION OF MENTAL DISORDERS (1997).

25. MILDRED L. BROWN & CHLOE ANN ROUNSLEY, TRUE SELVES: UNDERSTANDING TRANSSEXUALISM 12 (1996).

26. *Id.*

27. *Id.*

28. *See, e.g.*, Farmer v. Hawk-Sawyer, 69 F. Supp. 2d 120 (D.D.C. 1999).

29. *See* Sara Corbett, *When Debbie Met Christina, Who Then Became Chris*, N.Y. TIMES MAG., Oct. 14, 2001, at 84-87. In many states, including Massachusetts, a person may

transsexuals are considered to have changed their gender while maintaining their original genitalia.[30]

One study in the Netherlands estimated that approximately one in 12,000 men suffer from gender confusion.[31] Other statistics indicate that the condition occurs in about one in 30,000 adult males and one in 100,000 females, meaning it affects "much less than 0.01 percent" of the population of the United States.[32] As the statistics show, this is primarily a male issue; research has not uncovered any cases involving incarcerated women wishing to change their gender while in prison.[33]

C. Gender Identity Disorder

Gender Identity Disorder (GID), also sometimes known as gender dysphasia, is a psychological illness wherein a person has strong feelings that his physical gender is the opposite of his true gender.[34] Many transsexuals, if not all, suffer from GID.[35] "In adolescents and adults, the disturbance is manifested by symptoms such as a stated desire to be the other sex, frequent passing as the other sex. ... or the conviction that he or she has the typical feelings and reactions of the other sex."[36]

It is important to note that GID is well-recognized in the mental health community as a legitimate mental condition with physical manifestations.[37] Sex-reassignment surgeries, while once considered "cosmetic" or "elective," have now basically been accepted as genuine treatments by the

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petition a court to change her name and then amend her birth certificate to reflect her new gender. *See* MASS. GEN. LAWS, ch. 46, § 13(e) (2001) (providing "[i]f a person has completed sex reassignment surgery, so-called, and has had his name legally changed by a court ... the birth record of said person shall be amended to reflect the newly acquired sex and name"). *See also* COLO. REV. STAT. § 25-2-115 (2001); KY. REV. STAT. ANN. § 213.121 (2001); CAL. HEALTH & SAFETY CODE § 103425 (2001).

30. *See* Corbett, *supra* note 29 (relating the story of Chris, a woman who took testosterone, had her breasts removed, and changed her driver's license and is now legally considered to be a man, despite still having a vagina).

31. *See* THE HARRY BENJAMIN INTERNATIONAL GENDER DYSPHORIA ASSOCIATION'S STANDARDS OF CARE FOR GENDER IDENTITY DISORDERS, (6th ed. 1994) (hereafter STANDARDS).

32. BROWN & ROUNSLEY, *supra* note 25, at 9.

33. All cited cases involve men. This may be attributable to both the relative rarity of women becoming men and the smaller population of women in prison compared to men. At the end of 2001, women made up only 6.6% of the prison population nationwide. *See* HARRISON & BECK, *supra* note 11, at 6.

34. *See* MANUAL, *supra* note 24, §§ 302-85.

35. *See id.*

36. *Id.*

37. *Id.*

courts that have addressed the issue.[38]

1. Transsexual or Not?

One of the difficulties facing a prison official dealing with a self-proclaimed transsexual inmate is that GID is difficult to diagnose.[39] The standards for diagnosis are flexible and individualized, and even the world's leading transsexual research medical organization, the Harry Benjamin International Gender Dysphasia Association (HBIGDA), admits that "access to treatment, cost of treatment and therapies offered ... differ broadly from place to place."[40]

Although GID is often discussed as it relates to children and teenagers, the HBIGDA agrees that many young people, without treatment, simply "grow out of" their early gender confusion.[41] The HBIGDA also cautions its healthcare professionals that not every person with gender confusion is a transsexual, and requires comprehensive therapy and consultation for all patients before any physical treatments are undertaken.[42] Studies have shown that some patients will "purposely distort their life history" to achieve their goal of being diagnosed a transsexual.[43]

GID is not usually considered by itself a life-threatening illness; however, it is often seen in conjunction with other mental illnesses such as depression and suicidal tendencies.[44] Because GID manifests few physical

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38. *See, e.g.*, Meriwether v. Faulkner, 821 F.2d 408, 412 (7th Cir. 1987) (finding that "[t]ranssexualism is not voluntarily assumed and is not a matter of sexual preference"); Phillips v. Mich. Dept. of Corr., 731 F. Supp. 792, 793 n.2 (W.D. Mich. 1990) (stating that "[t]he Court, out of respect for plaintiff, will use female pronouns, as most parties in this case have done").

39. *See* STANDARDS, *supra* note 31.

40. *Id.* "[W]hen eligibility requirements are stated, they are meant to be minimum requirements ... individual professionals and organized programs may modify them." *Id.* Courts have acknowledged the haziness of the diagnosis. *See Phillips*, 731 F. Supp. at 793 n.2 (noting that gender dysphoria "is a fairly broad psychiatric term describing discomfort and rejection of one's gender").

41. STANDARDS, *supra* note 31.

42. *Id.* Among the examples of people who might think they are transsexual—but are not—include "individuals who have inappropriate sexual impulses toward exhibitionism, rape, molestation, or other antisocial or criminal behaviors ... [or] men with severe erection problems ... who thought that being female might be better than having to live the rest of their lives with their impotence." *Id.* at 106.

43. Reid, *supra* note 13, at 33.

44. *See id.* Prisoners sometimes may act as transsexuals either out of an underlying mental condition or simply to defy authority. *See* Lamb v. Maschner, 633 F. Supp. 351, 354 (D. Kan. 1986) (questioning "whether plaintiff is in fact a transsexual"). "Plaintiff's medical history indicates that he is a nonconformist and receives an 'apparent delight in defying conventions, rules and regulations.'" *Id.* The inmate in *Lamb*, a three-time convicted killer

signs, it is these suicidal feelings and depression that most prison inmates cite as their most pressing concern when petitioning courts for treatment.[45]

2. Treatments

As with defining "transsexual," there is disagreement on the proper treatments for GID, particularly since the length and depth of treatment differs from person to person depending upon the severity of the condition.[46] For the purposes of this Note, the most drastic treatment, SRS, will be spotlighted.[47]

Although other treatments are used, true transsexuals generally desire SRS and a complete change of gender.[48] Initial GID treatments range from the fairly simple, such as wearing the opposite sex's clothes for a feeling of comfort, to the next levels, which involve preparation for a change of gender up to the actual physical removal of genitalia and replacement with the genitals of the opposite gender.[49] Persons diagnosed with GID usually go through three stages of preparation before SRS.[50] The first stage is intensive, frequent psychotherapy, ideally with a counselor, psychologist, or psychiatrist who specializes in such conditions.[51] The second stage, which requires that the patient deal with the condition openly for at least two years, involves living as the opposite sex in public as often as possible.[52] The second stage also includes the administration of either female hormones, such as estrogen or male hormones, such as testosterone,

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serving three life sentences, refused treatment for a testicular tumor and also cut his scrotum, resulting in confinement in the state prison mental hospital. *See id.* "Clearly," the court wrote, "he is presently undergoing some type of mental treatment." *Id.*

45. *See* White v. Farrier, 849 F.2d 322, 323 (8th Cir. 1988). After being refused treatment, the plaintiff "went on hunger strikes, threatened ... suicide, and attempted to castrate himself on four different occasions, using a razor, a sharpened metal cup, glass from his smashed [TV] set and glass from his radio." *Id.* Admittedly, it is sometimes difficult to tell from the cases if the inmate is also suffering from other forms of mental illness. An attorney for the Massachusetts Department of Correction argued that if the fact that GID makes some prisoners "suicidal" is enough to warrant court-ordered SRS, then "any inmate could threaten suicide to blackmail corrections officials into giving them desired medical treatment." Cambanis, *supra,* note 11.

46. *See generally* STANDARDS, *supra* note 31.

47. The first Sex Reassignment Surgery (SRS) was performed in 1931, but the practice did not become widespread until the 1970s. *See* Reid, *supra* note 13, at 31. Though the procedure was originally called (and is still popularly referred to as) "sex-change," the modern clinical term (SRS) is used in this Note. *See id.*

48. *See* Reid, *supra* note 13, at 32.

49. *See* STANDARDS, *supra* note 31, at 14-15

50. *See id.*

51. *See id.*

52. *See id.*

so that the patient is literally undergoing a "psychologically unbalancing" second puberty.[53]

During these stages, the treating physician must be certain that the gender dysphasia is real and that "[t]he disorder is not a symptom of another mental disorder;"[54] that is, that the person genuinely has deep-seated, irreversible issues with his gender and that the feelings of dysphasia are not manifestations of paranoia, schizophrenia, or other afflictions.[55] It is not unheard-of for an inmate to bring up the issue of GID as an excuse or explanation for some criminal behavior.[56]

Finally, after the rigorous early stages, the patient may be approved to undergo SRS, a complicated, expensive procedure.[57] In men, this surgery involves removal of most of the penis and the entire testes, with the remaining penis turned "inside-out" and then grafted to the newly constructed vaginal opening.[58] A woman "becoming" a man has her reproductive organs removed in a full hysterectomy, her breasts removed in a mastectomy and then attachment of a penis and scrotum, created from her own skin.[59]

It is important to note that experts consider an individual to have had a sex-reassignment even without the altered genitalia, which means, for example, that a person could look entirely like a woman from head to toe—

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53. Reid, *supra* note 13, at 36. *See also* Corbett, *supra* note 29.

54. STANDARDS, *supra* note 31, at 5. A famous fictional example of a mentally ill person wrongly believing he is a transsexual is "Buffalo Bill," the deranged killer who murders and skins women to fashion himself a "woman suit." THOMAS HARRIS, THE SILENCE OF THE LAMBS 153-54 (St. Martin's Press 1988). "Buffalo Bill" is eventually exposed and killed after authorities search the names of people repeatedly rejected for SRS, "because he's not a transsexual ... [h]e just thinks he is and he's puzzled and angry because they won't help him." *Id.* at 154.

55. *See id. See also* BROWN & ROUNSLEY, *supra* note 25, at 9 "It is necessary to control psychiatric disorders before dealing with the transsexualism so that they do not interfere with the clear thought process necessary for a patient's honest self-examination in therapy." *Id.*

56. A recent example of this is the case of Sandy-Jo Battista, who blamed his rape of a child—for which he served almost 20 years in prison—on his alleged GID. *See* Gary V. Murray, *Sex Offender Wants to be Castrated*, WORCESTER TELEGRAM & GAZETTE, Oct. 19, 2001, at B1. Battista, formerly known as David Megarry Jr., offered to pay for his own castration and sex-reassignment surgery as a way of avoiding possible confinement for life in Bridgewater State Hospital under Massachusetts' sexual offender law. *See id.*

57. *See* Dr. J. Joris Hage, *Medical Requirements and Consequences of Sex Reassignment Surgery*, *in* COUNCIL OF EUROPE, XXXIIrd COLLOQUY ON EUROPEAN LAW 103 (1993).

58. *See id.* at 103-15.

59. *See id.* at 103-15 (1993). Other procedures include: for women, male hormones; for men, breast implants and body hair removal. *See id.*

except that she would have a penis and testicles (or alternately, he could be a masculine-appearing man with a vagina.)[60]

The Harry Benjamin International Gender Dysphoria Association describes a lengthy process for people hoping for gender-reassignment surgery that includes long-term psychological counseling, long-term use of hormones and an extended period of time living as the opposite sex.[61] The Association also recommends extensive post-operative therapy, as well as close monitoring by a physician and mental health expert at all stages of the process.[62] Hormone therapy for post-operative transsexuals usually continues for life.[63]

3. Further Complications

Making the issue of transsexual inmate lawsuits even more complicated is that even pro-inmate commentators admit that no one is sure under what theory of law transsexuals should be protected.[64] For example, because the idea of gender is complicated, and especially within the gender studies movement, debatable, there is "no consensus on whether transsexuals should be protected on the basis of sex, transsexual identity, or not at all."[65]

In other words, although courts are now recognizing GID as a legitimate disorder,[66] no court has ever called transsexuals a part of a "suspect class," which precludes strict scrutiny on the basis of GID.[67] Although the government may not discriminate on the basis of sex,[68] because transsexuals are often, for example biologically male and physically female (or somewhere in-between), it is unlikely a federal court would use sex discrimination as a basis for finding a transsexual inmate's rights have been

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60. *See id.* at 112 (1993). For an example of the latter, see Corbett, *supra* note 29.

61. *See* STANDARDS, *supra* note 31, at 5.

62. *See id.*

63. *See id.* at 16. Apparently, it is not unheard of for a post-operative transsexual to regret the surgery later, especially relating to the inability to have natural children, since neither sex after the surgery is equipped to conceive a child. *See id.*

64. *See* Kari E. Hong, *Categorical Exclusions: Exploring Legal Responses to Health Care Discrimination Against Transsexuals*, 11 COLUM. J. GENDER & L. 88, 108 (2002). Ms. Hong's article, while not specifically addressing the issue of transsexual prisoners, covers the topic as a part of a larger discussion of health care. As previously discussed, even experts fail to agree on a standard definition of gender, which can be defined as physical, mental, and emotional among other definitions. *See supra* note 23 and accompanying text.

65. *Id.*

66. *See* Meriwether v. Faulkner, 821 F.2d 408, 412 (7th Cir. 1987).

67. *See* Kirkpatrick v. Seligman & Latz, Inc., 475 F. Supp. 145, 147 (D. Fla. 1979) (finding a transsexual to be biologically male and therefore not part of a suspect class).

68. *See* Reed v. Reed, 404 U.S. 71, 76 (1971).

violated.[69] Apparently, no easy answers exist, as even the pro-transsexual commentators seem to agree.[70]

III. COSTS

It is important to recognize that SRS is expensive and time-consuming, and probably out of reach for the average American.[71] Estimates vary on the costs, which depend entirely on how complex a procedure is chosen, but the estimate for surgery alone for a woman to become a man is at least $50,000.[72] Private insurance plans uniformly exclude it.[73] Medicare does not pay for SRS.[74] The Civilian Health and Medical Program of the Uniformed Services, which serves the families of all members of the military, also excludes this surgery from its coverage.[75]

Medicaid, which serves lower-income Americans and which is administered by the states, is a more complicated issue. Medicaid, as run by the states, routinely excludes SRS from its list of covered procedures.[76] Courts in three states—California, Minnesota and Iowa—have ruled that their state Medicaid plan cannot categorically deny payment for SRS.[77]

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69. *See* Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1084 (7th Cir. 1984) (overruling a district court's ruling that discriminating against a transsexual was discrimination on sex-related grounds). Complicating matters further is a transsexual who "becomes" the opposite gender outwardly, through hormones and a new birth certificate, but who does not have SRS and is therefore still physically the original gender. *See, e.g.*, Corbett, *supra* note 29.

70. *See* Hong, *supra* note 64. The author claims that "a growing number of U.S. courts" are ruling for transsexuals in discrimination cases. *See id.* at 120. However, she cites only two cases, one of which, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), is more than 13 years old. *See id.* at 120. The other, more recent case, *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000), deals only with a transsexual prisoner's alleged assault by a guard and not with transsexual rights in general. This lack of support seems to call into doubt the idea that courts are moving toward sweeping transsexual rights, including transsexual prisoners' rights.

71. *See* BROWN & ROUNSLEY, *supra* note 25, at 9.

72. *See* Corbett, *supra* note 29. In fact, the reason Chris decided not to receive male genitals was because of the cost. *See id.*

73. *See, e.g.*, Blue Cross/Blue Shield of Massachusetts HMO Blue Plan, exclusions, 2001 (specifically excluding "services and supplies that are related to sex change surgery").

74. *See* Medicare Program, National Coverage Decisions, 54 Fed. Reg. 34555, 34572 (Aug. 21, 1989).

75. *See* 32 C.F.R. § 199.4(e)(7) (2002).

76. *See, e.g.*, ALASKA ADMIN. CODE, tit. 7, § 43.385(a)(1) (2003); ILL. ADMIN. CODE, tit. 89, § 140.6(*l*) (2003); 55 PA. CODE § 1163.59(a)(1) (2003).

77. *See* Smith v. Rasmussen, 57 F. Supp. 2d 736 (N.D. Iowa 1999) (holding that patient already had some of the SRS procedure prior to applying for public assistance); Pinneke v. Preisser, 623 F.2d 546 (8th Cir. 1980) (holding that denial of treatment for GID

Despite these rulings, many states' Medicaid statutes still specifically exclude this kind of surgery.[78] One notable exception of insurance coverage for SRS in this country is the City of San Francisco, which in 2001 extended insurance coverage to pay up to eighty-five percent of gender reassignment surgery, at an estimated cost of $37,000 for men and $77,000 for women, for municipal employees and their dependents.[79] Beyond the few exceptions, most agree it is extremely difficult to pay for a low or middle income American to finance a sex-reassignment operation.[80]

While commentators bemoan the lack of coverage for transsexual treatments for non-incarcerated people, the simple fact that payment is not available to most is enough to categorically deny the treatments for inmates.[81] Obviously, in a prison setting, the costs of treatment and SRS would be paid by taxpayers. This raises the risk, succinctly if facetiously stated by Federal Judge Richard Posner, that "[w]e do not want transsexuals committing crimes because it is the only route to obtaining a cure."[82] While there are no documented cases validating Judge Posner's

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was inconsistent with goals of Medicaid program); J.D. v. Lackner, 145 Cal. Rptr. 570 (Cal. Ct. App. 1978) (holding that SRS surgery was not cosmetic); Doe v. State Dep't of Pub. Welfare, 257 N.W.2d 816 (Minn. 1977) (holding that state's standards for determining needs were too high a burden for patients). This apparently does not mean that the states *must* pay for the surgery, but simply that they must consider each situation individually rather than as part of a blanket exclusion. In a related example, Massachusetts, which refuses to pay for SRS-related procedures such as breast augmentation, was recently ordered by a court to pay for breast reconstruction for an indigent mastectomy patient whose original request was rejected because she had undergone SRS at her own expense more than twenty-five years earlier. *See* Beger v. Acting Comm'r, Div. of Med. Assistance, 11 Mass. L. Rptr. No. 31, 745, 747 (Mass. Super. Ct. May 1, 2000).

78. *See, e.g.*, ALASKA ADMIN. CODE, tit. 7, § 43.385(a)(1) (2003); ILL. ADMIN. CODE, tit. 89, § 140.6(*l*) (2003); 55 PA. CODE § 1163.59(a)(1) (2003). In fact, based on court rulings, it is fair to assume that all but three states *categorically* refuse to pay for SRS for indigent patients.

79. *See San Francisco First City to Pay for City Workers' Sex Changes*, CHI. TRIB., May 1, 2001, at 11. Gender reassignment surgery is more complicated and therefore more expensive for women because of the increased work needed to create male genitalia. *See* Corbett, *supra* note 29, at 85.

80. *See* Maggert v. Hanks, 131 F.3d 670, 671 (7th Cir. 1997).

81. *See* Hong, *supra* note 64, at 99-100. Ms. Hong criticizes the fact that non-incarcerated transsexuals have almost no legal recourse when insurance companies, Medicaid or other providers refuse to cover their medical needs because transsexuals are not covered by the ADA or other non-discrimination laws. *See id.* It seems almost ironic that incarcerated transsexuals have legal recourse—through civil rights suits, however unsuccessful—that their non-inmate counterparts do not.

82. *Hanks*, 131 F.3d at 672. The same concern has been raised in Great Britain, which apparently has begun paying for inmates' SRS. *See* Jo Butler, *Kidnapper Allowed Sex-Change on NHS*, BIRMINGHAM POST (U.K.), Mar. 13, 1999, at 6.

worry, it begs the question of how far inmates will go to get what they want.[83]

IV. WHO'S WHAT?

A. Treating Inmates

The strict, if inexact, requirements for treating patients with GID raise serious issues about the practicality of treating inmates for GID.[84] First, because dealing with this condition is a long-term problem (many GID patients report having dealt with the condition since childhood), it suggests careful monitoring of inmates prior to and during their incarcerations.[85] Second, the amount of time, money, and expertise required could strain prison officials.[86] Third, the problem of safety—imagine a male inmate with breasts and women's clothing in a maximum security men's prison—are possibly insurmountable without massive outlays of money and manpower.[87]

B. Helping the "Poor" Transsexual Inmate

Because this Note argues that transsexual inmates deserve little more than a humane minimum of treatment or concern—which is what most non-transsexual inmates receive—it is worth examining other commentators' discussions of the issues. The few prior commentators on this issue tend to take the side of the transsexual inmate, calling her existence a "predicament"[88] or claiming that the transsexual is "trapped in Sing-Sing."[89] These commentators focus on the transsexuals' problems or the difficulties in dealing with "gender identity," almost completely

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83. In the 1975 film "Dog Day Afternoon," loosely based on a true story, Al Pacino played a man who unsuccessfully attempted to rob a bank to get the money to pay for his transsexual lover's gender-reassignment surgery. *See supra* note 1.

84. *See supra* notes 46-63 and accompanying text (discussing the generic treatment for transsexuals, which usually requires extensive counseling, hormone treatment, and an extended period of living publicly as the desired gender).

85. *See* BROWN & ROUNSLEY, *supra* note 25.

86. *See, e.g.*, O'Lone v. Shabazz, 482 U.S. 342 (1987) (allowing officials to keep inmates from attending religious services because the prison was overcrowded and control was difficult). Courts routinely take into consideration the needs of prison officials to control large numbers of potentially violent inmates, sometimes allowing them to go much farther than any outside official might have the right to do. *See id.* at 349.

87. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520 (1979) (describing the minimum level of comfort officials are responsible for providing).

