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Engage

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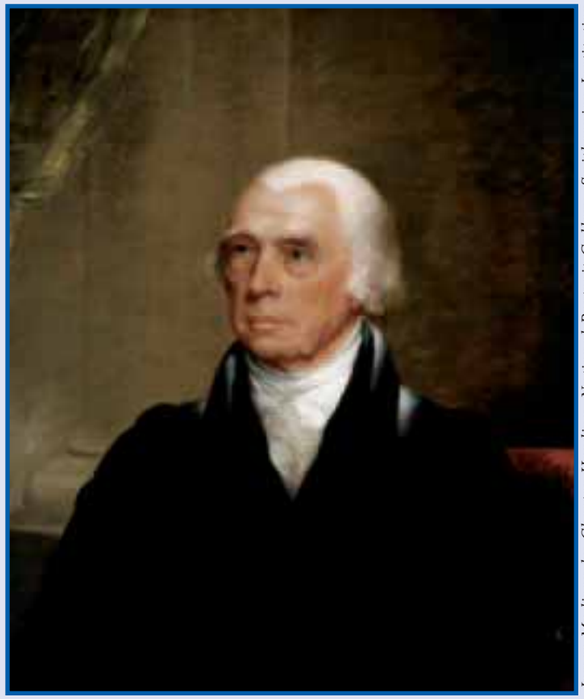

James Madison by Chester Harding, National Portrait Gallery, Smithsonian Institution

Volume 6, Issue 1

Letter from the Editor...

Engage, the journal of the Federalist Society for Law and Public Policy Studies, is a collaborative effort involving each of the Society's fifteen Practice Groups. The Federalist Society's Practice Groups spark a level of debate and discussion on important topics that is all too often lacking in today's legal community. Through their programs, conferences and publications, the Practice Groups contribute to the marketplace of ideas in a way that is collegial, measured, and open to all.

Volume 6, Issue 1, following the trend of our recent issues, is dedicated almost exclusively to original articles produced by Society members and friends. This issue addresses several topics that have dominated public discussion as of late, including military recruiting on law school campuses, voting rights, the Schiavo case, campaign finance regulation, corporate malfeasance, the role of religion in the public square, and asbestos litigation. That so many of these timely issues are addressed in *Engage* underscores the fact that the issues that animate Americans increasingly include a legal component. Also featured in this issue are analyses of topics that, while perhaps being less widely understood, remain highly significant. Among these are James P. Kelly, III's discussion of the religious liberties implications of U.N. efforts to establish human rights education programs, Daniel Fisher's analysis of recent securities reforms, and a point/counterpoint discussion on neutrality agreements between National Right to Work's Glenn Taubman and UNITE's Brent Garren.

Also notable in this issue are several reviews of fantastic books. Included among these is Federal Election Commission Chairman Bradley Smith's review of Tara Ross' recent book, *Enlightened Democracy: The Case for the Electoral College*.

Upcoming issues of Engage will feature other original articles, essays, book reviews, practice updates and transcripts of programs that are of interest to Federalist Society members. We hope you find this and future issues thought-provoking and informative.

E n g a g e

Volume 6, Issue 1 May 2005

The Journal of the Federalist Society's Practice Groups

Editor
Katherine J. Mendis

Administrative Law and Regulation

Supreme Court Decision: Regulatory Takings

*By Louis K. Fisher and Esther Slater McDonald**

In its recent decision in *Lingle v. Chevron U.S.A.*,[1] the Supreme Court unanimously repudiated its prior statements that government regulation of private property effects a taking—and, thus, is invalid absent just compensation—if it does not substantially advance a legitimate state interest. The Just Compensation Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation."[2] The Court's decision, which sharply limits constitutional protection for property rights, is one of the most significant of October Term 2004.

Since at least 1922, when Justice Holmes authored the seminal opinion for the Court in *Pennsylvania Coal v. Mahon*,[3] it has been established that a "taking" under the Just Compensation Clause can occur not only through the government's outright acquisition or physical invasion of property, but also through government regulation of property use. For more than fifty years thereafter, however, the contours of regulatory takings analysis remained unclear, as the Court routinely upheld government action that, without compensation, served valid public purposes even while greatly diminishing the economic value of certain private property.[4] Then, in *Penn Central Transportation Co. v. New York City*,[5] the Court expressly stated the rule "implicit" in earlier cases: An interference with property rights "may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial public purpose."[6] Twenty-five years ago, in *Agins v. City of Tiburon*,[7] the Court held that property regulation effects a taking if it does not "substantially advance legitimate state interests."[8]

The Court subsequently reiterated the availability of the substantially advances test in a long line of cases.[9] Nevertheless, in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,[10] the Court recognized the need for "a thorough explanation of the nature [and] applicability of the requirement that a regulation substantially advance legitimate public interests."[11] Similarly, the distinct requirement that property regulation not deprive an owner of all economically viable use[12] was not thoroughly explained until 1992, when the Court articulated "good reasons" for the rule in *Lucas v. South Carolina Coastal Council*.[13] In *Del Monte Dunes*, the Court did not explore the basis for the substantially advances test because the government itself had proposed the jury instruction incorporating that standard.[14] The *Lingle* case squarely presented the issue.

In *Lingle*, Chevron U.S.A. Inc. challenged a Hawaii law limiting the rents that oil companies may collect under their agreements with lessee dealers, who lease their service stations from the oil companies. The stated purpose of the law is to combat the effects of alleged concentration in the Hawaii market for gasoline, which, according to the legislature, causes retail gasoline prices to rise at the pump. The State argued that the legislature intended to achieve its purpose by "maintain[ing] the benefit" of a "multiplicity of independent lessee-dealerships" to "forestall" the "possibility that oil companies might try" at some unknown future date to "rais[e] rents to the point that existing dealers would be forced out of business."[15] According to the State, such a reduction in lessee-dealerships would lead to higher gasoline prices for consumers.

However, the law was unaccompanied by any legislative findings on the existence of these alleged dangers. Indeed, at trial, the State introduced no evidence that the legislature had conducted any hearings or compiled any evidence on these issues. Instead, the State conceded (1) that the Hawaii retail market for gasoline is highly unconcentrated; (2) that the rents Chevron and other oil companies were charging—which are prohibited by the law—have not caused high retail gasoline prices; and (3) that the forced reductions in rent imposed by the law will not cause lessee dealers to lower their retail gasoline prices to consumers. Accordingly, even the dissenting judge in the court of appeals agreed that the law did not substantially advance its purpose.[16] The dispositive issue before the Supreme Court was whether the substantially advances test is a valid part of Just Compensation Clause jurisprudence.

Chevron argued that the text of the Just Compensation Clause applies to *all* government action that deprives owners of traditional private property rights, such as the right to lease and collect rent on real property. The Clause refers to taking property rather than condemning it, and regulation can destroy property rights no less than direct appropriation. Nonetheless, *Mahon* recognized that the "seemingly absolute protection" afforded by the Clause necessarily is qualified by the government's need to accomplish its legitimate purposes through regulation.[17] As the Court stated, "[g]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[18] Thus, like the First Amendment's clear prohibition of *all* laws "abridging the freedom of speech,"[19] the "seemingly absolute protection" provided by the Just Compensation Clause is subject to an "implied limitation."[20]

The Supreme Court's regulatory takings jurisprudence defines the scope of the implied exception to the rule established by the text of the Just Compensation Clause. The Court recognized in *Mahon* that "the natural tendency of human nature is to extend the qualification [of the Clause's protection] more and more until at last private property disappears."[21] The Court cautioned that "obviously the implied limitation must have its limits, or the contract and due process clauses are gone."[22]

Because the government's need to regulate gives rise to the Just Compensation Clause's implied limitation in the first instance, the scope of that limitation should depend in large part on the strength of the government's interest in regulating the property at issue. In *Penn Central*, the Court held that "[i]n deciding whether a particular governmental action has effected a taking, this Court focuses . . . both on the character of the action and on the nature and extent of the interference with rights in the parcel."[23] The Court's other regulatory takings decisions likewise indicated that this critical inquiry into the character of the government's action was required by *Mahon*'s premise that it is the government's interest that qualifies the "seemingly absolute protection" provided by the Just Compensation Clause.[24]

Significantly, property regulation serving *any* legitimate government purpose potentially qualifies for the implied limitation on the Clause's protections. Initially, it might have been thought that the implied limitation could apply only to governmental regulation of "noxious" uses.[25] The Court more recently has recognized, however, that any distinction between preventing public harms and achieving public benefits is tenuous at best.[26] In *Lucas*, therefore, the Court recognized that the substantially advances test—which applies to property regulation with a legitimate government purpose—was the "contemporary statement[]" of the Court's historical recognition that government may burden property rights to prevent a "harmful or noxious use" without necessarily triggering the Fifth Amendment's compensation requirement.[27] But, regardless of the nature of the government's interest, it always has been necessary for the property regulation, at a bare minimum, actually to advance that interest in order to come within the Just Compensation Clause's implied exception.

In *Lingle*, the Supreme Court disagreed with this argument's fundamental premises concerning the text of the Just Compensation Clause and the meaning of *Mahon*. Instead of holding that regulation must be sufficiently justified to warrant an exception to the Clause's "seemingly absolute protection" of private property,[28] the Court held that the Clause protects property only from "regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."[29] Because the substantially advances test "does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property[,] it is tethered neither to the text of the Takings Clause nor to the basic justification for allowing regulatory actions to be challenged under the Clause."[30]

Chevron also argued that the inquiry into the character of the government's action furthers the fundamental purpose of the Just Compensation Clause "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[31] As the Court has held, "[t]he determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest."[32]

The substantially advances test prevented unfair "singling out" in two ways. First, property regulation cannot substantially advance legitimate government purposes if it restricts property uses that do not "substantially impede these purposes."[33] The substantially advances test thus focused on whether the property regulated is the source of the social condition the government seeks to address. Although in regulatory takings cases the Court frequently applies the general *Penn Central* balancing test, no such balancing should be necessary when, at the threshold, the property taken is not the source of the condition sought to be corrected. In that circumstance, compensation should be required because no basis exists for requiring the property owner to shoulder alone the economic burden imposed by the statute.[34] By ensuring that governmental action burdens only those property uses that are "the source of the social problem," the causal nexus required by the substantially advances test prevented a regulated landowner from being "singled out unfairly" by legislation seeking to remedy social problems not attributable to his property.[35]

In addition, even if the regulated property is the source of the social condition that the government purportedly seeks to address, the substantially advances test would not be satisfied if property regulation is not sufficiently related to that condition. No legitimate basis exists for singling out property for a special burden if the burden will not contribute to the problem's solution.[36] In that circumstance as well, the rationale for taking property rights without compensation—the government's need to achieve its legitimate purposes—is absent, and the core purpose of the Just Compensation Clause to prevent unfair burdens on discrete property rights is violated.

The risk of unfair singling out was conspicuously present in *Lingle*. The State made no claim that the rents charged by oil companies to lessee dealers had been the source of high gasoline prices or had impeded the State's efforts to reduce those prices. Nor did the State claim that the rents had caused a reduction in competition by contributing to market concentration. Thus, the State had no basis for singling out oil companies to shoulder the burden of the State's regulation; and, thus, the State had no rationale for taking Chevron's property interests without compensation. The legislature, however, was under political pressure to appear responsive to Hawaiians' concerns about gasoline prices. Unwilling or unable to address the circumstances that actually affect gasoline prices (such as high gasoline taxes and geographic isolation that discourages entry by new refiners), the legislature indulged a powerful lobbying group of local lessee-dealers with a grant of reduced rents, and avoided political accountability by placing the burden of the law on out-of-state companies. In this political climate, the State could not plausibly assert that the Just Compensation Clause leaves protection against such unfairness to the democratic process. On the contrary, the Clause should prevent unfair singling out by requiring just compensation for regulatory burdens unconnected to a legitimate purpose.

The Supreme Court dismissed these arguments as "untenable," on the ground that "[t]he owner of a property subject to a regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation."[37] Accordingly, the Court stated, "[i]t would make little sense to say that the second owner has suffered a taking while the first has not."[38] The Court did not explain, however, why the singling out of a property owner to bear a burden is not *unfair* when his property is not the source of the social condition that the government seeks to address. It is true that the owners of red cedar trees and the owners of white cedar trees would be singled out equally if both were ordered to destroy their trees to prevent harm to nearby apple orchards.[39] Nevertheless, the singling out of the white cedars' owner is *unfair* if only red—and not white—cedars actually endanger apple trees. Because the Supreme Court in *Lingle* did not discuss the unfairness element of the "singling out" rationale, it will be interesting to see how the Court applies that rationale in future cases.

Also noteworthy is the Court's disagreement with Chevron's argument that extreme deference to economic legislation is inappropriate under the Just Compensation Clause, an express limitation on governmental interference with individual rights. The State's primary argument was that adherence to the substantially advances test would herald a return of the unrestrained judicial activism of the *Lochner* era through "departure from the deferential standard of review that is appropriate in constitutional challenges to economic legislation."[40] The United States, which filed an *amicus* brief and participated in oral argument, similarly maintained that all "economic legislation" enjoys broad immunity from meaningful constitutional review. Chevron contended, however, that the extreme deference sought by the State and its *amici* applies primarily where rights are asserted under the elusive concept of "substantive due process." Less deference in that setting would revive the vice of the *Lochner* era, which was the courts' use of the "vague contours of the Due Process Clause" to strike down state laws "[un]restrained by some express prohibition in the Constitution."[41]

In contrast, the Court does not blindly defer to government regulation when it infringes upon specific, concrete rights—even rights that supposedly hold "subordinate position[s],"[42] such as the right to free commercial speech[43] or the right to engage in interstate commerce.[44] Rather, in such cases, the Court routinely examines the effectiveness of economic legislation to ensure that the *explicit* guarantees of the Constitution are not infringed.[45] These cases confirm that "simply denominating a governmental measure as a 'business regulation' does not immunize it from constitutional challenge on the ground that it violates a provision of the Bill of Rights."[46] The Just Compensation Clause is such an explicit source of constitutional protection; and, as the Court emphasized in *Dolan*, the Just Compensation Clause is not "a poor relation in these comparable circumstances" to the other amendments in the Bill of Rights.[47]

In fact, Chevron argued, examination of a law's effectiveness under the Just Compensation Clause is far less intrusive than under other provisions of the Bill of Rights. Determining under the Just Compensation Clause that a law fails to substantially advance a legitimate state interest would not bar the government from acting; it would mean only that the law effects a taking for which compensation must be paid. Rather than focusing on whether the government may regulate at all, the test focused on whether the government must pay just compensation for its regulation because an individual has been singled out to bear a burden that should be borne by the public. By asking whether the regulation advances the government's purpose, the test evaluated whether the property regulated is the source of the problem and whether the regulation addresses that problem. Moreover, allowing courts to answer that question does not necessarily require courts to disregard considered legislative judgments made after extensive factual inquiry. In *Lingle*, the State relied upon *post hoc* rationalizations developed by its lawyers and an expert hired for litigation. The Supreme Court thus was not presented with the question whether, as in the First Amendment context, some deference is owed to reasonable inferences drawn by the legislature on the basis of substantial evidence.[48]

The Court swept aside Chevron's arguments with the broad statement that "[t]he reasons for deference to legislative judgments about the need for, and likely effectiveness of, regulatory actions . . . are no less applicable" when addressing regulatory takings claims than "when addressing substantive due process challenges to government regulation."[49] Just as this conclusion seems difficult to reconcile with the "poor relation" statement in *Dolan*, the Court's characterizations of the substantially advances test seem difficult to reconcile with prior decisions in which the test played a role. For example, the Court indicated in *Lingle* that the substantially advances standard "prescribes an inquiry in the nature of a due process . . . test" by inherently asking whether the government's action is "fundamentally arbitrary and irrational."[50] The Court had previously stated, however, that the substantially advances test was "quite different" from the rational basis test applied to most due process and equal protection claims.[51] In addition, the Court in *Lingle* suggested that government action failing the substantially advances test inherently must be enjoined.[52] But, in *Del Monte Dunes*, the Supreme Court indicated that an injunction would *not* be appropriate if the government chose to provide just compensation for a taking under the substantially advances test: "Had the city paid for the property or had an adequate postdeprivation remedy been available, Del Monte Dunes would have suffered no constitutional injury from the taking alone."[53]

In addition to leaving these apparent inconsistencies unresolved, the *Lingle* decision raises the important question of how, if at all, the government's interest in regulating property might be relevant to the takings inquiry under *Penn Central.* The Supreme Court made clear in *Lingle* that the "substantially advances" formula is not "a stand-alone regulatory takings test that is wholly independent of *Penn Central*."[54] Accordingly, the *Penn Central* factors govern all

regulatory takings challenges except those where the regulation requires (either directly or through a land-use exaction) an owner to suffer a permanent physical invasion of her property, or deprives an owner of all economically viable use of her property.[55]

Prior to *Lingle*, the Court had stated that the three *Penn Central* factors—"the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action"—*all* "have particular significance."[56] The Court in *Lingle*, however, greatly downplayed the importance of the character of the government's action in the *Penn Central* analysis. Under *Penn Central*, the *Lingle* Court emphasized, the existence of a taking "turns in large part, albeit not exclusively, upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests," while the "character of the governmental action" also "may be relevant."[57] At the same time, the Court gave little shape to the "character" inquiry, stating only that it asks "for instance whether [the government action] amounts to a physical invasion or instead merely affects property interests through some public program adjusting the benefits and burdens of economic life to promote the common good."[58] This statement provides scant guidance because the Court previously had held—and *Lingle* itself reaffirmed—that regulation amounting to a physical invasion will be deemed a taking *per se*.[59]

It therefore remains unclear whether, in applying *Penn Central*, the lower courts are to disregard entirely the Supreme Court's prior indications "that the nature of the State's interest in the regulation is a critical factor in determining whether a taking has occurred, and thus whether compensation is required."[60] By jettisoning the substantially advances test, the Supreme Court only sharpened the need for answers to this and other "vexing subsidiary questions" about *Penn Central*.[61]

* The authors are associates at Jones Day in Washington, D.C. Jones Day represents the respondent in *Lingle v. Chevron*, and the authors participated in the drafting of the respondent's brief. This article originally was written as a preview of the Supreme Court's decision but has been adapted in light of the actual disposition. The views expressed herein are solely those of the authors.

Footnotes

[1] No. 04-163 (decided May 23, 2005).

[2] U.S. Const. amend. V.

[3] 260 U.S. 393 (1922).

[4] *E.g.*, Miller v. Schoene, 276 U.S. 272 (1928) (government required destruction of cedar trees that were causing damage to nearby apple trees); Goldblatt v. Hempstead, 369 U.S. 590 (1962) (government imposed limitations on sand and gravel excavation activities that destabilized surrounding land).

[5] 438 U.S. 104 (1978).

[6] *Id.* at 127.

[7] 447 U.S. 255 (1980).

[8] *Id.* at 260.

[9] *See* Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 333-34 (2002) (noting that property owner could have made the argument that land-use restrictions "did not substantially advance a legitimate state interest" to support a taking claim); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 704 (1999) (noting that jury instruction requiring "that a regulation substantially advance legitimate public interests" was "consistent with our previous general discussions of regulatory takings liability"); Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) ("A land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests'" (quoting *Agins*)); Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016 (1992) (noting that the Court had recognized the validity of the substantial advancement test "on numerous occasions"); Yee v. City of Escondido, 503 U.S. 519, 530 (1992) (noting that there must be "a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance"); Nollan v. Calif. Coastal Comm'n, 483 U.S. 825, 834 (1987) ("We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests'" (quoting *Agins*)); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485 (1987) (describing the substantially advances requirement as an "integral part[] of our takings analysis"); United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 126 (1985) (noting that the substantial advancement test represents part of "our general approach" in takings cases); *see also* San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621, 647 (1981) (Brennan, J., dissenting) (describing *Agins* as a "clear precedent[] of this Court" establishing that a land-use regulation "effects a taking if the ordinance does not substantially advance legitimate state interests").

[10] 526 U.S. 687.

[11] *Id.* at 704.

[12] *See Penn Central*, 438 U.S. at 124.

[13] 505 U.S. at 1019.

[14] 526 U.S. at 704.

[15] Brief for Petitioners at 2-3.

[16] Chevron U.S.A. Inc. v. Bronster, 363 F.3d 846, 859 (9th Cir. 2004) (Fletcher, J., dissenting).

[17] 260 U.S. at 415.

[18] *Id.* at 413.

[19] U.S. Const. amend. I.

[20] *Mahon*, 260 U.S. at 415; *id.* at 413; *cf.* Virginia v. Black, 538 U.S. 343, 358 (2003) ("The protections afforded by the First Amendment, however, are not absolute, and we have long recognized that the government may regulate certain categories of expression consistent with the Constitution.").

[21] 260 U.S. at 415.

[22] *Id.* at 413.

[23] 438 U.S. at 130-31.

[24] *See, e.g.*, Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001) (stating that a regulatory taking may occur when "a particular exercise of the State's regulatory power is so unreasonable or onerous as to compel compensation"); *id.* at 634 (O'Connor, J., concurring) ("The

purposes served, as well as the effects produced, by a particular regulation inform the takings analysis."); *Lucas,* 505 U.S. at 1071 (Stevens, J., dissenting) ("[T]he first and, in some ways, the most important factor in takings analysis [is] the character of the regulatory action."); *Yee*, 503 U.S. at 530 (stating that "whether there is a sufficient nexus between the effect of the ordinance and the objectives it is supposed to advance" bears on the existence of a regulatory taking); Hodel v. Irving, 481 U.S. 704, 716 (1987) (finding a regulatory taking based on the "character of the Government regulation," including that it burdened property rights in ways more broad than necessary and ways actually counterproductive to the government's goals); *Keystone*, 480 U.S. at 488 ("[T]he nature of the State's interest in the regulation is a critical factor in determining whether a taking has occurred."); Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 163 (1980) (stating that governmental regulation may restrict the exploitation of property "if such public action is justified as promoting the general welfare").

[25] *See Lucas*, 505 U.S. at 1022-23 ("The 'harmful or noxious uses' principle was the Court's early attempt to describe in theoretical terms why government may, consistent with the Takings Clause, affect property values by regulation without incurring an obligation to compensate . . . .")

[26] *Id.* at 1024 ("[T]he distinction between 'harm-preventing' and 'benefit-conferring' regulation is often in the eye of the beholder.")

[27] *Id.* at 1023-24.

[28] *Mahon*, 260 U.S. at 415.

[29] *Lingle*, slip op. at 9.

[30] *Id.* at 12.

[31] Armstrong v. United States, 364 U.S. 40, 49 (1960).

[32] *Agins*, 447 U.S. at 260.

[33] *Nollan*, 483 U.S. at 835-36; *see also Tahoe-Sierra*, 535 U.S. at 333-34 (holding a substantially-advances challenge foreclosed by the district court's finding that the regulation "represented a proportional response to a serious risk of harm to the lake"); *Keystone*, 480 U.S. at 491 (upholding regulation prohibiting "uses of property that are tantamount to public nuisances"); *Agins*, 447 U.S. at 262 (upholding regulation prohibiting development that would frustrate the "careful and orderly development of residential property"); *Penn Central*, 438 U.S. at 109 (upholding regulation that prevented renovations marring historic landmarks).

[34] *See Armstrong*, 364 U.S. at 49; *see also* Pennell v. City of San Jose, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part) (noting that traditional land-use regulation satisfies the Just Compensation Clause "because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy").

[35] *Pennell*, 485 U.S. at 20 (Scalia, J., concurring in part and dissenting in part); *see Nollan*, 483 U.S. at 835 n.4 (discussing application of Just Compensation Clause to property owners who have been "singled out to bear the burden" of remedying a problem to which they have not contributed more than others).

[36] *See Dolan*, 512 U.S. 393-95; *Nollan*, 483 U.S. at 838.

[37] *Lingle*, slip op. at 13.

[38] *Id.*

[39] *Cf. Miller*, 276 U.S. 272.

[40] Brief for Petitioners at 37.

[41] Tyson & Bro.-United Theatre Ticket Offices, Inc. v. Banton, 273 U.S. 418, 446 (1927) (Holmes, J., dissenting); *see also* Ferguson v. Skrupa, 372 U.S. 726, 730-31 (1963) ("It is now settled that States have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, *so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law*." (emphasis added) (internal quotation marks omitted)).

[42] Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978).

[43] *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980) (holding that regulation of commercial speech must "directly advance[] the governmental interest asserted").

[44] *See, e.g.*, S. Pac. Co. v. Arizona, 325 U.S. 761, 775-76 (1945) (holding that non-discriminatory regulation of interstate commerce must advance the state's purpose by such a degree as to outweigh national interests).

[45] *See, e.g.*, Edenfield v. Fane, 507 U.S. 761, 771 (1993) (requiring the state to "demonstrate that the harms it recites are real and that its restriction [of commercial speech] will in fact alleviate them to a material degree"); Kassel v. Consol. Freightways Corp., 450 U.S. 662, 671 (1981) (requiring "persuasive evidence" that regulation of interstate commerce furthers the state's interest).

[46] *Dolan*, 512 U.S. at 392.

[47] *Id.*

[48] *See* Turner Broad. Sys. v. FCC, 512 U.S. 622, 666 (1994).

[49] *Lingle*, slip op. at 15.

[50] *Id.* at 10, 14.

[51] *Nollan*, 483 U.S. at 834 n.3.

[52] *Lingle*, slip op. at 14.

[53] 526 U.S. at 710.

[54] *Id.* at 10.

[55] *Id.* at 8.

[56] Kaiser Aetna v. United States, 444 U.S. 164, 174 (1979).

[57] *Lingle*, slip op. at 9, 10.

[58] *Id.* at 9 (internal quotation marks omitted).

[59] *Id.* at 8 (citing Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982)).

[60] *Keystone*, 480 U.S. at 488 (citing *Mahon*).

[61] *Lingle*, slip op. at 9.

OMB Prompt Letters: Are They Promoting (Smarter) Regulation?

*By Karen R. Harned and Elizabeth A. Gaudio**

> *"Federal regulations can provide cost-effective solutions to many problems. If not properly developed, regulations can lead to an enormous burden on the economy."*[1]
> *John D. Graham, PhD, September 20, 2001*

Introduction

When President George W. Bush took office in 2001, many observers anticipated a change in the regulatory atmosphere of Washington. Relief was desperately needed,[2] and the new administration seemed to clearly appreciate the detrimental impact that burdensome regulations were having on the economy.[3] In 2001, Americans faced a bill of more than $800 billion each year to comply with regulations produced by Washington's alphabet soup of federal agencies.[4] Moreover, estimates indicated that small businesses paid a disproportionately large share of the total regulatory burden. For firms employing fewer than 20 employees, the annual regulatory burden in 2000 was estimated to be $6,975 per employee – nearly 60% higher than the $4,463 estimated for firms with more than 500 employees.[5]

From the outset, the Bush administration publicly recognized the problem of excessive regulation and declared that it would subject regulatory actions to critical cost-benefit reviews.[6] To oversee its regulatory policies, President Bush appointed Dr. John D. Graham, who chaired the Harvard Center for Risk Analysis,[7] to head the Office of Information and Regulatory Affairs (OIRA), an office within the Office of Management and Budget (OMB) that is charged with reviewing proposed and final agency rules to ensure that regulations are consistent with Executive Branch policies and priorities.[8]

With Graham at the helm, many foresaw an opportunity for OIRA to further expand its role in the regulatory review process.[9] Operating under the philosophy quoted above, Graham pledged to carry out OIRA's regulatory reviews "thoroughly and cooperatively."[10] And, arguably, Graham's influence has been felt through the reinvigoration of existing OMB policies and through the institution of some new techniques.[11] The "prompt letter," a procedure where OIRA proposes that an agency consider a new regulation, or modify or rescind an existing rule, represents one of the new regulatory tools introduced by Graham.[12]

This article will first examine the history of OIRA and its justification for issuing prompt letters. Next, the role of prompt letters in the overall regulatory reform effort will be evaluated. The article concludes that while prompt letters have done little to exacerbate the regulatory burden, the letters have likewise done little to promote agency priority setting and do not represent a good use of OIRA's limited resources. Specific alternatives for addressing the regulatory problem are then presented.

The Advent of OIRA's Regulatory Authority

Over the last decade OIRA has assumed greater influence over agency rulemakings. Yet Presidential oversight of rulemaking had its initial inception over thirty years ago after federal regulatory programs exploded in the 1960s. This major regulatory expansion resulted from a burst of legislation relating to public health and safety, consumer affairs and the environment.[13] President Nixon appreciated the impact of this new federal regulatory legislation and recognized the importance of coordinating executive agency actions. To oversee the coordination efforts, Nixon issued Executive Order 11541,[14] which created the Office of Management and Budget.[15]

Under President Ronald Reagan, the first President to staff OIRA, the regulatory review process and OMB's role in the process was strengthened in several important ways.[16] Recognizing the devastating impact that excessive and poorly designed regulations were having on the economy, Reagan created a Vice-Presidential Task Force on Regulatory Relief with a goal of reducing regulatory burdens on industry. As a result of the Task Force's findings, Reagan issued Executive Order 12291, which directed agencies to submit all proposed and final regulations to OIRA for review.[17] Additionally, rules likely to have an economic impact of $100 million annually were to be accompanied by cost-benefit analyses.[18] President George H.W. Bush essentially continued the Reagan Administration's regulatory review program.

OIRA's role in the regulatory process received increased prominence when President Clinton issued Executive Order 12866.[19] E.O. 12866 directs OIRA's oversight of agency rulemaking by requiring OIRA review of "significant" agency regulatory actions before they are offered for public comment, and again before they are issued in final form. Upon receipt of the rule from the agency, OIRA's review determines, in part, whether the rule is consistent with the President's policies and priorities. Additionally, OIRA reviews the agency's assessed costs, benefits and considered regulatory alternatives, "including the alternative of not regulating."[20] President George W. Bush then amended E.O. 12866 slightly with the issuance of Executive Order 13258, which eliminated the Vice President's role in regulatory review.[21]

President Bush has made it a top priority for his administration to lower the regulatory burdens on businesses.[22] Early in his tenure, Dr. Graham showed an appreciation for the concerns of small business in particular.[23] In 2002, OIRA and the Small Business Administration's Office of Advocacy entered into a Memorandum of Understanding to reduce the federal regulatory burden on small entities and to improve agency compliance with the Regulatory Flexibility Act (RFA). This partnership has enabled the two offices to share information to ensure that agencies adequately consider the impact of their proposed regulations on small businesses and consider less burdensome alternatives.

Moreover, with Graham in place as the Administration's regulatory czar, OMB also instituted several regulatory reform initiatives that were based largely on the results of cost-benefit accounting.[24] These proposals include targeting existing rules that "should be rescinded or changed to increase net benefits by either reducing costs or increasing benefits,"[25] and engaging in the same sort of activity with respect to "problematic" agency guidelines that have not complied with process requirements like cost-benefit accounting.[26] OIRA has also instituted the process of sending prompt letters to agencies when the Office believes that they are not prioritizing a particular, "beneficial" regulatory activity as highly as they should.[27]

Graham publicly stated that his pursuit of "smarter regulation" was neither pro-regulation nor anti-regulation.[28] Instead, he sought to "accelerate the adoption of good rules, modify existing rules to make them more effective and less costly, and rescind outmoded rules whose benefits do not justify their costs."[29] The cost-benefit approach advocated by OIRA under Graham could thus be used to either reform or eliminate regulations, or to identify areas where a regulation may be needed. Prompt letters, it seemed, would play critical roles in "encouraging" agencies to prioritize resources in order to promulgate "smarter regulations."[30]

Prompt Letters – An Effective Regulatory Tool for Encouraging "Smarter" Regulation?

In September of 2001, Graham formally introduced the "prompt letter."[31] In a memorandum sent to the President's Management Council, which laid out the Bush Administration's approach to the implementation of E.O. 12866, Graham announced that:

> OIRA plans to send, as occasion arises, what will be referred to as 'prompt' letters. The purpose of the prompt letter is to suggest an issue that OMB believes is worthy of agency priority. Rather than being sent in response to the agency's submission of a draft rule for OIRA review, a 'prompt' letter will be sent on OMB's initiative and will contain a suggestion for how the agency could improve its regulations. For example, the suggestion might be that an agency explore a regulatory matter, or consider rescinding or modifying an existing rule. We will request prompt agency response to 'prompt' letters, normally within 30 days.[32]

After three years of this proactive technique, it is now appropriate to ask — have prompt letters achieved the intended result of creating "smarter" regulations?

1. The Role of Prompt Letters with Regulatory Reform

As noted above, President George W. Bush indicated his intent to reduce the regulatory burdens on businesses.[33] Bush took immediate action by staunching the flow of President Clinton's midnight regulations.[34] On the day Bush took office, White House Chief of Staff Andrew Card, Jr. issued a memorandum to the heads of all executive agencies directing them to withhold any proposed or final rules from the Federal Register until the rule received approval from a Bush appointee and to withdraw regulations that had been sent to the Federal Register but not yet published unless the rule dealt with an emergency situation.[35] Independent agencies were also encouraged to participate in this review.[36]

Shortly after this initial directive, President Bush, like his predecessor, entrusted OIRA with rulemaking oversight. Since its inception, OIRA has been viewed as the regulatory gatekeeper: the executive office charged with stopping - or at least curtailing - unnecessary regulations. Historically, OIRA exercised this authority through the use of a "return letter," which requires an agency to reconsider a rule that fails to meet OMB requirements.[37] In his initial directive to agency heads in September 2001, Graham warned that "a return may occur if the quality of the agency's analyses is inadequate, if the regulatory standards adopted are not justified by the analyses, if the rule is not consistent with the regulatory principles stated in the Order or with the President's policies and priorities, or if the rule is not compatible with other Executive Orders or statutes."[38] Graham also advised that OIRA would be taking a newly proactive role by suggesting regulatory priorities for agency consideration through the use of prompt letters.[39]

Graham's proactive stance might appear perplexing. After all, one might argue that prompt letters, by promoting regulation, complicate, rather than further, the Bush Administration's pledge of regulatory reform. In theory, however, prompt letters utilize the cost-benefit approach as a means or tool for prioritizing, and thereby, improving regulation. Under this premise, the letters support the Administration's pledge to encourage "smarter" regulation[40] by incorporating the cost-benefit approach that has been the mainstay of rulemaking oversight for the last 25 years.[41] While there is no doubt that blocking and eliminating many regulations, *i.e.*, deregulation, are critical components of regulatory reform, studies have also shown that adding some regulations and modifying others could also save millions of dollars annually.[42] Even commentators supportive of cost-benefit analyses concede that there are situations in which quantitative measurements support regulations.[43] Additionally, federal rulemaking "suffer[s] from significant problems" due in part to poor priority setting.[44] Commentators, including the National Federation of Independent Business, therefore predicted that prompt letters would improve rulemaking by encouraging agencies to focus on a more efficient rule at a lower cost and with a higher benefit to society.[45]

2. No Appreciable Regulatory Burden Added By Prompt Letters

Because the role of prompt letters in regulatory reform is not transparent on its face, it is important to first assess whether they have added regulatory burden. Based upon progress to date, it is safe to conclude that they have not. OIRA issued letters in limited circumstances, as a mechanism for encouraging regulation in areas where empirical analyses had showed good rather than harm would result from a rule or formal policy. OIRA's initial prompt letters addressed a

range of issues including the use of lifesaving defibrillators in the workplace, food labeling requirements for trans fatty acids, and better information regarding the environmental performance of industrial facilities.[46]

To date, OIRA has issued just twelve true prompt letters.[47] In addition to these twelve, OIRA also counts as prompt letters the following: an agreement with Environmental Protection Agency curbing pollution from diesel-powered, non-road engines and also a letter suggesting 49 regulatory reforms that was sent to independent agency heads - agencies over which OMB lacks authority. Additionally, one can presume that agency resources and personnel committed to responding to a prompt letter are likely resources and personnel diverted from other rulemaking presumed to be lower priority. When viewed in light of the thousands of new rules issued each year, OIRA's twelve promotional efforts are nearly indiscernible.

3. Prompt Letters Encouraging "Smarter" Regulation?

While prompt letters may not have added appreciably to the regulatory burden, the question nevertheless remains – do they justify the use of OIRA's limited resources? C. Boyden Gray raised this question during a hearing before the House Judiciary Committee's Subcommittee on Commercial and Administrative Law held in the summer of 2004.[48] OIRA's own actions may provide the answer.

While OMB has issued fourteen prompt letters altogether, it sent just two in 2004. This decrease may indicate OIRA's recognition that other procedures present greater opportunity for rulemaking reform.

Undoubtedly some of OIRA's letters encouraged agency action. For example, its second prompt letter involved automatic external defibrillators (AEDs).[49] The letter requested the Occupational Safety and Health Administration consider whether the promotion of AEDs should be elevated to a priority. The prompt letter noted "some preliminary cost-effectiveness calculations" indicate "AEDs in the workplace might prove to be very cost-effective."[50] In 2003 OSHA issued a technical bulletin that encourages AED placement in the workplace.[51]

Justification for other letters is less impressive. For instance, the first prompt letter that was issued to the Food and Drug Administration (FDA), in 2001, involved mandatory disclosure of trans fatty acids in the Nutrition Facts panel of food products.[52] OIRA encouraged FDA to issue a disclosure rule, which FDA's own preliminary analysis showed benefits in the range of $25 billion to $59 billion, while costs would be $400 million to $850 million. OIRA reported in its 2003 Report to Congress that a final rule had been published in July 2003. What OIRA did not publicize was that the FDA proposed the rule in 1999, so rather than prompting agency action, OIRA's letter simply encouraged an ongoing agency rulemaking.

In a United States Department of Agriculture (USDA) rulemaking, OIRA issued a letter in May 2003 requesting that the Department of Health and Human Services (HHS) and USDA revise the Dietary Guidelines to reflect the risks associated from trans fatty acids and benefits associated with foods rich in Omega-3 fatty acids.[53] It does not appear that either HHS or USDA responded to OIRA prior to issuing a final rule in 2005. Moreover, one questions whether this issue even merited OIRA's attention since the guidelines are revised every five years and there is no indication that either agency had overlooked OMB's expressed concerns.

While OMB included a separate appendix on the status of its return letters in its 2003 report to Congress, in 2004 OMB did not provide a comparable status report on prompt letters.[54] However, as previously mentioned, in 2004 OIRA sent just two prompt letters. The first letter requested that the Environmental Protection Agency (EPA) promulgate rules to ensure compliance with the Beaches, Environmental Assessment and Coastal Health Act of 2000, which requires coastal States to adopt up-to-date pathogen criteria.[55] EPA had indicated that a proposed rule would be forthcoming. The second letter, sent to the National Institutes of Health (NIH), recommended that NIH prepare a response-to-comments document for public review before listing or delisting a substance on the Report on Carcinogens. OIRA has not indicated whether NIH responded.

While OMB may contend that prompt letters have resulted in proven benefits, without knowing what resources were expended to produce the letters, it is impossible to know if the claimed benefits outweighed costs. This lack of quantifiable information led to C. Boyden Gray's request for "empirical research" on prompt letters. Even if the prompt letters have provided some benefits to the regulatory climate, it is hard to justify them when one considers the amount of existing regulations in need of reform. Reform of existing burdensome regulations represents a better use of OMB's resources.

Furthermore, the prompt letters have not addressed workplace regulations, the category of regulation that imposes some of the highest costs on small businesses.[56]

When Graham introduced the prompt letter in 2001, he indicated that the letters might encourage agency reform of an existing rule. A few of the OIRA letters did suggest regulatory reforms, including one that recommended the Department of Transportation modify its crash test and, notably, a 2002 letter that recommended that the Office of Federal Housing Enterprise Oversight strengthen corporate governance of Fannie Mae and Freddie Mac. However, none of OIRA's prompt letters addressed the burdensome workplace rules that urgently need reform.

Opportunities for Reining in Burdensome Regulations

The Bush Administration's attempt to protect small entities from excessive regulatory burden has received mixed reviews.[57] The Administration has limited the regulatory burden in some notable respects, such as the 2001 freeze on new regulations and its increased reliance on the Office of Advocacy's efforts to identify regulations that unfairly burden small business. The administration has been less suc-

cessful at reforming existing rules. Because OIRA, like the federal agencies themselves, has limited resources, we recommend that OIRA focus on initiatives that offer the greatest opportunities for improving regulatory policy and reducing the regulatory burden on small businesses. We do not believe prompt letters provide such opportunities. Instead, OMB should concentrate on stricter enforcement of agency compliance with existing regulatory requirements, including OMB's guidelines for regulatory analysis and the RFA. Additionally, OMB should devote greater attention to the sea of existing regulations that need renovation.

One of the most striking conclusions in the 2001 Crain-Hopkins report was that "Firms employing fewer than 20 employees face an annual regulatory burden of $6,975 per employee, a burden of nearly 60 percent above that facing a firm employing over 500 employees."[58] Because of the disproportionate impact of regulatory costs on small firms, OIRA must continue its work with the Office of Advocacy in the Small Business Administration to strengthen the enforcement of the RFA and reduce unnecessary burden on small entities.

As previously mentioned, Dr. Graham's work on behalf of small business, particularly through the MOU between OIRA and the Office of Advocacy, has been helpful in ensuring that new regulations do not unfairly burden small business. Therefore, coordination with the Office of Advocacy should remain a priority, and OIRA should be prepared to return any draft rules for agency reconsideration if they have not taken into account the impact of the draft rule on small businesses as required by the RFA. In Graham's first six months as Administrator of OIRA, more than twenty rules were returned to agencies.[59] This amounted to more than the total number of returns during the entire Clinton Administration.[60] OIRA should continue to issue return letters when agencies' economic analyses fail to comply with OMB guidelines and other required regulatory measures like the RFA.

OIRA also should continue its work on recommendations for regulatory reform. OMB has completed two rounds of request for reform nominations and has identified a number of unnecessary regulations adversely impacting small businesses. In 2002, 1,700 commentators made suggestions, resulting in 156 recommendations for changes. Last October, a year and one-half after the process started, OIRA announced agencies would look into 34 of the 156. Thus far, no actions have been taken on those 34 regulations.[61] We encourage OMB to work with the agencies to complete these reform efforts.

Conclusion

The Bush Administration and OIRA have demonstrated an understanding of the impact that regulations have on all business generally, and on small businesses, in particular. More importantly, they have committed to tackling the larger problem of reining in the regulators. But, as often is the case, the tools used dictate the success in completing the job. It appears that the prompt letter may not be the best tool OIRA has for meeting its regulatory reform goals. OIRA should continue to expand its efforts in holding agencies accountable for the regulations they issue and working with allies, like the Office of Advocacy, to ensure that any new regulations do not unfairly burden the most important, and fastest-growing segment of the nation's economy – small business.

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Footnotes

[1] *See* Memorandum from John D. Graham, Administrator, Office of Information and Regulatory Affairs, to President's Management Council (Sept. 20, 2001) [hereinafter Graham Memorandum], *available at* http://www.whitehouse.gov/omb/inforeg/oira_review-process.html.

[2] Robert W. Hahn, *et al.*, *Assessing Regulatory Impact Analyses: The Failure of Agencies to Comply with Executive Order 12,866*, 23 HARV. J.L. & PUB. POL'Y 859 (2000) (concluding that regulatory reform efforts under Presidents Reagan, Bush and Clinton had fallen short of expectations).

[3] *See* President Bush's Small Business Agenda (September 11, 2002) (expressing support for "tear[ing] down regulatory barriers") *available at* http://www.whitehouse.gov/infocus/smallbusiness/regulatory.html#.

[4] *See* W. Mark Crain and Thomas D. Hopkins, *The Impact of Regulatory Costs on Small Firms* (2001) (estimating that in 2000 Americans spent $843 billion, or over $8,000 per household, to comply with federal regulations), available at http://sba.gov/advo/research/rs207tot.pdf.

[5] *Id.*

[6] *See* Graham Memorandum, *supra* note 1.

[7] *See* Biography of John D. Graham, *available at* http://www.whitehouse.gov/omb/inforeg/bio.html.

[8] *See* Questions & Answers about OIRA (Feb. 26, 2002), *available at* http://www.whitehouse.gov/omb/inforeg/qa_2-25-02.pdf.

[9] *See* Robert W. Hahn and Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489 (2002).

[10] *See* Graham Memorandum, *supra* note 1.

[11] *See* Richard A. Greene, *Recent Developments in Federal Regulatory Policy*, 6 J. SMALL & EMERGING BUS. L. 607, 615-620 (2002) (expressing support for "innovative" approaches instituted by Graham) and Robin K. Craig, *The Bush Administration's Use and Abuse of Rulemaking, Part I: The Rise of OIRA*, 28 ADMIN. & REG. L. NEWS 8 (2003) (criticizing the "expansion" of OIRA's regulatory review authority under Graham).

[12] *See* Graham Memorandum, *supra* note 1.; *Hearings Before the United States House of Representatives Subcomm. On Regulatory*

Reform and Oversight of the Comm. on Small Business (June 6, 2002) (testimony of John D. Graham) [hereinafter Graham testimony], *available at* www.whitehouse.gov/omb/legislative/testimony/graham/060602.html.

[13] *See* ROBERT V. PERCIVAL, *et al*., ENVIRONMENTAL REGULATION; LAW, SCIENCE AND POLICY at 104-09 (3d ed. 2000) (describing the development and growth of federal regulation in the 1960s).

[14] 35 Fed. Reg. 10,737 (July 1, 1970).

[15] OMB acquired a more critical role in regulatory matters as a result of the Paperwork Reduction Act of 1980 (currently 44 U.S.C. § 3501 et seq. (2004)), which authorized OMB to prevent agencies from imposing unnecessary paperwork burdens on the public.

[16] OIRA owes its genesis to the Paperwork Reduction Act signed by President Jimmy Carter. Under this act, Congress ordered the Director of OMB to "delegate to the [OIRA] administrator the authority to administer all functions under this subchapter, except that any such delegation shall not relieve the Director of responsibility of the administration of such functions." 44 U.S.C. § 3503(b). Under the Act the administrator "serve[s] as principal advisor to the Director [of OMB] on Federal information resources management policy." *Id.*

OIRA also plays an important role in the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. § 658 et seq. (2004), which requires federal agencies to assess the effects of proposed regulations on state, local and tribal governments and the private sector and to select the least burdensome regulatory option when possible.

[17] 46 Fed. Reg. 13,193 (Feb. 17, 1981).

[18] *Id.* at 1(b)(1), (3)(c).

[19] 58 Fed. Reg. 51,735 (Sept. 30, 1993).

[20] *See* Graham Memorandum, *supra* note 1.

[21] 67 Fed. Reg. 9385 (Feb. 26, 2002).

[22] *See* President Bush's Small Business Agenda, *supra* note 3.

[23] *See* Graham testimony, *supra* note 12.

[24] *See generally* Draft Report to Congress on the Costs and Benefits of Federal Regulations, 67 Fed. Reg. 15,014, 15,020 (Mar. 28, 2002) (describing OIRA's effort to shift from being a "reactive" to a "proactive" force "in suggesting regulatory priorities for agency consideration").

[25] *Id.* at 15,022.

[26] *Id.* at 15,035.

[27] *Id.* at 15,020.

[28] John D. Graham, Smarter Regulation – Progress and Unfinished Business, address before Kennedy School of Government, Harvard University (Sept. 25, 2003), *available at* www.whitehouse.gov/omb/inforeg.speeches/030925graham.pdf; John D. Graham, Reigning in the Regulatory State: The Smart-Regulation Agenda, Cato Institute Hill Briefing (October 3, 2003), *available at* www.whitehouse.gov/omb/inforeg.speeches/031003graham.pdf [hereinafter 2003 Remarks of Graham].

[29] *Id*.

[30] *Id.*

[31] *See* Graham Memorandum, *supra* note 1.

[32] *Id.*

[33] *See* President Bush's Small Business Agenda, *supra* note 3.

[34] When Clinton left office in January 2001, his administration left behind a last-minute legacy of thousands of pages of proposed rules. *See generally* 65 Fed. Reg. 66,923 (Nov. 8, 2000) through 66 Fed. Reg. 6426 (Jan. 19, 2001).

[35] Memorandum for the Heads and Acting Heads of Executive Departments and Agencies from Andrew H. Card, Jr., White House Chief of Staff, 66 Fed. Reg. 7702 (Jan. 24, 2001).

[36] *Id.*

[37] *See* Executive Order 12866, *supra* note 19.

[38] *See* Graham Memorandum, *supra* note 1.

[39] *Id.* Prompt letters do not have the force of "return letters," which are authorized by E.O. 12866. Instead, prompt letters simply represent an OMB request that "an agency elevate a matter in priority, recognizing that agencies have limited resources and many conflicting demands for priority attention." OMB, Informing Regulatory Decisions: 2003 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities at 185, available at www.whitehouse.gov/omb/inforeg/2003_cost-ben_final_rpt.pdf.

[40] *See* 2003 Remarks of Graham, *supra* note 28.

[41] *See* Hahn, *Assessing Regulatory Impact Analyses*, *supra* note 2, at 860.

[42] Robert W. Hahn, *The Economic Analysis of Regulation: A Response to the Critics*, 71 U. CHI. L. REV. 1021, 1053-54 (2004) (conceding that there are situations where quantitative cost-benefit analysis will support regulations).

[43] *Id.*

[44] *See* Hahn and Sunstein, *A New Executive Order for Improving Federal Regulation?, supra* note 9.

[45] *Id*. at 1521-24; Greene, *supra* note 11, at 619-20; William S. Morrow, Jr., *The Year in Review: Excerpts from 'Developments in Administrative Law & Regulatory Practice 2000-2001,* 27 ADMIN. & REG. L. NEWS 4 (2002); *The Impact of Regulation on Small Business: Hearings before the United States House of Representatives Subcomm. on Regulatory Reform and Oversight of the Committee on Small Business* (June 6, 2002) (testimony of Andrew M. Langer, National Federation of Independent Business).

[46] *See* OIRA prompt letters, *available at* http://www.whitehouse.gov/omb/inforeg/prompt_letter.html.

[47] *Id.*

[48] Jeffrey S. Lubbers, *Reviving the Administrative Conference of the United States: The Time Has Come*, 51 FED. LAW 26 (2004).

[49] *See* Prompt Letters, *supra* note 46.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Compare* OMB, 2003 Report to Congress, *supra* note 39, at 185, *available at* www.whitehouse.gov/omb/inforeg/2003_cost-ben_final_rpt.pdf *with* OMB, Progress in Regulatory Reform: 2004 Report to Congress on the Costs and Benefits of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities, *available at* http://www.whitehouse.gov/omb/inforeg/2004_cb_final.pdf.

[55] *See* Prompt Letters, *supra* note 46.

[56] *Reforming Regulation to Keep America's Small Businesses Competitive: Hearings Before the United States House of Representatives Subcommittee on Regulatory Reform and Oversight of the Committee on Small Business* (May 20, 2004) (testimony of Susan E. Dudley), *available at* www.mercatus.org/article.php/709.html.

[57] James L. Gattuso, *State of the Union: Small Business, Large Regulation*, The Heritage Foundation (Jan. 21, 2004) (observing that the Bush administration sent almost 100 significant new regulations to OIRA "topping not only the Reagan average of less than 70, but the Clinton rate of 90"), *available at* http://www.heritage.org/Research/Regulation/wm400.cfm; and James L. Gattuso, *Reining In the Regulators: How Does President Bush Measure Up?*, The Heritage Foundation BACKGROUNDER, No. 1801 (Sept. 28, 2004), *available at* http://www.heritage.org/Research/Regulation/bg1801.cfm; *see also* Testimony of Susan E. Dudley, *supra* note 56.

[58] *See* Crain and Hopkins*, The Impact of Regulatory Costs on Small Firms, supra* note 4.

[59] *See* 2003 Remarks of Graham, *supra* note 28.

[60] *Id.*

[61] James L. Gattuso, *State of the Union: Small Business, Large Regulation*, *supra* note 57.

CIVIL RIGHTS

DEFENDERS OF FREEDOM BANNED FROM CAMPUS: THE THIRD CIRCUIT ENJOINS ENFORCEMENT OF THE SOLOMON AMENDMENT ON FIRST AMENDMENT GROUNDS

*BY DOUGLAS H. WOOD**

Congress enacted the Solomon Amendment in 1994 to guarantee recruiters for the United States military equal access to the campus of a college or university that receives federal funding. Specifically, the Solomon Amendment requires schools receiving federal funds to provide military recruiters access "in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." [1] Congress has recognized that on-campus military recruiting is critical to ensuring that the military has sufficient access to encourage the best and brightest to serve, especially given the heightened emphasis on national security in recent years. The Department of Defense has explained that discriminatory treatment of military recruiters "sends the message that employment in the Armed Forces is less honorable or desirable than employment with other organizations," thereby undermining the military mission. *See Forum for Academic and Institutional Rights* v. *Rumsfeld*, 390 F.3d 219, 227-28 (3d Cir. 2004).

Nevertheless, many schools have objected to the Solomon Amendment, arguing that the mere cooperation of their career services staff with United States military recruiters on an equal basis with any civilian recruiter would violate university non-discrimination policies in light of the military's "Don't ask, don't tell" policy. In their view, the presence of recruiters on campus would send a message that the school endorses the military's policy, in violation of their internal policies prohibiting discrimination on the basis of sexual orientation. Schools have sought to express their disapproval by barring the military from recruiting on campus on an equal basis with other employers.

The United States Court of Appeals for the Third Circuit recently awarded a significant victory to those who would bar on-campus military recruiting, by granting preliminary injunctive relief to "FAIR" (Forum for Academic and Institutional Rights) and others, enjoining enforcement of the Solomon Amendment on certain law school campuses. [2] Over a vigorous dissent, the Third Circuit panel concluded that the Solomon Amendment compromises law schools' First Amendment rights, and is therefore an unconstitutional condition on the use of federal funds.

The law schools seeking the injunction all have a non-discrimination policy like the following:

> The School of Law is committed to a policy of equal opportunity for all students and graduates. The Career Services facilities of this school shall not be available to those employers who discriminate on the grounds of race, color, religion, national origin, sex, handicap or disability, age, or sexual orientation.... Before using any of the Career Services interviewing facilities of this school, an employer shall be required to submit a signed statement certifying that its practices conform to this policy. [3]

The law schools view the military as discriminating on the basis of sexual orientation because the military separates from service those who "demonstrate a propensity or intent to engage in homosexual acts." [4] The law schools sued, arguing that the Solomon Amendment imposes a penalty for the legitimate exercise of their First Amendment rights and is therefore an unconstitutional condition on the use of federal funds.

The interplay between the majority and dissent in the Third Circuit decision is best understood by the truism that where one begins often determines where one ends. As detailed below, whereas the majority's analysis focuses almost exclusively on what the dissent properly calls "the all-pervasive approach that this is a case of First Amendment protection," the dissent takes a more nuanced approach that gives due consideration to Congress's constitutional power to support the military alongside First Amendment considerations.[5]

The majority begins and ends with the supreme importance of the First Amendment. With this focus in mind, the majority asserts first, that law schools are expressive associations whose First Amendment right to disseminate their chosen message is impaired by the inclusion of military recruiters on their campuses; and second, that the federal government cannot compel law schools to assist recruiters in the expressive act of recruiting. Because the Solomon Amendment allegedly violates the First Amendment in these two ways, either of which would trigger strict scrutiny, the majority reasons that the government is not using the least restrictive means of recruiting talented lawyers because, for example, the military could recruit talented lawyers by advertising on television rather than compelling school career services to cooperate with their recruiting efforts. The Solomon Amendment does not survive this strict scrutiny, the majority asserts, and is therefore unconstitutional.

In the majority's view, this case is about two aspects of the law schools' First Amendment rights—their freedom of expressive association and their freedom from being compelled to assist the government's expressive act of recruiting.