88. Tedeschi, *supra* note 15.

89. Darren Rosenblum, *"Trapped" in Sing-Sing: Transgendered Prisoners Caught in the Gender Binarism*, 6 MICH. J. GENDER & L. 499 (2000).

removed from the glaring fact that these "patients" are inmates, convicted of crimes.[90] It seems likely that these authors are far outside the mainstream of the general public and the courts.[91]

C. Putting Transsexuals First

One commentator's argument focuses on the idea that transsexual inmates' rights and concerns should come before the needs of the prison officials, the other prisoners, and the public at large.[92] This commentator argues "[i]n cases where security issues arise, prison authorities often *force* transgendered people into segregation. [This] ... do[es] not provide sufficiently comfortable or safe environments for a transgendered inmate."[93] The commentator also worries that segregating inmates "excludes the prisoner from equal protection in prison life."[94] These arguments, while ostensibly humane, ignore the reality that the inmate *is* an inmate. The commentator admits that the cost of his preferred method of caring for the transsexual inmates, including extensive therapy, would be high because it would require specially trained medical professionals; these professionals apparently would be hired to serve only the transsexual inmates.[95]

That commentator and others have argued that all self-proclaimed preoperative transsexual inmates in men's prisons—likely all of the transsexuals currently incarcerated—should be allowed to wear women's clothing, use makeup and cosmetics and generally act as women would act, all as a part of their therapy.[96] This argument has often been rejected by

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90. *Id.* at 533.

91. It is not a stretch to assume that the lack of public outrage over the treatment of transsexuals indicates at least apathy on the part of most Americans to the transsexuals' plights. *See* Maggert v. Hanks, 131 F.3d 670, 671 (7th Cir. 1997).

92. *See* Rosenblum, *supra* note 89, at 528.

93. *Id.* at 528 (emphasis added).

94. *Id.* at 529

95. *See id.* Rosenblum also advocates special wards for transsexuals, suggesting that the costs to prisons would be low. *Id.* at 534-35. He writes that if a jurisdiction has too few transsexuals to place in a special ward (which seems likely), a prison system may work with another jurisdiction to create dedicated transsexual wards. *See id.* at 535. Rosenblum's arguments, however, ignore the time, effort and potential red tape involved in specially accommodating one or a few inmates in a prison system exclusive of the rights of thousands of other inmates.

96. *See id.* One pro-transsexual commentator, interestingly, admits that the loose boundaries of transsexualism create a risk that non-transsexuals will self-identify as transsexuals for less-than-noble motives. *See* Leane Renée, *Impossible Existence: The Clash of Transsexuals, Bipolar Categories, and Law*, 5 AM. U. J. GENDER & L. 343, 383-84 (1997). The commentator writes that she "recognize[s] the potential for a slippery slope ... [t]hat is, the possibility that all-female prisons will be overrun by thousands of Maxwell

courts, which defer to the prison officials who argue that allowing male inmates to wear women's clothes would create a security risk.[97]

Courts uniformly reject these arguments in the name of both deference to prison officials' expertise in dealing with inmates and as showing unfair preference for one inmate's needs over the needs of all other inmates in the same facility.[98] Courts are correct to prevent prisoners from seeking special rights such as different clothes or make-up. This could raise concerns not only of safety,[99] but also the possibility that other inmates would then take advantage of the system and try to seek "special rights," filing suits alleging equal protection violations because the transsexuals receive preferential treatment.[100] While concern for a troubled or mentally ill inmate is humane, the realities of running a prison system with thousands of convicted criminals trumps the needs of an individual.[101]

D. Inmates versus Prisons

Another commentator argues that because the only medically recognized

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Klingers, or Jack the Rippers in lipstick, or transvestites, who will enter women's prisons and rape inmates to an extent more frequent than what already occurs. *Id.* While Ms. Renée seems to be overstating the concern, raising theoretical fears of thousands of "fake" women in the nation's female prisons, her point is certainly relevant.

97. *See* Hudson v. McMillian, 503 U.S. 1, 9 (1992). "Because routine discomfort is part of the penalty that criminal offenders pay for their offenses against society, only those deprivations denying the 'minimal civilized measure of life's necessities' are sufficiently grave." *Id.* (citations omitted). Or, as another court stated, "[c]osmetic products are not among the minimal civilized measure of life's necessities." Murray v. United States Bureau of Prisons, 106 F.3d 401, 403 (6th Cir. 1997). The same court also dismissed the idea of allowing a prisoner to have some say in his or her choice of clothing. *See id.*

98. *See, e.g.*, Star v. Gramley, 815 F. Supp. 276 (C.D. Ill. 1993) (holding that a theoretical First Amendment right to express one's self in any way desired is overridden by legitimate security concerns); Lamb v. Maschner, 633 F. Supp. 351 (D. Kan. 1986) (holding that a self-identified pre-operative transsexual murderer serving three life sentences could not be transferred to a women's prison, despite the "relief" it might bring him, because doing so would violate the rights of the female prisoners).

99. *See supra* note 87 and accompanying text (discussing some of the risks).

100. This is one of the issues Congress attempted to address in the 1995 Prison Litigation Reform Act (PLRA). *See* 42 U.S.C. § 1997e. The PLRA requires inmates to exhaust all state administrative remedies before filing a federal civil rights claim. *See id.* Some inmates take advantage of their constitutional rights by claiming to need special treatment because of their self-proclaimed religious beliefs. *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).

101. For example, Massachusetts has roughly 10,100 inmates in its prison system. *See* MASSACHUSETTS DEPARTMENT OF CORRECTION, ANNUAL REPORT, 2001, p. iii. It is important to remember that each of these inmates must be constantly monitored, fed, clothed, and given medical and dental treatment as required, at a cost of about $36,100 per inmate, per year. *See id.*

way to completely cure transsexuals' mental and physical problems is through SRS, prisons have a moral duty to provide such treatments.[102] Denial of the treatment, it is argued, is a violation of the Eighth Amendment.[103] The focus in that Note is that transsexual prisoners are unduly suffering by not receiving the most definitive treatments available for their conditions and that the state is behaving unconstitutionally.[104]

Transsexual advocacy groups, understandably, work toward equal rights for transgendered people.[105] The groups and their members seek equal rights in workplaces, marriage, and other social and political arenas sought not only by sexual minorities, but by every minority group.[106] The debate over the rights of transgendered individuals in the general population is beyond the scope of this Note.[107] Some groups work specifically on the problems of transgendered prison inmates, an effort worth addressing here.[108]

The International Conference on Transgender Law and Employment (ICTLEP) was one of the first to look at this issue. Its "Policy for the Imprisoned, Transgendered," gives a good overview of the basic clash between transsexual prisoners' advocates, prison authorities, and society.[109] The group's policy statement, first issued in 1993, is worth examining because it acts as both a microcosm of the conflict and a macrocosm of the entire issue.[110] The organization insists on several rights that on their face

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102. *See* Anita C. Barnes, *The Sexual Continuum: Transsexual Prisoners,* 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 599, 645-46 (1998).

103. *See* U.S. CONST. amend. VIII. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id. See also* Barnes, *supra* note 102, at 645 (asserting that the refusal to provide treatment beyond psychotherapy is cruel and unusual punishment).

104. *See* Barnes, *supra* note 102, at 637-38.

105. Some examples of these groups are Parents and Friends of Lesbians and Gays (PFLAG) and the Intersex Society of North America. *See* BROWN & ROUNSLEY, *supra* note 25, at n.3.

106. *See id.* at 212.

107. *See, e.g.*, INTERNATIONAL CONFERENCE ON TRANSGENDER LAW AND EMPLOYMENT POLICY, *History of the International Conference on Transgender Law and Employment Policy, Inc.*, *at* http://www.transgenderlegal.com/ICTLEP (last visited May 6, 2003) [hereinafter ICTLEP]. ICTLEP is a Texas-based group headed by a female attorney, who was born a man, which specializes in the rights of transsexuals in the general public. *See id.*

108. *See generally id.*

109. *See* ICTLEP, *Policy for the Imprisoned, Transgendered* (Aug. 28, 1993), *at* http://www.transgenderlegal.com/imprison1.htm (last visited Apr. 24, 2003).

110. *See id.* The policy states, in its entirety:

I. Segregation in the interest of the inmate's safety and dignity shall not deprive any inmate from the rights, privileges and facilities afforded to other general population inmates.

conflict with both society's theoretical ideals and with the mundane details of running prisons.[111] For example, the organization favors cosmetics and women's clothes for inmates, and also suggests that transsexual inmates not be treated differently from other inmates in terms of recreation and intra-prison rights.[112] This, unfortunately, is one of the main contradictions in the advocacy groups' positions.

Groups such as ICTYLEP worry about transsexuals' "isolation" from the prison community, while insisting that they be allowed to dress as women and at the same time they be protected from assaults or rapes by other inmates.[113] It seems obvious that without massive outlays of money and personnel, these two concerns are mutually exclusive.[114] After all, the primary concern of prison officials is maintaining their facilities safely and hopefully, humanely.[115] They are not responsible for making the prisoners happy.[116]

II. Access to counseling shall be afforded all transgendered inmates and shall include peer support group participation by those from inside the institution and those from outside where possible. Counseling professionals should be qualified with respect to the current standard in gender science.

III. Transgendered inmates shall be allowed to initiate or to continue hormone therapy, electrolysis and other transgender treatment modalities as prescribed by involved professionals.

IV. The transgendered inmate shall have access to clothing, personal items and cosmetics that are appropriate to the gender presentation of that inmate and appropriate within the institutional setting.

V. Special care shall be taken not to make a spectacle of transgendered inmates to the amusement of others, or to deny or to deprive transgendered inmates of their dignity.

Id.

111. *See id.*

112. *See id.*

113. *See id.*

114. For an example of a court's thinking on this problem, see *Star v. Gramley*, 815 F. Supp. 276 (C.D. Ill. 1993) (denying transvestite prisoner's request to wear women's clothing for several reasons, including the risk of sexual assault, the risk of ridicule and violence against the dress-wearing male inmate, and the fact that it would unduly burden prison officials by requiring them to provide cosmetics and female clothing through its canteen for the benefit of one inmate). *Gramley* serves as a microcosm of the entire issue of the rights of transsexuals in prison.

115. *See* U.S. CONST. amend. VIII.

116. *See* Rhodes v. Chapman, 452 U.S. 337, 349 (1981) (stating that "the Constitution does not mandate comfortable prisons, and prisons ... which house persons convicted of serious crimes, cannot be free of discomfort"). In one well-known case, the allegedly transsexual inmate seeking transfer to a women's prison—for privacy reasons—was in prison for torturing and killing a woman and then having intercourse with her corpse. *See*

E. The Issues

In addressing the problem of transsexual inmates, several different issues come into play. First, would refusing to provide an allegedly transsexual inmate with extensive GID counseling, hormone treatments or, in the extreme, SRS, be considered cruel or unusual? Second, are prison officials required to do everything possible to make inmates comfortable and happy? Finally, would withholding expensive and time-consuming treatment—especially for a convicted murderer or robber—be repugnant to society's conscience? I would suggest that in light of society's mores and the common law, the answer is no to all three of these questions.[117]

While the Supreme Court has decided only one case involving a transsexual prisoner, on narrow grounds having little or nothing to do with the gender issues of the plaintiff,[118] it has consistently ruled that inmates' rights may be infringed or even ignored to serve the larger purposes of the penal system.[119] Commentators and groups advocating for increased rights of inmates—transsexual or not—tend to treat the Court's decisions as punitive measures rather than seeing them in light of the larger societal picture. The fact that prisoners are being punished for crimes against society and not for their beliefs or their gender-identity issues seems to be lost on the most radical activists and commentators.[120]

Long v. Nix, 877 F. Supp. 1358, 1360 n.2 (S.D. Iowa 1995). The court deliberately placed this information in its decision because it was "relevant due to his request to be housed in a women's prison." *Id.*

117. *See, e.g.*, Maggert v. Hanks, 131 F.3d 670, 671-72 (7th Cir. 1997).

118. *See generally* Farmer v. Brennan, 511 U.S. 825 (1994). The Supreme Court ruled that in the case of a transsexual inmate, Dee Farmer, who had been raped by a fellow inmate, the prison officials would be liable for not protecting her only if she could prove that the officials "[knew] of and disregard[ed] an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists ...." *Id.* at 837. The Court remanded the case to the lower court for reconsideration using that standard and the district court dismissed most of the claim. *See* Farmer v. Brennan, 11 F.3d. 668 (7th Cir. 1992).

119. *See, e.g.*, Procunier v. Martin, 416 U.S. 396 (1974) (holding that certain censorship of inmate mail was acceptable for penological reasons); Bell v. Wolfish, 441 U.S. 520 (1979) (granting prison officials great latitude because they are better equipped to make decisions than the Court).

120. *See generally* Barnes, *supra* note 102 (going to great lengths to make the very fact of the prisoners' confinements, apparently the results of lawful convictions by judges or juries, cruel and unusual in itself.)

V. WHOSE RIGHTS? INMATES' DESIRES VERSUS OFFICIALS' DUTIES

A. Every Prisoner's Rights

Underlying any examination of transsexual inmates' rights is the question of inmates' rights in general. The Supreme Court has repeatedly ruled that inmates have fewer overall rights than non-incarcerated people, and that while they retain certain basic rights, other rights may be infringed in the name of public policy.[121] The Court has specifically stated that while prisons may not be inhumane or cruel, "the Constitution does not mandate comfortable prisons."[122] Another federal court was even more direct, in a case involving a prisoner complaining about second-hand smoke, ruling "[a] prisoner's guarantee against cruel and usual punishment does not entitle him to better conditions in the institution than he would have in freedom."[123]

In *Turner v. Safley*,[124] the Court laid out a four-prong balancing test used in determining whether a prison regulation or a decision regarding a prisoner's life was constitutional.[125] The four prongs inquire: (1) whether there is a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it;[126] (2) whether a restriction or regulation is reasonable and whether other ways of expressing one's rights exist;[127] (3) how accommodation of a prisoner's rights affects the guards and other inmates and "the allocation of prison resources generally;"[128] and (4) whether the absence of ready alternatives prove the reasonableness of the prison's rules.[129] These factors indicate the level of deference that the Supreme Court gives to prison officials who make good faith efforts to accommodate inmates, and demonstrates the Court's

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121. The seminal case is *Turner v. Safley*, 482 U.S. 78 (1987), in which the Supreme Court held that while prison officials could monitor and limit an inmate's mail, the same officials could not prevent an inmate from marrying because keeping out contraband in mail was a legitimate penological goal, but stopping inmates' marriages served no real correctional purpose. *See id.* at 89. *See also Procunier*, 416 U.S. 396 (holding that certain censorship of mail was acceptable for penological interests).

122. Rhodes v. Chapman, 452 U.S. 337, 349 (1981).

123. Abdul-Ahad v. Top Tobacco Co., No 99-C-4067, 1999 U.S. Dist. LEXIS 16288, at *9 (N.D. Ill. Oct. 6, 1999) (dismissing prisoner's alleged Eighth Amendment claim based on his cellmate's smoking).

124. 482 U.S. 78 (1987).

125. *See id.* at 89-90.

126. *Id.* at 90 (quoting Block v. Rutherford, 468 U.S. 576 (1984) (upholding a ban on contact visits)).

127. *See id.* (citing Jones v. N.C. Prisoners' Union, 433 U.S. 119, 131 (1977)).

128. *Id.*

129. *See id.*

understanding of the constraints placed on prison officials.[130]

As Justice O'Connor wrote, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[131] While this decision was topically different from the issue addressed here, its holding—that prison officials have almost unlimited latitude in making good faith decisions—directly applies.[132] Transsexual inmates, as will be seen, are seeking rights that other inmates do not have and that conflict with penological interests.[133]

Several state and federal cases have given prison officials the right to restrict such "sacred cows" as religion, free speech, and privacy.[134] For example, the Supreme Court has ruled that prison officials can restrict inmates' attendance of religious services that were conducted in buildings where inmates of their classification were not allowed to enter.[135] In *Bell v. Wolfish*, the Supreme Court held that prison officials could restrict the materials inmates receive in an effort to maintain security and safety.[136] In a Massachusetts case, the Supreme Judicial Court (SJC) upheld the right of prison officials to monitor and restrict prisoners' telephone calls.[137]

Federal courts, as well as the SJC, subscribe to this view in almost all situations. The SJC, in upholding a prison regulation limiting inmates' rights to telephone use, stated "the standard of review governing a facial challenge to a regulation promulgated by a government agency is highly deferential."[138] Deference to officials, who are in theory experts on prison issues, is essential to any court's decision.[139] For this reason, the Supreme Court ruled that "courts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function of the criminal justice system."[140] In a decision dealing with

130. *See Turner,* 482 U.S. at 89-90.

131. *Id.* at 89. Justice O'Connor went on to write that "prison administrators ..., and not the courts [are] to make the difficult judgments concerning institutional operations." *Id.* at 89 (quoting *Jones*, 433 U.S. at 128 (alterations in original)).

132. *See id.* at 90.

133. *See id.*

134. *See, e.g.*, O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987) (restricting religious rights); Bell v. Wolfish, 441 U.S. 520 (1979) (allowing prisons to restrict inmate mail); Jackson v. Hogan, 446 N.E.2d 692 (Mass. 1983) (restricting inmate mail for safety reasons).

135. *See generally O'Lone*, 482 U.S. 342.

136. 441 U.S. 520 (1979).

137. *See* Cacicio v. Sec'y of Pub. Safety, 665 N.E.2d 85 (Mass. 1996).

138. *Id.* at 769.

139. *See* Rhodes v. Chapman, 452 U.S. 337, 349 n.1 (1981).

140. *Id.* at 352.

an even more basic issue—food—the Fifth Circuit sided with authorities in raising the level of violation prisoners must prove to show constitutional indifference.[141] The United States Court of Appeals for the Fifth Circuit held that prison officials were cruel only if they denied prisoners the "minimum civilized measure of life's necessities"[142] and that prisoners had to prove a certain level of personal intentional indifference on the part of officials in caring for the inmates in their charge.[143]

It must be noted, however, that transsexual inmates are entitled, as are *all* inmates, to a certain level of protection from bodily harm, whether inflicted by prison officials or by other inmates. For this reason, and despite the worries of transsexual-rights commentators, prisons have a responsibility to protect transsexuals, even if it means segregating them from the population at large.[144]

Prison officials have the right—indeed, the responsibility—to take necessary steps to protect prisoners from harm.[145] But as with other inmate claims, the courts have to ensure that the prisoner is being treated differently for a valid security issue before finding that the transsexual is somehow being discriminated against.[146]

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141. *See* Talib v. Gilley, 138 F.3d 211 (5th Cir. 1998). The inmate in *Talib* claimed that he missed meals because of various rules infractions. *See id.* The court almost flippantly dismissed the plaintiff's argument, because "[m]issing a mere one out of every nine meals is hardly more that that missed by many working citizens over the same period." *Id.* at 214 n.3.

142. *Id.* Deliberate indifference will be addressed in Part VI, *infra.*

143. *See id.* On a less vital note, prisoners often complain about many so-called violations of their rights that in actuality are little more than minor annoyances that minimize their legitimate complaints in the eyes of the public. *See, e.g.*, *Pay to Have it Your Way*, THE DAILY RECORD (Baltimore) Feb. 8, 2002, at 1. In York, Pa., jail officials required inmates to pay for ketchup, mustard and relish packets, and also for sugar and Equal, citing waste from discarded packets. *See id.* An American Civil Liberties Union official said he doubted the prisoners had a legal case: "I don't think anybody has a right to condiments," he said. *Id.*

144. *See, e.g.*, Hudson v. McMillian, 503 U.S. 1, 8 (1992). This has especially been found to be true when the violators are prison officials. *See id.* "When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated." *Id.* at 9.

145. Farmer v. Brennan, 511 U.S. 825 (1994). In this case, Farmer, a male transsexual who looked like a woman, was not protected and was assaulted sexually by other inmates. *See id.* at 830.

146. For example, in *Murray v. United States Bureau of Prisons*, No. 95-5204, 1997 U.S. App. LEXIS 1716, at *4 (6th Cir. Jan. 28, 1997), a transsexual inmate with female breasts who claimed she was being unfairly confined to her cell was in reality often confined to her cell because she refused to wear a brassiere. The court agreed with prison officials that ordering Murray to wear a bra, no matter how uncomfortable, related to legitimate security concerns. *See id. See also supra* note 96 and accompanying text (discussing prisoners' rights to choose clothing and to wear makeup).

B. Prisoners' Rights to Medical Care

Similar limitations on personal freedoms apply to medical care in prison. Along with giving up certain rights and allowing the infringement of others, prison inmates have little power to determine the course of their medical treatments.[147] Prison officials and medical personnel may make medical decisions based not only on an inmates' medical needs but on the needs and limitations of the penal system.[148] The Supreme Court has long held that an inmate must show there was reckless disregard for an inmate's health or safety in trying to prove a claim.[149] Moreover, prisoners have no right to make a claim based on a difference of opinion in the type, duration, or effectiveness of the medical treatment they receive—a right possessed by non-incarcerated people.[150]

Inmates may not take issue with the treatments provided as long as the treatments are medically appropriate—even if the inmate would prefer a different plan or type of treatment.[151] For example, even in the case of a serious illness such as AIDS, a doctor makes the ultimate decision of which course an inmate's treatment will take.[152] If an inmate-patient is unhappy with his treatment, he must show more than a disagreement with the doctor.[153] As the Ninth Circuit stated, "differences in judgment between an inmate and medical personnel do not constitute cruel and unusual punishment."[154]

The most important argument against the claim that many of the transsexual prisoners make is that the doctors who are treating them are offering the wrong treatments or are prescribing treatments that are not what they would choose for themselves.[155] But, these prisoners have no

147. Wallis v. Baldwin, 70 F.3d 1074, 1076 (9th Cir. 1995).

148. *Id.*

149. *See Farmer*, 511 U.S. 836-40.

150. *See, e.g.*, Sanchez v. Vild, 891 F.2d 240, 242 (9th Cir. 1989); Wright v. Collins, 766 F.2d 841, 849 (4th Cir. 1985); Harris v. Murray, 761 F. Supp. 409, 414 (E.D. Va. 1990).

151. *See* Burton v. Cameron County, Texas, 884 F. Supp. 234, 238-39 (S.D. Tex. 1995).

152. Taylor v. Barnett, 105 F. Supp. 2d 483, 488 (E.D. Va. 2000) (refusing an AIDS-infected prisoner from receiving the most state-of-the-art medications when the more basic treatments were effective enough to keep him reasonably healthy).