The majority's expressive association analysis proceeds by making an analogy between the facts in the present case and the facts in *Boy Scouts of America v. Dale*.[6] In *Dale*,

the Supreme Court held a state public accommodations law could not constitutionally be used to force the Boy Scouts to accept an openly gay scoutmaster.[7] The analogy is all the more persuasive because *Dale* involved upholding the right of a group to exclude a homosexual scout master; here, the majority holds that the law schools have the right to exclude those who exclude homosexuals. The majority makes the analogy to *Dale* as follows:

> Just as the Boy Scouts believed that 'homosexual conduct is inconsistent with the Scout Oath,' the law schools believe that employment discrimination is inconsistent with their commitment to justice and fairness. Just as the Boy Scouts maintained that 'homosexuals do not provide a role model consistent with the expectations of Scouting families,' the law schools maintain that military recruiters engaging in exclusionary hiring 'do not provide a role model consistent with the expectations of' their students and the legal community. Just as the Boy Scouts endeavored to 'inculcate youth with the Boy Scouts' values—both expressively and by example,' the law schools endeavor to 'inculcate' their students with their chosen values by expression and example in the promulgation and enforcement of their nondiscrimination policies. And just as Dale's presence in the Boy Scouts would, at the very least, force the organization to 'send a message, both to youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior,' the presence of military recruiters 'would, at the very least, force the law schools to send a message,' both to students and the legal community, that the law schools 'accept' employment discrimination 'as a legitimate form of behavior.'[8]

The majority purports to follow the elements of an expressive association claim under *Dale*: whether the law schools are expressive associations, whether state action significantly affects the law schools' ability to advocate their viewpoint, and whether the government's interest justifies the burden it imposes on the law schools. Each of these elements is satisfied in the eyes of the majority. As detailed below, however, the majority's conclusion that allowing recruiters on campus is forced *expressive activity* by the law schools does not withstand scrutiny. As we shall also see below, the majority's assertion that "we need not linger" on the third element—whether the government's interest justifies the burden it imposes on the laws schools—exposes the one-sidedness of its approach as compared to the dissent.[9]

The majority next scrutinizes the extent to which the Solomon Amendment compels law schools to subsidize a message with which they disagree. The majority likens the law school's position to that of the parade organizers in *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*,[10] who were compelled by a state non-discrimination statute to include an unwelcome gay, lesbian and bisexual contingent in their parade. In *Hurley*, the Court upheld the right of the parade organizers to exclude this homosexual message in their parade; here, the majority employs *Hurley* to uphold the right to exclude those who exclude homosexuals from campus recruiting. If military recruiters were permitted, in the majority's view, the law schools would be compelled to "*convey the message* that all employers are equal"—even those who allegedly violate the schools' non-discrimination policy—when they would rather "only *open their fora* and use their resources to support employers who, in their eyes, do not discriminate against gays."[11]

This is the key point of contention between the majority and the dissent: whether allowing recruiters equal access to campus is expressive activity. For the majority, the very presence of recruiters on campus *conveys a message* of school endorsement. The majority views the campus as a forum which should be open only to those of whom the university administration approves. Being forced to open their forum to employers who supposedly discriminate is likened to compelling the law schools to subsidize a message with which they disagree. By contrast, for the dissent, to condition federal funds on recruiters having equal access to campus is to require schools to do something, not to say something. Schools are neither prohibited from criticizing nor compelled to endorse anything about the United States military; they are simply asked to allow recruiters on campus on an equal footing with other recruiters. For the dissent, that someone might construe a "message" from the law schools permitting military recruiters on campus is beside the point. Congress did not enact the law to prohibit free expression, but to help support the military, and supporting the military is something Congress is very specifically empowered to do.

The appropriate lens, then, for the dissent is not free expression and strict scrutiny, but a balancing of Congress's power to support the military against the law schools' interest in controlling its expressive message.

Not surprisingly, the dissent begins by setting the general context for a constitutional challenge to a statute like the Solomon Amendment, pointing out the presumption of constitutionality for congressional statutes, especially those bottomed in Congress's power to support the military. [12] As the dissent points out, this is far from a pure First Amendment case. No court, after all, has ever declared unconstitutional on First Amendment grounds a statute solely designed to support the military. [13] Applying the "balance-of-interests" test from *Roberts* v. *United States Jaycees,*[14] the dissent begins by asking whether any First Amendment interest of the law schools trumps the Article I powers of Congress to provide for a military; Congress has an Article I power to provide for the general defense, while the law schools have a First Amendment interest in self-expression.[15] The dissent points out that in weighing these competing concerns, courts consistently defer in military matters to the prior weighing of competing interests by Congress. [16] Indeed, "Judicial deference is at its apogee when reviewing congressional decision making in the realm of military affairs."[17] Deference is re-

quired because the competence of courts relative to that of Congress and the President could not be lower than it is in the area of formulating military policy.

Taking on the majority's analogy to expressive activity in *Dale*, the dissent points out that unlike attempted government action in *Dale*—forcing a group to accept a gay scout leader against its wishes—the Solomon Amendment does not compel membership.[18] It does not compel any law school to hire certain faculty or admit certain individuals as students. It does not force inclusion of any members; it merely permits the transient presence of outsiders on equal terms with other outsiders. Moreover, law school recruiting, unlike Scout troop leadership, is not intended to instill the organization's values or to convey any message endorsed by the school. At its core, the application of the Solomon Amendment to campus is not about expression, but about action—allowing the equal access of recruiters to campus.

The dissent also directly addresses the majority's compelled speech argument by distinguishing the present case from *Hurley*. Unlike the parade in *Hurley*, recruiting is undertaken not for expressive purposes by the law school, but for instrumental reasons by the recruiter—finding talented lawyers to hire, or in the case of the military, to commission as officers. Also unlike the parade organizers in *Hurley*, the dissent sees little risk that the inclusion of recruiters on campus will lead others to attribute a message to the law school. The dissent questions the majority's notion that a permissible factual inference may be properly drawn that the law schools' anti-discrimination policies are violated from the transient presence of a military recruiter on campus. Does it even logically follow from seeing a recruiter on campus that the law school endorses the military's "Don't Ask, Don't Tell" policy? [19] As the dissent remarks:

> A participant in a military operation cannot be ipso facto denigrated as a member of a discriminatory institution. And conjuring up such an image is the cornerstone of Appellant's First Amendment argument. [20]

And even if recruiting were expression and could be attributed to the law school, the First Amendment provides more latitude for compelled financial support of government speech than for compelled support of private speech, such as that at issue in *Hurley*.[21]

Having countered the majority's two main arguments—expressive association and compelled speech—the dissent states its affirmative analysis for determining the "proper measure" of the competing interests of providing for the general defense on the one hand versus safeguarding academic self-expression on the other. The most analogous case for the law schools' claim based on self-expression is *United States* v. *O'Brien*.[22] There, plaintiff claimed that burning a draft card was "symbolic expression," protected by the First Amendment.[23] But the Court ruled that the government was well within its rights to ban the burning of an important military record even if doing so did incidentally burden "symbolic expression."[24] The primary purpose of prohibiting burning a draft card is to make possible the constitutionally legitimate government activity of running a selective service system and providing for the common defense. Even though some expressive conduct might be impeded, the ban was proper because its purpose was not to curtail expression, but to preserve an important military record provided for by Congress pursuant to its power to support a military. Analogously, the law schools argue that barring recruiters from campus is "symbolic expression" protected by the First Amendment from being penalized by the government. As in the draft card-burning case, however, the purpose of the penalty here would not be to curtail expression, but to further the important and difficult military objective of recruiting qualified officers. And the government is well within its rights to penalize barring recruiters from campus even if doing so does incidentally burden "symbolic expression." Moreover, as the dissent points out, the Solomon Amendment does not condition federal funds on the absence of campus criticism, but on whether the law schools deny equal access to recruiters.

To the extent the law schools seek to convey a message, not by speaking, but by engaging in the symbolic protest of excluding recruiters from equal access to campus, as the Court in *O'Brien* majestically declared: "We cannot accept the view that an apparently endless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[25] In any event, requiring equal access to campus for recruiters only incidentally burdens expression. The primary purpose of the Solomon Amendment is to make possible the constitutionally legitimate government activity of recruiting for the military and providing for the common defense, not to affect any such "message."

Finally, as the dissent concludes, "What disturbs me personally and as a judge is that the law schools seem to approach this question as an academic exercise, a question on a constitutional law examination or a moot court topic, with no thought of the effect of their action on the supply of military lawyers and military judges in the operation of the Uniform Code of Military Justice."[26] As anyone with military experience can attest, recruiting is important and challenging duty; the majority's dismissal of law schools' interference with that process and suggestion that alternative mechanisms would be sufficiently effective, fails to account for the realities of military recruiting. The dissent points out the further irony of the majority's rejection of military necessity: "They [the law schools] obviously do not desire that our men and women in the armed services, all members of a closed society, obtain optimum justice in military courts with the best-trained lawyers and judges."[27]

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Footnotes

[1]10 U.S.C. § 983(b).

[2]*See id.*

[3]*Id.* at 225.

[4]*Id.*

[5]*Id.* at 246-47.

[6]Boy Scouts of America v. Dale 530 U.S. 640 (2000).

[7]*See id.* 644.

[8]390 F.3d at 232 (internal citations omitted).

[9]*See id.* at 234.

[10]Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 9515 U.S. 557 (1995)

[11]390 F.3d at 238 (emphasis added).

[12]*Id.* at 247.

[13]*Id*.

[14]*Roberts v. United States Jaycees* 468 U.S. 609 (1984)

[15]390 F.3d at 247 (Aldisert, J., dissenting).

[16]*Id.* at 254.

[17]*Id*.

[18]*See* 390 F.3d at 259-60 (citing *Dale* at 644, 649).

[19]*See* 390 F.3d at 252.

[20]*Id*.

[21]*See id.* at 259.

[22]United States v. O'Brien, 20 391 U.S. 367 (1968).

[23]*Id.* at 369-70.

[24]*Id.* at 376.

[25]391 U.S. at 376

[26]24390 F.3d at 255.

[27]*Id*.

Should Ex-Felons Be Allowed to Vote?
A *Legal Affairs* Debate

*By Roger Clegg and Marc Mauer**

Clegg

Here's my basic position: In our democracy, there's a strong presumption that everyone should be allowed to vote. I think that there are both instrumental and equitable reasons for this. That is, we might think about letting only the wise vote if we had some way of identifying wise people, but we don't (it was Bill Buckley, after all, who rightly observed that he would rather be governed by the first 2000 names in the Boston phonebook than by the 2000 people on the Harvard faculty), and letting everyone vote is a way of diversifying risk (like an index fund: there's a book out now—*The Wisdom of Crowds*—about how the group is wise even if its constituents may be foolish). And, equitably, we believe that there is something troubling about being bossed around without having some say. The most famous formulation of this principle is, "No taxation without representation."

And yet, we don't let *everyone* vote. We don't let children vote, for instance, or noncitizens, or the mentally incompetent. Why? Because we don't trust them and their judgment. We have different reasons for not trusting them, but it seems to me that that is their common denominator. For some groups of people, their untrustworthiness trumps the instrumental and equitable presumptions. We're confident enough that children and the mentally incompetent lack good judgment; we don't see it as inequitable to bar noncitizens from voting, and we question their commitment to our *res publica*.

So the question is, do criminals belong in that category? And I think the answer is clearly yes. People who commit serious crimes have shown that they are not trustworthy. And, as to equity, if you're not willing to follow the rules yourself, you shouldn't be able to make the rules for everyone else. Self-government is serious business.

Now, I will freely concede that there are felons who ought to have their right to vote restored, but that should be done on a case-by-case basis, weighing (a) how serious the crime was, (b) how recently it was committed, (c) whether there has been a series/pattern of crimes, and (d) whether the individual has otherwise shown that he or she has turned his or her life around.

Anyway, that's my position. Now, Marc, let me ask you this question: Are there any circumstances where you would not allow a criminal to vote? Suppose, for instance, a terrorist has blown up the Capitol, killing every Senator and Representative. He pleads guilty, is completely unrepentant, and awaits execution in prison. But meanwhile there is a special election to fill the now-vacant positions. Would you let him vote?

Mauer

Roger, your central position is that people with felony convictions should be prohibited from voting because they have an undesirable character. This raises a concern regarding how these people will vote. To begin with your hypothetical—should a terrorist who has blown up the Capitol be permitted to vote?—let's look at a real world, though not American, analogy.

In 1996, the Israeli Supreme Court upheld the right of prisoners to vote. Intriguingly, the case was brought on behalf of Yigal Amir, the assassin of Prime Minister Yitzhak Rabin, and arguably the most despised citizen of his country. In upholding this fundamental right, the Court noted that society must "separate contempt for his act from respect for his right."

You express concern with the "trustworthiness" of people with felony convictions. If I was in charge of setting voting qualifications, there are many categories of people whom I would exclude due to their "untrustworthiness." For a start, admitted racists or anti-Semites wouldn't vote. Maybe I'd also exclude people who couldn't demonstrate that they had devoted sufficient attention to the upcoming election. Or perhaps greedy people who lack a commitment to the overall well-being of the community.

But in a democracy we don't (or at least shouldn't) set up such barriers. Let's not forget that it was not all that long ago that many Americans questioned whether women and African Americans should be part of our political community. No matter how reprehensible or ill-informed I find someone's views, my remedy is obviously to get out and vote and to convince others to support my position.

Voting is also clearly a fundamental expression of free speech. So if people with felony convictions (current or previous) are denied the right to vote, should we then also impose other restrictions on their speech? Should prisoners not be permitted to write a letter-to-the-editor? Should a probationer not be permitted to participate in the PTA at his child's school? Such restrictions hardly seem necessary to protect the community from any harm these people might cause.

This philosophical discussion is important, but the real world impact of these policies is equally significant. With more than four million citizens with felony convictions ineligible to vote, we may be selecting a president and political representatives this week based on this antiquated policy. This is precisely what happened in Florida in 2000, where President Bush prevailed with a margin of 537 votes while 600,000 ex-felons were not able to vote. We will never know how this group would have voted, but clearly the state's exclusionary policy may have decided the election. And the racial dynamics of disenfranchisement—13% of black males will not be voting this week due to disenfranchisement—has profound implications for representative democracy.

Clegg

While you don't quite come right out and say so, I take it that you would indeed allow my hypothetical terrorist to vote. So you get points for ideological consistency, although not for common sense. Someone trying to destroy our government can claim a right equal to that of any other citizen in running it? Sounds odd to me.

It is also interesting that you define trustworthiness in terms of what people believe and think. I'm more tolerant than that. I would rely on objective criteria: Is the person over 18? Is he or she a citizen? And has he or she been convicted of a serious crime—that is, a felony? No need to pass any of your tests.

Regarding voting and "free speech": The two are quite distinct. The Fourteenth Amendment expressly allowed felons to be denied the right to vote, and no one thought that this was changing the scope of the First Amendment. We allow free speech to children and noncitizens, for instance, even though we don't let them vote. We guarantee free speech because we want a robust marketplace of ideas; voting, which is done in secret, is not expressive in this way. Note that we also forbid felons from other activities—like holding certain jobs and possessing firearms.

Regarding "real world impact": The proponents of felon voting seem to think it is a decisive point in their favor if they can show that the felon vote may change the outcome of a presidential election. Let's just say that this is a two-edged sword at best. *Of course* it can change the outcome of an election; if it couldn't, then we wouldn't bother arguing about it. I'm sure that letting children and noncitizens vote could tip the balance in a close election, too. So what? You say that, if we let criminals vote, it may have a decisive outcome on the presidency. Yes—and that's supposed to reassure our law-abiding citizens?

You end by playing the race card—although, I hasten to add, not from the bottom of the deck. We are supposed to be swayed by the fact that a disproportionate number of those disenfranchised are black. But why should this be? If disenfranchisement makes sense, then why should the racial makeup of prison inmates change our minds about it? And if it doesn't make sense, is it nonetheless acceptable so long as it meets a racial quota? In other respects, too, the felon population does not look like America: It is overwhelmingly male, with certain age cohorts over- and others under-represented, and it is also drawn from the poor. Why not play the sex card, or the age card, or the money card?

Mauer

You are quite concerned with the "trustworthiness" of voters and believe that you have an objective criterion—a felony conviction —that defines this for us. This would then seem to lead us to a position whereby people convicted of either mass murder or first-time marijuana possession could both be assumed to be equally untrustworthy and a threat to the otherwise law-abiding electorate. Or that a $200 theft defined as a felony in one state represents a good measure, but not a similar theft considered a misdemeanor in a neighboring state.

You also believe that these untrustworthy voters will shift the outcome of elections, although you offer no evidence whatsoever to document this. But let's consider how this might come about, even for your hypothetical terrorist case. In today's election, the choice is between Bush and Kerry. We can all agree that there are clear differences between them, but it's hard to see how someone who wants to "destroy our government" will find much resonance in either candidate's platform. But maybe we should look at the local level, such as elections for sheriff, presumably a more direct concern for public safety interests. We can look pretty far, but I don't see the prospect of many candidates advancing a "pro-crime" agenda in order to take advantage of this presumed voting bloc.

Regardless of the severity of a person's felony conviction, there remains a fundamental question of whether this should be tied to the loss of the right to vote. Disenfranchisement hardly meets the traditional goals of sentencing. Certainly, it exerts no deterrent effect over and above any deterrence that imprisonment might achieve. And denying the vote runs counter to the goal of rehabilitation. Why send a message to people who are trying to become integrated into the community that they are still second-class citizens? The only function of sentencing addressed by disenfranchisement is punishment, but it is far from obvious what the "clear and compelling state interest" is in promoting this.

You conclude by accusing me of "playing the race card," a curious way to describe the legacy of three centuries of oppressive social history in this country. Well, the history of disenfranchisement policy is in fact overlaid with racism. In some Southern states in the post-Reconstruction era, disenfranchisement policies were tailored with the specific intent of excluding black voters based on the particular crimes that legislators of the time believed they were prone to commit. We can debate whether today's disenfranchisement policies are similarly motivated, but there is little doubt that racial disparities pervade the criminal justice system, ranging from law enforcement profiling to disparate application of drug law enforcement. You would presumably say this is unfortunate (if indeed you concur with the presence of such disparities), but should not affect our support for disenfranchisement. If so, the message to communities of color becomes one of counseling patience—your community will gain its legitimate degree of political influence just as soon as we can eliminate these pesky disparities.

Clegg

Marc, each state defines what a felony is; there is no reason why there must be uniformity in deciding what is a serious crime. And it seems to me perfectly fine to say that all felons have shown at least enough untrustworthiness to lose their right to vote while in prison. Once they are out, then states can make case-by-case distinctions between murderers, drug dealers, and the like.

You, Marc, are the one who refuses to make distinctions. You would treat them all the same: *No one* loses his right to vote, ever, whether in prison or out, whether a murderer or a drug dealer, whether this is the first offense or the tenth. While the title of this debate frames the question to the contrary, there is no such thing as an "ex-felon." That would be like being an "ex-veteran." One could use this neologism to make a distinction between felons who have served their time and those who have not, but I want to stress, Marc, that you don't make this distinction: You believe that all felons in prison or out ought to be able to vote, right?

As for felons shifting the outcome of an election: Marc, *you* were the one who raised this possibility, not me.

You argue that disenfranchisement serves a different purpose than most sentencing, and so it does. So what? The arguments I've made against disenfranchisement have not been within the rubric of sentencing. Depriving felons of firearms serves a different purpose, too, than traditional sentencing, but makes no less sense for that.

Felons can lose their second-class status and have their right to vote restored but, again, this should be done on a case-by-case basis. I would have no problem with a formal ceremony after time has been served and there has been a certain period of good behavior—including, perhaps, some community service—outside of prison. *That* would be the way to encourage the reintegration of felons into the community.

As for race, I've addressed the claim that these laws are rooted in discrimination in a recent column on *National Review* Online: The fact is, they aren't.

Yes, there are racial disparities in the criminal justice system, but the major reason by far for this is that more felonies are committed by those in some racial groups than in others, and there is no serious argument to the contrary. And you're right, Marc: To the extent that some relatively minor part of these disparities is a result of discrimination by police or prosecutors, I would argue that the solution is to address that discrimination, not to let criminals vote.

The people whose votes will be most diluted if criminals are allowed to vote will be the law-abiding folks in high-crime communities. And these people are themselves disproportionately poor people and people of color.

Mauer

Roger, you seem very worked up about getting me to acknowledge that I believe everyone with a felony conviction should be able to vote. So, yes, I do think that people in prison should have the right to vote. In many parts of the world, this places me in a very mainstream position.

For example, our immediate neighbor, Canada, permits people in federal prison to vote, a practice which was affirmed by their Supreme Court, stating that "Denial of the right to vote on the basis of attributed moral unworthiness is inconsistent with the respect for the dignity of every person that lies at the heart of Canadian democracy." Earlier this year, the European Court of Human Rights struck down the blanket denial of voting rights for prisoners in the United Kingdom.

And for those Americans who disdain looking to other nations for policy direction, we have the examples of our own states of Maine and Vermont which permit people in prison to vote. Shockingly enough, these states have not been taken over by rampaging criminals as a result. In fact, as described in a *New York Times* article earlier this week, prisoners who vote in Maine express a mix of liberal and conservative views on social, economic, and military policy.

You also distort the distinction in assessing the impact on the political process of allowing people with felony convictions to vote. Your contention is that this will lead to terrorists trying to "destroy our government." Have you been inside a prison lately? Half the people incarcerated nationally are there for a non-violent property or drug offense. But yes, disenfranchisement policies *are* likely to shift the political balance, since people with felony convictions are disproportionately low-income and from communities of color.

Likewise, the racial history of disenfranchisement laws is hardly as benign as you suggest. While it is true that some of these practices emerged at the time of the founding of the nation, the racial dimension is inescapable. Yesterday, I described the blatantly racist history in the post-Reconstruction South. In 1901, the president of the Alabama constitutional convention framed the practice quite clearly: "And what is it that we want to do? Why it is within the limits imposed by the Federal Constitution, to establish white supremacy in this State."

A comprehensive analysis of the national development of these laws by Angela Behrens and colleagues at the University of Minnesota concludes that "the racial composition of state prisons is firmly associated with the adoption of state felon disenfranchisement laws." In other words, more blacks equals more restrictions, controlling for other factors.

The degree of racial disparity in the prison system that is unaccounted for by crime rates is hardly a trivial number. The most comprehensive study of this issue found that only 76% of this disparity could be explained by arrest rates. This figure is likely to be even lower today, given the enormous increase of drug offenders, along with the racially skewed nature of the drug war.

And finally, you seem to have appointed yourself as a spokesperson for the "law-abiding folks in high-crime communities." If we're talking about black neighborhoods, it's odd that much of the leadership on disenfranchisement reform has come from the Congressional Black Caucus, NAACP, and other civil rights groups. Perhaps you should have a chat with some of these leaders to get a sense of why they've taken a position that seems so threatening to you.

Clegg

A few housekeeping matters first, Marc: (1) I'm not "worked up" about getting you to acknowledge your unwillingness to draw a distinction between felons in jail and out, murderers and drug dealers, and so forth. I just want our audience to know about it, so that they won't think I'm mischaracterizing your position, which is that not only those who have "paid their debt to society" should be able to vote, but even those who haven't.

(2) No one—and certainly not me in this debate—has suggested that letting felons vote will result in states being taken over by "rampaging criminals," so you shouldn't suggest otherwise. I'm not afraid that society will be taken over by illegal aliens if we let them vote, but I still oppose it; same thing here.

(3) Likewise, your statement that "[my] contention that this [that is, felon voting] will lead to terrorists trying to 'destroy our government'" is silly. Of course, I've said no such thing, and I think you know it; I just think—contrary to you—that those trying to destroy our government, among others, shouldn't have a role in running it.

(4) I have not "appointed [my]self spokesperson for the 'law-abiding folks in high-crime communities.'" I've just pointed out a policy implication of letting felons vote—the dilution of these folks' political power—which is a perfectly legitimate thing for me to do. I don't accuse you appointing yourself spokesperson for criminals, after all.

Now, it is true—and in the *National Review* Online column I cited in my last posting I acknowledged—that there were five states in the post-Reconstruction South that deliberately designed their disenfranchisement statutes to keep the just-freed slaves from voting. But (a) those laws are no longer on the books, and (b) those laws didn't, through some strange alchemy, transform all the other states' statutes—with roots in ancient Greece and Rome and passed before and after the Civil War, in the North and the South and the West—into Jim Crow laws.

Marc, where you can show that a state has enacted a law with the purpose and the effect of disenfranchising people because of their race, I will support you wholeheartedly in challenging it—and the courts will strike it down. As you know, the Supreme Court in 1985—in a unanimous opinion written by William Rehnquist—struck down a post-Reconstruction felon disenfranchisement law enacted with racist intent by Alabama. That, of course, is the state you cite, and the Court quoted the same language in the legislative history that you did.

So there is simply no need to throw the non-racist babies out with the racist bathwater. Let's face it: You want to do so because you know that you can't show racial animus in any existing statutes, for the simple reason that they don't have any.

Instead of defending your absolutist position that would allow any criminal to vote—even one still in prison, even one convicted of the most heinous crime, even one who has committed crime after crime and has shown no contrition whatsoever—why don't you focus on improving the mechanisms in the various states for restoring the right to vote on a careful, case-by-case basis?

Let's get back to the basic questions, Marc. Do you really think that our government and our political system will be improved by letting criminals vote, and do you really think it is unfair to say that people have to be willing to follow the law before they can claim a role in making it?

Mauer

Much of your concern about permitting people with felony convictions to vote still comes down to the fact that you believe that doing so will "dilute" the impact of law-abiding citizens, despite the fact that you have no evidence to indicate this is the case. Indeed, research by political scientist Jonathan Casper found that almost all defendants believed "the law they violated represented a norm that was worthy of respect and that ought to be followed."

Once we get past the lack of data, there is still the philosophical question of whether these policies are reasonable. An increasing body of opinion suggests this is not the case. In 2001, the bipartisan Ford/Carter National Commission on Federal Election Reform unanimously recommended that voting rights be automatically restored upon completion of sentence. This position has recently received the support of the American Correctional Association, the professional body of corrections leaders, as well.

Note that these positions are very much in contrast with your proposed method of "restoring the right to vote on a careful, case-by-case basis." Such a process leads to processes such as that in Florida, whereby the governor and his cabinet personally review the restoration applications of people seeking to restore their voting rights. In these sessions, current Governor Jeb Bush frequently asks applicants whether they are using alcohol, getting along well with their family, etc. These would all be perfectly legitimate questions for a parole officer to ask someone under supervision. But it is entirely inappropriate in a democracy to be imposing such character tests on something as fundamental as the right to vote. No one asked me on Election Day whether I had been drinking the night before or was planning on going to work that day.

Looking more closely at the relationship between a felony conviction and voting rights, the American Bar Association—as respectable an organization as they come—has endorsed a policy that is opposed to *any* deprivation of voting rights based on a conviction (although the organization is silent as to whether people in prison should be able to vote).

So I think there's no reason to believe that allowing people with felony convictions to vote will "dilute" the influ-

ence of the rest of us. But why do I believe that "our government and our political system will be improved by letting criminals vote"? Because in addition to being citizens, their life experiences, just like yours or mine, should be added to the national equation of how our collective political ideas get sorted out. Does being convicted of stealing a car or insider trading mean that people are not capable of having opinions about the war in Iraq, Social Security, or gay marriage?

And on the racial dynamics of disenfranchisement laws, You point out that the Supreme Court overturned Alabama's post-Reconstruction racist statute. I'm somewhat less encouraged than you that it took nearly a century—until 1985!—for such a blatantly racist policy to be struck down. And it is far from clear that current laws are without racial animus. Litigation in Florida contends that this is exactly the case with regard to that state's disenfranchisement policy, arguing that the intent of the acknowledged racist law of 1868 was never overturned. This case was recently argued in the 11th Circuit. And the 9th Circuit last year ordered a trial court to consider how racial disparities in the criminal justice system overall affected disenfranchisement practices. So it is far from settled that race plays no role in the history or current practice of these policies.

Clegg

I started this week's debate by stating my basic position, which is that there ought to be a presumption that people who have committed serious crimes lack the trustworthiness to be allowed the vote. This presumption has roots deep in western civilization, and we deny the right to vote to other groups that we view as objectively too untrustworthy to have a say in our self-government: children, for instance, and noncitizens, and the mentally incompetent. This makes sense even though we have instrumentalist and equitable reasons for allowing most adult citizens the vote. So, Marc, at the end of my posting yesterday, I asked you two questions: The instrumentalist one of why you thought our government and political system would be improved by letting criminals vote, and the equitable one of what's unfair about saying that people have to be willing to follow the law before they can claim a role in making it. Let's see how you answered these two questions.

You answer the first by saying that criminals, too, have life experiences and opinions on, for instance, the war in Iraq, Social Security, and gay marriage. That's certainly true, but children and illegal aliens also have opinions, and we don't let them vote. I suppose one might argue that criminals have unique perspectives or insights, but that's a tough argument for you to make, because you've gone out of your way to argue that there is no evidence that criminals as a group vote any differently from the general population (of course, you never cite any evidence to the contrary either).