153. *Id.*

154. Yang v. Rowland, No. 89-55689, 1992 U.S. App. LEXIS 10849 (9th Cir. May 7, 1992). The most important factor in determining whether an inmate's grievances rise to the constitutional level is deliberate indifference. *See id.*

155. *See, e.g.*, Cuoco v. Moritsugo, 222 F.3d 99 (2nd Cir. 2000); South v. Gomez, No. 99-15976, 2000 U.S. App. LEXIS 3200 (9th Cir. Feb. 25, 2000); Farmer v. Hawk-Sawyer, 69 F. Supp. 2d 120 (D.D.C. 1999). The prisoners in these cases claimed their treatments for GID were unsatisfactory.

right to determine a course of treatment; unlike non-incarcerated people, they may no more choose their treatment than they may choose their doctor or insurance plan.[156] And as will be discussed in Part VI.B of this Note, *infra*, a disagreement with a prison doctor is far from enough to prove that somehow the prison and its officials have been indifferent to the prisoner's needs.[157]

C. Transsexual Prisoners and Medical Care

Transsexual inmates obviously are entitled to the same level of care as any other inmate. This is not in dispute. Extrapolating the rights of transsexuals from the cases involving non-transsexuals in prison makes it clear that transsexual inmates have little or no argument that the state should pay for SRS or other extreme treatments.

The seminal transsexual inmate case, coming almost twenty years after the first of its type, is *Maggert v. Hanks*.[158] Judge Posner wrote in *Maggert* that the transsexual plaintiff, while certainly entitled to medical care—as are all inmates—was not entitled to estrogen treatments.[159] Judge Posner reasoned that prisons are not required to give an inmate "medical care that is as good as he would receive if he were a free person, let alone an affluent free person."[160] Furthermore, Judge Posner explained that because the Supreme Court has given prison officials wide latitude in determining which treatments are to be given inmates, the same applies in a case with a transsexual.[161] "The total cost [of SRS] ... can easily reach $100,000 ... [thus] [w]ithholding from a prisoner an esoteric medical treatment that only the wealthy can afford does not strike us as a form of cruel and unusual punishment."[162]

Judge Posner's reasoning, which has since been followed in a number of other cases,[163] is logical and is likely to become the norm. Judge Posner directly recognized the now overwhelming acceptance of GID as a

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156. *See, e.g.*, Reihley v. McGill, No. 92-016490, 1993 U.S. App. LEXIS 4596, at *5 (9th Cir. Mar. 4 1993).

157. *See infra* Part VI.B.

158. 131 F.3d 670 (7th Cir. 1997).

159. *See Maggert*, 131 F.3d at 672.

160. *Id.* at 671.

161. *Id.*

162. *Id. Compare Maggert*, 131 F.3d at 670 *with* Taylor v. Barnett, 105 F. Supp. 2d 483, 488 (E.D. Va. 2000) (upholding judge's refusal to order the most extreme AIDS treatments for an inmate who could be treated with less expensive medicines, even if they were not as "successful" in treating the symptoms of AIDS).

163. *See, e.g.*, Kosilek v. Nelson, No. 92-12820-MLW, 2000 U.S. Dist. LEXIS 13355 (D. Mass. Sep. 12, 2000); Wolfe v. Commonwealth, No. 98-1132, 1999 U.S. Dist. LEXIS 22493 (W.D. Pa. Apr. 13, 1999).

legitimate, serious illness,[164] but more importantly, he ruled that a prison is under no constitutional obligation to offer a prisoner more than the most basic treatment for this or any other medical or psychological condition.[165]

Tasha Maggert, the plaintiff in this case, also faced a seemingly insurmountable hurdle in his quest for treatment: a psychiatrist hired by the prison denied that the prisoner needed female hormones and diagnosed him not as a transsexual, but as someone whose "sexual identity is polymorphous and ... sexual aims ambiguous."[166] As discussed above,[167] this is one of the difficulties of providing extensive treatment in a penal setting.[168] Since GID is difficult to diagnose and because the standards for treatment are so varying, prison officials would have a difficult time accommodating a patient who claims he is transsexual.[169]

A more recent case explains what has become the norm in treating these inmates. In *Farmer v. Hawk-Sawyer*,[170] the court ruled that an inmate in a federal prison could not challenge the Federal Bureau of Prison's policy of maintaining transsexual inmates at the level of "gender change" that existed before incarceration, with no expansion of the treatment necessary.[171] The prison, the court ruled, had the right to require proof of previous gender treatment before even considering whether to offer the treatment to the inmate.[172] Other prison systems follow similar guidelines, either officially or unofficially, of keeping transsexual prisoners at the same level of treatment—or lack of treatment—as when they entered the

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164. *See* Maggert v. Hanks, 131 F.3d 670, 671 (7th Cir. 1997). "Gender dysphoria ... is a serious psychological disorder, as we know because the people afflicted by it will go to great lengths to cure it if they can afford the cure." *Id.*

165. *Id.* "[I]t does not follow that prisons have a duty to authorize the hormonal and surgical procedures that in most cases would at least be necessary to 'cure' a prisoner's gender dysphoria." *Id.*

166. *Maggert*, 131 F.3d at 671.

167. *See supra* notes 84-88 and accompanying text.

168. *See supra* notes 84-88 and accompanying text.

169. *See supra* notes 84-88 and accompanying text.

170. 69 F. Supp 2d 120 (D.D.C. 1999).

171. The Federal Bureau of Prisons policy on transsexuals in its entirety reads:

It is the policy of the Bureau to maintain a transsexual inmate at the level of change existing upon admission. Should the [Bureau] determine that either progressive or regressive treatment changes are indicated, the Medical Director must approve these prior to implementation. The use of hormones to maintain secondary sexual characteristics may be continued at approximately the same levels as prior to incarceration (with appropriate documentation from community physicians/hospitals) and with the Medical Director's approval.

UNITED STATES BUREAU OF PRISONS, HEALTH SERVICES MANUAL, PS 6000.05, ch. 6, § 11 (1997), *available at* http://www.bop.gof/progstat/6000_005.pdf (last visited Apr. 8, 2003).

172. *See Farmer*, 69 F. Supp. 2d at 128.

system.[173] This is done mainly in keeping with the Supreme Court's rulings on prison medical issues and later cases, all of which entitle prisoners to a minimum basic level of medical care but little beyond that.[174] Only a complete failure to provide such basic treatment is an unnecessary and wanton infliction of pain "wholly inconsistent with contemporary standards of decency and humanity."[175]

Medical authorities seem to be in agreement that the only "true" cure for GID is SRS, and that psychotherapy and long-term hormonal use is little more than a palliative.[176] However, the long-standing precedent is that prison officials are not required to cure every illness or to make an inmate "whole" again, but rather to treat the inmate's illness in a medically recognized way in an effort to avoid needless suffering.[177] This directly affects the arguments of transsexual prisoners and their advocates, who argue that the state has a responsibility to cure them of their GID, optimally through SRS.[178] This argument, however, is specious because prisons are

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173. Massachusetts Department of Correction follows this policy. *See* Kosilek v. Maloney, 221 F. Supp. 2d 156, 159 (D. Mass. 2002).

174. *See* Estelle v. Gamble, 429 U.S. 97, 103 (1976).

175. *Id.* at 103.

176. *See* Maggert v. Hanks, 131 F.3d 670, 671 (7th Cir. 1997) (acknowledging that "[t]he implication is that less drastic ... treatments are available for this condition. However, we have found only one report of successful nonradical treatment of gender dysphoria") (referring to B.K. Puri & I. Singh, *The Successful Treatment of a Gender Dysphoric Patient with Pimozide*, 30 AUSTRALIAN N. ZEALAND J. PSYCH. 422 (1996)).

177. *See, e.g.*, Cuoco v. Moritsugo, 222 F.3d 99 (2nd Cir. 2000) (finding refusal to provide estrogen treatment was an objective medical decision); South v. Gomez, No. 99-15976, 2000 U.S. App. LEXIS 3200 (9th Cir. Feb. 25, 2000) (holding that prisoner receiving female hormones before incarceration should continue to receive them in prison); Farmer v. Hawk-Sawyer, 69 F. Supp. 2d 120 (D.D.C. 1999).

178. *See Maggert*, 131 F.3d at 670. Courts have also ruled that cost may be taken into consideration by officials as a factor in determining depth of treatment. *See* Ralston v. McGovern, 167 F.3d 1160, 1162 (7th Cir. 1999) (stating that prisoners were entitled to a "civilized minimum" of care, and the "civilized minimum is a function both of objective need and of cost"). The Seventh Circuit also commented that treatments may be withheld if the treatments were "esoteric, experimental or expensive interventions, ... especially if the side-effects of the condition are not life-threatening." *Id.* (citing *Maggert*, 131 F.3d 670, 671). As discussed earlier, GID, while uncomfortable and serious, is not in itself considered a life-threatening condition such as cancer or AIDS. *See supra* notes 42-45 and accompanying text. In an analogous situation, the Federal Bureau of Prisons, which maintains the nation's federal prisons, has since the early 1980s generally refused to provide organ transplants for its prisoners. STATEMENT OF THE FEDERAL BUREAU OF PRISONS, Nov.18, 1998 *at* http://www.bop.gov (last visited Apr. 1, 2003.) The Bureau medical director makes the ultimate decision, which is based on several factors, including "whether there are alternative medical treatments available, the cost of the procedure and whether the inmate can defray any of these costs, the security issues involved and the nature of the

not required to offer transplants or optimal treatments for other illnesses.[179] To suggest that refusal to initiate treatment for GID, especially when no evidence of prior treatment exists, or to require SRS, is somehow unconstitutional, misreads years of precedent.[180]

Courts require real proof of constitutional violation, proof that is not easily documented or even alleged.[181] As the next section demonstrates, most transsexual inmates are unable to prove the most important factor in determining a constitutional violation: deliberate indifference on the part of prison officials and prison medical personnel.[182]

VI. DELIBERATE INDIFFERENCE

A. The Arguments

One factor that almost all transsexual inmate cases have in common is the argument used against the prison officials who refuse to provide the desired treatment. In most cases, the prisoners allege that prison officials refused to allow the treatment because of deliberate indifference, an issue that determines whether an inmate's complaint rises to the constitutional level.[183] The standard for deliberate indifference as defined by the Supreme Court is fairly clear, but it is worth examining in detail because most of the cases applying the standard support the argument that transsexual prisoners are entitled to no less—and no more—than any other inmate with a medical condition.[184]

B. Deliberate Indifference Defined

The Supreme Court has, over the course of almost forty years, made clear its requirements for proving deliberate indifference as cause for finding cruel and unusual punishment in an Eighth Amendment context.

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procedure." *Id.* The policy is based on the standard of care in the community, and "as community standards change, the medical care ... that is provided to inmates changes as well." *Id.* The Eleventh Circuit upheld this policy, rejecting claims that it was cruel and unusual punishment to require an inmate requiring a transplant to provide proof of financial ability to pay for the treatment. *See* Fernandez v. United States, 941 F.2d 1488, 1493 (11th Cir. 1991).

179. *See supra* note 61 and accompanying text.

180. *See supra* note 153 and accompanying text.

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

182. *See infra* Part VI.

183. For cases alleging deliberate indifference, see Cuoco v. Moritsugo, 222 F.3d 99 (2nd Cir. 2000) and South v. Gomez, No. 99-15976, 2000 U.S. App. LEXIS 3200 (9th Cir. Feb. 25, 2000).

184. *See, e.g.*, Estelle v. Gamble, 429 U.S. 97 (1976).

Basically, an inmate must show more than mere suffering, and certainly more than a lack of comfort, to prove that prison officials are violating his constitutional rights.[185] The Court's standard requires that "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."[186] In the major inmate cases, the courts almost always rule in favor of prison officials, because the threshold for proving a constitutional violation is so high that few instances of "unsatisfactory" medical treatment reach that level.[187]

In 1976, in *Estelle v. Gamble*, the Supreme Court reversed a Fifth Circuit ruling allowing an inmate to sue prison officials because he did not receive enough pain medication from a prison work-related back injury.[188] Citing earlier cases, the Court stated that while the Eighth Amendment originally applied only to torture and other heinous forms of prison punishment, the more recent interpretation is to hold repugnant to the constitution punishments which are "incompatible with the evolving standards of decency that mark the progress of a maturing society."[189] The Court wrote that prison officials have an obligation under the Eighth and Fourteenth Amendments to provide medical treatment to inmates under their "protection" and that failure to do so, in the worst cases, would be akin to "torture" or a lingering death.[190]

The Court did not specify the quality or depth of medical treatment required, but only that some treatment must be given to prisoners.[191] It is important to note that the Court kept the bar high for prisoners alleging

185. *See id.* This was the seminal case defining deliberate indifference in a prison setting. *See id.*

186. *Id.* at 106.

187. *See, e.g.*, *Estelle*, 429 U.S. 97 (1976); Trop v. Dulles, 356 U.S. 86 (1958); Wellman v. Faulkner, 715 F.2d 269 (1982); Gregg v. Georgia, 428 U.S. 153 (1976). All of these cases deal with the issue of cruel and unusual punishment and what standards must be used to determine if the state's treatment of an inmate reaches this level.

188. *See Estelle*, 429 U.S. at 97.

189. *Id.* at 102 (citing *Trop*, 356 U.S. at 101).

190. *See id.* Also, a certain irony inherent in any discussion of the quality or depth of prisoners' health care is that prisoners complain about the care they receive at the same time about 41.2 million *unincarcerated* Americans have no health care at all. *See* LEIGHTON KU, CENTER ON BUDGET AND POLICY PRIORITIES, *The Number of Americans Without Health Insurance Rose in 2001 and Appears to be Continuing to Rise in 2002*, Oct. 8, 2002, *at* http://www.cbpp.org/9-30-02health.pdf (last visited Apr. 30, 2003).

191. *See Estelle*, 429 U.S. at 97. This case is still relied upon by inmates complaining about the treatment they receive. *See, e.g.*, Suckrum v. Goord, No. 98-CV-0198E(H), 1999 U.S. Dist. LEXIS 5128 (W.D.N.Y. Apr. 6, 1999) (prisoner demanding bone marrow transplant for leukemia). For a discussion of the issue of transplants as an analogy for SRS, see *infra* notes 217-220.

constitutional violations.[192] "A medical decision not to order an x-ray, or like measures, does not represent cruel and unusual punishment."[193] In other words, prisoners can question medical decisions—as long as some treatment is offered—only on grounds of medical malpractice, which is a state tort claim and not a concern of the Supreme Court.[194]

The Court clarified its deliberate indifference standard in 1994 in *Farmer v. Brennan.*[195] Writing for the Court, Justice Souter laid out a two prong test: first, the "deprivation alleged must be, objectively, 'sufficiently serious;'" and second, it must be an "unnecessary and wanton infliction of pain [to] implicate[] the Eighth Amendment."[196] More importantly, the Court refused to create an objective test for deliberate indifference, instead holding "a prison official cannot be found liable ... for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety."[197] *Farmer*, while still offering inmates a chance to seek recourse, is also another decision—with no dissents—that limits the rights of transsexual inmates to look for relief by claiming prison officials have ignored their medical needs.[198] The key factor that makes *Farmer* work, and the one which commentators criticize, is the idea of knowledge;[199] in other words, unless a prison official has *actual knowledge* of a dangerous condition or threat to an inmate, the official cannot be held liable.[200] *Farmer* gives great latitude to

192. *See Estelle*, 429 U.S. at 107.

193. *Id.*

194. *See id.*

195. 511 U.S. 825 (1994).

196. *Id.* at 834 (citing Wilson v. Seiter, 501 U.S. 294, 297-98 (1991)).

197. *Id.* at 838. Justice Souter also wrote "the Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual punishments." *Id.*

198. *See id.* One inmates' rights commentator argues that *Farmer* helps inmates, but cites mostly a concurring opinion by Justice Blackmun. *See* Marjorie Rifkin, *Farmer v. Brennan: Spotlight on an Obvious Risk of Rape in a Hidden World*, 26 COLUM. HUM. RTS. L. REV. 273. Courts continue to rely on various factors in determining deliberate indifference, and as the Supreme Court seemed to prefer in *Farmer*, look at each case subjectively. *See* Farmer v. Hawk-Sawyer, 69 F. Supp. 2d 120 (D.D.C. 1999).

199. *See* James J. Park, *Redefining Eighth Amendment Punishments: A New Standard for Determining the Liability of Prison Officials for Failing to Protect Inmates from Serious Harm*, 20 QUINNIPIAC L. REV. 407, 452-56 (2001) (arguing that the *Farmer* standard should be scrapped in favor of a "duty to protect" standard that would look subjectively at each case to determine if the prison officials *should* have known of danger, not whether they did know). Mr. Park compares his suggested standard to the one required of landowners vis-à-vis their duty to *invitees*. *Id.* at 457-58.

200. *See* Farmer v. Brennan, 511 U.S. 825, 844 (1994). "Because ... prison officials who lacked knowledge of a risk cannot be said to have inflicted punishment, it remains open to the officials to prove that that they were unaware even of an *obvious* risk to inmate health

prison officials, who may escape liability if they can show they were unaware of the danger to an inmate.[201]

While medical treatment of inmates is one area in which the courts do not automatically defer to officials' judgment, [202] courts also have ruled that the prisoner must show more than mere negligence or dissatisfaction with the type of care given.[203] The Tenth Circuit ruled that deliberate indifference is marked by "proving there are such systematic and gross deficiencies in staffing, facilities, equipment, or procedures that the inmate population is effectively denied access to adequate medical care."[204]

Some federal courts have judged the standard differently, ruling that "an official may be held liable if he or she unacceptably and consciously chooses an easier and less effective treatment to the plaintiff's detriment."[205] However, this seems incongruent with other circuits' decisions allowing such factors as costs to be taken into consideration when determining a course of treatment for an inmate.[206]

Deliberate indifference is worth discussing because it shows that while the courts do not take denial of medical treatment to prisoners lightly, they also make it exceedingly difficult for an inmate to show that such a denial of care exists. The case law seems to show that for the courts to find deliberate indifference to an inmate's needs, the official indifference must be so extreme that it is obvious from the facts of the case.[207] The cases with

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or safety." *Id.* (emphasis added).

201. *See id. Farmer* even goes so far as to relieve officials of liability if they should have known of a risk, but honestly did not, or if they tried to avert a dangerous situation but failed to do so in time. *See id.* "Whether one puts it in terms of duty or deliberate indifference, prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause." *Id.* at 845.

202. *See* Todaro v. Ward, 565 F.2d 48, 52 (2nd Cir. 1977).

203. *See* Ramos v. Lamm, 639 F.2d 559, 575 (10th Cir. 1980). Even in the case of serious kidney disease, the Eighth Circuit ruled that a prisoner could not force officials to provide a kidney transplant when kidney dialysis, while not a cure, at least kept the inmate alive. *See* Barron v. Keohane, 216 F.3d 692, 693 (8th Cir. 2000).

204. *Id.*

205. Suckrum v. Goord, No. 98-CV-0198E(H), 1999 U.S. Dist. LEXIS 5128, at *2 (W.D.N.Y. Apr. 6, 1999) (citing Chance v. Armstrong, 143 F.3d 698, 703 (2nd Cir. 1998) (alleging that prison dentist should have filled diseased teeth rather than extract them)).

206. *See, e.g.*, Maggert v. Hanks, 131 F.3d 670, 672 (7th Cir. 1997).

207. In *Wellman v. Faulkner*, 715 F.2d 269 (7th Cir. 1983), the court found that Indiana's prison system medical care was so deficient that it was obviously a violation of the Eighth Amendment. *See id.* at 271-72, 275. For example, the doctors at Indiana State Prison at Michigan City were recent Vietnamese immigrants with no English comprehension, and the position of staff psychiatrist had gone unfilled for more than two years, leaving mentally ill inmates in the hands of psychiatric aides. *See id.* at 272. Another example of deliberate indifference involved a doctor who injected an inmate with penicillin

egregious violations of constitutional rights contrast sharply with the cases most often brought by transsexual inmates and show why refusals to fund SRS or other extreme medical measures do not rise to constitutional violations.

In addition, the Supreme Court also ruled that the deliberate indifference standard requires that the prisoner must "allege facts sufficient to indicate a culpable state of mind on the part of prison officials in order to demonstrate deliberate indifference."[208] In other words, the Court raised the standard even higher, obviously from the belief that prisoner suits over medical issues had to reach a certain standard of "badness" before they could be considered as constitutional violations.[209]

It is also important to note that the Supreme Court, in the 1976 case reinstating the death penalty,[210] reiterated the proposition that one of the factors used to decide the constitutionality of a punishment—and by extension the conditions of incarceration—is the "standards of decency" argument; that is, would the majority of the population support such a punishment?[211]

Clearly, even without exact poll figures, studies or statistics, one may

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despite knowledge of the inmate's penicillin allergy and then refused to treat the resulting allergic reaction. *See* Thomas v. Pate, 493 F.2d 151, 158 (7th Cir. 1974), *cert. denied sub nom.* Thomas v. Cannon, 419 U.S. 879 (1974) (mem.). Contrast these cases with *Estelle v. Gamble*, 429 U.S. 97, 107 (1976), in which the inmate did not make a successful case for deliberate indifference because he had been seen by medical personnel seventeen times in a three-month period. The Court stated that if the doctor failed to correctly treat an illness or otherwise acted negligently, the correct cause of action would be a malpractice suit in state court, but certainly not a constitutional rights case in federal courts because negligence is not the same as indifference. *See id.* at 105-06.

208. Rose v. Vasquez, No. C-93-2402, 1994 U.S. Dist. LEXIS 3218, at *3 (N.D. Cal. Mar. 14, 1994) (paraphrasing Wilson v. Seiter, 501 U.S. 294 (1991)).

209. In *Wilson*, Justice Scalia wrote that deliberate indifference required the Court to address not only the severity of the claims, but also the situation in which the alleged violation occurred (i.e., not during a riot when officials' concerns were elsewhere), and the subjective thinking of the officials in making decisions about health care. *See id.* at 303-04. In an earlier case, in what the critical concurrence by Justice White dismissed as "dicta," the Court ruled that "[i]t is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause." *Id.* at 310 (quoting Whitley v. Albers, 475 U.S. 312, 319 (1986)).

210. *See* Gregg v. Georgia, 428 U.S. 153 (1976). The Court reinstated the states' right to impose the death penalty after having outlawed it because of flaws in the penalty's applications under the Eighth and Fourteenth Amendments. *See* Furman v. Georgia, 408 U.S. 238 (1972)

211. *See Gregg*, 428 U.S. at 179. In the case of the death penalty, the Court noted that despite more than 100 years of debate over the penalty's value and its fairness, "it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction." *Id.*

determine that the prohibitions on treatments for indigent transsexuals are supported by the majority of Americans, especially since the prohibitions are determined by elected officials.[212] Whether one finds the prohibitions and the attendant lack of obvious sympathy for transsexuals to be rational or not, no evidence exists that public officials are somehow ignoring a public outcry or disregarding the voters' wishes in proscribing public funds from being used to treat transsexuals, whether free or incarcerated.[213]

An analogous situation, and one which could have direct impact on the futures of GID inmates, is organ transplants for prisoners. California, in early 2002, began a nationwide debate over the quality and depth of prison medical care when a two-time felon serving a fourteen year sentence for robbery received a heart transplant at a cost of $1 million.[214] California officials cited *Estelle v. Gamble* and a 1996 federal court case in justifying the transplant.[215] A columnist raised the issue that certainly will be on many peoples' minds as the issue arises more often, namely, that the inmate will be released from prison early because of his transplant (a so-called "compassionate release") so that "[t]aking up a life of crime could be the smartest thing this guy ever did."[216]

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212. *See, e.g.*, ALASKA ADMIN. CODE, tit. 7, § 43.385(a)(1) (2001); ILL. ADMIN. CODE, tit. 89, § 140.6(*l*) (2001); 55 PA. CODE § 1163.59(a)(1) (2001). These are all statutes passed by a state legislature, theoretically at least, after public hearing and discussions.

213. Though "Letters to the Editor," opinion columns, and newspaper editorials are far from scientific or legal proof of the public's views, reactions to Michelle Kosilek's request for SRS from a Massachusetts prison provide an interesting look into the minds of at least a few. A Boston columnist ridiculed Kosilek's efforts, warning that Massachusetts would "become a ... laughingstock" if her SRS was funded. Brian McGrory, *A Test Case for a Change,* BOSTON GLOBE, June 13, 2000, at B1. A Quincy, Massachusetts newspaper's headline demonstrates another opinion. *See Editorial: A Stupid and Unusual Inmate Ploy*, PATRIOT-LEDGER, June 10, 2000, at 30. In another editorial, a writer sarcastically said that Kosilek had no right to be a woman, because the woman he killed no longer had any rights at all. *Editorial: This One's a No-Brainer*, BOSTON HERALD, Jan. 7, 2000, at 20.

214. *See* Mitchell Landsberg, *Prisoner Received Heart Transplant: Total Amount Associated with Treating the Convicted Robber Could Hit $1 Million*, L.A. TIMES, Jan. 26, 2002, at 1A.

215. *See* Jackson v. McIntosh, 90 F.3d 330 (1995) (holding that California's refusal to offer a prisoner a kidney transplant might violate his Eighth Amendment rights). California spent $663 million on medical care for 156,000 inmates, an average cost of $5,000 per inmate. *See* Jim Wasserman, *Prisoner's Transplant Renews Debate*, ASSOCIATED PRESS, Jan. 30, 2002.

216. Steve Lopez, *Doin' Time with a New Ticker*, L.A. TIMES, Jan. 28, 2002, at B1. Mr. Lopez bemoans the lack of health care for the unincarcerated person to the relatively free care prisoners receive. *See id.* A spokesman for the non-profit National Commission on Correctional Health Care predicted that the number of liver transplants will rise in future years because of the number of inmates with Hepatitis C who will need new livers. *See* Landsberg, *supra* note 214, at A1.

Earlier law review articles have taken the tack that prisoners deserve transplants to keep them alive, despite the fact that the cost of a transplant is often beyond what a free American can afford.[217] One commentator disingenuously argues that rather than lower inmates to the medical treatment level of the poorest non-incarcerated Americans, society should work on raising the level of treatment of the poor to the inmates' level.[218]

Transplants for inmates make an effective counterpoint to the issue of inmate SRS because of their similar costs, their requirements of continuing treatment after the surgery, and the public's seeming disapproval.[219] While the ethics of inmate transplants are a larger issue beyond the scope of this Note, the similarities are enough to make the case against prisoner SRS stronger.

More importantly, despite the personal trauma GID may cause to an incarcerated person, no medical evidence exists that the condition by itself is life-threatening.[220] While almost no one disputes anymore that GID is a legitimate illness when accurately diagnosed[221]—which is neither easy nor foolproof—it cannot be argued that it rises to the level of serious heart disease or leukemia, where without a relatively specific treatment such as a heart or kidney transplant, the patient will certainly die.[222]

As the Supreme Court's rulings have made abundantly clear, inmates are *not* entitled to the same state-of-the-art treatments or top-of-the-line care that a non-incarcerated person would receive.[223] In fact, only when the officials are recklessly indifferent and provide no care or grossly inferior care, producing "physical torture or a lingering death,"[224] are they liable under the Eighth and Fourteenth Amendments. This is because the Court

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217. *See, e.g.*, Jessica Wright, *Medically Necessary Organ Transplants for Prisoners: Who is Responsible for Payment?* 39 B.C. L. REV. 1251 (1998).

218. *See id.* at 1291. While this is an admirable goal, it has little to do with the issue of inmate health care. Somewhat gratuitously, the author suggests that while inmates *must* receive transplants, prison officials may at least *ask* the inmates to pay for the treatment, even if the prison ends up paying in the end. *See id.*

219. Annual follow-up costs for the heart transplant patient are about $15,000. *See* Landsberg, *supra* note 214, at A1. About 4,119 patients are now waiting for a new heart to keep them alive. *See id.* Public reaction to the transplants is negative, as evidenced by a newscast contrasting the fates of the California inmate with a young New York man who had to borrow $150,000 to be placed on the heart transplant list and who has no guarantee that he will survive long enough to have a transplant. *See* NBC NIGHTLY NEWS (television broadcast, Jan. 31, 2002).

220. *See supra* notes 50-53 and accompanying text (discussing impact of GID on individuals).

221. *See supra* Parts I-V.

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

223. *See* Estelle v. Gamble, 429 U.S. 97, 103-05 (1976).

224. *Id.* at 103 (citing *In re* Kemmler, 136 U.S. 436, 447 (1890).

considers such a gross denial of treatment to be a form of cruel and unusual punishment, obviously a violation of the Eighth and Fourteenth Amendments.[225] Ultimately, the courts have left the decisions up to the doctors, who are judged to have been acting properly as long as they used good faith in making diagnoses and treatment decisions.[226]

As long as prison officials give the transsexual prisoners some medical treatment, and especially in cases where they continue the hormone treatments begun before incarceration, one would be hard-pressed to argue a constitutional violation.[227] Just as prison officials are not expected to provide the best treatment for all prisoners, they should not be expected to provide the best for transsexual inmates, especially when not even experts on GID can agree on what represents the best treatment or even who is exactly a transsexual.[228]

VII. JUST LIKE EVERYONE ELSE

As this Note has demonstrated, case law, statutes, and public policy make it clear that incarcerated transsexuals or alleged transsexuals have no constitutional, statutory, or legal rights to receive SRS or any other treatment besides the minimum level needed to prevent unnecessary suffering.[229] This part of this Note will synthesize the existing cases and laws to show that for a number of reasons, prison inmates who call themselves transsexuals should receive no more or no less than any other inmate with a non-life-threatening chronic condition.

Far from being inhumane, as some commentators and transsexual-rights advocates insist, this policy makes sense in a world with overcrowded prisons, limited financial resources, and the strong desire of the public to see lawfully convicted inmates serve out their sentences in less-than-comfortable conditions.[230]

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225. *See id.*

226. *See* White v. Farrier, 849 F.2d 322, 327 (8th Cir. 1988). "Prison officials do not violate the Eighth Amendment when, in the exercise of their professional judgment, they refuse to implement a prisoner's requested course of treatment." Long v. Nix, 86 F.3d 761, 765 (8th Cir. 1996) (citing Kayser v. Caspari, 16 F.3d 280, 281 (8th Cir. 1994)).

227. For example, the Federal Bureau of Prisons policy specifically provides continuing treatment to transsexual inmates at the level at which they were being treated before incarceration, but without any escalation of treatment. *See supra* note 146 and accompanying text.

228. *See supra* Part II.B.

229. *See supra* Parts I-V.

230. *See* Michael Cameron Friedman, *Cruel and Unusual Punishment in the Provision of Prison Medical Care: Challenging the Deliberate Indifference Standard*, 45 VAND. L. REV. 921, 934-35 (1992) (reluctantly admitting that the public often resents prisoners, who at the very least receive free food, housing and medical care, because so many non-

This note does not argue that transsexual inmates should be ignored, nor does it condone violence against these inmates. GID is, of course, not a choice, but a recognized medical and psychiatric condition, deserving of care.[231] But transsexual inmates, like all inmates, deserve less sympathy because of their crimes.[232] Following the years of precedent should provide transsexual inmates with the minimum of treatment to prevent suffering but without risking safety and institutional order and expending taxpayer dollars to provide treatment unavailable to most on the outside.[233]

First, the courts have often stated that the Constitution does not require comfortable prisons.[234] This defuses inmates complaining about their lack of comfort while incarcerated, especially when male inmates request transfer to women's facilities.[235] Second, male transsexual inmates are wrong in expecting to receive women's clothing or cosmetics to use in prison,[236] even if they believe it will alleviate their suffering. Allowing transsexual prisoners a choice of clothing could create serious security issues and possibly suits from other inmates who are not permitted to choose their attire.[237]

Prison officials should continue to treat a transsexual inmate at whatever level of treatment she was receiving before incarceration—to a point. Courts have ruled, and some prison systems agree, that to avoid needless suffering, this is the only prudent course of action.[238] This policy should not extend to paying for SRS, for safety, medical and ethical reasons.[239]

A. Prison Officials' Discretion

Transsexual prisoners who demand hormones, women's' clothes, make-

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incarcerated Americans lack all three).

231. *See* Meriwether v. Faulkner, 821 F.2d 408 (7th Cir. 1987).

232. *See supra* notes 89-95 and accompanying text.

233. *See supra* notes 64-76 and accompanying text.

234. Rhodes v. Chapman, 452 U.S. 337, 349 (1981). *See also supra* notes 108-109 and accompanying text.

235. *See* Long v. Nix, 877 F. Supp. 1358 (S.D. Iowa 1995) (refusing to grant the wish of a self-identified transsexual inmate, serving a life sentence for murder, to be placed in a women's facility where he could dress as a female). "[T]he Supreme Court found that a ... prisoner was not entitled to due process protections upon the discretionary transfer to a substantially less agreeable prison even where the transfer resulted in a 'grievous loss.'" *Id.* at 1367 (citing Meachum v. Fano, 427 U.S. 215 (1976)).

236. *See supra* note 90.

237. *See supra* notes 79-80.

238. *See supra* notes 163-164 (discussing this issue).

239. *See supra* Parts IV.A-C and note 171. *See also supra* note 45 and accompanying text (discussing risks of blackmail should SRS become an option for inmates); *supra* notes 211-216 (discussing analogous situation of inmate organ transplants).

up, an ultimately SRS are unfairly seeking remedies unavailable to other inmates in different situations.[240] Some of these remedies are, of course, also unavailable to the average American without a large personal outlay of money.[241] Inmates in state and federal facilities are uniformly refused or constrained in various constitutional rights offered to the non-incarcerated, including free expression, religious observance, freedom of association, and freedom from searches and seizures.[242] These are rights that if taken from a non-incarcerated American would certainly lead to findings of constitutional violations.[243]

It stands to reason, then, that inmates calling themselves transsexuals, whether officially diagnosed or not, should receive only the amount of treatment necessary to keep them from unduly suffering.[244] In most cases, this involves, at most, continuing hormone treatments for a diagnosed transsexual at pre-incarceration level to prevent withdrawal symptoms, but no escalation of the treatments or new treatments.[245] Requests by male inmates to wear women's' clothing or make-up or to somehow be segregated without losing any of the "privileges" accorded the other inmates may—and should—be dismissed outright.[246] If prison officials are required to allow transsexual inmates, who by any stretch of the imagination would be rare in even a large correctional facility,[247] to have their way, it would risk anarchy and requests from other inmates seeking accommodations.[248]

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240. *See, e.g.*, Cuoco v. Moritsugo, 222 F.3d 99 (2nd Cir. 2000) and South v. Gomez, No. 159576, 2000 U.S. App. LEXIS 3200 (9th Cir. Feb. 25, 2000). *See also supra* Parts I-V.

241. *See supra* Part III.

242. *See* U.S. CONST. amend. I & IV. The Supreme Court has given prison officials wide latitude in searching inmate cells and confiscating property, when prison security is at issue. *See* Hudson v. Palmer, 468 U.S. 517, 529-30 (1984). Other courts have given officials the right to order urinalysis to search for illegal drug use. *See* Forbes v. Trigg, 976 F.2d 308, 313-15 (7th Cir 1992). Courts have also given officials the right to take blood against an inmate's will for DNA testing. *See* Rise v. Oregon, 59 F.3d 1556, 1561 (9th Cir. 1995).

243. In *Hudson v. McMillan*, 503 U.S. 1, 9 (1993), the Court ruled that a prisoner aggrieved by the "wrongful destruction of property" during a search should seek administrative redress and not claim a constitutional violation. This is exactly the opposite of what a free American would do.

244. *See, e.g.*, *supra* note 172 and accompanying text.

245. *See* Estelle v. Gamble, 429 U.S. 97,103 (1976).

246. *See supra* note 98 and accompanying text.

247. For an estimate of the number of transsexuals in the general population, see *supra* notes 31-32 and accompanying text.

248. The Supreme Court consistently defers to the judgment of prison officials in matters regarding the regulation of inmates' daily lives and their privileges because the prison officials are, in most cases, better equipped to deal with it. *See supra* note 107 and accompanying text.

Perhaps the best solution for transsexuals seeking to continue treatment to the extent necessary is that given by a California transsexual rights activist, Sister Mary Elizabeth.[249] Sister Mary Elizabeth writes, in a manual of personal and legal advice for transsexuals, that transsexuals worried about their treatment in prison could take one simple preventative step: "The course of action, therefore, for the preoperative transsexual undergoing treatment should be quite obvious—avoid compromising situations which could lead to incarceration."[250]

Bradley A. Sultan

249. Sister Mary Elizabeth, *Legal Aspects of Transsexualism*, *at* http://www.transgendercare.com/guidance/resources/legal_aspects_ts.htm (last visited Mar. 28, 2003).

250. *Id.*

Zero Tolerance Policies: Fighting Drugs or Punishing Domestic Violence Victims?

I. INTRODUCTION

Most would agree that domestic violence is egregious. Yet when the victim lives in federally subsidized housing, it is the zero tolerance policy[1] that most egregiously impacts the victim. Consider the following examples:

- Tiffanie Alvera was assaulted by her husband, sought medical attention, and then obtained a restraining order against him.[2] The management of her Oregon apartment complex responded by serving Ms. Alvera with a twenty-four hour notice terminating her tenancy.[3]
- A Kentucky woman was served with an eviction notice after her ex-husband, Donald Jones, violated a no contact order by entering her apartment.[4] Mr. Jones held his ex-wife and a maintenance worker at gunpoint, threatened to kill them, but then shot himself.[5] The eviction proceeding was only dismissed after a formal complaint was filed with the regional Housing and Urban Development (HUD)

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1. Housing requirements that mandate the eviction of a resident because of criminal activity are known as zero tolerance or "one-strike" policies. *See, e.g.*, Barclay Thomas Johnson, *The "One Strike" Policy in Public Housing*, 35 CLEARINGHOUSE REV. 159, 159 (2001).

2. *See* Complaint, United States Dep't of Hous. & Urban Dev. v. C.B.M Group, Inc., ¶¶ 25-27, No. 01-857-PA, June 8, 2001 (D. Or.), *at* http://archive.aclu.org/court/alvera.pdf (last visited Apr. 14, 2003) [hereinafter Complaint]. For a more in depth discussion of Ms. Alvera's situation and resulting lawsuit, see *infra* Part IV.B.2.

3. *See* Complaint, *supra* note 2, ¶¶ 30-31.

4. *See* E.J. Hurst II, *Rules, Regs, and Removal: State Law, Foreseeability, and Fair Play in One Strike Terminations From Federally-Subsidized Public Housing*, 38 BRANDEIS L. J. 733, 755 (2000).

5. *See id.*

office.[6]

- Margaret Ramirez received an eviction notice from the Housing Authority of the City of Austin after she was assaulted in her home by an ex-boyfriend.[7] Ms. Ramirez was held accountable for her ex-boyfriend's actions because she "chose to let [him] in."[8] The eviction was not pursued after the manager of the housing project requested Ms. Ramirez be allowed to stay.[9]

- Lady Chanell Tanzy of Texas also received an eviction notice after her boyfriend assaulted her.[10] While Ms. Tanzy was being choked her arm went through the bedroom window, resulting in an injury that required twelve stitches.[11] Ms. Tanzy's boyfriend never resided with her at the government-subsidized apartment.[12] Yet HUD defended the eviction, stating, "she's been warned at least six times that she can't have this kind of action there."[13] Ms. Tanzy was ultimately allowed to remain in her apartment after a settlement was reached with the management.[14]

Zero tolerance policies are currently being contested throughout the country.[15] Most notably, the United States Supreme Court reviewed the issue in its 2002 term.[16] Not all zero tolerance laws are alike, however.

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6. *See id.* at 756.

7. *See* Diana Dworin, *Tenant Won't be Evicted, After All; Mayor Todd Urges 'Common Sense' in Following New Rules at Housing Authority*, AUSTIN AM.-STATESMAN, Feb. 24, 1996, at A1.

8. *Id.* (quoting a lawyer for the housing authority).

9. *See id.*

10. *See* Laura Griffin, *Eviction Upheld for Woman Who Was Attacked in Home; Advocates Say Wrong Message Sent on Domestic Violence*, DALLAS MORNING NEWS, May 26, 1999, at 1A.

11. *See id.*

12. *See id.*

13. *Id.* (quoting HUD spokesperson Bruce Roberts). According to Mr. Roberts, Ms. Tanzy had a "long line of problems ... there." *Id.* However, the local police had only responded to Ms. Tanzy's apartment once, the time she was assaulted. *See id.*

14. *See* Laura Griffin, *Crime Victim, Complex Settle Case; Woman Was Evicted, Told Ex-Boyfriend's Assault Was Her Fault*, DALLAS MORNING NEWS, July 15, 1999, at 23A. The details of the settlement were confidential. *See id.*

15. *See, e.g.*, Memphis Hous. Auth. v. Thompson, 38 S.W.3d 504 (Tenn. 2001), *cert. denied*, 534 U.S. 823 (2001) (mem.); Del. County Hous. Auth. v. Bishop, 749 A.2d 997, 999 (Pa. Commw. Ct. 2000), *cert. denied*, 523 U.S. 990 (2001) (mem.). For a discussion of these cases, see *infra* Part III.C.

16. *See* Rucker v. Davis, 237 F.3d 1113, 1117 (9th Cir. 2001) (en banc), *rev'd sub nom.* United States Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002). *See also infra* Part V.A.2.

Some states include or have interpreted the word "criminal" in their zero tolerance housing laws to mean any act or threat of violence.[17] As a result, domestic violence victims[18] are discriminated against when they are evicted because of a violent act by their partner.

This Note examines how domestic violence victims are discriminated against by zero tolerance housing laws and the legal remedies potentially available to them. Zero tolerance laws may be challenged as violating the intent of Congress in enacting the Fair Housing Act, or as violating the Fair Housing Act's provisions against sex-based discrimination.[19] This Note also discusses the importance of changing the policies or creating an exception for domestic violence victims.

II. DOMESTIC VIOLENCE

A. Overview

1. Definition and Dynamics of Domestic Violence

Domestic violence is a "multi-faceted pattern of control"[20] in an intimate relationship. Power in these relationships is always imbalanced in favor of the abuser.[21] One partner controls most aspects of the relationship and the victim—especially the timing of physical violence.[22] An abuser has an unlimited number of tactics in addition to physical violence at his disposal

17. *See* Press Release, NOW Legal Defense and Education Fund, Zero-Tolerance Policy Affects Domestic Violence Victims, Civil Rights Groups Charge in Oregon (July 10, 2001), *at* http://www.nowldef.org/html/issues/vio/Alvera%20Release.pdf (last visited Mar. 19, 2003). NOW Legal Defense and Education Fund specifically points to the policies of Michigan, California, Louisiana, Colorado and Massachusetts. *See id. See also* MASS. ANN. LAWS ch. 121B, § 32 (2001); OR. REV. STAT. § 90.400 (1999).

18. Although the term "domestic violence" can be defined broadly to include a variety of situations, this Note uses "domestic violence" to refer to a system of power and control in an intimate relationship. See *infra* Part II.A.1 for a discussion on the dynamics of domestic violence. While the author recognizes that anyone may be a victim of domestic violence, the overwhelming majority of victims are women. *See infra* Part II.A.2 (discussing prevalence of domestic violence). As a result, this Note refers generally to victims of domestic violence as women.

19. *See* discussion *infra* Part IV.

20. Ethan Breneman Lauer, *Housing and Domestic Abuse Victims: Three Proposals for Reform in Minnesota*, 15 LAW & INEQ. J. 471, 476 (quoting Loretta M. Frederick, *Effective Advocacy on Behalf of Battered Women*, *in* DOMESTIC VIOLENCE at vi-1 (1992)).

21. *See* PATRICIA GAGNÉ, BATTERED WOMEN'S JUSTICE 18-19 (1998).