You never do answer the second question of why it's unfair to say that those unwilling to follow the law shouldn't claim the authority to help make it for others. The closest you come is an argument that these policies are not "reasonable," but you never say why, except to cite some authorities. And who are these authorities? A federal commission headed by Jimmy Carter and Gerald Ford, the American Correctional Association, and the American Bar Association, which you call, apparently without irony, "as respectable an organization as they come." I don't know much about the ACA, but as for Jimmy Carter, Gerald Ford, and the ABA, I would be hard-pressed to come up with a more lackluster group.

Another question I asked you is why you don't devote more time to improving the case-by-case process of restoring the right to vote to some felons once they get out of prison, instead of taking the absolutist position that no one ever should be deprived of the right to vote for a crime, no matter what, when, or how many. The closest you come to answering this question is when you say that you don't like the way Florida's current case-by-case system works. And that's not really an answer.

Finally, the evidence that you produce—in response to my skepticism regarding the current existence of felon disenfranchisement laws on the books that reflect racial animus—is that someone has filed a lawsuit in Florida that makes that claim. This may come as a surprise to you, Marc, but many times lawsuits allege things that turn out not to be true. You note that an Alabama law was on the books for nearly a century before being struck down, but that's because our equal-protection law was ineffectual for most of that time, and there's no way such a law could last long today. If you disagree, then those generous donors supporting the Sentencing Project should get their money back.

Mauer

Your basic argument continues to be premised on the elusive concept of "trustworthiness," with frequent comparisons made to the exclusion of children and mentally incompetent people from the voting booth. But this is faulty logic.

Children and mentally incompetent people are prohibited from voting not because we believe they are untrustworthy, but because we have made a societal decision that they are not *mature* enough to make informed decisions and to appreciate the consequences of their actions. For the same reasons, we do not permit children to drive cars or to drink alcohol. But an adult on probation for a felony conviction is certainly permitted to have a driver's license and to drink alcohol. The only exception we generally make in this regard is to deny these privileges to persons convicted of drunk driving. But this is a question of public safety, not maturity or trustworthiness.

So your rationale for disenfranchisement therefore has no basis in terms of restrictions we impose on other groups, but rests on your concept and definition of trustworthiness. I have earlier elaborated on the problematic nature of trying to make this distinction, assuming that one believes it is a reasonable criterion for voting. But you seem to exhibit no concern whatsoever about the consequences of imposing character tests on the most fundamental right we have as citizens in a democracy: the right to vote. I suppose I still maintain the naïve belief that this was the ideal behind the

struggle for democracy in this country.

A century ago, arguments eerily similar to yours were voiced in regard to women's suffrage. At that time, many people (mostly men) believed that women were not worthy of voting, and that permitting them to do so would "dilute" the influence of the presumably enlightened male electorate. This seems rather antiquated today. Perhaps someday, so too will the notion that some citizens should not be able to vote, even those with a felony conviction.

And let me correct your misperception that I spend all my time advocating an "absolutist position" at the expense of improving the process of restoring voting rights to people with felony convictions. While I have no shame about my absolutist—I prefer to consider it consistent and rational—position, in fact our work at The Sentencing Project has involved extensive engagement in working for change in policy and practice. In alliance with the Right to Vote campaign and many allied organizations nationally, we have been pleased to witness the significant reforms that have been achieved in this area in recent years. Since 1996, nine states have scaled back or repealed aspects of their disenfranchisement laws. These include such changes as the elimination of a permanent ban on voting for people with a felony conviction in New Mexico, the extension of voting rights to people on probation in Connecticut, and easing the restoration process in Alabama, Delaware, Maryland, and other states. Notably, these changes have been bipartisan—five of the bills were signed into law by Republicans and four by Democrats.

We've just been through what was by all accounts an historic election this week, and we will all be sorting through the meaning of it over the coming months. Sitting on the sidelines of this engagement, though, are the nearly five million Americans who were not able to participate due to a current or previous felony conviction. Three-quarters of this group are not incarcerated; they are either serving their sentence in the community or have previously completed their term. No other democratic nation even comes close to this scale of exclusion. I am not threatened by including the voices of these five million people in our national electorate. I think that's what democracy is all about.

*Roger Clegg is General Counsel of the Center for Equal Opportunity. Marc Mauer is Assistant Director of The Sentencing Project. This debate, which took place online between November 1 and November 5, 2004, was posted on *Debate Club* on legalaffairs.org, the website of *Legal Affairs* magazine, and can be found at www.legalaffairs.org/debateclub. It has been reprinted with permission.

CORPORATIONS

SECURITIES ACT REFORMS TAKE FLIGHT

*BY DANIEL I. FISHER**

On November 3, 2004, the Securities and Exchange Commission issued proposed rule release number 33-8501, entitled "Securities Offering Reform" (the "Proposal"), which would represent the most far-reaching reform of the securities offering process since 1998 and, if adopted, would be the most significant reform in decades. The Proposal seeks to reduce the regulation of communications during securities offerings, to allow large companies better and more efficient access to the capital markets, and to change some aspects of liability in the securities offering process.

In 1998, the SEC proposed "the Aircraft Carrier" release, or Regulation AC. Nick-named the Aircraft Carrier because it seemed to carry everything, Regulation AC would have created a new paradigm for the regulation of securities offerings and reporting. Regulation AC would have allowed on-demand effective filing and introduced an entirely new system of integrated disclosure. Unfortunately, inertia and political instability doomed Regulation AC, and securities offering reform lay dormant for several years. The new Proposal seeks to achieve some of Regulation AC's goals, such as streamlining the registration process for large issuers and taking steps to acknowledge technological realities of the marketplace, while at the same time making the existing regulations clearer.

The Proposal, while not as robust as Regulation AC, takes significant steps toward reworking the offering and communications processes, altering the timeline for disclosure as it relates to liability, changing the registration process and modifying the traditional prospectus delivery requirements. This article is not a comprehensive description of the reforms included in the Proposal; rather, it seeks to offer an understanding of those aspects of the Proposal that are most likely to have an impact on the day to day practices of securities lawyers who represent clients interacting with the public capital markets, whether issuers or underwriters.

Communications-Related Proposals

The Securities Act of 1933 (the "Securities Act") currently strictly regulates all communications made during the offering process.[1] Prior to the filing of a registration statement, no "offers" to sell or solicitation of "offers" to buy the securities are permitted under §5(c) of the Securities Act. The extremely broad interpretation that the SEC has given to the term "offer" has had the practical result of making issuers or potential underwriters so fearful of "gun jumping"[2] that no communications about the issuer or offering to the public are made, for fear that such communications could be deemed to be an attempt to "condition the market" or solicit public interest in a potential offering.

Pre-Filing Communications

The Proposal would create a safe harbor to permit communication with the marketplace without fear of gun-jumping so long as the communication occurs thirty days or more prior to the filing of a registration statement. The communication must not reference the securities offering and the issuer must take reasonable measures to ensure the communication is not republished within the thirty-day pre-filing period. For example, the Proposal indicates that an interview published within thirty days prior to filing would not be protected under the safe harbor, even if the interview was given prior to the thirty day window.

In addition to the thirty-day safe harbor for all issuers, proposed Securities Act Rule 163 would allow "well-known seasoned issuers"[3] to make pre-filing oral and written offers without incurring §5(c) liability. However, any Rule 163 communication would then need to be filed with the SEC in conjunction with the issuer's filing of a registration statement.

As another effort to facilitate appropriate communication to the marketplace, proposed Rule 168 would permit reporting issuers to communicate certain regularly available factual business information and forward-looking statements at any time during the offering process (including during the pre-filing period) so long as the communications did not speak to the offering and were consistent with the issuer's normal course of business.

Free Writing Prospectuses

The Proposal introduces the concept of a "free writing prospectus" into the offering communications framework. A free writing prospectus is any written communication which could be seen as an offer to sell or a solicitation of an offer to buy securities pursuant to a previously filed registration statement that is not a preliminary or statutory prospectus.[4] All issuers would have to file with the SEC any free writing prospectus on the day of its first use.

Any issuer would be eligible to use a free writing prospectus after the filing of a registration statement, though an unseasoned issuer[5] would have to include a statutory prospectus in addition to any free writing prospectus.[6] However, in a significant technological advance, an unseasoned issuer would be permitted to deliver a statutory prospectus by electronic hyperlink. The Proposal would consider media communications concerning an issuer to be free writing prospectuses, and thus media communications would be required to be filed with the SEC if the issuer cooperated with the media in the creation of the communication.[7]

In another technological advance, electronic roadshows would be considered to be free writing prospectuses. The Proposal would require that the electronic roadshow, including the transcript, be filed with the SEC unless at least one version of the roadshow were available to a wide audience.

In addition, pursuant to the SEC's goal of full disclosure, if any information in the electronic roadshow goes beyond the information in a statutory, preliminary or free writing prospectus already on file with the SEC, such additional information would have to be filed.

Regulation FD Modifications

Regulation FD currently requires public disclosure by an issuer of material nonpublic information privately disclosed to certain classes of people, but contains an exception for a public securities offering. The Proposal attempts to clarify that only communications that are directly related to a registered, capital-raising securities offering, and not tangential communications, such as regularly released forward-looking information or a communication done in the pre-filing period, are outside the scope of Regulation FD.

Liability Proposals

Although the Proposal significantly liberalizes the pre-effectiveness offering communication framework, the SEC is proposing a tightening of offering liability standards to accompany this liberalization. Currently, much of the liability in the offering process is related to the contents of the §10(a) statutory prospectus, which, given the practical timing of registered offerings, the SEC views as well past the time investors actually make their investment decisions.

Proposed Rule 159 would attach liability to the date of the investment decision, which would essentially mean that information in the preliminary prospectus (or a free writing prospectus or road-show communication) could give rise to liability, even if later corrected in the statutory prospectus. The SEC believes that the information available to investors at the time of the investment decision must be materially accurate and complete, and that information provided after such time should not be considered for determining liability.

The Proposal also clarifies whether, for purposes of defining communications made by or on the behalf of the issuer, the issuer is a "seller" in a primary offering for purposes of §12(a)(2).[8] In a firm-commitment underwritten offering,[9] the issuer might not be considered a §12(a)(2) "seller" since the public purchases the securities from the underwriter. However, proposed Rule 159A clearly states that an issuer is a §12(a)(2) "seller," and is liable for offers and sales made through, among other things, registration statements, preliminary prospectuses or prospectus supplements and most free writing prospectuses. However, communication by a participating underwriter would not be deemed made "on behalf of the issuer" solely because of the communicator's status as a participating underwriter.

The Proposal also clarifies that an issuer or underwriter does not escape §11 liability merely by including exculpating information in a free writing prospectus. Instead, information must actually be included in the registration statement at the time of effectiveness in order to be available as a defense.

Registration Proposals

The Proposal contains a number of incremental but significant improvements to the shelf registration process,[10] especially for larger companies. In general, the Proposal would increase the ability of issuers to use the shelf registration process to quickly access the public capital markets with increased flexibility, and to incorporate by reference information between their filings under the Securities Act and the Exchange Act to a greater degree than is currently permitted.

Much of the portions of the Proposal that address the registration process involve a new class of reporting company, the "well-known seasoned issuer" (or "WKSI") mentioned above in connection with proposed Rule 163. As noted above, under the Proposal, a WKSI is an issuer that (i) is eligible to register securities on Form S-3,[11] (ii) has either a common equity market value of $700 million[12] or has issued $1 billion in debt securities in the past three years[13] and (iii) has been current and timely in its Exchange Act filings for the past 12 months. The primary benefit of being a WKSI under the Proposal is the ability to file "automatic shelf registration statements" which would not be reviewed by the Staff of the SEC, thus potentially saving WKSIs time and expense and giving them certainty about the timing of future offerings. In addition, the Proposal would allow base prospectuses to eliminate certain information currently required, such as the primary or secondary nature of the offering, certain selling security holder information and plan-of-distribution information. Essentially, the Proposal allows WKSIs to file one "master" base prospectus, and then to update it with supplemental prospectuses as business plans and market conditions warrant, to a much greater degree than is possible under the current registration framework with its heightened requirements for the content of base prospectuses.

Besides automatic effectiveness for WKSIs, the Proposal would simplify the shelf registration process by allowing the base prospectus to leave out information "unknown or not reasonably available" to the issuer, as well as any information available in the issuer's Exchange Act reports. This proposal would simplify and shorten the preparation period for the initial base prospectus filing.

The Proposal also contains several smaller reforms that will simplify the registration process. Perhaps the most significant among them is the ability of new, unseasoned issuers to incorporate by reference Exchange Act reports into their registration statements on Form S-1. Under the proposal, if an issuer has filed at least one annual report on Form 10-K and has timely filed all other required reports, it need not file a full Form S-1 every time it offers securities, prior to becoming eligible for the shorter form S-3.[14] The Proposal would also amend Rule 415 to allow shelf registration statements to have a three-year life span, as opposed to the two-year life span that is effectively in place today.

Prospectus Delivery Proposals—Access Equals Delivery

In a significant step forward into the electronic age of securities offerings, the SEC is taking a new approach to the delivery of a statutory prospectus under §10(a) of the Securities Act. The Proposal would implement a new policy that is designed to address the burdensome process of physically

delivering the statutory prospectus. Under the current framework, each investor in a registered offering must be physically delivered a §10(a) statutory prospectus. This "prospectus delivery obligation" extends to all purchasers within 25 days of the effective date of the registration statement. This makes corporate printers very happy, but is a burden to all other parties involved.

Proposed Rule 172 would permit an "access equals delivery" approach for compliance with the prospectus delivery requirements. A §10(a) prospectus delivery would be deemed accomplished so long as the registration statement is effective and the issuer has filed a §10(a) prospectus with the SEC. Under the Proposal, purchasers are presumed to have access to electronic communication and the sophistication to utilize the information contained online through EDGAR, the SEC's database. The real-world implications of this new approach would be to relieve many of the truly burdensome requirements for underwriters under the current prospectus-delivery requirement.

The proposed rule would also permit an exemption whereby written confirmation of the sales of securities and notices of allocation could be sent to investors without being preceded or accompanied by a statutory prospectus. This would allow underwriters to send an electronic communication to investors informing them of allocations under a particular transaction.

Proposed Rule 173 would provide that, in each sale where a statutory prospectus is required, the purchaser can be provided with a notice that the sale was made pursuant to a registration statement or otherwise subject to prospectus delivery requirements, with the notice replacing the statutory prospectus delivery. A purchaser would still be entitled to request and receive a copy of the statutory prospectus.

As a whole, the Proposal would be the most significant reform of the securities offering process in decades. It takes significant strides toward implementing many of reforms in the Aircraft Carrier, and would improve the offering and communications processes, alter some aspects of disclosure liability, modify the registration process and change the prospectus delivery requirements. If adopted, it would significantly alter the securities offering process for attorneys, issuers and underwriters, and thus is well worth watching.

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Footnotes

[1] The process of offering securities through a registration statement is typically divided into the period before a registration statement is filed, the period after filing but before the registration statement is declared effective (the "waiting period"), and the period after the registration statement is declared effective.

[2] The colloquial term for pre-filing offers, or certain communications made during the waiting period, is gun-jumping.

[3] Under the Proposal, a well-known seasoned issuer is an issuer that (i) is eligible to register securities on Form S-3, (ii) has either a common equity market value of $700 million or has issued $1 billion in debt securities in the past three years and (iii) has been current and timely in its filings under the Securities Exchange Act of 1934 (the "Exchange Act") for the past 12 months.

[4] A preliminary prospectus containing nearly all the final information about the offering, more commonly known as a "red herring," is used to offer securities before the statutory prospectus, which must contain all information relating to the offering, is available.

[5] Generally defined as an issuer who has not been subject to the reporting requirements of the Exchange Act for 12 months.

[6] This requirement would not apply to media communications.

[7] This would address situations such as the now-famous Google interview in *Playboy* magazine.

[8] §12(a)(2) allows plaintiffs to bring suit against anyone who "offers or sells a security … by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading."

[9] In a firm commitment the underwriters commit to purchase all the securities from the issuer and re-sell them to the general public (*cf.* a "best efforts" offering).

[10] Shelf registration statements permit companies to file registration statements for offerings to be made on a delayed basis. Typically, a "base prospectus" is initially filed as a registration statement and contains generic information about the issuer, as well as required information about the planned offering or offerings. After filing a base prospectus, an issuer will utilize a "prospectus supplement" to "take down" the securities from the shelf and conduct a specific offering.

[11] The primary forms used by issuers to access the public capital markets are Forms S-1 and S-3. S-1 is used for a company's initial public offering and until it has been public for 12 months, and S-3 is used thereafter. S-3 is a shorter form with less information required, on the theory that the company has been making Exchange Act filings and its information has penetrated the marketplace.

[12] This measure would not include equity held by affiliates of the issuer.

[13] Only issuers registering debt securities would be eligible to be tested by this measure.

[14] As noted above, generally this provision will apply to companies that have completed their initial public offering but have not been subject to the Exchange Act reporting requirements for 12 months.

The Lawyer's Role in Preventing Corporate Fraud

*Given By Roger C. Cramton**

Many years ago, during my third year of law school at the University of Chicago, a prominent Washington lawyer gave the after-dinner talk at the law review banquet. Thurman Arnold was in the final years of an illustrious career. A cowboy from Wyoming, he became a law professor at Yale, a trust buster for FDR in the New Deal years, a federal judge, and, finally, began private practice as a founder of Arnold & Porter. Arnold's final remarks in his reminiscences have always remained fresh in my mind.

> There may come a time in your practice of law, when, despite your very best efforts on behalf of your client, someone must go to jail. Remember! ... when that time comes, ... make sure it's the client!!

Arnold's message, of course, was that the lawyer's job is to represent the client diligently and competently "within the bounds of the law." If the lawyer assists or further's a client's crime, fraud or other misconduct, the lawyer risks going to jail with or instead of the client.

My remarks today fall into two parts: a brief statement of my views of a lawyer's obligations under the SEC's implementation of § 307 of Sarbanes-Oxley ("SOx") followed by some unsolicited advice to you as corporate lawyers.

A. "Reporting Up" and "Reporting Out" Under State Ethics Rules and SOx

§ 307 of the Sarbanes-Oxley Act of 2002 directed the SEC to adopt a rule requiring a lawyer "to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal officer (CLO) or the chief executive officer (CEO) of the company (or the equivalent thereof)."[1] If the CLO or CEO does not "respond appropriately" to the report, the attorney must report the evidence up the corporate ladder to higher authority and, if no appropriate action is taken, to the board of directors.

The SEC rule implementing this requirement states in part:

> If an attorney, appearing and practicing before the Commission in the representation of an issuer, becomes aware of evidence of a material violation by the issuer or any officer, director, employee, or agent of the issuer, the attorney shall report such evidence to the issuer's chief legal officer (or the equivalent thereof) or both the issuer's chief legal officer and its chief executive officer (or the equivalents thereof) forthwith.[2]

The other key component of § 307 – the up-the-ladder reporting requirement if the CLO or CEO does not "appropriately respond" to the reporting lawyer – was implemented by an SEC rule which states that the reporting lawyer "shall report the evidence of a material violation" to the board or relevant board committee, unless the lawyer "reasonably believes that the chief legal officer or the chief executive officer . . . has provided an appropriate response within a reasonable time."[3] The lawyer who reports up the ladder must also "explain his or her reasons" for believing that the issuer has not made an appropriate response to those to whom the report was made. On the other hand, if the lawyer "reasonably believes" that "an appropriate and timely response" has been made, the lawyer "need do nothing more . . . with respect to his or her report."[4]

Moreover, the SEC, pursuant to the statutory directive that it promulgate "minimum standards of professional conduct for attorneys appearing in practice before the commission," included a "reporting out" provision that is consistent with the ethics rules of the vast majority of states. Section 205.3(d)(2) provides that a lawyer may, without the issuer's consent, reveal confidential information to the SEC related to the representation that the lawyer reasonably believes necessary:

> - to prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interests or property of the issuer or investor;
> - to prevent the issuer, in an SEC investigation or proceeding, from committing perjury or another illegal act that is likely to perpetrate a fraud on the SEC; or
> - to rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interests or property of the issuer or investors, in furtherance of which the lawyer's services were used.[5]

As you know, bar leaders have attacked the SEC rules implementing SOx in colorful but misleading terms such as "betraying" or "ratting on" a client. I disagree.[6]

First, the obligations and permissions conferred on securities lawyers by the SEC's adopted and proposed rules are consistent with and reflect the duties of lawyers under state corporate law and the ethics rules of the vast majority of the states.[7] The characterization of those rules as novel requirements that would result in a fundamental change in the relationship of a lawyer to a corporate client is hot air: a hullaballoo stirred up primarily to defeat or limit a new vehicle of regulation that, unlike the disciplinary process of the states, might provide a substantial deterrent to lawyer assistance of corporate fraud and criminality.

Second, the reporting-up obligation of the SEC's SOx rules has already served a valuable function. It has forcefully reminded corporate lawyers that under corporate law and

state ethics rules their fundamental obligation is to the corporate entity, not to the officers who temporarily direct its affairs. Informing the ultimate authority – the board of directors – of a prospective or ongoing illegality that will cause substantial harm to the corporation is not a radical new idea but a restatement of the loyalty to the entity client required by both corporate law and state ethics rules.

The congressional premise was that too many inside and outside lawyers had fallen into a practice of "see no evil, report no evil." SOx's reporting-up requirement is a return to the traditional view that the lawyer should bring independent legal judgment to bear to ensure that corporate managers act within and not without the bounds of the law.

My major problem with the SEC's rules is that they contain major loopholes inconsistent with congressional intent that may result in noncompliance and ineffective enforcement. The standard that triggers up-the-ladder reporting is muddled and weak, and the inappropriate breadth of the "colorable defense" exception endangers the efficacy of the reporting-up requirement.[8] If corporations are to have loyal and faithful representation, reporting up the ladder is essential: no corporation should embark on an illegal course of conduct without the ultimate authority – the board – being informed, warned and responsible.

Third, although required "reporting up" is the most important aspect of the new regime, the existing and proposed "reporting out" provisions have received more attention and criticism. Most lawyers do not understand that current ethics rules in every state in the Midwest – and 41 states overall – permit disclosure to prevent a client's criminal fraud.[9] An even larger number of states (44) require such disclosure when continued representation would assist an ongoing criminal fraud.[10] In short, the SEC's present permissive disclosure provision is consistent with the ethics rules most or all of you are supposed to be operating under today. So is the SEC's proposed rule which would require "noisy withdrawal," a fact that most lawyers do not understand.

Fourth, it is virtually unheard of for a lawyer to blow the whistle on a client even when current law requires it to be done. Only a few of the many corporate failures over the last ten years involved a whistleblower of any kind, and they were disaffected employees, not the inside or outside lawyers who may have been in a better position to know that some illegality had occurred.

Fifth, if maximum deterrence of corporate illegality is desired, lawyers should be required both to report up the ladder and to disclose in the extraordinary situation in which an adamant board refuses to heed the lawyer's advice. What board will go ahead when a lawyer reports the facts and law that make the proposed conduct illegal,[11] or do nothing when the lawyer then threatens to withdraw and inform the SEC that he has done so "for professional considerations"? Skeptics worry that a rogue lawyer or one of bad judgment might provoke a situation that would be embarrassing and harmful to the company. My view is that inside or outside lawyers will never (or virtually never) pursue a matter up the corporate ladder and threaten to disclose the claimed illegality unless there is substance to the claim. The consequences for that lawyer would be effective banishment from the profession: unemployment as a lawyer.

In conclusion, the SOx regulations are designed to reinforce the corporate lawyer's basic duty to prevent corporate agents from committing law violations that will harm the corporation. And that's the lawyer's job under corporate law and legal ethics rules as well as under SOx.

B. Some Unsolicited Advice

I am an academic lawyer and my own limited practice experience was with the federal government with a federal agency and the people of the United States as my client. I have never had to deal with earning my living by obtaining and retaining corporate clients which may have managers who are difficult and demanding. Yet I have studied corporate fraud situations over many years and have served as an expert consultant on lawyer conduct in a substantial number of civil cases in which law firms were charged with assisting a corporate fraud. I have been fascinated by the lawyer's role as a business counselor in preventing or failing to prevent a corporate fraud from occurring. In every major corporate fraud, lawyers have played an essential role: structuring and documenting the fraudulent transactions, providing legal opinions required for the transactions to occur, and drafting and approving the required securities filings concerning the transactions, offerings and financials.[12]

There are a number of constants in many of these cases. The corporation involved is an important client of the firm, paying large fees. The lawyer responsible for the representation develops a close relationship with the dominant manager who retained, directs and can fire the lawyer. Over time the lawyer views the representation and the surrounding environment from the point of view of the manager. When suspicious circumstances occur – and even red flags – the lawyer rejects or minimizes them, acting as an advocate for the manager. If a disgruntled employee, for example, makes credible allegations of wrongdoing, the lawyer relies on the manager's denial or performs a perfunctory investigation that is later viewed as a "whitewash." When the manager pushes for "creative" and "aggressive" interpretation of law in framing transactions and making securities disclosures, the lawyer eagerly complies, arguing that it is the lawyer's job to push the envelope of the law to its extreme if it serves the client's interest. The board of directors is given as little information as possible; it is treated as a body whose only function is to rubber-stamp the actions and proposals of those in control. In essence, the lawyer in treating the manager as "the client" violates the fundamental duty of a lawyer for a corporation: that the lawyer act in the best interests of the entity rather than the interests of those temporarily in control of the entity.

From scenarios such as this I have distilled a number of important lessons for the corporate lawyer. Under the constraints of time, I limit myself here to four major lessons.

First, make sure that the board of directors, or an appropriate committee of the board containing independent directors, signs off on major matters that involve substantial legal risk after being fully informed of those risks. Always bear in mind that your client is the corporate entity and not the managers who provide direction on a day-by-day basis. All corporate frauds start with lawyers treating senior management as the client and failing to communicate with higher authority within management, or if management is the problem, with the board of directors, which is the ultimate authority on all matters except those on which shareholders must act. It is natural for you to defer to the interests and desires of the managers who hired you, direct your work and can fire you. But when facts arise that suggest a substantial legal problem, such as a material violation of law by a division manager or a self-dealing arrangement proposed by a dominant manager, you must be sure that higher authority within the corporation is informed of the situation and has taken appropriate steps to evaluate the situation and, if necessary, prevent or rectify any wrongdoing.

Second, do not assume the attorney-client privilege or work-product immunity will protect legal files or lawyer-client communications. Any transaction can go sour and, if it does, it is likely to be subject to after-the-fact scrutiny. If the SEC or a state or federal prosecutor begins an inquiry, the corporation is likely to "cooperate" with the inquiry. Large corporate frauds almost invariably result in change of control and often in bankruptcy; successors in interest will waive the privilege and confidentiality in an effort to recover assets from the managers who looted the enterprise and the lawyers and accountants who assisted them. Even in the cases where waiver does not occur, the fraud victims probably will be successful in using the crime-fraud exception to penetrate the privilege.

Third, you won't avoid civil liability by portraying your job as a lawyer narrowly and attempting to place the blame on others. Lawyers involved in client fraud situations almost invariably assert that agents of the client lied to them, they did not know of facts indicating fraud, and they reasonably relied on the decisions of officers and directors of the company on business matters and on the judgments of eminent accountants on all accounting-related matters. They were legal technicians – scriveners – not professionals with a broad responsibility. They claim, therefore, that the legal advice they gave was proper under the circumstances and that all the wrongdoing is attributable to other actors. (At the same time, those other actors – the company's officers and directors and the outside accountants – are claiming that they also had limited knowledge and relied on the legal advice of the lawyers.) The "circle of blame" that results is a classic (and generally unsuccessful) attempt at avoidance of responsibility, since each provides evidence against the others. More broadly, lawyers cannot absolve themselves from legal responsibility by pretending that only business or accounting decisions are involved, just as managers and accountants cannot avoid responsibility by claiming that they relied on lawyers. If a series of transactions has no substantial business purpose (i.e., no property or risk is transferred to a second party) and the facts and circumstances suggest that its sole function is to give the company's balance sheet a false boost, legal questions are raised that are not resolved by an accountant's approval.

Fourth, in shaping future business transactions for a corporate client, try to work only for clients who want a legal advisor who will chart a prudent course through the shoals of the law. Beware of corporate managers who push you to be "creative and aggressive" in exploring the limits of the law. The business lawyer is a counselor and advisor, not a litigator, and the goal is a sound result that will advance the interests of the client "within the bounds of the law." Wise counseling involves a prudent awareness of the existence of legal risk and not an effort in every situation to test how far the envelope of the law may be pushed. Lawyers who take the latter approach run a grave risk of assisting illegal conduct. If you cast prudence aside and take large legal risks, your work may become the subject of public litigation under very adverse conditions: jurors don't like lawyers or corporate managers and the "hindsight bias" will operate against you.[13] If the transaction has harmed third parties and appears to be fraudulent or illegal, your claim that you did not "know" what the managers were really doing will fall on deaf ears.