22. *See* Breneman Lauer, *supra* note 20, at 477-78 (noting that abuse does not occur with any predictability).

to maintain control.[23] Indeed, domestic violence "*need not involve physical contact with the victim.*"[24]

An abuser is *not* simply "out of control."[25] Rather, the abuser makes calculated decisions aimed at "training" his partner to behave the way he chooses.[26] In fact, the systematic power and control exerted over a victim has been compared to that used in Nazi concentration camps.[27] Consequently, contrary to popular belief, domestic violence is not two people "consensually settling a difference with fists."[28] Rather, domestic violence is a systematic pattern of utilizing power to control a partner.[29]

When a woman attempts to end an abusive relationship or separate from her abuser, she may be in the most danger.[30] Ending the relationship means ending the abuser's control over her.[31] As a result, most abusers attempt to reestablish their power over their partner by increasing the use of threats or violence.[32] Statistics support the assertion that victims are in greater danger after they leave the relationship.[33] Specifically, one study found that

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23. *See* DOMESTIC ABUSE INTERVENTION PROJECT, *Power and Control Wheel*, *at* http://www.duluth-model.org/daippce.htm (last visited Mar. 19, 2003). Some examples of tactics a batterer may use in addition to physical violence are: isolation (keep victim from friends and family), economic abuse (maintain strict control over finances; prevent victim from working), intimidation ("towering" over victim, yelling at victim), and threats (to injure, to flee with the children, to kill himself). *See id.*

24. ANN JONES, NEXT TIME, SHE'LL BE DEAD 88 (1994) (quoting Emerge, a Boston counseling program for men who batter). A batterer can obtain the same results from physically abusing his partner as he can from using verbal abuse, psychological abuse, and intimidating acts. *See id.*

25. *Id.* at 89.

26. *See id.* For examples of tactics used by abusers, see *supra* notes 23-24 and accompanying text.

27. *See id.* In fact, domestic violence victims often have the "same psychological reactions to long-term abuse [as] exhibited [by] hostages, prisoners of war, and victims of terrorism." *Id.* (citation omitted).

28. Breneman Lauer, *supra* note 20, at 477.

29. *See id.*

30. *See* GAGNÉ, *supra* note 21, at 20, 23. "Among female victims, those separated from their partners for six months or less are three times more likely to be physically assaulted than are women who are divorced from their partners, and about 25 times more likely than are married women." *Id.* at 23 (citation omitted).

31. *See* JONES, *supra* note 24, at 95.

32. *See id.* (discussing how threat "if I can't have you nobody can" may tragically come to fruition). *See also* SUMAN KAKAR, DOMESTIC ABUSE: PUBLIC POLICY/CRIMINAL JUSTICE APPROACHES TOWARDS CHILD, SPOUSAL AND ELDERLY ABUSE 37 (1998).

33. *See* KAKAR, *supra* note 32, at 37. *See also* Joan Zorza, *Woman Battering: A Major Cause of Homelessness*, 25 CLEARINGHOUSE REV. 420, 423-24 (1991). "[D]ivorced and separated women ... account for 75 percent of all battered women and report being battered 14 times as often as women still living with their partners." *Id.*

seventy-three percent of battered women who sought emergency medical services had already left their abusers.[34] Other research has shown that instead of ending the violence, leaving the abusive relationship often escalates the violence by the abuser, who attempts "to coerce the victim into reconciliation or to retaliate for the victim's perceived rejection or abandonment of the [abuser]."[35]

Overall, domestic violence victims live in a "complex web of emotional manipulation, physical intimidation, physical and sexual exploitation, and financial dependence."[36] Domestic violence emerges in relationships over time.[37] One partner exerts power over the other subtly throughout the relationship, such as by interfering with the other's ability to work.[38] Consequently, the victim is left "confused, terrified, humiliated, and ashamed" with nowhere to turn.[39]

2. Prevalence of Domestic Violence in America

Obtaining an accurate assessment of the prevalence of domestic violence is difficult due to under-reporting.[40] Statistics on domestic violence also vary depending upon the source.[41] Statistics also vary because victims often do not self-identify, or studies may define domestic violence differently.[42] In addition, some studies rely upon the number of incidents

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34. *See* KAKAR, *supra* note 32, at 37.

35. *Id.*

36. *Id.* at 44.

37. *See* GAGNÉ, *supra* note 21, at 19.

38. *See* Zorza, *supra* note 33, at 424. "Violence in a relationship escalates in both frequency and severity over time ...." *Id.* at 423 (citation omitted). *See also* KAKAR, *supra* note 32, at 44. As a result, victims are often unable to leave the relationship by the time they realize the abuse has reached an intolerable level. *See id.*

39. KAKAR, *supra* note 32, at 44. In addition to the increased danger a victim faces when she attempts to leave or end the relationship, the victim's emotional state may also affect her decision of whether to leave the relationship. *See supra* notes 30-35 and accompanying text.

40. *See* KAKAR, *supra* note 32, at 11.

41. For example, the National Clearinghouse for the Defense of Battered Women cites thirty different studies that suggest the prevalence of domestic violence ranges from 259,000 women per year to 28 million. NATIONAL ORGANIZATION FOR WOMEN, *Viewpoint: Violence: It's a Fact*, NAT'L NOW TIMES, Jan. 1995, *at* http://www.now.org/nnt/01-95/oped3.html (last visited Mar. 29, 2003).

42. *See, e.g.*, FEDERAL BUREAU OF INVESTIGATIONS, THE STRUCTURE OF FAMILY VIOLENCE: AN ANALYSIS OF SELECTED INCIDENTS 1, *at* http://www.fbi.gov/ucr/nibrs/famvio21.pdf (last visited Mar. 28, 2003) [hereinafter FBI ANALYSIS]. The FBI reports on "family violence," which is defined as "a crime against a person or a robbery where the relationship of the victim to the offender is identified as within the family." *Id.* Alternatively, the National Crime Victimization Survey (NCVS) reports on "intimate

reported to police departments[43] while other surveys randomly sample households.[44] Many times, however, people that are homeless or staying in a shelter are not surveyed, resulting in an entire group of people being ignored.[45]

The most common estimate of the occurrence of domestic violence is that a "woman is beaten every fifteen seconds."[46] While many advocates cite this statistic as proof of the prevalence of violence against women,[47] many opponents argue that the figure is an exaggeration.[48] Nonetheless, less controversial figures still lead to the conclusion that domestic violence is a serious problem in our country.[49] For example, the National Crime Victimization Survey (NCVS) estimates that in 1998 about one million crimes were committed against persons by their intimate partners.[50] Some estimates of the rate of domestic violence are as high as four million

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partner violence" that is defined as "crimes ... committed against persons by their current or former spouses, boyfriends, or girlfriends." CALLIE MARIE RENNISON, PH.D. & SARAH WELCHANS, U.S. DEP'T OF JUSTICE, INTIMATE PARTNER VIOLENCE 1 (2000). The results of these studies, therefore, would differ drastically. This may also explain the differences in the estimates of the prevalence of domestic violence. *See infra* notes 50-51 and accompanying text.

43. *See* FBI ANALYSIS, *supra* note 42, at 2. However, only about half of all victims of domestic violence between 1993 and 1998 reported the violence to law enforcement. *See* RENNISON & WELCHANS, *supra* note 42, at 7. Alternatively, the NCVS data includes reported and unreported incidents of domestic violence. *See id.* at 7-8.

44. *See* RENNISON & WELCHANS, *supra* note 42, at 7. The NCVS uses a nationally representative sample of United States households as the basis for its data. *See id.*

45. *See id.* at 8. The NCVS only reflects "[t]he experiences and estimates of intimate partner violence ... of those individuals residing in households." *Id.*

46. CALIFORNIA OFFICE OF CRIMINAL JUSTICE PLANNING, EVERY 15 SECONDS A WOMEN IS BEATEN ... HOW CAN SOMEONE ESCAPE THE VIOLENCE?, *at* http://www.ocjp.ca.gov/publications/pub-15s.pdf (last visited Apr. 11, 2003).

47. *See, e.g.*, NEW YORK STATE, DOMESTIC VIOLENCE DATA SHEET, *at* http://www.opdv.state.ny.us (last visited Jan. 9, 2003); KENNEBUNK, MAINE POLICE DEPARTMENT, DOMESTIC VIOLENCE: THE ISSUE, *at* http://kennebunkpolice.maine.org (last visited Nov. 4, 2002) (stating "[a]ccording to the FBI, every 15 seconds a woman is battered in the United States by her husband, boyfriend or live-in partner.").

48. *See, e.g.*, Paul Moreno, *Northampton Paper Adds to the Confusion About Domestic Violence*, MASS. NEWS, *at* http://www.massnews.com (last visited Mar. 28, 2003) (arguing that these statistics are misleading and that *men* are actually victims of domestic violence every fifteen seconds).

49. *See* RENNISON & WELCHANS, *supra* note 42, at 1. This source may be viewed as less controversial because it was completed by the Bureau of Justice Statistics of the Department of Justice and clearly indicates the source of its figures. *See id.*

50. *See id.* "Intimate partner violence" in this survey refers to "crimes ... committed against persons by their current or former spouses, boyfriends, or girlfriends." *Id.*

incidents per year.[51]

Women comprise the majority of domestic violence victims.[52] The percentage of female domestic violence victims can vary with the survey.[53] Regardless, domestic violence accounts for a higher number of crimes against women than against men.[54] Specifically, women are the victims of intimate partner violence seven times more often than men.[55]

B. Domestic Violence and Poverty

Many people believe that domestic violence only occurs in families that are impoverished, illiterate, and unemployed.[56] Families from any class, race, neighborhood, or educational level may experience domestic violence.[57] Indeed, "[t]he Justice Department's 1994 NCVS reported less than a 10% difference in the rate of family violence between those with household incomes less than $10,000 and those earning more than $50,000."[58]

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51. *See* NAT'L DOMESTIC VIOLENCE HOTLINE, NAT'L STATISTICS, *at* http://www.ndvh.org (last visited Jan. 10, 2003) (citing U.S. DEP'T OF JUSTICE, VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS (1998)).

52. *See* KAKAR, *supra* note 32, at 43. In addition, a recent survey for the National Institute of Justice reported that "64 percent of women who reported being raped, stalked, or physically assaulted since age 18 had been victimized by intimate partners, compared to 16.2 percent of men who had been raped, stalked, or physically assaulted since age 18." AM. CIVIL LIBERTIES UNION, *Facts on Domestic Violence* (2001), *at* http://archive.aclu.org/news/2001/domviolence_factsheet.html (last visited Mar. 19, 2003) [hereinafter ACLU Fact Sheet].

53. *Compare* RENNISON & WELCHANS, *supra* note 42, at 1 (finding women the victims in eighty-five percent of domestic violence incidents) *with* NAT'L DOMESTIC VIOLENCE HOTLINE, *supra* note 51 (reporting women are the victims of domestic violence ninety-two percent of the time).

54. *See* RENNISON & WELCHANS, *supra* note 42, at 1. Between 1993 and 1998, intimate partner violence accounted for twenty-two percent of violent crime against women, but only three percent of violent crime against men. *See id.*

55. *See id.* at 2.

56. *See* KAKAR, *supra* note 32, at 33. However, unemployment may actually be caused by the high incidence of work-related problems. *See* Zorza, *supra* note 33, at 425.

> Abusive [partners] harass 74 percent of employed battered women at work, either in person or over the telephone, causing 56 percent of them to be late for work at least five times a month, 28 percent to leave early at least five days a month, 54 percent to miss at least three full days of work a month, and 20 percent to lose their jobs.

Id. (citations omitted).

57. *See* KAKAR, *supra* note 32, at 34, 43.

58. *Id.* at 94. On the other hand, another report in 1994 based on Department of

Lower socio-economic groups may appear to have a higher occurrence of violence because women in these groups often must rely on more visible means of assistance.[59] For example, victims without financial resources are more likely to need to stay at a shelter, seek free counseling, and request low cost legal advice.[60] Resources available for poor women are often public assistance-based.[61] Thus, the myth that violence only occurs in poor, uneducated, and unemployed families continues and is erroneously validated.[62]

While domestic violence does not occur solely in lower socioeconomic groups, victims in lower classes are at a greater disadvantage when seeking assistance.[63] The reason for this is a combination of two facts: (1) women are most susceptible to domestic violence in their own homes;[64] and (2) domestic violence victims may not be free to leave due to the lack of affordable housing.[65]

1. Zero Tolerance Policies Limit a Victim's Legal Options to Remain in Her Home Safely

Women may be effectively protected from further abuse by evicting the abuser from the common dwelling.[66] Evictions usually may be obtained through a civil protective order.[67] The court may exclude the abuser from

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Justice data indicates that "women in families with a household income less than $9,999 experienc[e] intimate partner violence at a rate over five times as high as women in families with incomes over $30,000." ACLU Fact Sheet, *supra* note 52. A more recent report found higher rates of domestic violence in 1998 against women living in households with lower annual incomes than women in households with higher annual incomes. *See* RENNISON & WELCHANS, *supra* note 42, at 4. This survey also found no discernable relationship between domestic violence against men and household income. *See id.*

59. *See* KAKAR, *supra* note 32, at 34. "Violence that occurs in more privileged environments rarely comes to public attention because the victims in those situations do not require formal social agencies' assistance." *Id.* at 43.

60. *See id.* at 34.

61. *See id.*

62. *See* KAKAR, *supra* note 32, at 34.

63. *See generally* Gretchen P. Mullins, *The Battered Woman and Homelessness*, 3 J.L. & POL'Y 237 (1994).

64. *See* RENNISON & WELCHANS, *supra* note 42, at 5. "Between 1993 and 1998 almost two-thirds of intimate partner violence against women ... occurred in the victim's home." *Id.*

65. *See* Susan A. Reif & Lisa J. Krisher, *Subsidized Housing and the Unique Needs of Domestic Violence Victims*, 34 CLEARINGHOUSE REV. 20, 21 (2000).

66. *See* Mullins, *supra* note 63, at 246.

67. *See id.* However a protective order "may even increase the risk or seriousness of future violence." GAGNÉ, *supra* note 21, at 24. In addition, protective orders "cannot stop someone from harming or killing another person." *Id.*

the residence and explicitly give the victim possession.[68] If a court fails to order the abuser out of the home, then the woman is left vulnerable to great danger.[69] As a result, "[i]n many such cases, the woman will flee with her children, or will be discouraged from ever seeking intervention again."[70] However, "once a woman is out of the home, many judges are unwilling to reinstate her [through a civil protection order], almost ensuring that she will become homeless."[71]

In addition, a victim may be reluctant to obtain a civil protection order if she is going to face an eviction under the housing authority's zero tolerance policy.[72] Obtaining a protection order notifies the landlord that "criminal activity" occurred in or near a residence.[73] As a result, the landlord may use the federally mandated strict liability, zero tolerance clause in the lease to evict the victim.[74]

Similarly, a domestic violence victim cannot rely upon the criminal prosecution or arrest of her abuser to keep her safe in her own home.[75] Any safety provided by the incarceration of the abuser is lost when she becomes homeless because the criminal act leading to the imprisonment has subjected her to a zero tolerance eviction.[76] "Unless society is also able to protect the victims of domestic violence and convey to the abusers the message that it will not tolerate the violence, the abusers will go on driving their victims from homes and shelters."[77]

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68. *See* Zorza, *supra* note 33, at 427.

69. *See id.*

70. *Id.*

71. *Id.*

72. *See* Reif & Krisher, *supra* note 65, at 30. A woman may be reluctant to seek assistance of the courts at the cost of her housing. *See id.* In addition, once a victim is evicted she likely will no longer be eligible for public housing in the future. *See id.*

73. *See, e.g.*, *infra* Part IV.B.2. *See also infra* Part III (discussing zero tolerance policies in housing law).

74. *See infra* notes 94-100 and accompanying text (discussing federal zero tolerance policy).

75. *See* GAGNÉ, *supra* note 21, at 20. *See also supra* notes 30-36 and accompanying text (discussing the increased danger a victim faces after separation). "Policing of domestic violence has improved over the last two decades .... Nonetheless, arrest has mixed results. Sometimes it deters further violence; sometimes it increases the likelihood of recurrence." *Id.* at 23-24 (citation omitted).

76. *See* Reif & Krisher, *supra* note 65, at 32.

77. Zorza, *supra* note 33, at 429. "[W]omen continue to live in a system that is unable to protect them, expects them to leave an abusive spouse, does not provide adequate resources to those trying to escape, and fails to understand the psychological responses of those who refuse to leave." GAGNÉ, *supra* note 21, at 24.

2. Victims Lack Housing Options

a. Lack of Low-Income or Transitional Housing

Most people earning only minimum wage cannot afford safe and sanitary housing by working forty hours a week.[78] Domestic violence victims may have difficulty working full time or even at all because of actions of the abuser.[79] A domestic violence victim, therefore, may be at an increased risk for homelessness.[80] Alternatively, domestic violence victims may be compelled to continue or return to living with an abusive partner.[81] Perhaps rates of domestic violence are significantly higher for persons living in rental housing because of a victim's lack of housing options.[82] Consequently, the supply of affordable housing must be increased to adequately address the homelessness for domestic violence victims.[83]

b. Shelter Reality

Homeless shelters are often filled with women and children who are there because of domestic violence.[84] In fact, on an average night, homeless shelters for families in the United States provide shelter to one-half of their clients as a result of domestic violence.[85] The Senate Judiciary Committee has estimated that half "of all homeless women and children [were] fleeing domestic violence."[86] Furthermore, homeless shelters may only be receiving the "over-flow" from domestic violence shelters that are already full.[87]

Shelters specifically for domestic violence victims are continually filled

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78. See Reif & Krisher, *supra* note 65, at 21.

79. *See* Zorza, *supra* note 33, at 424. *See also supra* note 56.

80. *See* NAT'L COALITION FOR THE HOMELESS, *Why are People Homeless? at* http://www.nationalhomelessness.org (last visited Jan. 10, 2003).

81. *See id. See also* Zorza, *supra* note 33, at 421. For example, fifty-nine percent of victims seeking to stay in a New York domestic violence shelter are turned away because there is no space. *See id.*

82. *See* RENNISON & WELCHANS, *supra* note 42, at 5 (stating that women residing in rental housing were victims of domestic violence three times more often as women living in housing they owned).

83. *See* NAT'L COALITION, *supra* note 80.

84. *See* Zorza, *supra* note 33, at 421.

85. *See id.*

86. *Id.* In another survey, thirty-four percent of cities "identified domestic violence as a primary cause of homelessness." NAT'L COALITION, *supra* note 80.

87. *See* Mullins, *supra* note 63, at 244-45 (noting that victims are often turned away from domestic violence shelters due to overcrowding).

to capacity by women and children seeking refuge.[88] There are about 1,200 battered women's shelters across the country.[89] Nonetheless, there are often too few shelters for the "demand."[90] Furthermore, even when shelters have space, they offer only temporary respite.[91] Finally, general homeless shelters often cannot meet the specific needs of domestic violence victims.[92]

III. ZERO TOLERANCE LAWS

A. Anti-Drug Abuse Act of 1988: The Creation of "One Strike and You're Out"

In the 1980s, the war on drugs was thriving and Congress wanted to do its part for the cause.[93] As a result, Congress passed the Anti-Drug Abuse Act of 1988 (ADAA).[94] The ADAA amended the United States Housing Act of 1937 to require that all public housing leases contain language

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88. *See* KAKAR, *supra* note 32, at 28.

89. *See id.*

90. *See* Zorza, *supra* note 33, at 421-22 (noting that, in one report, domestic violence shelters in Massachusetts "reject five women and two children for every two people that they accept").

91. *See id.* at 422 (noting that many shelters only allow a short stay of somewhere between thirty and ninety days).

92. *See* SAN DIEGO REGIONAL TASK FORCE ON THE HOMELESS, *Domestic Violence as a Precursor to Homelessness*, *at* http://www.co.san-diego.ca.us/rtfh/victims.html (last visited Mar. 19, 2003) [hereinafter REGIONAL TASK FORCE ON THE HOMELESS]. Counseling and support groups are usually not offered. *See id.* Victim safety is also an issue because most homeless shelters are not confidential. *See id.* (stating that safety is of utmost concern because a woman may be in extreme danger when she leaves the abuser). *See also supra* notes 30-35 and accompanying text. In addition, women fleeing domestic violence would not find as great a sense of community at a general homeless shelter as they would at a domestic violence shelter. *See* REGIONAL TASK FORCE ON THE HOMELESS, *supra.* As a result, victims do not have adequate options when domestic violence shelters are full.

93. *See* Ryan Johnson, *Criminal and Drug Related Evictions From Public Housing for the Activities of Third Parties*, 1 LOY. J. PUB. INT. L. 49, 51 (2000).

94. Pub. L. 100-690 Sec. 5101, 102 Stat. 4181 (codified at 21 U.S.C. § 1501) (1994) (repealed 1997). *See also* 42 U.S.C. § 1437d(*l*)(6) (1998). Section 1437d(*l*)(6) was previously designated 1437d(*l*)(5) until 1998. *See* Johnson, *supra* note 93, at 160. For consistency, this Note refers to the statute in its current form, which reads:

> [A]ny criminal activity that threatens the health, safety or right to peaceful enjoyment of the premises by other tenants or any drug-related criminal activity on or off the premises, engaged in by a public housing tenant, any member of the tenant's household, or guest or other person under the tenant's control, shall be cause for termination of the tenancy.

§ 1437d(*l*)(6).

allowing for an eviction due to drug or criminal activity.[95] Consequently, a tenant could be evicted even if the criminal act occurred away from the premises or a third party committed the criminal act.[96]

Indeed, the United States Department of Housing and Urban Development (HUD) has interpreted the statute as authorizing evictions by local Public Housing Authorities (PHAs) whether or not the tenant knew, should have known, or tried to prevent the criminal activity.[97] Under this interpretation, tenants are held strictly liable for the acts of another member of the household, a guest, or another person under their control.[98] Furthermore, a strict liability interpretation holds a tenant responsible without regard for the tenant's "own fault, knowledge, or ability to control the criminal activity."[99] Although PHAs are given discretion when deciding whether to evict innocent tenants,[100] the federal government rewards PHAs for zero tolerance evictions.[101] The result is that many innocent tenants are

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95. *See* § 1437d(*l*)(6).

96. *See* Johnson, *supra* note 93, at 52. For example, "a child's school friend possessing illegal drugs, possession of drugs by an emergency babysitter, or, a leasehold member arrested off the premises for possession of illegal drugs, are all good causes to terminate federally assisted housing rights for the entire family." *Id.* (citations omitted). Recently the Supreme Court also upheld the eviction of four tenants based upon a daughter having cocaine three blocks from the home, grandsons smoking marijuana in the parking lot, and a caregiver possessing cocaine in the home. *See* United States Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 128 (2002). *See also infra* Part IV.A.

97. *See* Rucker v. Davis, 237 F.3d 1113, 1117 (9th Cir. 2001) (en banc), *rev'd sub nom.* United States Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002) (citing 56 Fed. Reg. 51560, 51567 (Oct. 11, 1991)).

98. *See* Johnson, *supra* note 1, at 159.

99. *Id.*

100. *See id.* at 162. PHAs may "exercise discretion and consider all the circumstances, including whether all family members participated in the criminal acts." *Id.* HUD further stated "when a tenant has taken all reasonable steps to prevent the criminal activity, eviction may not always be warranted or proper." *Id.* at 164 (quoting UNITED STATES DEP'T OF HOUS. & URBAN DEV., NOTICE PIH 96-16 at 7-8 (Apr. 12, 1996), *at* http://www.hudclips.org (last visited Mar. 19, 2003)).

101. *See* Brief of Amici Curiae The Coalition to Protect Public Housing et al., at 28, United States Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002) [hereinafter Brief of Amici Curiae] (citing HUD Initiative 96-16, *"One Strike and You're Out" Screening and Eviction Guidelines for PHAs* (Apr. 12, 1996)). For example, the amount of money annually awarded to a PHA for capital improvements is based upon how the PHA has "implement[ed] effective screening and eviction policies and other anticrime strategies." *Id.* (quoting 42. U.S.C. § 1437d(j)(1)(I)(i) (1994)). In addition, a similar incentive structure exists in the allocation of funds to PHAs. *See id.* One of the factors considered by HUD in distributing funds is "the security provided by a PHA, which, in turn, is measured by, among other things, a PHA's adoption and implementation 'of screening and resident eviction policies and procedures.'" *Id.* (quoting 24 C.F.R. § 902.43(a)(5)(i) (1998)).

evicted for the activity of others that they could not control or reasonably foresee.[102]

B. States and Zero Tolerance

In addition to requirements that leases for federally subsidized housing contain the "one-strike" language,[103] some states have similar provisions in their own housing codes.[104] However, the interpretation of federal and state zero tolerance policies has varied by jurisdiction.[105] The following is an overview of the housing codes of Massachusetts and Oregon, which have incorporated a zero tolerance policy into their state housing laws similar to the federal statute.

1. Massachusetts

Massachusetts not only adopted the zero tolerance policy of the federal statute, but added provisions explaining what types of criminal activities would not be tolerated.[106] In Massachusetts, a woman is not even entitled to a pre-eviction hearing if she is seriously assaulted or threatened in her own home by a member of her household.[107] In addition, applicants for

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Furthermore, "HUD explicitly emphasizes that funding decisions will be based in part upon a PHA's ability to document that current eviction screening procedures result in the eviction of residents who meet the one-strike criteria and the total number of evictions as a result of the enforcement of one-strike criteria." *Id.* at 29.

102. *See generally* Brief of Amici Curiae, *supra* note 101. The amici curiae identifies four groups of innocent tenants likely to be negatively affected by zero tolerance laws:

> (1) the family evicted for minor infractions unexpectedly committed by someone beyond their control; (2) the family evicted for the misconduct of an adult family member despite extraordinary efforts to ensure that the actor stayed away the moment he began to stray; (3) *the victim of violence evicted because of the crime committed against her in her own home*; and (4) the family evicted for the uncharacteristic act of a child with an otherwise unblemished record.

Id. at 8 (emphasis added).

103. *See supra* Part III.A.

104. *See, e.g.*, MASS. GEN. LAWS ch. 121B, § 32 (2002).

105. *See* Johnson, *supra* note 1, at 176-77.

106. *See* MASS. GEN. LAWS ch. 121B, § 32 (2002).

107. *See id.* The Massachusetts statute states, in part:

> The tenancy of a tenant of a housing authority shall not be terminated without cause and without reasons therefor[e] given to said tenant in writing prior to such housing authority filing an action for summary process or seeking an injunction .... A tenant shall be granted a hearing by a housing authority at least fifteen days prior to any such termination except in the case of non-payment of rent or if there is reason to believe that the tenant or a member of the tenant's household has (1) unlawfully caused serious physical harm to another tenant or employee of the

public housing are to be disqualified, "absent outweighing mitigating circumstances,"[108] if they or a household member disturbs the neighbors or damages property at a prior residence.[109] Similarly, according to state law, applications should be denied if the applicant or a household member has previously engaged in criminal activity.[110] As a result, Massachusetts' zero tolerance policy allows PHAs to implement these measures regardless of whether the tenant is moving into or leaving public housing.[111]

2. Oregon

The zero tolerance policy in Oregon's housing law is also based on the federal statute.[112] In addition to providing for the eviction of tenants for

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> housing authority, or any other person lawfully on the premises of the housing authority, or (2) threatened to seriously physically harm another tenant or housing authority employee, or any person lawfully on the premises of the housing authority.

Id.

108. *Id.*

109. *See id.* The prior behavior, if repeated, must "substantially interfere with the rights of the other tenants to peaceful enjoyment of their units" or have a "materially adverse effect on the housing development or any unit in such development." *Id.*

110. *See id.* The previous criminal activity, if repeated, must "interfere with or threaten the rights of other tenants to be secure in their persons or in their property or with the rights of other tenants to the peaceful enjoyment of their units and the common areas of the housing development." *Id.*

111. For a discussion of the impact of zero tolerance policies on domestic violence victims, see *infra* Part IV. Even if Congress or HUD enact policies that protect domestic violence victims from being evicted for the actions of their abusers—as urged by this Note—victims in Massachusetts will still be subject to eviction under state law. Consequently, state legislators in Massachusetts must also act in order to protect and support domestic violence victims. *See infra* Part V (calling upon Congress and HUD to act).

112. *See* OR. REV. STAT. § 90.400 (1999). Oregon's statute provides, in part:

> [T]he landlord, after at least 24 hours' written notice specifying the acts and omissions constituting the cause and specifying the date and time of the termination, may immediately terminate the rental agreement and take possession ... if: (a) [t]he tenant, someone in the tenant's control or the tenant's pet seriously threatens immediately to inflict personal injury, or inflicts any substantial personal injury, upon the landlord, the landlord's agent, or other tenants; (b) [t]he tenant, someone in the tenant's control or the tenant's pet inflicts any substantial personal injury upon a neighbor living in the immediate vicinity of the premises or upon a person other than the tenant on the premises with permission of the landlord or another tenant.

Id. Compare with MASS. GEN. LAWS ch. 121B, § 32 (2002). A person is in the tenant's control "when that person enters or remains on the premises with the tenant's permission or consent after the tenant reasonably knows or should know of that person's act or likelihood to commit any act of the type described in ... this section. OR. REV. STAT. § 90.400(5)

threats, violence, or damage to property, Oregon's statute allows for the eviction of a tenant because of an "act that is outrageous in the extreme."[113] Thus, Oregon's landlords are provided with substantial ammunition to evict a tenant under the zero tolerance policy.[114]

C. Case Law on Zero Tolerance Policies

Litigation regarding zero tolerance policies in state courts has led to a variety of results.[115] The following is a discussion of recent cases that have not imposed a strict liability on tenants for the actions of others.

1. *Boston Housing Authority v. Bell*[116]

Donna Bell was evicted because her son assaulted a Boston Housing Authority (BHA) police officer.[117] Ms. Bell's lease contained a provision that allowed for termination if a member of the household "commit[ted] 'any criminal or other activity which threatens the health or safety of ... BHA employees.'"[118] BHA sought to evict Ms. Bell for violating this provision.[119] However, the Boston Housing Court awarded possession to Ms. Bell.[120] BHA appealed and the case was transferred to the Massachusetts Supreme Judicial Court (SJC) on its own motion.[121]

In deciding *BHA v. Bell*, the SJC upheld its earlier decision in *Spence v.*

(1999).

113. OR. REV. STAT. § 90.400(3)(e) (2000). An "act outrageous in the extreme" is defined as an act that "a reasonable person in that community would consider to be so offensive as to warrant termination of the tenancy within 24 hours, considering the seriousness of the act or the risk to others." *Id.*

114. *See generally* OR. REV. STAT. § 90.400 (2000). Victims located in Oregon, like those living in Massachusetts, would be left unprotected even if Congress and HUD act to prevent their eviction for the actions of their abusers, as urged by this Note. *See supra* notes 106-11 (discussing Massachusetts' zero tolerance law); *infra* Part V. (calling upon Congress and HUD to act).

115. For a listing of cases discussing zero tolerance policies, including cases imposing strict liability, see Johnson, *supra* note 1, at 176-77. *See also infra* Part IV.A.2. (discussing *HUD v. Rucker*).

116. 697 N.E.2d 130 (Mass. 1998). .

117. *See id.* at 131. Her son was a member of her household at the time he assaulted the BHA police officer. *See id.* When the assault occurred, the BHA police officer was attempting to arrest one of his friends for possession of a gun. *See id.*

118. *Id.* The lease clause is based upon Massachusetts' zero tolerance policy. *See* MASS. ANN. LAWS ch. 121B, § 32 (2002). *See also supra* note 107.

119. *Bell*, 697 N.E.2d at 131.

120. *See id.*

121. *See id.*

Gormley[122] that a tenant may only be evicted for cause under the state's housing code.[123] When section 32 is violated by a household member, the court wrote, "a fair inference exists that the tenant is aware of potential problems, and able to exercise some influence or otherwise prevent violent and destructive conduct on the premises."[124] However, a tenant should not be evicted if this influence can be negated.[125] Therefore, the question became whether Ms. Bell could have foreseen and prevented her son's violence.[126] The court remanded the case for a determination regarding Ms. Bell's ability to have foreseen and prevented the lease violation.[127]

Applying *Bell* in the domestic violence context, victims may argue against zero tolerance evictions for the actions of their abusers. First, a tenant could argue that she is unable to "exercise some *influence* or otherwise *prevent*" the criminal activity for which she is being evicted.[128] As discussed above, a domestic violence victim cannot be expected to influence the actions of her abusive partner.[129] Nor is the victim able to foresee or prevent the criminal activity.[130] The choice is up to the abuser alone.[131] The victim should not be held accountable for the actions of her controlling, abusive, or unpredictable partner.[132]

2. *Memphis Housing Authority v. Thompson*[133]

The Memphis Housing Authority (MHA) sought to evict Tara Thompson and her three children after Tallen Williams, the father of her youngest child, was caught with drugs in his possession while babysitting in her apartment.[134] One week later, MHA served Ms. Thompson with

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122. 439 N.E.2d 741 (Mass. 1982).

123. *See* Boston Hous. Auth. v. Bell, 697 N.E.2d 130, 131-32 (Mass. 1998) (quoting Spence v. Gormley, 439 N.E.2d 741 (Mass. 1982)) (citation omitted).

124. *Id.* at 132. *See also* MASS. GEN. LAWS ch. 121B, § 32 (2002).

125. *See Bell*, 697 N.E.2d at 132. (citing *Spence*, 439 N.E.2d at 746). The burden is on the tenant to disprove the inference that the lease violation could have been prevented. *See id.*

126. *See id.*

127. *See id.*

128. *See id.* at 131-32 (quoting Spence v. Gormley, 439 N.E.2d 741 (Mass. 1982) (emphasis added)).

129. *See supra* Part II.A (discussing dynamics of domestic violence).

130. *See supra* notes 36-39 and accompanying text.

131. *See supra* notes 25-29 and accompanying text.

132. *See infra* notes 252-52, 325-26 and accompanying text (noting the unjustness of punishing victims for the actions of their abusers).

133. 38 S.W.3d 504 (Tenn. 2001), *cert. denied*, 534 U.S. 823 (2001) (mem.).

134. *See id.* at 506.

notice of termination of her lease for violating the zero tolerance clause.[135] MHA subsequently pursued an unlawful detainer action when Ms. Thompson refused to vacate her apartment.[136]

The General Sessions Court granted summary judgment for MHA and Ms. Thompson appealed the ruling.[137] MHA moved for summary judgment, arguing that the lease had been indisputably violated.[138] The circuit court originally denied the motion, but later reconsidered and issued an order granting possession to MHA.[139] Consequently, Ms. Thompson sought relief from the Western Section Court of Appeals.[140] Ms. Thompson argued that she could not control the activity of Mr. Williams, nor did she have any prior knowledge of his illegal activity.[141] The appellate court, however, held that the lease provision did not require that Ms. Thompson have any knowledge of Mr. Williams' drug-related criminal activity.[142]

The Supreme Court of Tennessee granted Ms. Thompson's appeal and reversed the decision of the appellate court.[143] Ms. Thompson argued that eviction would only be proper if the tenant knew or should have known of the criminal activity.[144] MHA argued that the tenant should be held strictly liable for violations of the lease.[145] The court agreed with Ms. Thompson that a tenant must have known or should have known about the criminal activity, *but only regarding* a "guest or other person."[146] Accordingly, the court held that tenants may only be evicted if they "failed to take reasonable steps to prevent or halt" the criminal activity.[147]

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135. *See id.* The lease provided that there was a cause for termination "if 'the resident, any members of the household, a guest of [sic] other person under the resident's control' engages in 'any drug related criminal activity on or off the premises.'" *Id.* This provision is taken directly from 42 U.S.C. § 1437d(*l*)(6). *See supra* note 94.

136. *See Thompson*, 38 S.W.3d at 506.

137. *See id.*

138. *See id.* Ms. Thompson did not deny that drugs were found on her premises. *See id.*

139. *See id.* at 506-07.

140. *See id.* at 507.

141. *See id.*

142. *See Thompson*, 38 S.W.3d at 507.

143. *See id.* at 513.

144. *See id.* at 509. The amicus curiae Tennessee Association of Legal Services joined in Ms. Thompson's argument. *See id.*

145. *See id.* MHA argued that an eviction would be "appropriate even if a tenant had no knowledge of the illegal activity." *Id.*

146. *Id.* at 512-13. The court noted that the lease referred to "four separate categories of people: (1) the resident [Thompson]; (2) household members; and (3) guests or (4) other persons under the resident's control. The phrase, 'under the resident's control,' relates only to the last two categories—guests or other persons." *Id.* at 511-12.

147. *Id.* at 513. Courts should examine "whether the guest or other person had a prior criminal record," whether the tenant knew of the record, and whether the tenant sought

In its holding, the *Thompson* court severely narrowed the protection for domestic violence victims against being evicted for the actions of their abusers by imposing strict liability on the tenant and household members.[148] Thus, if the abuser is named on the lease, or can be ascertained to be a household member, a domestic violence victim may still be evicted.[149] On the other hand, a victim may be able to argue that her assailant was a guest or "other" person and she was unable to "prevent" or "halt" the criminal activity.[150] A domestic violence victim, consequently, must be diligent in maintaining the distinction between guest and household member in order to protect herself against eviction.

3. *Delaware County Housing Authority v. Bishop*[151]

Barbara Bishop lived in Pennsylvania's public housing since 1979.[152] The Delaware County Housing Authority (DCHA) sought to evict Ms. Bishop in 1995 because of the criminal activities of her two adult sons, who were identified on her lease as residents.[153] DCHA asserted that Ms. Bishop's lease, which contained a zero tolerance provision, had been violated.[154]

After a ruling for DCHA by the District Justice, Ms. Bishop appealed to the trial court.[155] The court specifically noted that (1) Ms. Bishop had been a peaceful resident for almost twenty years; (2) she did not engage in any criminal acts herself; (3) her two adult sons were not shown to be under her control; and (4) she did not know of their criminal activity.[156] The trial court subsequently held in Ms. Bishop's favor, stating that DCHA failed to

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"outside intervention from social services agencies or law enforcement officials." *Id.*

148. *See Thompson*, 38 S.W.3d at 512.

149. *See id.*

150. *See id.* at 513.

151. 749 A.2d 997 (Pa. Commw. Ct. 2000), *cert. denied*, 532 U.S. 990 (2001) (mem.).

152. *See id.* at 998.

153. *See id.* Nathaniel Bishop only moved back in with his mother after a fight with his girlfriend. *See id.* Five days later, while his mother was away, he raped and robbed another resident of the housing development. *See id.* As a result, the police executed a search warrant of Ms. Bishop's home and discovered a small amount of marijuana and cocaine during the search. *See id.* The police determined that the drugs belonged to Ms. Bishop's other son, Ralph Walters. *See id.*

154. *See id.* at 999. Specifically, Ms. Bishop's lease required tenants "[n]ot to engage in criminal activity, including drug-related criminal activity, on or near the public housing premises, and to have the [t]enant's guests, any family member or other person under the [t]enant's control refrain from such activity." *Id.*

155. *See id.*

156. *See id.*

consider the surrounding mitigating factors.[157] The trial court concluded that DCHA either acted arbitrarily, or flagrantly abused its discretion.[158] DCHA appealed to the Commonwealth Court of Pennsylvania, arguing that the trial court substituted its judgment in place of DCHA's discretion.[159]

However, the appellate court was not persuaded by DCHA's arguments and affirmed the decision of the trial court.[160] The court found that Congress did not intend for § 1437d(*l*)(6) to impose strict liability on tenants.[161] Furthermore, the zero tolerance provision of the DCHA lease was limited by the phrase "under the Tenant's control."[162] Ms. Bishop, accordingly, was not held strictly liable for the criminal activities of her adult sons.[163] The court stated that Ms. Bishop's eviction would be contrary to Congress' intent because she "had no knowledge of her sons' criminal conduct, because her sons were not under her control, and because [Ms.] Bishop reasonably could not have foreseen her sons' criminal conduct."[164]

The *Bishop* decision may provide domestic violence victims with protection against eviction for the actions of their abusers. As long as the assailant is not listed as a tenant, a victim may argue that the actions of the abuser were not under her control.[165] Similar to Ms. Bishop, who was not found to be in control of her two adult sons, a domestic violence victim cannot possibly control her abuser.[166] However, the circumstances that weighed in Ms. Bishop's favor may not exist in a domestic violence situation.[167] A victim may not be living in her home "peacefully" simply because of the occurrence of domestic violence.[168] In addition, a victim

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157. *See* Del. County Hous. Auth. v. Bishop, 749 A.2d 997, 999 (Pa. Commw. Ct. 2000).

158. *See id.*

159. *See id.*

160. *See id.* at 1000, 1002.

161. *See id.* at 1001-02 (discussing § 1437d(*l*)(5), the earlier codification of § 1437d(*l*)(6)).

162. *Bishop*, 749 A.2d at 1000-01. The phrase "under the Tenant's control" was found to apply to family members, as well as guests and other persons. *See id. Compare Bishop*, 749 A.2d at 999, *with* Memphis Hous. Auth. v. Thompson, 38 S.W.3d 504, 511-12 (Tenn. 2001) (holding that "under the resident's control" only modified "guests" or "other persons"). Ms. Bishop's adult sons were found not to be under her control. *See Bishop*, 749 A.2d at 1001. *See also supra* note 154 for a discussion of the zero tolerance provision in Ms. Bishop's lease.

163. *See Bishop*, 749 A.2d at 1002.

164. *Id.*

165. *See id.* at 1000-01. *See also supra* note 162 and accompanying text.

166. *See id. See also supra* Part II.A (discussing dynamics of domestic violence).

167. *See Bishop*, 749 A.2d at 999.

168. *Cf. id.*

may have a criminal record herself, or be aware of the criminal activity of her abuser.[169] While *Bishop* provides some arguments against eviction, domestic violence victims may still find themselves being evicted because of the criminal activity of their partner.

IV. LEGAL RECOURSES AGAINST ZERO TOLERANCE POLICIES

A. Current Challenges to 42 U.S.C. § 1437d(*l*)(6)[170]

1. *Rucker v. Davis*[171]

Four plaintiffs filed suit against Harold Davis, the Oakland Housing Authority (OHA), and HUD for an unlawful eviction originally commenced against each plaintiff separately.[172] Pearlie Rucker, sixty-three years old, was the first tenant.[173] Ms. Rucker lived in public housing with her mentally disabled daughter, two grandchildren, and one great grandchild.[174] When Ms. Rucker's daughter was caught three blocks from their apartment with cocaine, OHA sought to evict Ms. Rucker.[175] Ms. Rucker regularly searched her daughter's room for alcohol or drugs, but never had reason to suspect drug use by her daughter.[176]

Similarly, OHA sought to evict tenants Willie Lee and Barbara Hill for the actions of their grandsons.[177] Mr. Lee, seventy-one, and Ms. Hill, sixty-three, were both long-term residents of pubic housing.[178] Mr. Lee and Ms. Hill asserted they had no knowledge of their grandsons' participation in the illegal activity.[179] However, OHA attempted to evict Mr. Lee and Ms. Hill when their grandsons were found in the apartment complex parking lot

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169. *Cf. Bishop*, 749 A.2d at 999.

170. *See supra* Part III.C (discussing previous cases interpreting zero tolerance policies).

171. No. 98-00781, 1998 U.S. Dist. LEXIS 9345 (N.D. Cal. June 19, 1998), *vacated* 203 F.3d 627 (9th Cir. 2000), *amended by* 237 F.3d 1113 (9th Cir. 2000) (en banc), *rev'd sub nom.* United States Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002).

172. *See Rucker*, 237 F.3d at 1117.

173. *See id.*

174. *See id.*

175. *See id.*

176. *See id.* The unlawful detainer action against Ms. Rucker was dismissed by OHA in February 1998 after her daughter was incarcerated. *See Rucker*, 535 U.S. at 128 n.1. OHA determined that Ms. Rucker's daughter was no longer a threat to other tenants. *See id.*

177. *See Rucker*, 237 F.3d at 1117.