Let me repeat: Lawyers who are unduly aggressive in manipulating law and facts to satisfy a demanding client run great risks of assisting corporate crime or fraud. The role of a business lawyer in shaping future transactions is not to push the law to its extreme but to guide the corporate client safely through the shoals of the law.

Just a short time ago, a former Enron executive and four former Merrill Lynch executives were convicted of conspiring to help Enron report bogus profits.[14] The case centered on a single transaction: a purported sale of barges by Enron to Merrill in late December 1999, when Enron was struggling to meet Wall Street's profit projections for the year. When Enron was unable to sell the barges to a third party, Merrill agreed to "purchase" the barges for $7 million in exchange for Enron's secret oral promise to buy the barges back within six months for an amount that would provide Merrill with an interest-like payment that would compensate it for Enron's use of its money. Sure enough, Enron bought the barges back and then included a substantial profit on the "sale" in its report of 1999 income. Lawyers and accountants for Enron and Merrill concluded that the transaction was a "sale" not a "loan" and prestigious law firms gave legal opinions to that effect. This and other transactions were later set aside in Enron's bankruptcy proceeding as having no substantial business purpose other than to provide a cover for a false and misleading report of Enron's income: a fraudulent securities filing designed to mislead investors. How could these lawyers structure, document and approve the legality of this transaction, which could not have been completed without their help?

Lawyers talk themselves into assisting such fraud by manipulating the letter of legal rules in aggressive ways while

ignoring the clear intent of the rules involved and the underlying policies that ultimately control their judicial interpretation. An Enron employee provided a colorful illustration:

> Say you have a dog, but you need to create a duck on the financial statements. Fortunately, there are specific accounting [or legal] rules for what constitutes a duck: yellow feet, white covering, orange beak. So you take the dog and paint its feet yellow and its fur white and you paste an orange plastic beak on its nose, and then you say to the accountants and the lawyers, "This is a duck! Don't you agree that it's a duck?" Everybody knows that it's a dog, not a duck, but that doesn't matter, because you've met the rules calling it a duck.[15]

But the rules that distinguish a duck (i.e., a "sale") from a dog (i.e., a "loan") are backstopped by more substantive legal norms: our law provides that a transaction must have a business purpose other than that of misleading investors, and the securities laws ultimately turn on whether what is disclosed, viewed as a whole, is known to be false or misleading. Thus it turns out that the general norms of securities and other law are more decisive than narrow technical rules. When a wooden application of technical rules defeats the fundamental goals of securities regulation and private law, such as honest disclosure or integrity of transactions, the broader principles prevail in the courts.

Preaching to lawyers and bar groups about their moral and public responsibilities has proven to be ineffective. Professional discipline, for a variety of reasons, provides virtually no control over the failure of law firms to monitor the partners who are bringing in juicy fees from corporate clients. The spread of limited liability partnerships accentuates the willingness of partners to ignore the risks that other partners are taking. Today's emphasis on "the bottom line" both in corporations and law firms gives rise to a culture valuing the false sense of prestige and status that flows from the managers meeting market estimates of expected profits and the law firm being among the leaders in the annual listings of profits per partner. From the vantage point of respect for law and public responsibility of lawyers, the current scene runs the risk of a "race to the bottom." The massive corporate failures and frauds of recent years were not the work of a few "bad apples" but a systemic problem that requires systemic solutions.

One major part of the problem is that accountability to law of the professionals who are responsible for maintaining the legitimacy of corporate transactions and securities filings (accountants, lawyers and bankers) disintegrated during the aftermath of the savings-and-loan crisis. Professional discipline for assisting a corporate fraud has been a total non-starter: lawyers are never disciplined for failing to withdraw when ethics rules require them to do so or for assisting a major corporate fraud.[16] The *Central Bank* case eliminated aiding-and-abetting (secondary) liability of professionals under the federal securities law; lawyers, accountants and bankers are liable only if they can be proven to be active participants in a fraudulent scheme.[17] The Private Securities Litigation Reform Act of 1995, which imposed special pleading requirements on civil plaintiffs in securities fraud actions,[18] may have eliminated a number of frivolous fraud suits but also reduced the prospects of meritorious securities litigation. And the Securities Litigation Uniform Standards of 1998[19] carried things further by reducing the availability to plaintiffs of state securities fraud laws.

The decline of legal risks in the 1990s made professionals less accountable to the law and changes in the provision of professional services created conflicts of interest that adversely affected independent judgment. The result was that "[t]he remnants of a professional ethos in accounting, law and securities analysis give way to getting the maximum revenue per partner."[20]

Conclusion

The congressional premise underlying § 307 of Sarbanes-Oxley was that many inside and outside lawyers had fallen into a "see no evil, report no evil" state of mind. The SEC regulations implementing it remind business lawyers that their fundamental obligation under corporate law and state legal ethics rules is to the corporate entity, not to the managers. Informing the ultimate authority – the board of directors – of a prospective or ongoing illegality that may cause substantial harm to the corporation is not a radical new idea but a restatement of the loyalty to the entity required by law.

The SEC rules implementing SOx are useful precisely because they provide some needed deterrence to lawyer misconduct on behalf of the wrongdoing of corporate managers. The rules have many ambiguities and loopholes, especially the tortured triggering standard and the unwise scope of the "colorable defense" exception to the provision of an appropriate response to a report of a material violation.[21] But it still must be welcomed as a new beginning.

Some years ago, Louis Brandeis was being questioned by a Senate committee about the generality and vagueness of the Sherman Act. Businessmen argued that the law was unfair because its boundaries were not clear. Brandeis replied to them as follows:

> [Y]our lawyers ... can tell you where a fairly safe course lies. If you are walking along a precipice no human being can tell you how near you can go ... because you may stumble on a loose stone, . . . slip and go over; but anybody can tell you where you can walk perfectly safe within a convenient distance of that precipice. The difficulty which men have felt ... has been rather that they wanted to go to the limit rather than that they have wanted to go safely.[22]

This is great advice from a great man!

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Law Emeritus, Cornell Law School. This article is a transcript of his remarks from "Corporate Citizenship and the Law: The Fifth Driker Symposium for Excellence in the Law," given Nov. 8, 2004 at Wayne State University. It was originally published in 50 WAYNE L.R. 2005, and has been reprinted with permission. Correspondence concerning this article should be addressed to Prof. Cramton at *rcc10@cornell.edu*.

Footnotes

[1] Sarbanes-Oxley Act of 2002, Pub.L.No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 18, 28 and 29 U.S.C.). For a fuller treatment of the subject of this Article, see Roger C. Cramton, George M. Cohen & Susan P. Koniak, *Legal and Ethical Duties of Lawyers After Sarbanes-Oxley*, 49 VILLANOVA L. REV. 725 (2004) [hereinafter "Cramton et al., Lawyer Duties After SOx"].

[2] Implementation of Standards of Professional Conduct for Attorneys. 17 C.F.R. §205.3(b)(1) (2004).

[3]*Id.* at §205.3(b)(3).

[4]*Id*. at §205.3(b)(8) and (9).

[5]*Id*. at §205.3(d) (2). In August 2003, shortly after the SEC rules implementing SOx had gone into effect, the ABA amended Model Rules 1.6 and 1.13 in a manner that permits disclosure of confidential information in many of the same situations. See Lawrence A Hamermesh, *The ABA Task Force on Corporate Responsibility and the 2003 Changes to the Model Rules of Professional Conduct*, 17 GEO. J. LEG. ETHICS 35 (2003).

[6]See Cramton et al., Lawyer Duties After SOx, cited supra n. 1, for a fuller statement of my views.

[7]*Id*., at 779-88.

[8]*Id*. at 752-64 (critique of the triggering standard) and pp. 771-79 (critique of "colorable defense" exception).

[9]For a tabulation of the position of all 50 states and the District of Columbia on lawyer disclosure of confidential information, see Attorneys' Liability Assurance Society (ALAS), *Ethics Rules on Client Confidences,* reprinted in Thomas D. Morgan & Ronald D. Rotunda, 2003 SELECTED STANDARDS OF PROFESSIONAL RESPONSIBILITY 161-72 (2003). Statements in this article concerning the number of jurisdictions with ethics rules permitting or requiring a lawyer's disclosure of client confidential information are based on this source.

[10]*Id*.

[11]In December 2003, Akin Gump withdrew from representing a corporate client because company officials had refused to include certain information in a securities filing after the firm had warned that doing so would be a material violation of the securities laws. The firm's letter to the client's board of directors "reserve[d] the right to inform the S.E.C. of our withdrawal and the reasons therefore." See *Patrick McGeehan, Lawyers Take Suspicions on TV Azteca to Its Board*, N.Y. TIMES, Dec. 24, 2003 (discussing the first reported instance of required "reporting up" under the SEC's SOx rules and threat of subsequent disclosure to the SEC if the violation was not remedied).

[12]Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues*, 58 BUS. LAWYER 143 (2002) (discussing the role of lawyers in Enron and other corporate failures or frauds).

[13]The "hindsight bias,"one of the best-established findings of cognitive psychology, leads human beings, when they know that an event has happened, to exaggerate the extent to which the event could have been anticipated in advance. *See id*., at 147 and 174.

[14]See Kurt Eichenwald, *Jury Convicts 5 Involved in Enron Deal With Merrill*, N.Y. TIMES, Nov. 4, 2004, C1 (describing the Enron transaction and the convictions of the executives).

[15]W. Bradley Wendel, *The Jurisprudence of Enron: Professionalism as Interpretation*, Cornell Law School Working Papers Series, Paper 16, p. 10 (2004), available at <http://lsr.nellco.org/cornell/clsops/papers/16>.

[16]Lawyers should ask themselves why lawyers in corporate fraud situations never withdraw from the representation when ethics rules require them to do so (they usually continue the representation at least until the fraud becomes public); why they never act as whistleblowers even when ethics rules permit or even require them to do so; and why they are never disciplined for these relatively clear violations of rules of professional conduct. The answers provide interesting light on why lawyers for corporations are not deterred by rules of professional conduct, which are applied to them only for egregious and old-fashioned crimes such as stealing a client's money.

[17]Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994) (holding that secondary liability under § 10(b) of the Securities Exchange Act of 1934, supported by many years of federal decisions in all circuits, did not exist because no specific statutory language authorized it).

[18]Pub. L. No. 104-67, §21D(b), 109 Stat. at 747. See Jill Fisch, *The Scope of Private Securities Litigation: In Search of Liability Standards for Secondary Defendants,* 99 Colum. L. Rev. 1293, 1295-96 (1999).

[19]Pub. L. No. 105-353, 112 Stat. 3227 (preempting state statutory and common law securities fraud claims by requiring class actions involving nationally traded securities to be brought exclusively in federal court under uniform federal standards).

[20]Former Treasury Secretary Paul O'Neill came to this conclusion after reflecting on the "new" and "exotic" financial maneuvers that many professional urged on him in his earlier capacity as a corporate executive. See David Wessel, *Venal Sins: Why the Bad Guys of the Boardroom Emerged in Masse*, WALL ST. J., June 20, 2002, at A1.

[21]For discussion of these important questions, see Cramton et al., Lawyers Duties After SOx, cited supra, n. 1, at 751-64 (triggering standard) and 764-79 ("colorable defense" and other exceptions to an appropriate response to a report).

[22]Louis L. Brandeis, Hearings before Sen. Comm. on Interstate Commence, S. Res. No. 98, 62nd Cong., 1st Sess. 1161 (1911), quoted in Harry First, BUSINESS CRIMES 27 (1990).

Criminal Law and Procedure

The Unborn Victims of Violence Act and State Legislative Reform

*By Jack Wade Nowlin**

In April of 2004, President George W. Bush signed into law a significant piece of federal legislation regarding the legal status of unborn children, the Unborn Victims of Violence Act of 2004 ("Laci and Conner's Law").[1] This legislation extends the basic protections of the federal criminal law to unborn children, criminalizing acts of fetal homicide and fetal battery which would be federal crimes if committed against newborn infants or other persons. The Unborn Victims of Violence Act may come to serve as a model for state legislative reform efforts.

A majority of states do not extend the basic protections of the criminal law equally to unborn children even in those areas where such protections can be provided consistent with the Supreme Court's abortion jurisprudence. In fact, the Court's abortion decisions[2] do not place any serious constitutional obstacle in the path of jurisdictions wishing to criminalize third-party assaults on pregnant women and their unborn children. Laws of this kind do not interfere with judicially-created reproductive rights such as the right to abortion. Quite the contrary, they actually reinforce reproductive rights by providing additional bases of liability for criminals who attack pregnant women and thereby deny them free "choice" in the area of reproduction. Nor does the Court's refusal in the abortion context to recognize unborn children as constitutional persons for purposes of the Fourteenth Amendment[3] preclude states from recognizing unborn children as persons for purposes of the application of their state criminal or civil laws. The legal distinction between federal constitutional personhood and state legal personhood should be very clear, as should be the principle that states may extend legal protections beyond the federal constitutional minimum. Finally, the Court's balancing of interests in decisions such as *Roe* and *Casey*, which led the Court to rule in favor of a broad right to abortion, carries no necessary implication that fetal rights are of less than a very high order of importance. Quite the contrary, *Roe* and *Casey* plainly accorded great weight to the decisional autonomy of pregnant women, which suggests that the state interest in fetal life may have been viewed as of a very high order of magnitude, though still outweighed by the even higher order interest in the mother's reproductive autonomy.

As many as twenty states still provide unborn children with *no* individual legal protection from homicidal acts committed by persons who attack them and their mothers. More than a dozen other states deny unborn children, as individuals, the legal protections of the criminal law until the child reaches some particular stage of development, such as viability or "quickening." Significantly, of the remaining eighteen or so states that provide fuller protection for unborn children, a substantial number classify fetal homicide as "manslaughter" even when the homicide is intentional or felony-related and would have been classified as murder if the victim had been a newborn baby, child, or adult. Other states provide no clear protection to unborn children for assault or battery not causing death but perhaps causing serious and irreparable injuries to the fetus. In sum, only a handful of states provide unborn children with anything like the full extent of the protection of the criminal laws. Since the vast majority of criminal acts causing harm to unborn children fall outside the jurisdiction of the federal government and thus outside the reach of the Unborn Victims of Violence Act, state legal reform reflecting the equal worth and dignity of the unborn is of the utmost importance.

Six aspects of the Unborn Victims of Violence Act may be considered by state legislatures and state courts. First, the Unborn Victims of Violence Act recognizes the unborn child as a potential *victim* of crime rather than as a mere "reproductive interest" of the mother who is, of course, also a potential victim of crime. An unborn child, as an individual member of the human species, possesses his or her own individual moral right to equal concern and respect.[4] It is a biological mistake to view an unborn child as a mere extension of the mother's body, and it is a concomitant moral mistake to view an unborn child as a mere object in which the mother has an interest. This is, of course, not to deny that mothers have an interest in the life and health of their children, born and unborn; rather it is to recognize that the criminal law protects our interests in the health and safety of *persons*, such as our family members, by extending to those persons their own legal rights as individuals to the protections of the criminal law. Thus we do not treat the mother as the principal or sole legal victim of the murder of her newborn child, and we should not treat the mother as the principal or sole legal victim of the murder of her unborn child. Not surprisingly, many grieving mothers of unborn murder victims share this view and believe the law should recognize their children, as well as themselves, as victims.[5]

Second, the Unborn Victims of Violence Act does not discriminate against unborn children based on their age or their stage of physical and mental development. Instead, the Act extends the protections of the federal criminal law to the "child in utero" and defines that term as a "member of the species homo sapiens, at any stage of development, who is carried in the womb."[6] The Act thus identifies the possession of natural rights to life, liberty, and the pursuit of happiness as an intrinsic attribute of human existence and thus as worthy of protection through the criminal law from the moment a new person comes into being. In short, the Act recognizes that *all* human beings have human rights worthy of legal protections, not merely a sub-set of human beings who possess certain advanced physical or mental capabilities. The Act therefore avoids the pitfall of an arbitrary denial of the protection of the criminal laws to unborn children merely

because they are at earlier stages of fetal development. Indeed, by this latter line of reasoning, it is unclear why newborn infants are entitled to the protections of the criminal law.[7]

Third, the Unborn Victims of Violence Act extends the protections of the criminal law to prohibit conduct that causes "bodily injury" to the unborn child as well as "death."[8] Thus, unlike a number of state fetal protection laws, the Act does not limit its scope of protection to homicide, but also protects the unborn child from potentially grievous bodily harm falling short of death, reflecting the view that the right to protection from bodily injury as well as from death is an essential part of the protections of the criminal law and thus an essential part of respect for the equal dignity and worth of unborn children.

Fourth, the Unborn Victims of Violence Act requires no special or arbitrary mental state with respect to the presence of the child in utero, but rather follows in the path of well-settled principles of criminal law in providing for the "transfer" of the criminal mental state of the attacker from the mother to the unborn child. The Act thus states that if the attacker is not intentionally attempting to kill the unborn child, then the punishment for harming the child is "the same as the punishment provided under federal law for that conduct had that injury or death occurred to the unborn child's mother."[9] For example, if an individual attacks a pregnant woman without knowing that she is pregnant, the attacker's criminal mental state with respect to the woman (such as an "intent to kill") is "transferred" to the fetus as well. Such a transference or replication of mental state is not uncommon in the criminal law and ensures that a criminal who intends to kill A but who instead kills B is open to both a murder charge (of B) and a potential attempted murder charge (of A).[10] The Act, by following a version of the doctrine of "transferred" intent, makes certain that a criminal defendant can receive punishment commensurate with his or her actual culpability in terms of both the defendant's mens rea and actus reus.

Fifth, the Unborn Victims of Violence Act expressly exempts from its reach both abortion[11] and acts of an unborn child's mother causing harm to the unborn child.[12] Quite obviously, any fetal homicide law placing restrictions on abortion would trigger the heightened scrutiny associated with the Supreme Court's abortion jurisprudence. The likely result would be invalidation of the fetal homicide law. Additionally, laws that criminalize actions by the mother which harm the fetus raise legal issues concerning state interference with the bodily integrity and reproductive autonomy of the mother. Invalidation by the courts is a possibility here as well. Plainly, then, the questions of abortion and of harm to an unborn child inflicted by his or her own mother raise legal and moral concerns quite distinct from those involved in the case of third-party attacks on mothers and their unborn children. These former issues are thus best dealt with by laws specifically addressing their particular concerns rather than by general fetal battery and homicide legislation. The Unborn Victims of Violence Act is written with clarity to ensure that these issues do indeed remain distinct from the general prohibition of fetal battery and homicide.

And, sixth, the Unborn Victims of Violence Act avoids the imposition of capital punishment for fetal homicide, stating that "[n]otwithstanding any other provision of law, the death penalty shall not be imposed for an offense under this section."[13] On prudential grounds, states with capital punishment should *avoid* extending the death penalty to cases of fetal homicide, settling instead for the substantial equality of the imposition of life imprisonment in cases of feticide that would warrant the death penalty under state law if the victim were a newborn child. While this does deny the unborn child perfect equality of treatment under the law, prudence dictates this course of action for two principal reasons. Initially, as a political matter, the invocation of the death penalty in the context of fetal homicide may split the "culture of life" coalition, given that many pro-life advocates are opposed to the death penalty, and thus may potentially cause the defeat of legislation designed to protect unborn children from assaultive crimes. Furthermore, the imposition of the death penalty in fetal homicide cases will provoke the much more rigorous application of "proportionality" analysis accorded to capital punishment under the Eighth Amendment as opposed to the more permissive application used by the courts in the context of non-capital sentencing.[14] Obviously, the stricter application of the Eighth Amendment standard would make it much easier for reviewing courts to invalidate fetal homicide laws, perhaps holding, mistakenly, that the intentional destruction of an unborn child in his or her earlier stages of development is insufficiently serious as a criminal offense to justify imposition of the death penalty. In sum, avoiding the imposition of capital punishment maximizes the chances that fetal protections laws will be passed by legislatures and upheld by courts.

Significantly, a number of states in recent years have expanded the reach of their criminal laws to provide greater protection for the unborn. Now the federal Unborn Victims of Violence Act serves as a roadmap for action expanding the protection of federal criminal law to unburn children, to the extent allowed by the decisions of the U.S. Supreme Court.

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Footnotes

[1] 18 U.S.C. § 1841.

[2] Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992); Stenberg v. Carhart 530 U.S. 914 (2000).

[3] *See* Roe v. Wade, 410 U.S. 113, 158 (1973) (stating that "the word 'person', as used in the Fourteenth Amendment, does not include the unborn.").

[4] For discussions of fetal personhood, see JOHN FINNIS, ABORTION,

NATURAL LAW, AND PUBLIC REASON, IN NATURAL LAW AND PUBLIC REASON (Robert P. George & Christopher Wolfe, eds., 2000); ROBERT P. GEORGE, THE CLASH OF ORTHODOXIES: LAW, RELIGION, AND MORALITY IN CRISIS 66-74 (2001)

[5] As one mother put it: "I know that some lawmakers and some groups insist that there is no such thing as an unborn victim, and that crimes like this only have a single victim — but that is callous and it is wrong. Please don't tell me that my son was not a real victim of a real crime. We were both victims, but only I survived." Testimony of Tracy Marciniak, Before the Subcommittee on the Constitution, Committee on the Judiciary, U.S. House of Representatives, On the Unborn Victims of Violence Act of 2003 (H.R. 1997), July 8, 2003.

[6] 18 U.S.C. § 1841(d).

[7] *Cf.* PETER SINGER, PRACTICAL ETHICS 182 (2nd ed., 1993) Singer states that: "[B]eing a human being, in the sense of a member of the species homo sapiens, is not relevant to the wrongness of killing it; it is, rather, characteristics like rationality, autonomy, and self-consciousness that make a difference. Infants lack these characteristics. Killing them, therefore, cannot be equated with killing normal human beings, or any other self-conscious beings. *Id.* at 182.

[8] 18 U.S.C. § 1841(a)(1).

[9] 18 U.S.C. § 1841(a)(2)(A).

[10] *See*, *e.g.*, Poe v. State, 341 Md. 523, 671 A.2d 501 (1996) (holding a criminal defendant liable for both the attempted murder of the intended victim and the murder of an unintended victim).

[11] 18 U.S.C. § 1841(c)(1).

[12] 18 U.S.C. § 1841(c)(3).

[13] 18 U.S.C. § 1841(a)(2)(D).

[14] On the differences in application of the Eighth Amendment's prohibition of cruel and unusual punishments in capital and non-capital contexts, see Harmelin v. Michigan, 501 U.S. 957, 996- 1001 (1991)(Kennedy, J., concurring in part and concurring in the judgment).

Legal Problems with Online Gambling

*By Ronald J. Rychlak**

I. Introduction

Not long ago, Nevada and Atlantic City, New Jersey stood out from the rest of the nation as jurisdictions where one could bet legally. With the emergence of Indian gaming, state lotteries, riverboat gambling, and other forms of legal wagering, today two states (Utah and Hawaii) stand alone as the only jurisdictions without some form of legalized gaming. In fact, today anyone with a computer and Internet access can go to a "virtual casino" and gamble on almost any casino-style game or place bets on professional and collegiate sporting events.

Online gaming is emerging as a major enterprise for the Internet, and a serious concern for lawmakers.[1] There are presently more than 1,400 gambling (or "gaming") sites on the web. With about 14.5 million patrons, it is estimated that global revenues for Internet gaming were about $4.2 billion in 2003.[2] Many observers believe that Internet gaming is well on its way to becoming a $100 billion-a-year industry.

Despite its prevalence, Internet gambling is illegal in all fifty states.[3] Several foreign nations, however, either sanction Internet gaming or do not enforce laws against it. Since web pages do not recognize international borders, a gaming site operated in any nation can attract gamblers from every other nation. Most Internet gamblers are from the United States,[4] and that is a serious concern for American lawmakers.

Gambling, of course, has traditionally been seen as a vice, and in the United States it has a history associated with organized crime. As states have moved toward legalization, they have also instituted strict regulatory schemes designed to keep the games fair and the ownership honest. With Internet gaming, however, this may be impossible. "One of the most heavily regulated industries in the world has crashed with full force into one of the most unregulated, and inherently unregulatable, phenomenon of modern times."[5]

Several different concerns lead to the call for regulation or prohibition of Internet gambling:

> -Concern about underage gamblers. Obviously, it is harder to verify age over the Internet than in person.
> -Concern about fraud by Internet casino operators. Internet casino operators have already avoided paying their customers either by refusing to pay or by moving their website to another address and changing the name.[6]
> -Concern that video gambling (whose addictive nature has been compared to crack cocaine)[7] from the privacy of one's own home will lead to an increase in gambling addiction.[8]
> -Concern that Internet casinos will negatively affect state tax revenues by taking business away from brick-and-mortar casinos that pay taxes.[9]

These reasons for wanting to control Internet gaming, however, do not translate easily into action. When it comes to regulation or prohibition, there are two basic lines of thought. One line holds that Internet gambling cannot be entirely stopped, so it has to be regulated.[10] The opposing argument is that it cannot be regulated, so it must be prohibited.[11] Unfortunately, both groups are partially correct: Internet gaming is very difficult to regulate or to prohibit.

Since many of the Internet gaming web pages are sanctioned by some foreign government, one possibility would be simply to rely upon the regulatory authority provided by that nation. An obvious problem with that solution is that regulation in another nation is unlikely to protect American gamblers. More importantly, many (but not all)[12] of the sanctioned virtual casinos are located in small, island nations that provide virtually no actual regulation; they just charge a fee.[13] Consider:

> In Nevada and New Jersey the applicant for an unrestricted gaming license can expect the process to take one to two years. The applicant has the burden of proving to the licensing authorities that it is legitimate and has the necessary skills available to operate a casino in compliance with the law. The applicant must pay the costs of the independent investigation undertaken to test the accuracy and complete truthfulness of its responses to the myriad questions answered in filling out the application. These costs routinely amount to between $500,000 and $1,000,000. There are public hearings to delve into personal and business transgressions admitted in the application or turned up in the investigation. These amounts do not take into consideration the legal fees that each applicant incurs in getting help and advice in connection with the process.[14]

In contrast, most of the off-shore nations that license Internet casinos charge between $8,000 and $20,000, and the time to obtain the license is between one and five weeks.[15] Obviously, these other nations do not devote as much time and effort to gaming regulation as is expected in the United States. As such, reliance on the laws of other nations will not meet the needs of American lawmakers.[16]

Since gambling has traditionally been a matter of state concern, some individual states have taken action to try to stop Internet gambling. In 2001, for instance, New Jersey's Attorney General filed civil suits against three offshore casinos.[17] This is in line with similar actions taken by officials in New York, Minnesota, and Missouri.[18] In Florida, the Attorney General distributed "cease and desist" letters to at least ten media companies providing publishing or broadcasting advertisements for offshore computer gambling sites.[19]

The Attorneys General of Indiana, Minnesota, and Texas have all issued opinions specifically declaring Internet gambling illegal under the laws of their respective states,[20] and other states are putting new legislation in place.[21] Legal actions, however, are very difficult to bring. The Internet casino operations are usually located beyond the state's jurisdictional limits,[22] and even if the necessary evidence could be uncovered, prosecutors are unlikely to go after individual gamblers. As such, states have been unable to significantly impact online betting.

Federal law has its own problems.[23] The U.S. Department of Justice takes the position that Internet gambling is illegal under at least four federal statutes: the Interstate and Foreign Travel or Transportation in Aid of Racketeering Enterprises Act (otherwise known as the Travel Act);[24] the Professional and Amateur Sports Protection Act;[25] the Interstate Transportation of Wagering Paraphernalia Act;[26] and the Wire Act.[27]

The most notable prosecution was probably that of Jay Cohen, an American citizen who set up a bookmaking business in the Caribbean island of Antigua. Although Cohen's operation was based exclusively in Antigua, it targeted customers in the United States through advertisements in American radio, newspaper, and television. Bets on American sporting events were accepted either by toll free telephone or via the Internet.