178. *See id.* Mr. Lee had resided in public housing for over twenty-five years and Ms. Hill had been a resident for over thirty years. *See id.*

179. *See id.*

smoking marijuana.[180]

Lastly, Herman Walker was evicted by OHA for the activity of his caregiver.[181] Mr. Walker, seventy-five and disabled, required the assistance of an in-home caregiver.[182] Within a two month period, Mr. Walker's caregiver was caught with cocaine in Mr. Walker's apartment three times.[183] After each incident, Mr. Walker was issued notice of a lease violation.[184] OHA terminated Mr. Walker's lease with the third notice and began unlawful detainer proceedings.[185]

The four tenants filed suit in district court for a preliminary injunction to prevent their eviction.[186] The tenants also sought to prohibit the enforcement of HUD's zero tolerance policy and the corresponding provision in the OHA lease against innocent tenants.[187] The tenants argued that the eviction of innocent tenants was not authorized in 42 U.S.C. § 1437d, the codification of the zero tolerance policy.[188] In the alternative, the tenants argued that if the eviction of innocent tenants is authorized by § 1437d(*l*)(6), then the statute was unconstitutional.[189]

The district court granted the tenants' request for an injunction.[190] OHA then appealed to the Ninth Circuit.[191] A panel of the Ninth Circuit held that Congress did not intend to create an "innocent tenant" defense to § 1437d(*l*)(6).[192] The panel further held that the failure to include an

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180. *See id.*

181. *See id.*

182. *See id.* Mr. Walker had resided in public housing for about ten years. *See id.*

183. *See Rucker*, 237 F.3d at 1117.

184. *See id.*

185. *See id.* After termination of his lease, Mr. Walker then fired his caregiver. *See id.*

186. *See id.*

187. *See id.* The OHA lease stated a tenant must:

> assure that tenant, any member of the household, or another person under the tenant's control, shall not engage in (i) Any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other public housing residents or threatens the health and safety of the housing authority employees ... or (ii) Any drug-related criminal activity on or near the premises ....

Rucker v. Davis, No. 98-00781, 1998 U.S. Dist. LEXIS 9345, at *3-*4 (N.D. Cal. June 19, 1998) (quoting OHA lease paragraph 9(m)).

188. *See id.*

189. *See Rucker*, 237 F.3d at 1117.

190. *See Rucker*, 1998 U.S. Dist. LEXIS 9345, at *39. OHA was specifically enjoined from "terminating the leases of tenants ... for drug-related criminal activity that does not occur within the tenant's apartment unit when the tenant did not know of, and had no reason to know of, the drug-related criminal activity." *Id.*

191. *See Rucker*, 237 F.3d at 1118.

192. *See* Rucker v. Davis, 203 F.3d 627, 645 (9th Cir. 2000) (2-1 decision).

"innocent tenant" defense was not unconstitutional.[193] As a result, the tenants' preliminary injunction was vacated.[194]

Consequently, the tenants filed for an en banc re-hearing in the Ninth Circuit.[195] The Ninth Circuit en banc subsequently reversed the earlier panel decision and affirmed the grant of the preliminary injunction.[196] The court stated that "Congress did not intend § 1437d(*l*)(6) to permit the eviction of innocent tenants."[197] The court, therefore, rejected HUD's interpretation of the statute.[198]

After the decision of the Ninth Circuit, HUD issued a notice providing additional guidance to all public housing authorities within that circuit.[199] HUD advised the states to "disregard [its] interpretation of [§] 6(*l*)(6) [sic] and follow the Ninth Circuit interpretation of the statute."[200] Specifically, HUD instructed the PHAs that fault by the leaseholder must be shown before evicting a tenant for criminal activity.[201]

HUD's petition for writ of certiorari to the United States Supreme Court was granted on September 25, 2001.[202] The main issue on appeal was whether the lease provision required by federal law may be violated by criminal activity regardless of whether the tenant knew or should have

193. *See id.* at 647-48.

194. *See id.* at 650.

195. Rucker v. Davis, 222 F.3d 614 (9th Cir. 2000) (ordering en banc rehearing).

196. *See* Rucker v. Davis, 237 F.3d 1113, 1127-28 (9th Cir. 2001).

197. *Id.* at 1123. The court noted that § 1437d as a whole, in addition to the legislative history, clearly demonstrated that Congress did not intend to evict innocent tenants. *See id.*

198. *See id.* at 1127. "The absurdity and unjustness of the potential results in this case confirms that HUD has missed the mark in discerning Congress's intent." *Id.* at 1124.

199. *See* UNITED STATES DEP'T OF HOUS. & URBAN DEV., NOTICE PIH 2001-8 (HA) (Mar. 13, 2001), *at* http://www.hudclips.org (last visited Mar. 19, 2003) [hereinafter NOTICE PIH 2001-8]. *See also* Wendy L. Stasell, Rucker v. Davis *and Its Significance for Tenant Advocates*, 35 CLEARINGHOUSE REV. 144, 152 (2001).

200. NOTICE PIH 2001-8, *supra* note 199 (acknowledging that en banc decision was binding precedent).

201. *See id.* If the criminal activity was committed outside the leaseholder's unit, the tenant must have "take[n] 'reasonable steps to prevent drug activity from occurring' in circumstances in which the leaseholder 'knew or should have known of the criminal activity' and could 'realistically exercise control over the conduct of [the] household member or guest.'" *Id.* (quoting Rucker v. Davis, 237 F.3d 1113 (9th Cir. 2001)) (alteration in original). If the criminal activity was committed inside the unit, the tenant must show that she took "all requisite steps to prevent criminal activity from occurring there." *Id.* HUD cautions, however, that local PHAs should still review the Ninth Circuit decision independently in order to formulate their own interpretation. *See id.* at n.1.

202. *See* United States Dep't of Hous. & Urban Dev. v. Rucker, 533 U.S. 976 (2001) (mem.).

known of the drug activity.[203] Examining whether Congress intended for § 1437d(*l*)(6) to deprive tenants of public housing without considering the tenant's guilt or innocence was also at issue.[204] In addition, the Supreme Court was asked to examine whether construing § 1437d(*l*)(6) would lead to "absurd results."[205] The constitutionality of § 1437d(*l*)(6) was also a concern of the parties.[206]

HUD urged the Supreme Court to uphold its interpretation of § 1437d(*l*)(6).[207] First, HUD contended that its interpretation did not require a PHA to evict a tenant; rather, it allowed PHAs to make their own decisions.[208] HUD also argued that its interpretation of the statute advanced the goal of Congress to rid public housing of drugs and violent crime.[209]

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203. *See* Brief for Petitioner at 1, United States Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002) [hereinafter Brief for Petitioner].

204. *See* Brief for Respondents at 2, United States Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002) [hereinafter Brief for Respondents].

205. *See* Brief for Petitioner, *supra* note 203, at 44. *See also supra* note 198 (quoting Rucker v. Davis, 237 F.3d 1113, 1124 (9th Cir. 2001)).

206. Brief for Respondents, *supra* note 204, at 33-39. (arguing that HUD's interpretations violated the due process requirements of the Constitution).

207. *See* Brief for Petitioner, *supra* note 203, at 14.

208. *See id.* at 34. The PHA may consider:

> all circumstances relevant to a particular case such as the seriousness of the offending action, the extent of participation by the leaseholder in the offending action, the effects that the eviction would have on family members not involved in the offending activity and the extent to which the leaseholder has shown personal responsibility and has taken all reasonable steps to prevent or mitigate the offending action.

Id. at 7 (quoting 66 Fed. Reg. 28776, 28,803 (May 24, 2001) (codified at 24 C.F.R. § 966.4)). *See also supra* note 100. The Supreme Court also noted that the PHA may consider: "the degree to which the housing project suffers from 'rampant drug-related or violent crime,' 'the seriousness of the offending action,' and 'the extent to which the leaseholder has ... taken all reasonable steps to prevent or mitigate the offending action.'" *Rucker*, 535 U.S. at 134 (citations omitted).

209. *See* Brief for Petitioner, *supra* note 203, at 34. *See also supra* notes 93-96 and accompanying text (discussing creation of the zero tolerance policy). The problem is addressed in four ways:

> First, 'if household member criminal activity is ground for termination, then the tenant has reason to try to control or prevent the activity." ... Second, a requirement that termination of the tenancy and eviction be limited to cases in which the tenant's knowledge could be demonstrated would pose enormous enforcement difficulties, which likely would be sufficient to render any such provision of very limited value in restoring peace and security to public housing projects. ... Third, household-wide responsibility for drug-related criminal activity serves other worthwhile objectives ..... Fourth, even if a tenant is genuinely unaware of the household member's drug-related criminal activity, termination of

According to HUD, § 1437d(*l*)(6) was not ambiguous and did not permit an "unknowing" tenant defense.[210] Furthermore, HUD argued that the section did not violate the Constitution.[211] Consequently, HUD contended that a tenant could be evicted under § 1437d(*l*)(6) without regard to the tenant's knowledge or fault, and the Ninth Circuit opinion should be vacated.[212]

However, the tenants argued that Congress intended for § 1437d(*l*)(6) to allow for a tenant to raise an "innocent" tenant defense,[213] and that HUD misinterpreted congressional intent in arguing that the omission of an innocent tenant defense by Congress indicated Congress' affirmative intent to bar such a defense.[214] Furthermore, the tenants contended that HUD's interpretation of the section contradicted the intent of Congress,[215] violated the due process rights of tenants,[216] and did not further the goals of Congress.[217] The tenants urged the Supreme Court to affirm the ruling of

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the tenancy may nonetheless be an effective (even if sometimes harsh) measure.

Brief for Petitioner, *supra* note 203, at 35-37. In addition, "a tenant who 'cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project.'" *Rucker*, 535 U.S. at 134 (quoting 56 Fed. Reg. 51560, 51567 (Oct. 11, 1991) (codified at 24 C.F.R. § 966)).

210. *See* Brief for Petitioner, *supra* note 203, at 22. HUD argued that mere omission of the level of knowledge required by a tenant did not make the section ambiguous. *See id.* at 22-23. Further, HUD contended that the section was clear regarding the eviction of the leaseholder for any violation. *See id.* at 24-25. Finally, the section, according to HUD, did not require the criminal act to be committed by someone "under the tenant's control" in order for an eviction to occur. *Id.* at 26.

211. *See id.* at 17.

212. *See id.* HUD noted that, even if the Court had any further doubts about § 1437d(*l*)(6), it should be given deference to HUD's interpretation because "[i]nsofar as Congress left any ambiguity on the question, Congress assigned to HUD—not to the courts—the authority to resolve it." *Id.* at 49 (citation omitted).

213. *See* Brief for Respondents, *supra* note 204, at 4-5. The tenants argued that:

> when properly viewed through the lens of Congress's actions and the section's place in the overall framework of antidrug legislation, [the section] is intended to protect innocent children, parents, grandparents and other tenants from the actions of overzealous governmental entities seeking to deprive them of public housing, without which they would be homeless.

Id. at 5.

214. *See id.* at 18. The tenants also argued that HUD's argument failed to take into consideration the context of § 1437d(*l*)(6). *See id.* at 18-19.

215. *See* Brief for Respondents, *supra* note 204, at 23. *See also supra* notes 209-13 and accompanying text (discussing HUD's interpretation).

216. *See* Brief for Respondents, *supra* note 204, at 26, 33. HUD's interpretation denies judicial review of a tenant eviction except for the "mechanical determination of 'whether a violation of the lease has occurred and whether the lease provides that such a violation is grounds for eviction.'" *Id.* at 26.

217. *See id.* at 28. *See also supra* note 209 (discussing how HUD's interpretation

the Ninth Circuit, thus preserving the innocent tenant defense.[218]

2. Ruling of the United States Supreme Court

The Supreme Court was not persuaded by the tenants' arguments and reversed the en banc opinion of the Ninth Circuit.[219] The Court held that § 1437d(*l*)(6) was not ambiguous and permitted the eviction of tenants for the actions of third parties regardless of their knowledge of the drug or criminal activity.[220] Unlike the en banc Ninth Circuit, the Supreme Court interpreted the term "any" to modify "drug-related criminal activity."[221] A previous opinion of the Court had defined the term "any" to apply "indiscriminately."[222] Consequently, Congress' use of the phrase "any drug-related criminal activity" was interpreted to allow for evictions regardless of the tenant's knowledge.[223]

The Court also disagreed with the Ninth Circuit's interpretation of the phrase "under the tenant's control" applying not only to "other person," but also to any "guest" or "member of the tenant's household."[224] The Court found this argument to be "nonsensical" and in violation of basic rules of grammar.[225] Furthermore, the Court interpreted "control" to mean only "that the tenant ha[d] permitted access to the premises."[226] The Court determined that "the plain language of § 1437d(*l*)(6) require[d] leases that grant public housing authorities the discretion to terminate tenancy without regard to the tenant's knowledge of the drug-related criminal activity."[227]

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furthered the goals of Congress in enacting § 1437d(*l*)(6)). "Evicting innocent tenants will not make public housing safer; it will only increase the number of victims of someone else's drug activity." Brief for Respondents, *supra* note 204 at 32.

218. *See* Brief for Respondents, *supra* note 204, at 50.

219. United States Dep't Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 130 (2002).

220. *See id.*

221. *See id.* at 130-31. "The en banc Ninth Circuit thought that the statute did not address 'the level of personal knowledge or fault that is required for eviction.'" *Id.* at 130 (quoting Rucker v. Davis, 237 F.3d 1113, 1120 (9th Cir. 2001)).

222. *Id.* at 131. (quoting United States v. Gonzales, 520 U.S. 1, 5 (1997)).

223. *See id.*

224. *Id. See also supra* note 221 (quoting the relevant part of the statute discussed here). If "under the tenant's control" also applied to any "guest" or "member of the tenant's household," then a tenant could not be evicted if the tenant either lacked knowledge of the criminal activity of the third party or could not control the person. *See Rucker*, 535 U.S. at 131.

225. *See Rucker*, 535 U.S. at 131.

226. *Id.* (quoting 66 Fed. Reg. 28,776, 28,781 (May 24, 2001) (codified at 24 C.F.R. § 966)). Using this interpretation of "control," a guest or household member would always be under the tenant's "control" because permission to be on the premises is implied in those terms. *See id.*

227. *Id.*

The Supreme Court further found that the Ninth Circuit was incorrect in its conclusion that a plain reading of § 1437d(*l*)(6) would lead to "absurd results."[228] According to the Court, the statute did not require evictions.[229] Rather, the statute "entrusted" the local PHAs to make the decision of whether to evict the tenant for a violation.[230] The mere fact that a PHA could choose to evict a tenant without prior knowledge of the drug-related activity did not make the eviction "absurd," in the Supreme Court's view.[231] A "no fault" eviction, according to the Court, was simply a common occurrence in landlord-tenant practice.[232]

The Supreme Court also found that Congress would have had sound reasons for allowing local PHAs to evict tenants without regard to fault.[233] First, the Court noted that "provid[ing] public and other federally assisted low-income housing that is decent, safe, and free from illegal drugs" is a reasonable purpose for providing no-fault evictions in § 1437d(*l*)(6).[234] In addition, the Court was persuaded by the argument that "a tenant who 'cannot control drug crime, or other criminal activities by a household member which threaten health or safety of other residents, is a threat to other residents and the project.'"[235] Thus, according to the Court, Congress clearly intended to permit local PHAs the discretion to conduct no-fault evictions.[236]

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228. *Id.* at 134.

229. *See id.*

230. *See id. See also supra* note 208 (discussing factors PHA may consider). However, the local PHA often appears to give little weight to these factors or not take these factors into consideration at all, especially in domestic violence situations. *See infra* Part V.

231. *See Rucker*, 535 U.S. at 134.

232. *See id.* In addition, holding tenants strictly liable for the actions of their guests, other household members, or others under their control "maximizes deterrence and eases enforcement difficulties." *Id.* (citing Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 14 (1991)). The view that strict liability "maximizes deterrence" contradicts the earlier position of the Court that PHAs are "entrusted" with the discretion to choose to evict or not. *See id. See also supra* note 231 and accompanying text. If the PHA can consider certain factors when deciding whether to terminate the lease, then the deterrence argument of the Court is lessened. Furthermore, if a tenant could not have foreseen the criminal activity, then the statute provides no deterrence.

233. *See Rucker*, 535 U.S. at 134. *See also supra* notes 93-96 and accompanying text (discussing enactment of zero tolerance laws).

234. *See Rucker*, 535 U.S. at 134 (quoting 42 U.S.C. § 11901(1) (1994)).

235. *Id.* (quoting 56 Fed. Reg. 51,560, 51,567 (Oct. 11, 1991) (codified at 24 C.F.R. § 966)). This argument is particularly problematic in the case of domestic violence victims because it cannot be said that they are ever in control of their abusive partner. *See supra* notes 21-22 and accompanying text. As a result, domestic violence victims would always be a "threat to other residents and the project." *Rucker*, 535 U.S. at 134.

236. *See Rucker*, 535 U.S. at 134.

Finally, the Supreme Court held that § 1437d(*l*)(6) was constitutional.[237] The Court noted that, as construed, the statute was not ambiguous.[238] In addition, the Court had previously stated that "[t]here are ... no 'serious constitutional doubts' about Congress' affording local public housing authorities the discretion to conduct no-fault evictions for drug-related crime."[239] Therefore, the Court upheld HUD's interpretation and application of § 1437d(*l*)(6).[240]

3. Application to Zero Tolerance Policies and Domestic Violence

Although the tenants in *Rucker* faced eviction because of drug-related criminal activity of third parties,[241] the outcome of the case has dire implications for domestic violence victims evicted because of the criminal activity of their abusers.[242] First, the eviction of a domestic violence victim should not be handled with strict liability.[243] To evict a victim solely because she is assaulted by her partner flies in the face of all logic, and surely contradicts the intent of Congress.[244] Allowing PHAs to utilize § 1437d(*l*)(6) to punish domestic violence victims would be a travesty of

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237. *See id.* at 135. The en banc Ninth Circuit held that § 1437d(*l*)(6) should be construed to avoid unconstitutional outcomes. *See* Rucker v. Davis, 237 F.3d 1113, 1119 (9th Cir. 2001). Evicting a tenant without regard to the tenant's fault was viewed by the en banc Ninth Circuit as raising serious constitutional concerns. *See id.* at 1124-25.

238. *See Rucker*, 535 U.S. at 130. *See also supra* notes 219-29 and accompanying text (discussing Supreme Court's interpretation of the statute).

239. *Rucker*, 535 U.S. at 135. (quoting Reno v. Flores, 507 U.S. 292, 314 n.9 (1993)) (emphasis omitted). The Court relied upon the fact that an eviction is not required, but is merely at the discretion of the local PHA. *See id.* at 135. In addition, the Court held that the Due Process Clause of the Fourteenth Amendment was not violated because the local PHA provided the tenant prior notice to the termination. *See id.* at 135-36.

240. *See Rucker*, 535 U.S. at 128. Congress was found to have clearly spoken on the issue and HUD's interpretation was consistent with the intent of Congress. *See id.* at 130-31.

241. *Rucker*, 237 F.3d at 1116.

242. Victims who face eviction may experience difficulties in obtaining restraining orders, finding permanent housing, or keeping their public housing assistance. *See* Mullins, *supra* note 63, at 246; Zorza, *supra* note 33, at 421; Reif & Krisher, *supra* note 65, at 30.

243. HUD's policy applies strict liability to a violation of § 1437d(*l*)(6) regardless of whether the violation occurred because of a household member, guest, or other person. *See supra* notes 97, 213, 233 and accompanying text.

244. Even if Congress intended to evict grandmothers for the drug activities of third parties, the support of Congress for domestic violence victims through other legislation would undermine the argument that Congress intended § 1437d(*l*)(6) to allow for the eviction of domestic violence victims. *See supra* Part IV.A.2. (discussing Supreme Court's interpretation of the intent of Congress). *See generally* Violence Against Women Act, 18 U.S.C. §§ 2261-66 (1994); Victims of Crime Act, 42 U.S.C. §§ 10601-608 (1984); and Victims Economic Security and Safety Act, H.R. 2670 and S. 1249, 107th Cong. (2001).

justice.[245]

Since the Supreme Court held that § 1437d(*l*)(6) does not permit an innocent tenant defense,[246] PHAs may continue evicting tenants for the actions of others.[247] HUD should encourage PHAs *not* to enforce a zero tolerance policy against a domestic violence victim.[248] Without the guidance of HUD, PHAs will continue, in their "discretion," to "exercise their judgment" to evict victims.[249]

On the other hand, upholding an innocent tenant defense would not necessarily provide complete protection for domestic violence victims.[250] If HUD should act and provide an innocent tenant defense for domestic violence victims, HUD's definition of "innocent tenant" will be crucial to the situation of the victim. If the offending party must be "under the tenant's control," then there is a strong argument that a domestic violence victim should not be evicted for the actions of her abuser.[251] If anyone is said to be in "control" in a domestic violence relationship, it is undoubtedly the abuser.[252] As a result, it would be unjust to evict the victim based upon the violence she has suffered.

However, this definition of an innocent tenant will still allow room to evict domestic violence victims because the Supreme Court has interpreted "under the tenant's control" broadly.[253] In addition, the phrase "under the

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245. *See* Brief of Amici Curiae, *supra* note 101, at 28.

246. *See supra* notes 213-18 and accompanying text (discussing "innocent" tenant defense).

247. For an example, see the four cases highlighted in the Introduction, *supra* Part I discussing eviction of domestic violence victims for the acts of their abusers.

248. See *infra* notes 315-21 for a discussion of the implementation of a non-discriminatory policy by a management company resulting from litigation.

249. *See supra* notes 100, 209 and accompanying text (discussing discretion HUD delegates to PHAs).

250. For a discussion of the Supreme Court's opinion in *Rucker*, see *supra* Part V.A.2.

251. *See* 42 U.S.C. § 1437d(*l*)(6) (1999); Rucker v. Davis, 237 F.3d 1113, 1120 (9th Cir. 2001) (en banc), *rev'd sub nom.* U.S. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002).

252. *See supra* notes 21-22 and accompanying text (discussing power imbalance in a domestic violence relationship).

253. HUD advocated for a broad interpretation of "under the tenant's control" in its appeal to the United States Supreme Court. *See* Brief for Petitioner, *supra* note 203, at 26-27. Specifically, HUD argued that the only control a tenant needed was "legal" control of the other person. *See id.* at 27. Ultimately, the Supreme Court upheld HUD's argument. *See* U.S. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 129-30 (2002). Under this interpretation, a victim could be evicted if the abuser lived in the home, was visiting with the permission of the victim, or was there to exchange the children. *See supra* notes 225-27 and accompanying text.

tenant's control" may be limited only to guests and "other persons."[254] If the abuser was a member of the household, the victim would then have no recourse under an innocent tenant defense.[255] Yet, given the dynamics of domestic violence, a victim cannot be said to ever be in control of her abusive partner.[256]

HUD may also define a tenant as innocent when the tenant could not have foreseen the criminal activity.[257] Similarly, HUD could impose a "knew or should have known" standard.[258] A foreseeability standard may provide protection to the first-time victim, but will provide little or no protection for the majority of domestic violence victims.[259] Furthermore, an inquiry into whether a victim could foresee or should have predicted the abuse would only place the blame and responsibility back on her.[260]

Consequently, an innocent tenant defense may provide some relief to domestic violence victims, but it is not foolproof. The insistent PHA may still find a way to evict a victim for the actions of her abuser. As a result, HUD should explicitly remove domestic violence victims from the strict liability requirements imposed by the Supreme Court.[261]

B. Remedies Under the Fair Housing Act

The Fair Housing Act protects citizens from discrimination in housing.[262] The Act was passed originally as part of the Civil Rights Act of

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254. *See supra* notes 137, 225-28.

255. A member of the household would always be under the tenant's control because the tenant had allowed the household member to be on the premises. *See Rucker*, 535 U.S. at 129 (2002); *supra* note 227 and accompanying text.

256. *See supra* Part II.A.1. (discussing dynamics of domestic violence). *See also supra* notes 151-63 (discussing *Delaware County Housing Authority v. Bishop*, 749 A.2d 997 (Pa. Commw. Ct. 2000), *cert. denied*, 532 U.S. 990 (2001) (mem.)).

257. *See* Boston Hous. Auth. v. Bell, 697 N.E.2d 130, 132 (Mass. 1998). *See also supra* notes 116-27 and accompanying text.

258. Memphis Hous. Auth. v. Thompson, 38 S.W.3d 504, 507 (Tenn. 2001), *cert. denied*, 534 U.S. 823 (2001) (mem.). *See also supra* notes 133-47 and accompanying text.

259. If a victim has been previously assaulted, then she may be viewed by the PHA as being able to "foresee" future assaults. In addition, when an abuser threatens the victim, the PHA may again make an argument that the ensuing violence and criminal activity was foreseeable. Given the dynamics of domestic violence, it is likely that many victims would, therefore, not be deemed "innocent." *See supra* Part II.A.1 (explaining how domestic violence is a systematic pattern developing over time).

260. *See* GAGNÉ, *supra* note 21, at 21. In addition, "[i]n violent relationships, women learn that they are unable to predict the outcome of their [own] behavior because abusers' responses are random and directed toward total control ...." *Id.*

261. *See generally* U.S. Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002).

262. *See* 42 U.S.C. § 3604(a)-(b) (1994).

1968,[263] and specifically addressed discrimination based upon race, color, religion, or national origin.[264] Protection against discrimination based upon sex was added in 1974, and protection against discrimination based upon handicap or familial status was added in 1988.[265]

1. Discrimination Based Upon Sex

A domestic violence victim may argue that the Fair Housing Act is violated if she is evicted for the actions of her abuser.[266] The Act makes it "unlawful to refuse to ... rent ... to refuse to negotiate for the ... rental of, or otherwise make unavailable or deny, a dwelling to any person because of" a person's sex.[267] A policy that allows eviction of a victim of domestic violence has "a disparate impact on women and therefore discriminates on the basis of sex."[268] Consequently, housing facilities that evict tenants because they are abused by their partner are discriminating against them because of their sex.[269]

2. *United States v. C.B.M. Group, Inc.*[270]

Ms. Tiffanie Alvera resided in Seaside, Oregon at Creekside Village Apartments.[271] On the morning of August 2, 1999, she was physically assaulted by her husband, Mr. Mota.[272] Ms. Alvera was treated at a hospital and, following her release, immediately applied for, and was granted, a temporary restraining order against Mr. Mota.[273] That same day, Ms. Alvera provided Creekside's management with a copy of the restraining order, which required Mr. Mota to move away from the apartment complex and prohibited him from contacting Ms. Alvera.[274] Mr. Mota was arrested

263. § 3601.

264. *See* David A. Thomas, *Fixing Up Fair Housing Laws: Are We Ready for Reform?*, 53 S.C. L. REV. 7, 9 (2001).

265. *See id.*

266. *See infra* Part V.

267. § 3604(a).

268. Complaint, *supra* note 2 ¶ 72.

269. *See id.* ¶¶72-73.

270. Consent Decree, No. 01-857-PA (D. Or. Nov. 5, 2001), *at* http://archive.aclu.org/court/alveraconsentdecree.pdf (last visited Apr. 14, 2003) [hereinafter Consent Decree]. HUD brought an action in federal district court on behalf of Ms. Alvera, who intervened as of right pursuant to 42 U.S.C. § 3612(o)(2). *See id.* ¶ 1.

271. *See id.* ¶ 2.

272. *See* Complaint, *supra* note 2, ¶¶ 25; Consent Decree, *supra* note 270, ¶ 2.

273. *See* Complaint, *supra* note 2, ¶¶ 25-26.

274. *See id.* ¶¶ 27, 29.

the same day and eventually convicted of assault.[275]

Although Creekside had not received any complaints from residents about Ms. Alvera and Mr. Mota, two days after the assault Creekside served Ms. Alvera with a twenty-four hour eviction notice.[276] The eviction notice read:

> Pursuant to Oregon Landlord/Tenant law, this notice is to inform you that your occupancy will terminate because: You, someone in your control, or your pet, has seriously threatened immediately to inflict personal injury, or has inflicted substantial personal injury upon the landlord or other tenants. ... Specific details: On August 2, 1999, at approximately 6:00 a.m., Humberto Mota reportedly physically attacked Tiffani[e] Alvera in their apartment. Subsequently, Police were called in.[277]

The notice further stated that Ms. Alvera's tenancy would terminate effective midnight August 5, 1999.[278]

Ms. Alvera then applied for a one bedroom apartment because she no longer qualified for a two bedroom subsidized unit.[279] The resident manager "reluctantly" accepted the application, but informed the supervising property manager that she did not wish to have Ms. Alvera as a tenant.[280] Consequently, Ms. Alvera's application was rejected because of the domestic violence incident for which she received the eviction notice, even though a one bedroom was available at that time.[281] In addition, the resident manager refused to accept Ms. Alvera's rent for the months of August and September.[282]

On October 22, 1999, Ms. Alvera filed a complaint with the HUD.[283]

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275. *See id.* ¶ 28.

276. *See id.* ¶ 31.

277. *Id.* This notice complies with OR. REV. STAT. § 90.400(3) (2001). *See supra* notes 114-16 and accompanying text.

278. *See* Complaint, *supra* note 2, ¶ 31.

279. *See* Charge of Discrimination, HUD v. C.B.M. Group, Inc., No HUDALJ 10-99-0538-8, ¶ 19 (Apr. 16, 2001), *at* http://www.nowldef.org (last visited Apr. 14, 2003) [hereinafter Charge of Discrimination].

280. *Id.*

281. *See* Charge of Discrimination, *supra* note 279, ¶ 20. Ms. Alvera made a second application for a one bedroom apartment on October 9, 1999. *See id.* ¶ 24. She eventually leased a one bedroom apartment, commencing in November, although the apartment had been vacant since August 1, 1999. *See* Charge of Discrimination, *supra* note 279, ¶ 24. Ms. Alvera received a letter dated the same day she signed the new lease that stated "if there is any type of reoccurrence of the past events ... Creekside would have no other alternative but to cause an eviction to take place." *Id.*

282. *See id.* ¶ 39.

283. *See id.* at I.

Ms. Alvera alleged that she had been discriminated against by Creekside Village Apartments and C.B.M. Property Management because they failed to make an apartment available to her due to her sex, in violation of the Fair Housing Act.[284] As a result, the Secretary of HUD conducted an investigation into the complaint.[285]

At the HUD administrative hearing, the management argued that their policy was well supported.[286] First, they argued that the policy was designed to "protect other tenants both from threats of violence or actual violence and from being disrupted in their tenancy."[287] Second, they argued that the policy was consistent with and even mandated by the rules of the housing authority.[288] Finally, the management argued that they evict the entire household because a temporary restraining order does not necessarily stop the violence.[289]

The Secretary found the management's reasons for their policy to evict the victim of domestic violence to be unfounded.[290] Furthermore, the Secretary found reasonable cause to believe the management of Creekside Village Apartments violated the Fair Housing Act by discriminating against Ms. Alvera because of her sex.[291] Specifically, the Secretary found that "[t]he evidence taken as a whole establishes that a policy of evicting innocent victims of domestic violence because of that violence has [a] disproportionate[ly] adverse impact on women and is not supported by a valid business or health or safety reason by the [management]."[292]

As a result of the Secretary's finding, a Charge of Discrimination was issued on April 16, 2001.[293] Similar to the Secretary's findings, the

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284. *See id. See also* 42 U.S.C. §§ 3601-3619; *supra* Part V.B. (discussing Fair Housing Act).

285. *See* Charge of Discrimination, *supra* note 279, at I; Complaint, *supra* note 2, ¶¶ 12-13.

286. *See* HUD Determination of Reasonable Cause, Alvera v. Creekside Village Apartments, No. 10-99-0538-8, 5 (1999), *at* http://www.nowldef.org (last visited Jan 14, 2003) [hereinafter Determination of Reasonable Cause].

287. *Id.* However, no other tenant complained or was even aware of the domestic violence incident. *See id.*

288. *See* Determination of Reasonable Cause, *supra* note 286. However, Rural Development, the housing authority, provided in their rules and policies that "[i]t is not the intent that this provision of material lease violation apply to innocent members of the tenant's household who are not engaged in illegal activity, nor are responsible for control of another household member or guest." *Id.*

289. *See id.* However, Mr. Mota left the country after he was released from jail. *See* Charge of Discrimination, *supra* note 279, ¶ 27.

290. *See* HUD Determination of Reasonable Cause, *supra* note 286, at 5.

291. *See id.* at 6.

292. *Id.*

293. *See* Complaint, *supra* note 2, ¶ 15.

management company was charged with:

> adopting and enforcing a facially neutral policy of terminating the tenancy of the victim of domestic violence after an incident of violence between household members, which has a disparate impact on women who are disproportionately the victims of domestic violence, [the management] discriminated against [Ms. Alvera] in the terms, conditions, or privileges of a dwelling, because of her sex ....[294]

Furthermore, the Secretary suggested that management's policy of evicting the victim of domestic violence because of a violent incident was not justified as a business necessity.[295]

Ms. Alvera decided to resolve the charge through federal civil action.[296] As a result, the Attorney General, on behalf of Ms. Alvera, filed a civil action in the United States District Court for the District of Oregon against C.B.M. Group, Inc., Creekside Village Apartments, and related individuals.[297] Ms. Alvera later intervened in the action.[298]

All parties involved in *Alvera v. C.B.M. Group, Inc.* agreed to settle the case without trial or other evidentiary hearings in November, 2001.[299] The purpose of the consent decree was to ensure that C.B.M. Group would not discriminate in the future against tenants who have been victims of domestic violence and to provide training to the C.B.M. Group employees.[300] The defendants were specifically enjoined from:

> (a) Taking any action directed to the eviction of any person on the basis that such person has been the victim of violence, including domestic violence, initiated by another person, whether or not such person is residing in the tenant's household; or (b) Discriminating in any way against a person in the terms, conditions or privileges of his or her tenancy on the basis that such person has been the victim of violence, including domestic violence, initiated by another person, whether or not such a person is residing in the tenant's household; or (c) Taking any other action in violation of the Fair Housing Act, 42 U.S.C. §§ 3601-3619.[301]

The defendants were required to notify in writing all employees having any responsibility for the management of any residential rental property of the

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294. Charge of Discrimination, *supra* note 279, ¶ 32.
295. *See id.* ¶ 30.
296. *See* Complaint, *supra* note 2, ¶ 16.
297. *See id.* ¶¶ 17-18.
298. *See* Consent Decree, *supra* note 270, ¶ 2.
299. *See id.* ¶ 7.
300. *See id.*
301. *Id.* ¶ 8.

settlement's requirements within thirty days.[302] In addition, all employees were required to attend training on "their responsibilities under federal, state, and local Fair Housing laws, regulations, and ordinances."[303] Under the settlement, the defendants were also required to post a notice in each residential property they managed informing tenants that it was not their policy to take any action contrary to the conditions of the settlement.[304] Finally, the defendants were required to abide by these conditions for five years from the entry of the decree.[305]

Moreover, the defendants were prevented from attempting to evade the terms of the settlement by transferring responsibilities of property currently owned or operated by C.B.M. Group.[306] If the defendants contract with another company to manage a property they currently own during the period of the Consent Decree, they must require that company to comply with all provisions of the settlement.[307] As a result, tenants residing at any of the current properties of C.B.M. Group are protected from discrimination for the next five years.[308]

Furthermore, any evictions by the defendants throughout the life of the decree for reasons other than non-payment of rent are monitored by the United States Attorney's Office.[309] First, C.B.M. Group must keep a copy of all documents relating to the eviction of any tenant for a reason other than non-payment of rent.[310] Second, and perhaps most importantly,

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302. *See id.*¶ 12. The defendants must also revise all employee manuals, handbooks, or policy directives to reflect the settlement. *See id.*

303. *Id.* ¶ 16. In addition, the defendants must provide information about the date, location, and duration of the training, the name and address of the trainer, a copy of the curriculum, and a list of employees who attended the training to HUD and the United States Attorney's Office. *See id.* The Defendants are also responsible for any costs associated with the training program. *See id.*

304. *See* Consent Decree, *supra* note 270, ¶ 13.

305. *See id.* ¶ 19.

306. *See id.* ¶¶ 14.

307. *See id.* ¶ 15. Furthermore,

> [w]ithin thirty (30) days of any such change of management, the [defendants] shall provide the United States Attorney with the following information: (a) the identity of the new management entity and the name and telephone number of the person responsible for continuing compliance with the objectives of this Decree; and (b) a copy of the portion of the management contract which imposes the obligation to comply with the provisions of this Decree.

Id.

308. *See id.* ¶¶ 17-18.

309. *See id.* ¶ 18.

310. *See* Consent Decree, *supra* note 270, ¶ 17. Documents must be kept for all residential property managed by C.B.M. Group. *See id.* In addition, the United States Attorney's Office is permitted to inspect the documents at any time after providing seventy-

C.B.M. Group must promptly notify the United States Attorney's Office after serving notice of an eviction to any tenant because of acts of violence committed by any person associated with the tenant.[311] Finally, C.B.M. Group is required to cooperate with any further inquiry by the United States Attorney into the circumstances of an eviction for reasons other than non-payment of rent.[312]

The Consent Decree also provides for the enforcement of the above conditions.[313] The United States Attorney's Office and C.B.M. Group must first attempt to resolve any issues regarding interpretation or compliance with the decree informally.[314] The United States District Court for the District of Oregon may also impose any remedy authorized by law on the defendants for failing to comply with the Consent Decree, upon motion of the United States Attorney.[315] In addition, the United States Attorney may notify the Oregon Housing and Community Services of the failure of the defendants to comply with any provision of the settlement after obtaining an order establishing noncompliance.[316]

While *Alvera v. C.B.M. Group, Inc.* involved discrimination against only one domestic violence victim, the impact of the settlement agreement will be far-reaching.[317] The settlement decree prevents C.B.M. Group from applying a zero tolerance policy to victims of domestic violence at any of its properties.[318] In addition to Oregon, C.B.M. Group owns or operates housing facilities in Arizona, California, Hawaii, and Nevada.[319] As a result, domestic violence victims will be protected from housing discrimination in five states for the life of the Consent Decree.[320]

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two hours notice. *See id.*

311. *See id.* ¶ 18. Notice to the United States Attorney must occur within seventy-two hours of the eviction notice being served and should be made by facsimile, if practical. *See id.*

312. *See id.* ¶ 20.

313. *See id.* ¶¶ 19-21.

314. *See id.* ¶ 20.

315. *See id.* The United States District Court for the District of Oregon retains jurisdiction to enforce the terms of the Consent Decree, except the "catch all" requirement not to violate the Fair Housing Act. *See id.* ¶ 21. *See also supra* note 301 and accompanying text.

316. *See* Consent Decree, *supra* note 270, ¶ 21. The defendants' failure to act in accordance with the settlement does not have to be willful. *See id.*

317. *See* Press Release, ACLU, Settlement Reached in Case of Oregon Domestic Abuse Victim Who Faced Eviction; Important Precedent Set for Battered Women Nationwide (November 5, 2001), *at* http://archive.aclu.org/news/2001/n110501a.html (last visited Mar. 19, 2003) [hereinafter ACLU Press Release].

318. *See generally* Consent Decree, *supra* note 270.

319. *See* ACLU Press Release, *supra* note 317.

320. *See id.*

Housing managers throughout the nation should be put on notice that zero tolerance policies are discriminatory when applied to domestic violence victims.[321] As a result, zero tolerance policies should continue to be challenged.[322] The design of the settlement will, therefore, serve as a model for other housing facilities throughout the country.[323]

V. RECOMMENDATIONS

In order to prevent the discrimination against domestic violence victims that occurs when a strict liability standard is imposed for the criminal activities of others, the federal government must act, either through HUD or Congress. First, a policy that exempts domestic violence victims from strict liability standards should be issued.[324] HUD's current contention that PHAs are entitled to use their own discretion simply does not provide enough protection for domestic violence victims against eviction.[325] The federal government should not re-victimize a domestic violence victim by allowing and supporting her eviction through its incentives to local PHAs.[326] On the contrary, PHAs should have their money taken away, or at the very least, no longer receive any incentive, when they unjustly evict a domestic violence victim because she has suffered violence from her partner. Victims of violence at the hands of their partners have been and will continue to be evicted under the "discretion" HUD has given PHAs.[327]

Second, HUD must monitor any implementation of the policy prohibiting discrimination based upon domestic violence.[328] Merely issuing a new policy will not provide protection for domestic violence victims. As HUD has said itself, PHAs are allotted discretion in deciding whether to evict a tenant based upon a violation of the zero tolerance policy under

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321. *See id.*

322. *See id.* The ACLU is currently investigating complaints that similar discrimination has occurred in other states where zero tolerance policies are in effect. *See id.*

323. *See id.*

324. *See* United States Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125, 134 (2002); *supra* notes 232-42 and accompanying text (discussing strict liability standard implied by § 1437(d)(*l*)(6)).

325. *See supra* note 213 and accompanying text for a discussion of the discretion of PHAs. The United States Supreme Court also found that local PHAs had much discretion in deciding whether to evict. *See Rucker*, 535 U.S. at 129-30; *supra* notes 100, 230 and accompanying text. Many victims have been evicted for the acts of their abusers under the "discretion" of their local PHA. For examples, see *supra* notes 3-14 and accompanying text.

326. *See supra* note 101 and accompanying text (discussing incentives federal government provides for evictions based upon § 1437d(*l*)(6)).

327. See *supra* notes 3-14 and accompanying text for recent examples of domestic violence victims evicted by PHAs because of the abuse of their partners.

328. *See* discussion, *supra* Part V.

§ 1437(d)(*l*)(6).[329] Consequently, there is a strong likelihood, given past practices, that local PHAs may choose to bypass any such policy preventing the eviction of domestic violence victims for the actions of their abusers.

In addition, the Supreme Court's holding in *Rucker*, that innocent tenants may be evicted, leaves domestic violence victims completely vulnerable to evictions.[330] Victims would be perhaps best protected if Congress issued a directive to HUD to issue a no eviction policy for the actions of abusers against domestic violence victims, in spite of the Supreme Court's decision.[331] Congress and HUD should specifically define a domestic violence victim as an "innocent tenant" with regard to the actions of her abuser.

Furthermore, HUD and Congress should keep in mind that if the eviction of a domestic violence victim is allowed, then the victim may face a decrease or withdrawal in subsidized housing benefits.[332] For example, the Section 8 subsidy may be terminated "if a preponderance of the evidence indicates that a family member engaged in violent criminal activity or drug-related criminal activity even if the family member has not been arrested or convicted."[333] Therefore, domestic violence victims evicted under § 1437(d)(*l*)(6) for the actions of their abusers stand to lose their access to federal housing not only once, but for a lifetime. Considering how difficult it is to find affordable housing, if a domestic violence victim is evicted, she will likely become homeless or forced to return to the abuser.[334]

Consequently, zero tolerance policies and practices put domestic violence victims in real danger. If they report the violence, they face eviction.[335] If they do not report the violence, they remain in physical danger.[336] Moreover, if victims obtain a restraining order to evict the abuser, they too may be evicted.[337] PHAs, therefore, should actively provide support for the victim in numerous ways. For example, PHAs

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329. *See supra* notes 100, 230 and accompanying text (discussing discretion delegated to PHAs by HUD).

330. 535 U.S. 125 (2002). Domestic violence victims may face eviction simply because their abuser damages property while picking up the children, or threatens a PHA worker, or because they should have "foreseen" the abuse. *See* discussion *supra* Part V.A.2.

331. As noted by the Supreme Court, if Congress acts and the legislation is unambiguous, then courts cannot impede upon Congress' decision. *See Rucker*, 535 U.S. at 130-32; *supra* note 239 and accompanying text.

332. *See* Reif & Krisher, *supra* note 65, at 32.

333. *Id.* (citation omitted).

334. *See* discussion *supra* Part V.

335. *See* discussion *supra* Part V.

336. *See supra* notes 29-34 and accompanying text.

337. *See supra* notes 67-172 and accompanying text.

could transfer the victim to a different housing complex so that the abuser could not easily find her; they could encourage their staff to enforce protective orders against the abuser and not the victim; they could change locks at no cost, contact the police if the abuser enters the property, and assist the victim in eviction proceedings against the abuser.

VI. CONCLUSION

Domestic violence victims are particularly vulnerable to zero tolerance policies and HUD's current interpretation of § 1437d(*l*)(6). However, domestic violence victims should not be punished for the acts of their abusers. Rather, they should be protected and supported by the local PHAs, HUD, and Congress. HUD can, and should, start to address the specialized housing needs of domestic violence victims by issuing a directive prohibiting PHAs from using the criminal acts of abusers as a basis for the eviction of the victim. In the interim, local housing authorities and facilities should take it upon themselves to prevent the punishment of domestic violence victims for the acts of their abusers.

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* Special thanks to Judith G. Greenberg, Professor of Law, New England School of Law, for her invaluable assistance with this Note.