The FBI began an investigation of the company in 1997. In a 15-month period, Cohen's company collected approximately $5.3 million in funds wired from nearly 1,600 customers. Cohen was eventually arrested and charged with criminal conspiracy and substantive offenses under the Wire Act. His various asserted defenses were rejected in a lengthy Circuit Court opinion, and Cohen was convicted and sentenced to 21 months in prison. Both the conviction and the sentence were upheld on appeal.[28]

Despite the holding in Cohen's case, there are significant questions about the applicability of existing federal legislation to on-line casinos, which might be viewed differently from a sports betting operation like Cohen ran.[29] The current federal legislation was enacted with an eye toward prohibiting sports betting, but none of the current federal statutes expressly deal with Internet casino-style gambling. Recently, the U.S. Fifth Circuit Court of Appeals held that the Wire Act does *not* apply to Internet casinos.[30] As such, federal legislators have been scrambling to come up with laws that can be effective in stopping or regulating Internet gaming. While they differ in details, there are two principal areas of focus: Internet service providers and financial transactions facilitators.

II. Internet Service Providers and the Kyl Bill

Senator Jon Kyl of Arizona has proposed at least two versions of the Internet Gambling Prohibition Act, more commonly known at the "Kyl Bill."[31] The most recent congressional action on Internet gambling occurred in the summer of 2003, when the Senate Banking Committee voted 19-0 to approve restrictions proposed by Kyl and the House voted 319-104 to outlaw the use of credit cards, checks and other bank instruments to pay for Internet bets. The House version was similar to the original version of Kyl's legislation, but the Senate Banking Committee added a provision to prevent states from authorizing online wagers within their borders. That immediately drew opposition from the American Gaming Association, which complained this would favor Indian gaming and the parimutuel industry over mainstream casinos. *See* Tony Batt, *Congress Unlikely to Act on Internet Gambling: Budget Expected to be Top Priority of Post-election Agenda*, Las Vegas Review-Journal, Oct. 27, 2004. This legislation would focus on Internet Service Providers ("ISPs"). ISPs provide a direct connection from a company's networks to the Internet. They may also provide related services such as virtual hosting, leased lines (T-1 or T-3) and web development. Since no web page can operate without being located on a server, ISPs make logical targets for law enforcement. Among the largest national and regional ISPs are AT&T, WorldNet, IBM Global Network, MCI, Netcom, UUNet, and PSINet.

The Kyl Bill would make it illegal for any person engaged in a gambling business to knowingly use the Internet to place, receive, or otherwise bet or wager, or to send, receive, or attract information aiding in wagering or betting.[32] The logical problem with targeting ISPs would seem to be in demonstrating that the ISP knew the character of the activity offered on each of millions of websites that it serves. "To expect each ISP to know the nature and content for all existing and new hosts is unrealistic and a viable defense to criminal prosecution."[33]

Aware of this problem, Senator Kyl structured his bill to allow any local, state, or federal law enforcement agency to notify an ISP of an aberrant server and request that the ISP terminate its service. The legislation would shield ISPs from civil liability if they voluntarily terminate service to the offending web page.[34] On the other hand, if the ISP fails to discontinue service, the law enforcement agency can seek a preliminary injunction requiring it to terminate service.[35]

Despite the thought that went into the Kyl Bill, it still suffers from the problem of being unable to affect ISPs hosted in foreign nations where Internet gaming is legal.[36] As such, it seems that a law focusing on ISPs will ultimately be unable to prohibit or regulate Internet gambling in an effective manner.

III. Financial Transactions

Internet gaming relies on the use of credit cards and other means of transferring funds. As such, many legislators and commentators have identified financial institutions as a possible focus for Internet gaming regulation.

> [I]t is obvious that, in order for an Internet or related telephonic gambling operation to be commercially viable, money must flow from bettors to the operator and presumably in the opposite

direction as well. The mechanisms for these transfers are the financial service providers, i.e. credit card companies, banks, and other entities that provide the means for fund transfers. Control of such financial service providers can therefore constitute a very potent and effective means of enforcing (albeit indirectly) a prohibition against illegal gambling activity.[37]

In 2002, the New York Attorney General took action against online casinos by suing Citibank and PayPal for facilitating them. Citibank ultimately paid $100,000 in costs and $400,000 to groups providing counseling to recovering problem gamblers.[38] It also agreed to "block and decline authorizations for bankcard transactions consistent with and pursuant to, then-standard Visa and MasterCard rules and procedures for posting to bankcard accounts that are marketed to consumers in the United States."[39]

The New York Attorney General also reached a settlement with the money transfer service, PayPal, Inc.[40] This agreement provided that PayPal would stop "processing any payments for online gambling merchants, where such payments involved New York members."[41] PayPal paid $200,000 in costs, penalties, and "disgorgement" of online gaming profits.[42] There have also been attempts by losing gamblers to avoid payments to credit card companies for gambling debts (based on the Statute of Anne).[43]

Because of legal actions like these, many leading credit card companies, including Bank of America, Fleet, Wells Fargo, MBNA, Chase Manhattan and others, now attempt to block Internet gaming transactions.[44] It can be, however, difficult for financial institutions or government regulators to identify a particular business as being in the casino industry. This is particularly true if the business seeks to disguise itself by handling transactions through an ancillary "ghost" firm that shows up as a legitimate, non-gambling business.[45] When that is done, "it is extremely difficult for regulators [or financial institutions] to differentiate Internet gambling Web site data transfer and legal data transfer."[46] Because of dodges like this, 85% of online casinos are able to report that they accept Visa and Mastercard, and about two-thirds report that they accept PayPal.[47] So, like laws aimed at ISPs, federal laws aimed at financial institutions are not having much success in stopping online gambling.

IV. International Concerns and the WTO

Recently, the World Trade Organization issued a preliminary ruling against the United States on Internet gaming. The island nations of Antigua and Barbuda contended that the United States ban on Internet gaming was an unfair trade practice in violation of the terms of its agreement with the WTO. Antigua and Barbuda complained that the United States through the various federal statutes in combination with state laws has created the effect of a complete and total prohibition of Internet gambling. Antigua also argued that the United States' ban on allowing its residents to use online wagering services based in Antigua harmed its ability to diversify Antigua's economy.

A panel from the WTO ruled that a United States ban on Internet gambling was indeed a violation of global trade rules. It held that the United States was violating its commitments under the General Agreement on Trade Services (GATS) by not providing market access and/or national treatment under GATS to Internet gambling services provided by operators licensed by the governments of Antigua and Barbuda. The Bush Administration has vowed to vigorously appeal the decision.[48]

Under international law, if the panel is upheld Antigua and Barbuda could impose trade sanctions (which would hurt their economies more than the United States), or the United States might elect to pay sanctions to the two nations. Obviously, neither of those outcomes is likely. The problem that may one day arise is that a more formidable nation with an economic interest in Internet gaming, such as England, may also challenge the United States laws and regulations.[49] If that happens, the United States may be forced to take another look at how it treats Internet gambling.

V. Conclusion

In 2002, the United States General Accounting Office performed a survey of Internet gambling web sites. The findings showed that current federal statutes are not effective in controlling Internet gambling.[50] Recent legislative proposals that have focused on ISPs or financial institutions also have difficulties. Must, then, American lawmakers resign themselves to permanent, unregulated Internet casinos? Maybe not.

Since Internet casinos cannot be stopped as long as they are legal in other nations, American lawmakers should focus on a certification process for online casinos. Those casinos that are already operating traditional gambling establishments within the United States could be given the opportunity to develop online casinos which would be accessible through a regulatory gateway page.[51] These online casinos would face competition from unregulated virtual casinos, which might be able to operate at a lower cost than the regulated web pages. Gamblers wanting assurance of fair games, however, would presumably be interested in using the regulated pages, particularly when they are linked to well-established casino brand names.

Regulators (and tax authorities) would have substantial control over these online casinos, because of the brick-and-mortar casinos over which they also have control. As such, reasonable regulations could be put in place to assure fair games, verify the age of gamblers, collect taxes, and minimize the risk to problem gamblers (to the extent that is possible). Unregulated online gaming would still exist, but if this regulation were done correctly, these officially sanctioned web pages should be able to capture a significant portion of the market. Consumers would have the choice of betting with casinos that are regulated and fair, or they could take their risks with other entities that are less secure but might offer better odds. In the end, the market could play a significant role in bringing online gaming under control.

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Footnotes

[1] It is now estimated that gambling accounts for 4.3% of all e-commerce. Adrian Parke & Mark Griffiths, *Why Internet Gambling Prohibition Will Ultimately Fail*, 8 GAMING LAW REVIEW 295 (2004).

[2] Hearings Before the Subcomm. On Crime, Terrorism and Homeland Security, House Comm. on the Judiciary, 108th Cong. (2003), available at http://www.usdoj.gov/criminal/cybercrime/Malcolmtestimony42903.htm (statement of John G. Malcolm, Deputy Assistant Attorney General, Criminal Division, United States Department of Justice); Lawrence G. Walters, *The Law of Online Gambling in the United States–A Safe Bet, or Risky Business*?, 7 GAMING LAW REVIEW 445, 445 (2003) ("Some studies show that over 1,800 Internet gambling sites exist on the web, with a total of 14.5 million users placing bets").

[3] United States General Accounting Office, Interim Report on Internet Gambling, September 23, 2002, on the Internet at <<http://www.gao.gov/new.items/d021101r.pdf>>.

[4] Sue Schneider, *The Market: An Introduction*, in INTERNET GAMBLING REPORT V 47, 48 (Mark Balestra ed., 2002); Parke & Griffiths, supra note 1, at 295 (50% to 70% of the Internet gamblers worldwide are from the United States).

[5] Jeff German, *Fed Panel Focuses on Internet*, LAS VEGAS SUN, May 22, 1998 (quoting Wisconsin Assistant Attorney General Alan Kesner testifying before the National Gambling Impact Study Commission).

[6] Thompson, 2 N.C. J. L. & Tech. at 88.

[7] *Gambling Fever Burns up Bills, then Lives, and 'It happens so fast'*, THE COMMERCIAL APPEAL (Memphis), April 4, 1994, p. 1A (citing Jim Jongewaard, director of recovery programs for chemical dependency and compulsive gambling at the Memphis Psychological Center). See also Ronald J. Rychlak, Video Gambling Devices, 37 UCLA L. Rev. 555 (1990).

[8] Parke & Griffiths, *supra* note , at 295 ("the use of virtual cash, unlimited accessibility, and the solitary nature of gambling on the Internet" are "potential risk factors" for problem gambling). For a general discussion of the problems associated with the legalization of gambling, see Ronald J. Rychlak, The Introduction of Casino Gambling: Public Policy and the Law, 64 Miss. L.J. 291 (1995).

[9] Internet casinos could also provide the federal legislators with the opportunity to get their hands on tax revenues from legal gambling.

[10] *See* generally Parke & Griffiths, *supra* note 1, at 298 ("From the U.S. experience, regulating prohibition of Internet gambling effectively is unfeasible."). "Given the unfeasibility of a blanket ban... focus should be redirected onto developing Internet gambling regulation." *Id.*

[11] Senator Jon Kyl (R-AZ) summed up how he felt about Internet gambling in an interview when he said, "I don't believe it can be regulated, so we have to prohibit." Steven Crist, *All Bets Are Off*, SPORTS ILLUSTRATED, January 26, 1998, p. 85.

[12] Australia, Austria, Belgium, Germany, Great Britain, and South Africa all license some form of online gambling operations.

[13] Thirty percent of Internet gambling web sites claim to hold licenses from either Antigua or Curacao. United States General Accounting Office, Internet Gambling: An Overview of the Issues, Appendix IV: Survey of Internet Gambling Web Sites (December 2, 2002) (Report to Congressional Requesters). See also Christopher J. Murphy, *Online Bookmaking and Gaming in the Isle of Man*, 6 GAMING LAW REVEIW 89 (2002); Roger A. Petersen, *Internet Gaming in Costa Rica*, 5 GAMING LAW REVIEW 89 (2001) (noting that there is no specific legislation authorizing Internet gaming but that the authorities have not enforced the existing anti-gambling laws against online casinos); Jeff Dense, *The Socioeconomic Impact of Gaming in the Virgin Islands*, 8 GAMING LAW REVIEW 175 (2004) (noting that the Virgin Islands enacted legislation to legalize Internet gaming, but that conflicts with U.S. law had hampered development of the industry). The Council of Ministers of the Isle of Man recently issued a statement indicating that it will be actively marketing itself as a jurisdiction which does not place any restrictions on the acceptance of wagers from U.S. residents. Isle Of Man reconfirms its commitment to developing as a well regulated Tier One Online Gaming Jurisdiction, January 4, 2005, <<http://www.gov.im/ipa/ViewNews.gov?page=lib/news/ebusiness/isleofmanreconfi.xml&menuid=11570>>.

[14] Chuck Humphrey, Licensing Online Gambling by Foreign Countries, Gambling-Law-US.com, <<http://www.gambling-law-us.com/Articles-Notes/online-licensing.htm>> (2003).

[15] *Id.* This comparison does not even take into consideration the difference in taxes and fees that are charged and used to fund ongoing regulation.

[16] This analysis could shift in the future, as Great Britain recently authorized online gaming, and other European nations may follow suit. *See* Mike Brunker, Britain embraces Internet gambling, MSNBC (2004) <<http://msnbc.com/id/3071035/>>.

[17] *See* N.J. Dep't of Law and Pub. Safety, Attorney General Announces Civil Action Against Three Internet Casinos, June 18, 2001, available at N.J. Dep't of Law and Pub. Safety, Attorney General Announces Civil Action Against Internet Sports Betting Operations, June 18, 2001.

[18] *See*, e.g., People v. World Interactive Gaming Corp., 185 Misc.2d 852, 862, 714 N.Y.S.2d 844, 852 (N.Y. S.Ct. 1999); State of Minnesota v. Granite Gate Resorts, Inc., 568 N.W.2d 715 (Minn.Ct. App. 1997); State v. Interactive Gaming Communications Corp., No. 197(f0014(1) (Mo.Cir. Ct., Greave Cty).

[19] This action prompted many Florida companies to scale back their operations, move from Florida, or get out of the business all together. Lawrence G. Walters, *The Law of Online Gambling in the United States—A Safe Bet, or Risky Business?*, 7 GAMING LAW REVIEW 445 (2003).

[20] 95 Op. Fla. Att'y Gen. 70 (1995); 98 Op. Ind. Att'y Gen. 5 (1998); 96 Op. Kan. Att'y Gen. 31 (1996); 95 Op. Tx. Att'y Gen DM-344 (1995).

[21] *See* Kelly B. Kramer, *A New Front in the Battle Against Internet Gaming?*, 6 GAMING LAW REVIEW 21 (2002).

[22] Though some states have claimed jurisdiction over any Internet site that is accessible from within that state. See Michael J. Dunne and Anna L. Musacchio, *Jurisdiction Over the Internet*, THE BUSINESS LAWYER, Vol. 54, No. 1, Pg. 385 (ABA Section of Business Law, November 1998); Millennium Enterprises, Inc. v. Millenium Music, LP, Civ. No. 98-1058-AA (D.C. Ore. 1999) (discussing numerous cases on the subject).

[23] Gaming is normally a matter for state control, but international Internet gambling transactions are subject to federal laws because under the Commerce Clause of the Constitution, Congress has power to regulate commerce with other nations. Parke & Griffiths, *supra* note 1, at 296.

[24] 18 U.S.C.S. sec.1952 (2004).

[25] 18 U.S.C.S. sec.3702 (2004).

[26] 18 U.S.C.S. sec. 1953 (2004).

[27] 18 U.S.C.S. sec. 1984 (2004). Other federal laws that possibly might be used to prosecute Internet gambling site operators and those affiliated with the site include sections 1955, 1956, and 1957 of Title 18 of the United States Code. CHARLES DOYLE, INTERNET GAMBLING: OVERVIEW OF FEDERAL CRIMINAL LAW 1 (Susan Boriotti and Donna Dennis ed., Novinka Books 2003). See also Adrien Goss, *Jay Cohen's Brave New World: The Liability of Offshore Operators or Licensed Internet Casinos for Breach of United States' Anti-Gambling Laws*, 7 RICH. J. L. & TECH. 32, 12 (2001).

[28] U.S. v. Cohen, 260 F.3d 68 (2nd Cir. 2001).

[29] The Wire Act is generally said to be the most directly applicable law, but the statutory language refers to "sporting event or contest," strongly suggesting that it is of limited applicability. Moreover, legislative history suggests that it is unlikely that federal prosecutors could successfully prosecute individuals for playing online casinos.

> [T]he casual gambler's risk...does not come from current federal law and potential amendments to federal law. Section 1084, as currently written, could not be used as a tool to prosecute "casual" gamblers who participate in games over the internet.

Anthony Cabot, Internet Gambling Report IV 285 (2001).

[30] In Re Mastercard International Inc., Internet Gambling Litigation, 313 F.3d 257 (5th Cir., 2002) (finding that the Wire Act does not prohibit Internet gambling).

[31] S. 627, 108th Cong. (2003). The version of the bill would have amended the Wire Act to prohibit Internet betting of any type, but it made exceptions for fantasy sports and horse racing. One of the most controversial provisions of this bill was that it would have extended the prohibition so as to make it illegal to gamble, not just to run a gambling site. Although the bill passed the Senate with ninety votes, it was never voted on during the 105th Congress and subsequently dropped.

Two years later, the IGPA of 1999 differed from its earlier counterpart in that it did not seek to amend the Wire Act but create a new section under Title 18. The 1999 bill also made more exemptions for lotteries, fantasy sports leagues, horse and dog tracks, and an individual bettor could no longer be prosecuted. The bill also suggested different punishments for Internet Service Providers, including injunctions and pecuniary damages. The 1999 IGPA still was twenty-five votes short of being placed on the President's desk.

[32] Internet Gambling Prohibition Act of 1999, S. 692, 106th Cong. sec. 2(b)(2). The legislation would also prohibit gambling businesses from accepting credit cards, electronic fund transfers or other payment methods from online bettors.

[33] Cabot, *supra* note 29, at 188.

[34] Other federal legislation also provides "safe harbor" to innocent ISPs. See 17 U.S.C.A. § 512 (2004).

[35] Tony Batt, Arizona Senator Pushing Online Casino Gaming Restrictions, LAS VEGAS REVIEW-JOURNAL (Jan. 28, 2004), http://www.reviewjournal.com/lvrj_home/2004/Jan-28-Wed-2004/business/23091911.htm.

[36] The first version of the Kyl Bill would have made the placing of bets illegal. That provision, however, seems to have proved too controversial and it was dropped in the later version of the bill.

[37] Thomas N. Auriemma and Gary A. Ehrlich, *Proactive State Enforcement of Internet Gambling Prohibitions: Worth the Effort or Waste of Time?*, 6 GAMING LAW REV. 507-513 (2002). *See generally* Paul Hugel & Joseph Kelly, *The Internet, Gaming, RICO and Credit Cards: A Legal Analysis*, 4 GAMING LAW REVIEW 135 (2000).

[38] Joseph M. Kelly, *Payment Problems and New Solutions: From National Regulation to Global Solutions*, 7 GAMING LAW REVIEW 123, 124 (2003).

[39] Citibank, Assurance of Discontinuance, September 1, 2002, at sec. 18, cited in Kelly, supra note 38, at 125. The settlement agreement also provided that "a card member's use of a general purpose credit card in connection with gambling does not mean that the credit card issuer is involved in gambling or promotion of gambling." Id. at sec. 21. Additionally, part of the agreement stated that a consumers' use of credit cards for Internet gambling "cannot be deemed the promotion or facilitation of gambling." Id. at sec. 22.

[40] In its prospectus filed with the SEC on June 28, 2002, PayPal acknowledged: "Some online casinos use our product to accept and make payments. If these casinos are operating illegally, we may be subject to criminal prosecution for numerous laws, including but not limited to money laundering laws." PayPal Prospectus filed with the SEC, at sec. 9, cited in Kelly, supra note 38 at 124-125.

[41] Citbank, *supra* note 39, at sec. 20, cited in Kelly, supra note 38, at 125.

[42] *Id.*

[43] This common law doctrine, which has been modified by statute in most states, makes gambling debts unenforceable in court. See Rychlak, *supra* note 8, at 296-97. Some of the Internet debtor/gamblers have had cases settle on very advantageous terms. E.g., Providian Nat'l Bank v. Haines, Case No. CV 98-08858 (Cal. Super. Ct. 1998); Marino v. American Express, Case No. CV 99-6166 (Super.Ct. Marino Co. 1999); Oregon Circuit Court for the County of Clackamas, Case No. CCV 01-04094, *cited in* Kelly, supra note 38, at 125 (case by an online gambler against numerous defendants, including credit card companies, settled for approximately $250,000).

[44] Press Release of the New York State Attorney General, *Financial Giant Joins Fight Against Online Gambling* (June 14, 2002); Kelly *supra* note 38, at 124. *See also* I. Nelson Rose, *Why Visa is Dropping Online Gambling*, 7 GAMING L. REV. 243-244 (2003). Rose notes that "[t]he credit card issued with the Caesars Palace logo specifically states that it cannot be used for gambling." *Id.* at 244.

[45] Parke & Griffiths, *supra* note 1, at 297.

[46] *Id.*

[47] United States General Accounting Office, *Internet Gambling: An Overview of the Issues, Appendix IV: Survey of Internet Gambling Web Sites* (December 2, 2002) (Report to Congressional Requesters); Parke & Griffiths, *supra* note 1 (also noting other ways around credit card limitations, such as the use of "E-cash").

[48] A spokesman for U.S. Trade Representative Robert Zoellick said that the preliminary ruling failed to take into account the negotiating record in the Uruguay Round of global trade talks, which created the WTO in 1995. Mills said that under the Clinton Administration, the language in the service agreements of those talks clearly intended to exclude gambling when the United States joined the WTO.

[49] This is not an unlikely possibility. EU nations are already facing similar pressure to ease restrictions on online gaming. *See* Thibault Verbiest & Ewout Keuleers, *Gambelli Case Makes it Harder for Nations to Restrict Gaming*, 8 GAMING LAW REVIEW 9 (2004); European Court of Justice, Case C-243/01, *Piorgiorgio Gambelli and Others*, November 6, 2003.

[50] United States General Accounting Office, *Internet Gambling: An Overview of the Issues, Appendix IV: Survey of Internet Gambling Web Sites* (December 2, 2002) (Report to Congressional Requesters).

[51] Such gateway pages were employed in order to verify the legitimacy of charities in light of the Tsunami disaster in 2004-05.

A Criminal Code for the 18th Century

*By Joseph Wheatley**

Introduction

The federal criminal code has it all. Its crimes run the gamut—trafficking in dentures, murder, even misappropriating the likeness of "Smokey Bear." Where else in federal law could you find "chemical weapons" and "child support" side by side? All joking aside, bizarre juxtapositions such as these are actually signs of a larger problem.

Simply put, the code belongs to another era—even as crimes have evolved with the times. A hodgepodge of incongruous crimes (and potential non-crimes), it lacks an overall structure and suffers from analytical gaps—flaws which many states and the Model Penal Code (MPC) resolved decades ago. While other parts of the federal code have been modernized, the criminal code has fallen behind, and efforts to reform it have faltered time and again.

In 1981, United States Attorney General William French Smith testified before a congressional committee that "[w]e have been laboring for decades under a complex and inefficient criminal justice system—a system that has been very wasteful of existing resources." More than twenty years later, the code—if it can even be called a code—has not improved, and may have become even more byzantine and unwieldy in the interim.

Applied as it is, the code may indeed be inefficient, but it has also slighted the interests of justice. In particular, since the code is open to judicial interpretation and fails to serve as a layperson's rules of conduct, it could undermine the moral dimension of the justice system. In turn, with less moral support among the public, the code might not command the deference that it might otherwise.

A Vintage Criminal Code

Parts of the federal criminal code date back to the early years of the United States. In 1948, Congress created Title 18 of the U.S. Code, entitled "Crimes and Criminal Procedure," otherwise known as the federal criminal code. Before then, Congress had enacted new provisions on a piecemeal basis, resulting in a hodgepodge of disparate laws, not a comprehensive penal code. Though it was meant to bring order to chaos, Title 18 merely organized the chaos. Primarily cosmetic changes and a confusing alphabetical ordering system failed to resolve the code's larger flaws. Title 18 still suffered from the same organizational and analytical shortcomings that plagued its predecessor.

Efforts to develop and enact a comprehensive federal criminal code began in earnest in the 1960's. The flaws of Title 18, the successful release of the MPC, and concerns about rising crime prompted groups in government and academia to reconsider the logical underpinnings of federal criminal law. Proposed by President Johnson, the National Commission on Reform of Federal Criminal Laws met between 1967 and 1970, and delivered its final report to President Nixon in 1971. The Commission recommended that the criminal code be completely rewritten. Congress considered the report for more than 10 years. Committee meetings were held and legislation was proposed, but Congress never enacted a comprehensive criminal code. Ideological differences and procedural obstacles proved insurmountable. Subsequent reform efforts have not materialized.

Why Reform the Code?

Since reform plans stalled in the 1980's, the federal criminal code has undergone evolutionary—not revolutionary—changes on a piecemeal basis. As such, the code retains much of its original character and bears little resemblance to the MPC or the modern codes of many states. Even so, is a comprehensive reform of the code necessary? In its present form, Title 18 suffers from flaws so substantial that comprehensive reform is the only option. Discussed below are three major flaws in the code, along with reform proposals for each, which have been derived from the MPC and reformed state codes.

First, Title 18 merely alphabetizes offenses, rather than functionally conceptualizing them—as the MPC does. The alphabetical format provides little guidance about the existence of offenses, the relationships between offenses, and their grades of seriousness. For instance, Chapter 89 ("Professions and Occupations") contains just one oddly placed crime, "Transportation of dentures" (18 USC 1821). Also, offenses against the person, such as assault (Chapter 7) and homicide (Chapter 51), are isolated in distant categories, even though they deal with conceptually related harms and dangers. These kinds of idiosyncrasies originated because Congress added offenses to the code on an *ad hoc* basis, with little regard for their interactions or levels of seriousness. Such a system causes needless confusion for prosecutors and defense attorneys—not to mention the layperson, who relies on the law for rules of conduct.

A code organized along functional lines, such as the MPC, would help resolve some of these drawbacks. Under the MPC, for instance, the category of "offenses involving danger to the person" includes crimes such as homicide, assault, and sexual offenses. When organized functionally, penal provisions complement one another, so as to avoid coverage gaps or overlapping offenses—and the under- or over-punishment that could result. Also, a functional code such as this would diminish confusion for prosecutors, defense counsel, and the layperson—as well as establish the relative seriousness of crimes that is so lacking in Title 18.

Second, Title 18 lacks a comprehensive "general part," a section with definitions and principles that apply to specific offenses—such as inchoate offenses (e.g., attempt), principles of liability, and general defenses. As a result, much of the federal criminal code is not codified. For instance, Chapter 1, titled "General Provisions," provides little more than a

handful of definitions and an insanity defense. With so little guidance provided, the rest of the code is left to federal judges to interpret as they see fit. In contrast, the MPC provides a relatively thorough "general part," which streamlines the rest of the code, limits discretion by the judiciary, and provides notice to the layperson.

Third, Title 18 lacks an analytical framework for determining liability that attempts to reflect communal notions of blameworthiness. The MPC follows a three-part framework based on the presence of criminal conduct (whether an act or an omission), justification defenses, and excuse defenses. First, has the actor committed criminal conduct? Aside from a few exceptions, Title 18 does not consider more than the question of the criminal act itself, whereas the MPC considers two additional questions that are crucial to determining blame. Second, even though an actor commits criminal conduct, his conduct may be justified (and thus not wrongful) because it was done in self-defense, for instance. Third, an actor may be excused for criminal (and wrongful) conduct because he committed it under duress, for instance. By incorporating such defenses, this analytical framework tries to follow communal notions of blameworthiness.

However, Title 18's incomplete "general part" frustrates the use of a full-fledged framework for determining liability. As shown above, the code provides little in the way of defenses, and falls short of what the MPC provides. Until it has the justification and excuse defenses which refine and complete judgments of blameworthiness, the code cannot claim the moral standing that the MPC has attained. Such standing requires a full-fledged framework for determining liability that Title 18 simply does not possess.

The Costs of Inaction

As shown above, Title 18 possesses many flaws—inefficiencies and injustices, not to mention bizarre juxtapositions such as "Child Support" and "Chemical Weapons." Ostensibly, the federal criminal justice system perseveres in spite of these problems. The legal community may have adapted to the flaws in the criminal code—but what of the unqualified layperson, who bears the brunt of the criminal law? The present course of action, muddling through these problems, imposes costs upon society and slights the interests of justice. Comprehensive reform of Title 18—albeit a daunting prospect—would lead to a cheaper and fairer criminal justice system.

Moreover, a criminal code that is in sync with communal notions of justice could command greater respect—and compliance—than it might otherwise command in its currently flawed form. For instance, were the law clearer and more accessible, it could serve one of its original functions as rules of conduct for the layperson. Also, an analytical framework that permits defenses would reflect broad-based notions of blameworthiness and thereby affirm the community's role in the law. Although utilitarian principles usually clash with desert principles, desert actually advances utilitarian interests here.

Title 18, what regrettably passes for the federal criminal code, amounts to a list of crimes cobbled together over hundreds of years. It suffers from minimal organization and a negligible analytical framework, both of which invite excessive interpretation by the judiciary. Inefficiencies abound, thanks to the confusion that the code creates for all parties. Many of the states modernized their codes decades ago, yet the federal government has stubbornly held on to obsolete legislation. The country deserves better.

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Environmental Law and Property Rights

Legal Alchemy: The General Mining Law of 1872 as Privatization Model

*By Andrew P. Morriss and Roger E. Meiners**

Sometime soon you will pick up a major newspaper and read that an environmental pressure group is denouncing the Bush Administration for a massive "giveaway" of public resources to a foreign mining company under the "outmoded" General Mining Law of 1872.[1] Such attacks on the "outdated," "tawdry," "anachronistic," "gargantuan fire breathing dragon" of the Mining Law have become routine. Former Clinton Interior Secretary Bruce Babbitt brought this critique into the government, staging a dramatic signing of a "check" for $10 billion when, as required by law, he signed over title to land claimed by a Canadian mining company under the Mining Law.

It is true, as the critics claim, that under the Mining Law anyone who discovers valuable mineral resources on much (but not all) of the federally owned public land can obtain not just the mineral rights but also a complete title to both the surface and mineral rights. It is also true that obtaining this title requires giving the government only a nominal payment. The law does not "giveaway" public resources, however. Instead, it transforms rock into gold (and other valuable minerals) – serving as a sort of legal philosopher's stone. The Mining Law does so because it provides an institutional solution to the problems caused by public ownership of valuable resources. Because of the strengths of the Mining Law, the United States has avoided many of the problems experienced by other mineral-rich countries under a variety of alternative approaches. Far from an outdated relic of the 19th century, as critics contend, the General Mining Law of 1872 represents a model for allocating publicly owned resources.

How the Law Works

In much of the world governments claim ownership of mineral resources under all land, including privately held property. In the United States, mineral resources under private property are usually also owned privately. Mineral rights under public land are usually owned by the same government that owns the surface but those under most federal public lands are available to be claimed under the Mining Law.

The Mining Law's basic operation is quite simple (although some specific features give rise to extraordinarily complex legal questions). The fundamental principle is that any one may claim eligible mineral resources located on eligible public land by (a) discovering the existence of valuable resources; (b) complying with minimal requirements to record and prove the claim; and (c) paying a small fee. Once these steps are accomplished, at the claimant's option, the claimant receives title to either the mineral resources alone or both the mineral resources and the surface estate.

This might not be as significant if either the lands or the minerals eligible to be claimed were defined narrowly. They are not. Minerals are eligible to be claimed if they have not been specifically removed by other federal statutes (e.g. oil, natural gas, and "common" minerals such as gravel). Mobile resources such as oil and natural gas require coordinated approaches to their recovery from common pools and the law deals with them differently. "Common" minerals like gravel are so common that including them would allow claims of virtually all federal land. (That might be a good thing, but it isn't the aim of the Mining Law.) Federal lands are eligible to be claimed if the lands were neither "acquired" nor withdrawn by the federal government. Acquired lands are those the federal government has purchased from the lands' owners (for a post office or national park, for example). Withdrawn lands are unpurchased lands dedicated to specific uses (such as parks or military bases). These exceptions to the general principle of allowing free access to publicly owned mineral resources are quite sensible. Withdrawn lands are largely those being used for other purposes and allowing someone to claim them would disrupt the existing use. Acquired lands were acquired for a purpose and allowing them to be claimed would prevent the government from having secure title to land needed for government buildings, parks, and the like.

A Brief History of U.S. Mining Law

American mining law is radically different from mining law in most of the rest of the world. How did this difference arise? There were several, relatively small mineral rushes before 1849, but American mining law is the direct result of the experience of the California Gold Rush. Gold was discovered at Sutter's Mill only a few days before the official transfer of California (and much of the rest of Mexico's northern territory) to the United States. Under Mexican law, based on the European continental legal tradition, mineral deposits were the property of the state. As a result, it was at least possible that those rights would now belong to the United States, since the U.S. had promised only to respect existing Mexican titles in the transferred territory.

The discovery of gold dramatically changed California, however, and made an assertion of title to the mineral resources by the U.S. federal government impossible. Three things left the mineral resources of the new American territory in a legal limbo. First, the Gold Rush brought tens of thousands of people in just a few years into what had been a sparsely populated hinterland. These new residents were not interested in legal theories of ownership; they wanted to get rich quickly. Second, the rapid collapse of Mexican forces in California meant the new territory was taken with only a small American military force. The American commander in California refused to take responsibility for civil law enforcement and, with the threat of desertion growing as word of the riches awaiting in the hills spread, could do little with the troops he had. Third, Congress was paralyzed over the status of the new territories and the question of whether to

allow slavery in them. As a result, Congress did nothing for over a year to resolve the new territory's legal status.

The immigrants to California did not wait for the politicians in Washington, D.C. to settle the question of mineral rights ownership and slavery. They simply moved to California and took possession of mineral resources. The miners developed a customary legal system adequate to safeguard their claims built around recognition of first possession, creation of a title register, and restrictions on tort-based crime.[2] California's budding political class did not wait either – they organized a provisional state government and successfully sought admission to the union as a state in 1850. This gave mining interests positions in the Congress to head off any attempts by the federal government to assert ownership of mineral resources. By the time the federal government was first able to address mining issues in the 1860s, there was little choice but to recognize the customary practices of the miners. Congress did just that in the 1866 Lode Law,[3] the 1870 Placer Act,[4] and the General Mining Law of 1872.

Since 1872, the Mining Law has been attacked regularly by those looking to increase the federal revenue by substituting royalty schemes for the free access principle. In particular, eastern interests have repeatedly attempted to realize the potential revenue in selling mineral rights to transfer that revenue to their own pockets. The Mining Law's survival is due largely to the geographically concentrated nature of the mining industry in the western states with large amounts of federal land. As a result, western state senators, regardless of party, have used Senate procedural rules to repeatedly block attempts to require payment of royalties, use of auctions, and other methods designed to produce revenue for the federal government from hard rock mineral resources under public land.

Is it a good thing that the Mining Law has not been abolished? Environmental pressure groups and eastern state senators and congressmen don't think so. Particularly during the Clinton Administration, the Mining Law was under attack almost continuously by both outsiders and the Administration itself. Secretary of the Interior Bruce Babbitt led the charge, by staging public relations events like his signing of the "check" for $10 billion and by using administrative means to obstruct the Mining Law.[5] He also appointed John Leshy, one of the Mining Law's most determined and articulate critics, to be the Solicitor General of the Interior Department, where Leshy worked hard to undermine the law.[6] Critics are especially outraged that some of those who claim land under the Mining Law then don't actually mine. Instead, some have opted to build ski resorts or houses. The critics seem to have a good argument: why give away valuable resources instead of selling them? The argument is less sound than it first appears, however. Giving away mineral resources is precisely the right way to ensure that appropriate choices are made about the use of these resources. Moreover, the Mining Law provides a template for how to allocate other publicly owned resources as well.

Why Give Minerals Away?

Giving away mineral resources under the Mining Law solves three important problems that plague governments of countries with mineral resources around the world: it creates incentives to locate minerals, to develop resources when it is economically sensible to do so, and avoids corruption. The alternatives (auctions, royalty schemes, licensing) are inferior to the Mining Law with respect to each of these.

The most basic problem with respect to hard rock mineral resources is finding deposits to develop. Mining is long past the days of the California Gold Rush, when miners literally picked gold nuggets up out of streams or hunched over streams with a pan. Most mining operations today operate on low grade ore that requires processing tons to recover usable amounts of the mineral. Finding the deposits takes a considerable investment in developing knowledge about the characteristics of each area explored. It is not uncommon, for example, for mining companies to spend up to a million dollars locating and evaluating a potential claim. The title to the mineral resources is thus not free for the mining company – it is paid for by investment in knowledge that enables the mineral resource to be exploited.

Consider the alternative of auctioning mineral rights. If the federal government does not determine the mineral content of the subsurface before the auction, the price of the mineral rights to each parcel will reflect only the average value of such rights. Some lucky auction participants will purchase the rights to plots that ultimately have mineral resources and receive a windfall over the price they paid. The rest of the participants will have worthless mineral rights. If, on the other hand, the federal government first spends the money necessary to conduct a mineral survey of all its lands, auction participants will bid more for valuable plots. The cost of securing those higher bids is the cost of conducting surveys on all the federal land and the foregone revenue from the sites about which the surveys generated information that there is *not* a substantial mineral deposit, which will surely exceed the additional revenue. By rewarding investment in knowledge, the Mining Law gives individuals an incentive to discover valuable information – where mineral deposits exist under eligible public land – at no cost to the government.

By rewarding those who discover information about the value of public lands, the Mining Law "sells" the land for the price of production of useful information rather than for the price of a transfer payment to the government. As a result, those interested in acquiring mineral resources invest in the production of useful knowledge – the location of valuable mineral deposits. Society gains knowledge; those who produce the knowledge gain the right to exploit the minerals. The trade is similar to that offered to those who discover other forms of new, useful knowledge – we award patents to inventors for the same reason that we grant mineral rights (a right which we also describe with the legal term "patent") to those who discover them.

Once mineral rights have been privatized under the Mining Law, the new owner has no obligation to actually

develop the resource. Like the owner of any other form of private property, mineral rights owners who acquired their mineral rights under the Mining Law may sell their property, make use of it, or do nothing with it. In a number of high profile cases, the property owners have opted to do something other than mine the land and exercise mineral rights they acquire under the Mining Law. For example, near the Keystone, Colorado ski resort, the General Accounting Office found a 160 acre claim patented in 1983 for $2.50 per acre (the statutory fee) and never mined was now worth $11,000 an acre.[7]

Criticism of such outcomes misses an essential point. Private ownership of land is an effective means of ensuring appropriate choices are made about land use because land owners bear the costs and reap the rewards of their choices. In the Keystone mining claim example, the best use of land near a luxury ski resort is unlikely to be mining, unless the mineral deposits are extraordinarily valuable. Armed with the knowledge of the value of the mineral deposits underlying the 160 acre parcel, the landowner made a tradeoff between recreational and mining uses and chose the more valuable use. What the critics of the Mining Law really object to is not the failure to mine but the privatization of the land use decision. (The criticism is also a bit disingenuous as it seems unlikely that those criticizing the landowner's decision would really be happier if he had opted to dig an open pit mine on the site.)

The alternative to private land use decisions is continued federal management of the land in question (since all land privatized under the Mining Law is federal land). The record of federal land management agencies is hardly encouraging. Even with respect to "crown jewel" public lands such as Yellowstone National Park, the federal government has performed appallingly badly in managing the land.[8] With respect to less well known lands, the federal record is as bad or worse. The reason is simple: federal land managers and their political bosses in Congress bear neither the costs nor reap the rewards of the land management decisions they make.

The Mining Law's simple rules and virtually automatic privatization of land claimed has an important additional benefit: avoiding corruption. In virtually every nation with significant natural resources, where those resources are allocated through a process that provides government officials with discretion in choosing who will receive permission to exploit the resources, corruption is rampant. Indeed, the problem is so pervasive that natural resource economics includes a serious debate on whether or not the presence of significant resources constitutes a "curse" rather than a blessing for a nation.[9] The nondiscretionary nature of the Mining Law provides an effective guarantee against corruption; there is simply nothing to allocate, and so no reason to bribe an official.

There is some evidence that 19th century legislators deliberately chose to give away resources to avoid official corruption. Long before the California Gold Rush, Congress had tried using leases, sales, and other revenue generating methods to dispose of public lands. Giving resources away was the innovation, not their sale, and the federal government gave away a great deal of the public domain during the 19th century through the homestead laws, transfers to states, and a variety of other laws including the General Mining Law. The subsequent experience with discretionary disposal programs further supports the anti-corruption rationale. From the Teapot Dome scandal of the 1920s, which arose out of the oil leasing program, to the coal lease programs of the 1980s, to the recent scandals involving the Bureau of Indian Affairs, corruption issues have plagued such programs.

What About the Environment?

Many critics of the mining industry argue that the potential for environmental problems requires restricting mining, including replacing the Mining Law with licenses that could incorporate environmental safeguards and more stringent government oversight of mines. In particular, the critics point to the possibility that long after a mine has closed, environmental problems will appear. Since the mine owner will have been long gone, they argue, the public will be left with the cost of cleaning up the former mine site.

There is some appeal to this argument. Mines do pose hazards after their closing. Water collects in the mine shafts and pits, absorbs chemicals, and then finds its way out of the mine site into rivers and aquifers. In some cases this process takes decades and the responsible party is impossible to find when the pollution is discovered.

In reality, however, mining is no different than many other human activities. Pharmaceutical companies manufacture medicines that may have long term adverse consequences, which become known long after the manufacturer is no longer in business. Manufacturers create products which may have latent defects, discovered only after the responsible parties are long gone from the scene. Farmers store a variety of hazardous materials on their properties, from fuel to pesticides, which may leak into soil and groundwater and not be discovered until a new owner changes the land use decades later. In short, we all engage in behavior with potential long term consequences which will remain unknown indefinitely, yet we do not regulate much of this behavior. Should mining be different?

Our answer is no. Critics of mining and the Mining Law neglect two important points. First, mining is subject to the general rules of tort, contract, and property law as well as to the overall environmental laws (e.g. the Clean Water Act). These legal rules already ban harm to the lives and property of others. To justify additional regulatory measures, there must be evidence of harms which these laws do not address. Second, property ownership creates an incentive for the owner of the land (and recall that the Mining Law allows claimants to receive both the surface estate and the mineral rights) to take into account the total value of the combined surface and mineral rights. If mining operations reduces the value of the surface estate, it takes money straight from the pocket of the land owner. Just as other property owners do, mine owners will therefore consider the impact of their opera-

tions on the long term value of the property. Creating latent hazards will reduce the value of the surface estate, since potential buyers will be hesitant to accept property that has not had sufficient remediation.

Will these points be sufficient to prevent every former mine site from causing environmental harm in the future? We don't know. But would, for example, requiring a $100 million bond for 30 years offer such protection? That's also uncertain – what if the bonding company goes bankrupt? What if the damages turn out to be $200 million? Because we cannot know the future, we cannot buy ourselves absolute security from potential future harms.

Conclusion

The principle of free access to mineral resources on public lands, as embodied in the General Mining Law of 1872, has survived for over 130 years despite regular assaults from rent-seekers and interest groups. It has survived because it solves three key problems in the transformation of rock into gold. First, it creates appropriate incentives to motivate individuals to undertake the very expensive and risky business of finding valuable mineral deposits at no cost to the public. Second, once those individuals have found the minerals, it gives them the incentive to make appropriate decisions about whether or not to extract the minerals, weighing the alternative land uses against mining. Finally, by eliminating government discretion, it dramatically reduces the potential for government corruption.

This alchemy can be done elsewhere as well. The potential for great wealth exists throughout our society, with undiscovered "gold" just waiting for entrepreneurs to uncover it. Electromagnetic spectrum frequencies, for example, are capable of multiple uses. Allocating such goods through auctions bleeds the winners of the capital they need to develop the resource; allocating them to those who identify a means of exploiting the resource would focus that capital on productive activities. Deciding among competing uses of valuable resources, whether it is land outside a ski resort or radio frequencies, is a task to which government is ill-suited, as bureaucrats neither receive the rewards of good choices nor bear the costs of bad ones. Privatizing resources puts them in the hands of those who win or lose depending on their choices, creating powerful incentives to make those choices well. Corruption is an endemic problem in government as the endless, and expensive to administer, ethics laws, campaign finance reforms, and other efforts to stem it attest. Removing discretion from government activities, and making more of government's responsibilities turn on self-initiated action by citizens, is an effective means of eliminating corruption before it appears. Like Harry Potter, who unexpectedly finds the philosopher's stone in his pocket at the end of the second book, we have the institution needed to turn all sorts of things to gold at our fingertips. We need only use it.

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Footnotes

[1] 30 U.S.C. §22 et seq. This article is derived from Andrew P. Morriss, Roger E. Meiners, and Andrew Dorchak, *Homesteading Rock: A Defense of the Free Access Principle under the General Mining Law of 1872,* 34 Environmental Law 745-807 (2004) (Any reader who would like a copy of this article may contact Morriss at andrew.morriss@case.edu and a copy will be sent.). More extensive citations to support our arguments, as well as more extended versions of many of them, are contained therein. For another, excellent market-based defense of the Mining Law, see Richard Gordon & Peter VanDoren, *Two Cheers for the 1872 Mining Law,* Cato Policy Analysis No. 300 (1998) at *4, available at http://www.cato.org/pubs/pas/pa-300.html

[2] See Andrew P. Morriss, *Miners, Vigilantes, & Cattlemen: Overcoming Free Rider Problems in the Private Provision of Law,* 33 Land & Water L. Rev. 581 (1998); John Umbeck, *A Theory of Contract Choice and the California Gold Rush,* 20 J.L.& Econ. 421 (1977); and John Umbeck, A Theory of Property Rights, With Application to the California Gold Rush (1981).

[3] Lode Law of 1855, 14 Stat. 251 (repealed 1872).

[4] 16 Stat. 217 (1870).

[5] *See* Andrew P. Morriss, Roger E. Meiners, and Andrew Dorchak, *Between a Hard Rock and a Hard Place: Politics, Midnight Regulations and Mining,* 55 Administrative Law Review 551 (2003).

[6] Leshy authored the most comprehensive critique of the Mining Law before coming to Interior. *See* John D. Leshy, The Mining Law: A Study in Perpetual Motion 14 (1987).

[7] General Accounting Office, The Mining Law of 1872 Needs Revision, at 4 (March 1989) GAO/RCED-89-72.

[8] *See* Louis De Alessi, *Private Property Rights as the Basis for Free Market Environmentalism,* in Who Owns the Environment? (Peter J. Hill & Roger E. Meiners, eds., 1998) at 29 ("Environmental problems typically arise when property rights are not fully private and/or transaction costs are substantial. Under these circumstances, individuals do not bear the full economic consequences of their decisions and thus lack the incentive to take them fully into account.")

[9] *See, e.g.,* Xavier Sala-I-Martin and Arvind Sumramanian, *Addressing the Natural Resource Curse: An Illustration from Nigeria*, NBER Working Paper 9804 (2003) at 5 (finding that "stunted institutional development – a catch-all for a range of related pathologies, including corruption, weak governance, rent-seeking, plunder, etc. – is a problem intrinsic to countries that own natural resources such as oil and minerals.")

The Heavy Hand of Redevelopment

*By M. David Stirling**

In late 2002, Elaine Evans, together with business and residential owners of 22,883 other parcels in over twenty separate neighborhoods of San Jose, were notified by the local redevelopment agency (RDA) that their properties were "blighted." Neither the 120 property owners who opposed the designation at the agency's public hearing, nor the 1,422 who protested in writing, nor the several thousand whose properties were not – except perhaps in a most technical sense – blighted, nor Elaine Evans' court challenge, were successful in derailing this eventual massive government condemnation of their properties.

It's happened regularly in California and around the country for several decades: homeowners and small business owners in older sections of a community are informed that their property has been found to be "blighted;" that the local RDA is prepared to acquire their property through eminent domain, if necessary; and that an appraiser will be recommending a price the RDA will offer them for their property, should they prefer to take the money and leave. Whichever route they choose, the RDA's ultimate success is rarely in doubt.

The harsh reality is that people who have lived and/or conducted business in the same location – perhaps for a generation or more – are forced from their homes and businesses by a little known local government body with a better use in mind for their property. Invariably, that better use is calculated to generate substantially greater revenues for the RDA than the existing property owners are.

Variations on this scenario have played out thousands of times in California since the state's redevelopment law was enacted over a half -century ago While the original purpose of this expanded use of eminent domain was to provide an expedient remedy to city neighborhoods plagued by boarded-up warehouses, abandoned gas stations, flop-houses, alcoholics and prostitutes, redevelopment planners quickly discovered they also could utilize eminent domain on residents and small businesses in older, modest, yet still viable neighborhoods of the community.

With the vast financial incentives redevelopment provides – power to condemn private property and give it to other private parties; power to give developers public money to develop projects; sole use of all property tax increases generated over the life of the project (often 30 years); and authority to sell bonds to raise revenue to fund the project, all without a vote of affected property owners or local residents – RDAs almost overnight became the state's most powerful and least accountable political subdivisions. Today, 400 of California's 478 incorporated cities have active redevelopment agencies. [1]

Few can reasonably deny local government the tools necessary to "redevelop" the decrepit, crime-infested, and virtually hopeless areas so familiar to many large cities. Even moderate-sized communities have effectively utilized RDAs to create clean, productive, and people-friendly neighborhoods where once urban-like wastelands lay. But as often as not, redevelopment law in California and in other parts of the country has been misused – some would say abused – over the past half-century.

Of redevelopment's several controversial elements, two in particular stand out as the most vulnerable to misuse. The first is the lack of clear definition – and RDAs' selective application – of redevelopment's triggering mechanism, the designation of "blight." The second is the expanded interpretation of the term "public use," as contained in the Fifth Amendment of the Constitution. [2]

The original definition of "blight" in California law was taken from the federal government's urban renewal statute of 1949. Instead of Congress defining blight in clear and unambiguous language, the statute provided federal funds for a "slum area or a *blighted*, deteriorated, or deteriorating area." By granting the urban renewal administrator unfettered discretion to decide what property-characteristics fit within the statute's purpose, Congress effectively set the future course for blight designation. As a result, the U.S. Supreme Court's controlling precedent essentially accepted blight to be in the eye of the beholder. [3]

Following Congress' lead, mid-century California legislators created a definition of blight as amorphous as the federal statute. Over the years, as political columnist, Dan Walters, recently wrote, "local officials stretched the definition to ludicrous lengths. One city even declared unoccupied, undeveloped marshland to be 'blighted' because it was subject to periodic flooding." Walters observed that blight was misused to make way for "shopping centers, auto malls, big-box retailers and other projects" – primarily for the purpose of generating additional sales-tax revenues to make up for property tax revenues lost to redevelopment projects.[4]

Although 1993 legislative amendments to the redevelopment statute purported to – and did to a degree – make blight designations more difficult to impose, in practice, and with relatively few exceptions, any city lured by redevelopment's economic incentives can still find and declare blight without fear of its designation being challenged, much less set aside.

When property owners in modest neighborhoods are told that their properties have been designated as blighted, virtually none realize the impact that designation has on their property. No one unfamiliar with redevelopment law – in other words, 99.9 per cent of the population – understands how the initial blight determination is made. In practice, the city (or county) contracts with and pays a consultant with past experience in making blight determinations. In the earlier-mentioned San Jose Redevelopment Project case, Elaine Evans' court brief showed the consultant's blight-bias by

revealing that the agency contracted to pay the consultant $338,080.00, in return for which it would "produce a blight analysis to be used by the agency . . . to demonstrate that all or part of the Survey Area is blighted . . . in order to justify the inclusion of that geographic area within a proposed redevelopment project area." When the process is understood, what targeted property owners are up against becomes all too clear. For consultants in the business of doing blight assessments, not finding blight is not in their economic best interest.

The term "public use," contained in the Fifth Amendment, was intended to limit government's ability to seize private property through eminent domain, the process used by RDAs to acquire "the project area." What historically was considered a "public use" – and what most people even today readily accept as a public use, i.e., building a highway, constructing a school, a jail, a post office, and the like – only raises the question of how much money the government will pay the owner for his property. Over the past several decades, however, as modern, more ambitious planners came to regard the traditional notion of public use as too confining, the term was mutated into the almost limitless standard of "public benefit." This resulted in what is now routine practice: if the RDA makes a plausible showing that its seizure of the property will benefit the public sooner or later, reviewing courts generally uphold the taking.

Invariably, the public benefit standard – as compared with the public use limitation – promotes the RDA practice of taking one private party's property to give to another private party. In Chula Vista, for example, the RDA utilized eminent domain to take a privately-owned 3.2 acre parcel with an old building and give it to a major corporation at a below-market-value price, in order to build a parking lot. In exchange, the corporation agreed that within six years it would develop the adjacent property it already owned. The RDA justified taking the previous owner's land on the basis that the increased business activity and employment at the corporation's new facility would generate greater tax revenues for the city, and that would benefit the public.

In Cypress, the Cottonwood Christian Center applied for a permit to build a $50 million worship center on the 15-acre parcel it had owned for several years. The city council, however, preferring Costco's proposal to build a big retail store on the property, created an RDA to simply seize the land. The city went so far as to assert that Cottonwood's proposed religious center would itself constitute "blight' and a "public nuisance." Again, the justification for using eminent domain was the public benefit Costco's big retail store would provide by way of increased business activity, local employment, and sales tax revenues, compared with a religious center. Countless government take-overs of private property for public benefit have occurred throughout California, and around the nation, and they continue.

One other redevelopment concern that deserves mention is the revenue-generating incentive called "tax increment financing" (TIF). Most often, TIF explains why so many communities establish and promote active RDAs. Once a redevelopment project is established, property values within the project area appreciate, in turn generating increased property tax revenues. 100 per cent of those revenues remain with the RDA to spend at will and without citizen oversight; and not just for a limited time, but for the life of the project – often 30 years or more. Not one penny of the RDA's increased property tax revenues flow to overlapping local government agencies, including the local school district, to pay for the increased services those entities are required to provide to the project area. This is but one of the several bizarre characteristics of redevelopment law.

Thomas Jefferson observed, "The natural progress of things is for liberty to yield and government to gain ground." One of the surest ways for a citizenry to lose its liberties is to idly sit by while ever-more overreaching government planners devise complicated programs to extinguish our fundamental right to own and use private property. The onerous burden of eminent domain in the redevelopment context falls almost entirely on modest neighborhoods, where homes and businesses are peopled not by the financially, legally, or politically connected, but by those with little resources to resist. With California's median-priced home values making home ownership affordable to fewer households daily, and small businesses struggling ever harder to compete, it is critical that local government's vast power of eminent domain be used with care. While redevelopment has its legitimate uses, it also uproots and disperses families and destroys mom-and-pop type businesses. Instead of growing government intrusiveness, it would be much more constructive to grow the notion of community pride and individual responsibility, whereby all small property owners and business people can strive for a piece of the American dream.

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Footnotes

[1] Nearly all states have adopted redevelopment laws modeled largely after California's.

[2] "nor shall private property be taken for public use, without just compensation."

[3] Berman v. Parker, 1954

[4] Sacramento Bee, June 15, 2004.

FEDERALISM AND SEPARATION OF POWERS

DISCRIMINATION, RETALIATION, AND IMPLIED PRIVATE RIGHTS OF ACTION

*BY KEVIN NEWSOM**

On Tuesday, November 30, 2004, the U.S. Supreme Court heard oral argument in *Jackson v. Birmingham Board of Education*.[1] The facts giving rise to the case are simply stated: Roderick Jackson, the one-time girls' basketball coach at Ensley High School in Birmingham, Alabama (the author's home town, incidentally) alleged that the school board demoted him in response to—in legal jargon, in "retaliation" for—his complaint to supervisors that his team was being denied equal access to gym facilities in violation of Title IX of the federal Education Amendments of 1972. The question the Supreme Court agreed to decide is "[w]hether the private right of action for violations of Title IX . . . encompasses redress for retaliation for complaints about unlawful sex discrimination."[2] On behalf of eight other States, the State of Alabama, through yours truly, intervened and urged the Court—both in a written brief and at the oral argument—to answer that question in the negative.

I. The *Real* Question Presented

This is a case in which the parties could not even quite agree on the appropriate mode of analysis for approaching the case. Jackson, for his part, pitched the case as being fundamentally about the substantive scope of Title IX's prohibition. So long as Title IX can be read to prohibit retaliation, he said, an implied private right of action to enforce that prohibition follows as a matter of course. And that, he claimed, is because the Court recognized an implied right of action covering a Title IX claim in *Cannon v. University of Chicago*.[3] So, from Jackson's perspective, the case is just a garden-variety statutory interpretation case; none of the heightened congressional-intent requirements that the Court has developed over the years in dealing with implied-right-of-action issues (culminating in *Alexander v. Sandoval*)[4] applies.

I disagree. In my view, the implied-right-of-action issue cannot be so easily dispensed with. Indeed, I think that, very arguably, the Court has already rejected the view that the only issue in a case like Jackson's is the substantive scope of the underlying statute. In *Virginia Bankshares, Inc. v. Sandberg*,[5] for instance, the Court pointedly criticized cases from the implied-right-of-action heyday for having never focused their "probe of the congressional mind" on "private rights of action, as distinct from the substantive objects of the legislation."[6] The Court stressed the importance under modern doctrine "of enquiring specifically into intent to authorize a private cause of action."[7]

Jackson, we argued, cannot side-step this "heightened concern" for congressional intent[8] simply by citing to *Cannon*. *Cannon* involved a traditional "discrimination" claim (the plaintiff there complained of unequal admissions practices for men and women), not a retaliation claim. It had nothing to say—one way or the other—about retaliation. *Cannon* is thus properly read to recognize an implied private right of action for core Title IX discrimination claims; it cannot fairly be understood to create a one-size-fits-all private remedy for any practice that Title IX might plausibly be construed (at some future date) to prohibit.

The separation of powers concerns that animate this Court's implied-right-of-action jurisprudence[9] require a rigorous showing of congressional intent not only to demonstrate the existence of an implied private remedy as an initial matter, but also to justify its scope. Again, *Virginia Bankshares* is illustrative. There, this Court addressed the question whether a minority shareholder could sue under the implied private right of action for §14(a) of the Securities Exchange Act. The Court acknowledged *J.I. Case Co. v. Borak*,[10] which had recognized an implied remedy in §14(a), but it did not stop there; instead, it went on to detail the showing a plaintiff must make to "extend the scope" of an existing right of action.[11]

"Assessing the legitimacy of any such extension or expansion," the Court held, "calls for the application of some fundamental principles governing recognition of a right of action implied by a federal statute . . . ."[12] First, the Court emphasized that "recognition of any private right of action for violating a federal statute must ultimately rest on congressional intent to provide a private remedy."[13] "From this," the Court continued, "the corollary follows that the breadth of the right once recognized should not, as a general matter, grow beyond the scope congressionally intended."[14] Accordingly, even where (as here) the issue is not initial recognition, but expansion, a plaintiff faces a "serious obstacle" where he cannot demonstrate a "manifestation of intent to recognize a cause of action (or class of plaintiffs) as broad as [his] theory" would entail.[15]

Accordingly, in my view it seems clear enough that Jackson bears the burden here of showing "affirmative"[16] and "persuasive"[17] evidence of Congress' intent to create in Title IX a private right of action specifically for retaliation.

II. The Spending Clause Angle

Even setting to one side the debate about whether the case is really about the scope of Title IX's prohibition—or instead about Congress' intent to make retaliation privately actionable—there is the fact that Title IX is a Spending Clause statute.[18] Accordingly, Title IX is subject to the clear-statement rule articulated in *Pennhurst State School and Hospital v. Halderman*.[19] That rule, which exists to ensure that a recipient of federal funding exercises its choice to accept funds "knowingly" and "cognizant of the consequences of [its] participation," requires that any enforceable condition on the receipt of funds be stated "unambiguously" in the statute.[20]

Here, of course, the condition that Jackson seeks to enforce is a private remedy for (or, in his view, a prohibition of) retaliation. The question, accordingly, is not simply whether Title IX's generic reference to "discrimination" might, on balance, plausibly be interpreted to reach retaliation. Rather, the question is whether private liability for retaliation, specifically (or, again, at the very least, a prohibition on retaliation) so plainly arises from "the clear terms of the relevant statute,"[21] that it can be said to be "unambiguous[ ]"[22] or "'obvious.'"[23]

III. The Sources of Statutory Meaning

Whatever the frame of analysis, the Court will presumably have to sift through the traditional indicia of statutory meaning to determine whether retaliation is privately actionable under Title IX. In my view—admittedly biased—the Court won't find in any of the usual places any affirmative evidence of a clear congressional intent to reach, let alone remedy, retaliation.

A. The Text

In relevant part, Title IX states that "[n]o person in the United States shall, on the basis of sex . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance."[24] All agree that Title IX makes no specific mention of retaliation. Jackson's point, though, is that retaliation is "simply one variant" of the "discrimination" to which Title IX does refer.[25] But as it turns out, the concepts of "discrimination" and "retaliation" are fundamentally different, both as a matter of plain meaning and as a matter of ordinary legal usage.

First, standard English and legal dictionaries alike make clear that "discrimination" is a comparative term; it refers to the perception or treatment of one person or thing *in relation to others*. (I'll spare you the string cite.) Second, the case law is to the same effect. The Supreme Court has recognized, for instance, that "[c]onceptually, of course, any notion of discrimination assumes a comparison of substantially similar entities."[26] Third, technical niceties aside, there is a very real sense in the daily give and take (important to the Spending Clause's "notice" requirement) in which people just know that discrimination and retaliation are distinct concepts. Judge Posner has described them as *quintessentially* distinct. Addressing the question whether a plaintiff's false-arrest and excessive-force claims were related for attorneys-fees purposes, Judge Posner explained that they were "as different as a claim of discrimination and a claim of retaliation for opposing that discrimination."[27] Indeed, Jackson's pleadings show that even he appreciates the difference. In its motion to dismiss, the school board, unable to make out the particulars of Jackson's complaint, assumed that he was attempting to assert both a "discriminat[ion]" claim and a "retaliation" claim. In response, Jackson answered that, no, he was not raising a "discriminat[ion]" claim, only a "retaliation" claim.

The textual problem for Jackson is that he does not claim to have been disadvantaged in a comparative sense—*i.e.*, to have been treated unfairly in relation to someone else. Rather, Jackson's beef is with the school board's treatment of him in an absolute sense; specifically, he contends that he was given negative evaluations and was ultimately terminated from his coaching duties. Unlike a typical "discrimination" claim, Jackson's complaint requires no knowledge of (and thus offers no allegations concerning) others' circumstances. Assuming the truth of the facts stated in the complaint, what happened to Jackson was wrong; it was unjustified—but it was not "discrimination."

B. The Structure

The absence of a specific anti-retaliation provision in Title IX stands in stark contrast to this Nation's other major gender-discrimination statute, Title VII. In Title VII, Congress dealt with employment discrimination in one statutory section, 42 U.S.C. § 2000e-2, and then addressed retaliation, expressly, in an altogether separate section, 42 U.S.C. § 2000e-3(a). Title VII's structure indicates two things about Title IX's meaning. First retaliation is not, as a textual matter, simply one variant of discrimination; if it were, Title VII's express prohibition of retaliation would be superfluous, having been subsumed under § 2000e-2's general anti-discrimination provision. Second, when Congress wants to address retaliation, it knows how to do so and does so expressly. "The fact that [Congress] enacted no analogous provisions in the legislation here at issue strongly suggests that Congress was simply unwilling to impose any potential monetary liability on a private suitor" for retaliation.[28]

The implication that arises from Title VII's structure—that Title IX does not reach, much less remedy, retaliation—is strengthened by the fact that Title IX "'was patterned after Title VI of the Civil Rights Act of 1964.'"[29] When Congress enacted the Civil Rights Act of 1964, which included both Titles VI and VII, it addressed retaliation only in Title VII. Where, as in that instance, "'Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"[30] That same presumption—that Congress intentionally omitted any prohibition on retaliation from Title VI—carries over to Title VI's clone, Title IX. Put simply, Congress was plainly up to something very different when it enacted Titles VI and VII side by side in 1964. Eight years later, in 1972, in choosing the template for Title IX, Congress had a choice of models; it discarded Title VII (which addresses retaliation expressly) in favor of Title VI (which makes no mention of it).

C. The Sullivan *Decision*

Both in his briefs and at oral argument, Jackson relied heavily, as an aspect of contemporary context bearing on Congress' intent in enacting Title IX, on the Supreme Court's decision in *Sullivan v. Little Hunting Park, Inc.*,[31] which dealt, in part, with the claim of a white homeowner that he had been wrongfully expelled from his homeowners' association for protesting the association's refusal to permit him to assign his association shares to his black lessee. *Sullivan*, Jackson says, held that 42 U.S.C. § 1982, which prohibits discrimination in property transactions, "also protects from re-

taliation those who complain about such discrimination," and thus "established th[e] principle" that statutory bans on discrimination "are construed to include prohibitions on retaliation."[32] From *Sullivan*, Jackson asserted, it can be inferred that Congress "presumably intended" Title IX's prohibition on "discrimination" to entail an unstated remedy for retaliation, as well.[33]

Jackson's reliance on *Sullivan* as proof of Congress' intent is misplaced. Let's start with what *Sullivan* actually says. The paragraph on which Jackson stakes his argument provides as follows:

> We turn to Sullivan's expulsion for the advocacy of Freeman's cause. If that sanction, backed by a state court judgment, can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property. That is why we said in *Barrows v. Jackson* that the white owner is at times "the only effective adversary" of the unlawful restrictive covenant. Under the terms of our decision in *Barrows*, there can be no question but that Sullivan has standing to maintain this action.[34]

Now, there are several problems with Jackson's reliance on *Sullivan*. First, the paragraph on which Jackson relied is, to put it mildly, pretty opaque. Far from climaxing—as Jackson suggested—with a resounding affirmation that any statutory prohibition on discrimination necessarily entails a corollary remedy for retaliation, the paragraph concludes (with something of a thud) by stating, cryptically, that *Sullivan* "ha[d] standing to maintain" his lawsuit.[35] And, indeed, *Barrows v. Jackson*, which the *Sullivan* Court cited for support, was purely a third-party standing case; it had nothing to do with private rights of action.

Second, and relatedly, there is no evidence that *Sullivan* was understood—let alone universally understood—in the years leading up to Title IX's passage, the way that Jackson has characterized it. Indeed, even Justice Harlan, who dissented in *Sullivan*, was left scratching his head; he couldn't make heads or tails of what the Court was trying to do. With respect to the issue of "relief for Sullivan," Justice Harlan called the majority opinion "highly elliptical."[36] The opinion, he said, did not in any way "explain[ ] what legal standard should determine Sullivan's rights under § 1982"; instead, it "simply state[d] that 'Sullivan has standing to maintain this action' under § 1982."[37] Given Justice Harlan's own confusion, it is perhaps not surprising that we were unable to find a single lower-court decision during the period preceding Title IX's enactment that construed *Sullivan* to, as Jackson said, "establish[ ] th[e] principle" that a prohibition on "discrimination" necessarily entails a remedy for retaliation. (Notably, having been essentially dared by us to find one, Jackson offered no such case in his reply brief.)

There is a third and final problem. *Sullivan* dealt with § 1982, which not only uses entirely different language than Title IX (indeed, the word "discrimination" does not even appear in § 1982), but also was enacted pursuant to an altogether different constitutional power. Section 1982 is "authorized by the Enabling Clause of the Thirteenth Amendment"—arguably the most sweeping grant of federal power in the Constitution—and is thus to be given the broadest possible construction.[38] As a Spending Clause statute, by contrast, Title IX is subject to the settled rule that its requirements be clear and unambiguous. Thus, even if *Sullivan* had definitively construed § 1982 to reach retaliation, that construction would not necessarily carry over to the Title IX context.

D. The Regulation

Jackson also asked the Court to defer to an administrative regulation promulgated by the Department of Education[39] that, he said, definitively "interpret[ed] Title IX's core prohibition on discrimination" to reach retaliation.[40] In relying on the regulation, Jackson sought to bring himself within the ambit of the Supreme Court's statement in *Sandoval* that regulations that "authoritatively construe the statute itself" may be enforced through an implied right of action applicable to that statute, because a "Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well."[41] In *Sandoval*, of course, the Court held that Title VI's disparate-impact regulations do not qualify because they "forbid conduct that § 601 permits," namely, unintentional discrimination.[42] By contrast, Jackson asserted, § 100.7(e) does "not extend the protection of Title IX beyond its terms" but, instead, "reflect[s] an 'interpretation of the terms of Title IX itself.'"[43]

With respect, Jackson is just wrong. In order to trigger the permissive treatment outlined in *Sandoval*, Jackson and his amici repeatedly described § 100.7(e) as an authoritative "interpretation," or "construction," of § 901's ban on "discrimination."[44] But in fact, § 100.7(e) is not, and does not even purport to be, an authoritative interpretation of the term "discrimination." It is instead merely a prophylactic procedural rule governing the conduct of official administrative investigations. This case, accordingly, does not concern the kind of regulation posited by the Supreme Court during oral argument in *Sandoval*—that is, "an interpretive regulation which [is] not precluded by [the Court's] case law" in that it does not "say that you don't have to have intentional discrimination," but says instead that "this is what intentional discrimination consists of." That, as we told the Court then, might be "a harder case."[45] But it is not *Jackson's* case.

In relevant part, the regulation Jackson cited provides that—

> No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section [901] of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.[46]

Jackson and his amici correctly pointed out to the Court that subsection (e) is titled "Intimidatory or retaliatory acts prohibited." What they uniformly failed to acknowledge is the larger context in which subsection (e) is situated.

Section 100.7 itself—of which subsection (e) is a part—is titled "Conduct of investigations." And the context could not be clearer that it is official, administrative investigations by the Department of Education to which the regulation is addressed. Subsection (a) requires Department officials to perform periodic compliance reviews of fund recipients; subsection (b) authorizes individuals to file administrative complaints with Department personnel; subsection (c) briefly describes the sort of investigation the Department should conduct; and subsection (d) addresses how the Department will resolve investigations. *It is against that backdrop* that subsection (e) prohibits retaliation against individuals who cooperate in official Department investigations. Section 100.7(e), therefore, is at most a valid prophylactic § 902 regulation aimed at "effectuat[ing]" § 901's discrimination prohibition.[47] It is *not* an "authoritative interpretation"[48] of § 901's ban on "discrimination" to include retaliation—or, for that matter, even a generally applicable prohibition of retaliation.

IV. The Public Policy Angle

Without any meaningful support (we argued, anyway) in the text, structure, or context of Title IX itself—or, as just shown, in the only Title IX regulation that even mentions retaliation—Jackson's position boiled down to public policy. At bottom, that is, Jackson's argument was not so much that retaliation *is* discrimination but, instead, that an additional layer of protection against retaliation would facilitate the operation of Title IX's anti-discrimination provision. Specifically, Jackson contended that Title IX could not achieve its objectives if recipients of federal funds "felt free to retaliate" against those who complain about prohibited discrimination.[49]

There are two very basic problems with Jackson's policy arguments. First, they are irrelevant to the Supreme Court's analysis. As *Sandoval* makes clear, the Court has long since "abandoned th[e] understanding"—once the governing rule for implied-right-of-action cases—that "'it is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose' expressed by a statute."[50] Under what the *Sandoval* Court called the "*ancien regime*,"[51] a federal court could imply a right of action whenever "that remedy [was] necessary or at least helpful to the accomplishment of the statutory purpose" or, put another way, could provide some "effective assistance to achieving the statutory purposes."[52] Under the Court's current, more restrained approach, it does not "matter how desirable [a cause of action] might be as a policy matter, or how compatible with the statute"; all that matters is "[s]tatutory intent."[53]

There is another problem. Jackson and his amici framed the case as offering the Court a binary choice: either (i) it had to recognize an implied right of action for retaliation or (ii) it would leave those who complain about discrimination wholly unprotected. Absent the implication of a private remedy for retaliation, the argument went, recipients of federal funds will feel "free to retaliate"[54] against and "free to punish"[55] complainants—who, in turn, will be "without recourse."[56] Jackson's message was clear: without a private cause of action, those who complain about discrimination cannot be "safe from reprisal."[57]

But the choice is not all or nothing. There remains an intermediate remedial option—namely, the option Congress itself envisioned when it enacted Title IX in the first place. Even absent a private right of action under § 901, the Department of Education retains the power under § 902 to proceed against retaliators administratively. As the Solicitor General acknowledged in its brief in support of Jackson, "[e]ven if Section 1681 did not bar retaliation, federal agencies would still have rulemaking authority to bar that practice."[58] Accordingly, federal agencies may target retaliation under Title IX even where private suitors may not.

Pursuant to its administrative-enforcement authority, the Department may "take such remedial action as [it] deems necessary to overcome the effects" of discrimination.[59] That remedial action may of course include the ultimate sanction of terminating federal funding. But the Department needn't go so far every time, as Jackson has tried to suggest. Rather, the regulations make clear that it may first attempt to remedy violations "by informal means" and, failing that, by "the suspension" of funds.[60] The Department itself touts its "flexible approach" to enforcement, including, *e.g.*, "voluntary resolutions," "agreements with recipients," "violation letters," and "negotiations."[61] And, indeed, the Court has acknowledged that, while wielding the club of funding termination, the Department may leverage individual relief for victims, including reinstatement.[62] Finally, as Senator Bayh himself explained during the debate on Title IX, the mere threat of terminating a recipient's federal funding will often convince it to change its ways: "The civil rights experience . . . indicates that the very possibility of such a sanction has worked wonders."[63]

V. Congress' Duty

We concluded our brief in *Jackson* with the following practical point: Over the years, Congress has proven itself fully capable of legislatively overruling interpretations of Title IX with which it disagrees. In *Grove City College v. Bell*,[64] for instance, the Court held that that Title IX was "program-specific"—*i.e.*, that the receipt of grants by some students at a federally-funded college did not trigger institution-wide coverage under Title IX, but, instead, imposed Title IX obligations only on the financial aid program.[65] Believing that *Grove City* too narrowly construed Title IX, Congress promptly passed, over a presidential veto, the Civil Rights Restoration Act of 1987,[66] which reinstated a rule of institution-wide application for Title IX.[67]

Ordinarily, of course, Congress' demonstrated ability to respond to a particular statute's judicial interpretation might not cut decisively in either direction; whatever the Court's

decision, the argument would go, Congress can step in to "fix" it. But, here, given the prevailing presumption against implying private rights of action and the clear-statement rule that applies to Title IX as a Spending Clause statute, the more prudent course is for the Court to proceed with caution and to decline to create a cause of action that Congress did not. In staying its hand, we said, the Court would put the ball back where it belongs—in Congress' court.

* Mr. Newsom serves as State Solicitor General of Alabama. The views expressed in this article are entirely those of the Author and do not necessarily reflect the views of the Attorney General of Alabama.

Footnotes

[1] The oral argument transcript can be found on the U.S. Supreme Court's website at: http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-1672.pdf.

[2] Brief of the States of Alabama, Delaware, Hawaii, Nevada, Oregon, South Dakota, Tennessee, Utah, and Virginia as Amici Curiae in Support of Respondent at i, *Jackson* (No. 02-1672).

[3] 441 U.S. 677 (1979).

[4] 532 U.S. 275 (2001).

[5] 501 U.S. 1083 (1991).

[6] *Id.* at 1103.

[7] *Id*.

[8] *Id*.

[9] *See, e.g*., Cannon v. Univ. of Chicago, 441 U.S. 677, 730-31, 743, 746 (1979) (Powell, J., dissenting).

[10] 377 U.S. 426 (1964).

[11] *Va. Bankshares*, 501 U.S. at 1102.

[12] *Id*.

[13] *Id*. (citing Touche Ross & Co. v. Reddington, 442 U.S. 560, 575 (1979)).

[14] *Id*.

[15] *Id*.

[16] Alexander v. Sandoval, 532 U.S. 275, 293 n.8 (2001).

[17] Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 20 (1979).

[18] *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998).

[19] 451 U.S. 1 (1981).

[20] *Id.* at 17.

[21] Barnes v. Gorman, 536 U.S. 181, 187 (2002).

[22] *Pennhurst*, 451 U.S. at 17.

[23] *Gebser*, 524 U.S. at 287 (citation omitted).

[24] 20 U.S.C. § 1681(a) (2000).

[25] Brief for the Petitioner at 8, *Jackson* (No. 02-1672).

[26] General Motors Corp. v. Tracy, 519 U.S. 278, 298 (1997).

[27] Lenard v. Argento, 808 F.2d 1242, 1246 (7th Cir. 1987).

[28] Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 21 (1979).

[29] Alexander v. Sandoval, 532 U.S. 275, 280 (2001) (quoting Cannon v. Univ. of Chicago, 441 U.S. 677, 694 (1979)).

[30] Russello v. United States, 464 U.S. 16, 23 (1983) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972)).

[31] 396 U.S. 229 (1969).

[32] Brief for the Petitioner at 8, 14, *Jackson* (No. 02-1672).

[33] *Id*. at 21.

[34] *Sullivan,* 396 U.S. at 237 (internal citations omitted).

[35] *Id*.

[36] *Id.* at 251 (Harlan, J., dissenting).

[37] *Id*. at 254.

[38] *Id.* at 235 (majority opinion).

[39] *See* 34 C.F.R. § 100.7(e).

[40] Brief for the Petitioner at 9, *Jackson* (No. 02-1672).

[41] 532 U.S. 275, 284 (2001).

[42] *Id*. at 285.

[43] Brief for the Petitioner at 33, *Jackson* (No. 02-1672) (citation omitted).

[44] *See generally id.*

[45] The oral argument transcript can be found on the U.S. Supreme Court website at: http://www.supremecourtus.gov/oral_arguments/argument_transcripts/99-1908.pdf.

[46] 34 C.F.R. § 100.7(e).

[47] *See* Alexander v. Sandoval, 532 U.S. 275, 281-82 (2001) (assuming validity of § 602 regulations "proscribing" conduct not within the core of § 601).

[48] *Id.* at 284.

[49] Brief for the Petitioner at 22, *Jackson* (No. 02-1672).

[50] *Sandoval*, 532 U.S. at 287 (quoting J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964)).

[51] *Id*.

[52] Cannon v. Univ. of Chicago, 441 U.S. 677, 703, 707 (1979).

[53] *Sandoval*, 532 U.S. at 286-87; *accord, e.g.*, Cent. Bank of Denver, N. A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 188 (1994) (holding that "[p]olicy considerations" are irrelevant except to show result "'so bizarre' that Congress could not have intended it") (citation omitted); Thompson v. Thompson, 484 U.S. 174, 187 (1988) ("[The Court] 'will not engraft a remedy on a statute, no matter how salutary.'" (quoting California v. Sierra Club, 451 U.S. 287, 297 (1981))); Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16, 23 (1979) (finding that the relevant issue is not "utility" or "desirability of implying private rights of action in order to provide

remedies thought to effectuate the purposes of a given statute" but, rather, "whether Congress intended to create the private remedy asserted").

[54] Brief for the Petitioner at 22, *Jackson* (No. 02-1672).

[55] Brief of Amici Curiae New York Lawyers for the Public Interest, the Southern Poverty Law Center, and the Training and Advocacy Center of the National Association of Protection and Advocacy Systems Supporting Petitioner at 7, *Jackson* (No. 02-1672).

[56] Amicus Curiae Brief of the National Partnership for Women and Families and 31 Other Organizations and Individuals in Support of Petitioner at 16, *Jackson* (No. 02-1672).

[57] Brief for the Petitioner at 12, *Jackson* (No. 02-1672).

[58] Brief for the United States as Amicus Curiae Supporting Petitioner at 20 n.3, *Jackson* (No. 02-1672); *see also* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 292 (1998) (holding that agencies may enforce requirements "that effectuate [Title IX's] non-discrimination mandate, 20 U.S.C. § 1682, even if those requirements do not purport to represent a definition of discrimination under the statute").

[59] 34 C.F.R. § 106.3(a).

[60] *Id.* § 100.8 (incorporated in 34 C.F.R. § 106.71).

[61] Office of Civil Rights, U.S. Dep't of Educ., Annual Report to Congress: Fiscal Years 2001 and 2002 (2003), *available at* www.ed.gov/about/offices/list/ocr/AnnRpt2002.

[62] *See Gebser*, 524 U.S. at 288-89; *see also* Civil Rights Division, U.S. Dep't of Justice, Title IX Legal Manual (2001), *available at* http://www.usdoj.gov/crt/cor/coord/ixlegal.pdf ("[A]gencies are encouraged to identify and seek the full complement of relief for complainants and identified victims . . . including . . . back pay . . . .").

[63] 117 Cong. Rec. 30,408.

[64] 465 U.S. 555 (1984).

[65] *Id.* at 573-74.

[66] Pub. L. No. 100-259, 102 Stat. 28 (1988).

[67] *Cf.* 42 U.S.C. § 2000d-7 (abrogating state immunity for Title IX actions in response to Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985)).

RETURN OF THE KINGS: A GLANCE AT *BUSH* V. *SCHIAVO*

*BY GEOFFREY W. HYMANS**

The practice group for which I volunteer is the "Federalism and Separation of Powers" practice group. Federalism cases, with their emphasis on exploring the constitutional limits on the power of the federal government, sometimes receive far more attention than cases involving separation of powers. Last year, then, may have been an exception. At least one high profile Supreme Court case this year had serious separation of powers implications,[1] and a state Supreme Court case that received a huge amount of media attention actually contained the most direct showdown between separate branches in several years.

The latter case was *Bush v. Schiavo*.[2] That case made national headlines because of the underlying facts. In 1990, Theresa Schiavo suffered a cardiac arrest as a result of a potassium imbalance. She has never regained consciousness, and has been fed through tubes. In 1998, Theresa's husband Michael petitioned the guardianship court in Florida to authorize "the termination of life-prolonging procedures."[3] Theresa Schiavo's parents opposed the petition.

Using the clear and convincing evidence standard, the trial court determined and the appellate court affirmed that Theresa Schiavo was in a "'permanent or persistent vegetative state'" and that she would "'wish to permit a natural death process to take its course.'"[4] The decision was affirmed by the intermediate Florida appellate court, and the Florida Supreme Court denied review.

The parents of Terry Schiavo sought relief from judgment by instituting additional, separate proceedings attacking the judgment. Yet after these separate proceedings had run their course, the intermediate Florida appellate court affirmed the denial of the motion for relief from judgment, the Florida Supreme Court denied review, and Theresa's feeding tube was removed on October 15, 2003.

The next step forms the crux of the separation of powers issue. On October 21, 2003, the Florida Legislature enacted a law which purported to allow the Governor to "issue a one-time stay to prevent the withholding of nutrition and hydration from a patient"–*i.e.*, from Theresa.[5] The law had a 15-*day* sunset clause.[6] The Governor promptly issued a stay through an executive order.

Thus, the Florida legislature delegated to the Governor a claimed power to "stay" the execution of a final judgment from the Florida courts. This is the most direct challenge by one branch of government to another that we have seen in many years.[7] While couched as a law of general application, the timing of the law's passage, along with its short effective duration, allowed the Florida Supreme Court to determine that the act of the legislature was aimed at legislatively overturning a specific decision of the court. A far more interesting scenario might have developed had the legislature had a bit more courage in their delegation convictions, and purported to provide the Governor the claimed power on a permanent basis.

After reviewing the need for "'strict'"[8] separation of powers, the court announced the categorical rule that would guide its decision: "'[H]aving achieved finality . . . a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy'"[9] and "'purely judicial acts . . . are not subject to review as to their accuracy by the Governor.'"[10] The court held that the legislation "effectively reversed a properly rendered final judgment and thereby constituted an unconstitutional encroachment on the power that has been reserved for the independent judiciary."[11] The court added:

> When the prescribed procedures are followed according to our rules of court and the governing statutes, a final judgment is issued, and all post-judgment procedures are followed, it is without question an invasion of the authority of the judicial branch for the Legislature to pass a law that allows the executive branch to interfere with the final judicial determination in a case. That is precisely what occurred here and for that reason the Act is unconstitutional *as applied* to Theresa Schiavo.[12]

The "as applied" language is interesting. It leaves open the question of whether an arguably broader encroachment on the court's power to render final judgments—a similar law passed without a 15-day sunset clause—might survive review. This commentator suspects that would not be the case, but the court is at least attempting to limit its holding to the facts of the present case.

Another interesting aspect of the law at issue was that the Governor retained authority to lift the stay, and upon issuance of the stay, the circuit court was required to appoint a guardian ad litem to "make recommendations to the Governor and the court."[13] This ongoing involvement of the Governor in the determination of whether to terminate life-prolonging procedures was not analyzed by the court because the law's central focus, the ability to enter a stay, was found to violate separation of powers. But the continuing interference of the executive branch in what most courts would view as core judicial functions would almost certainly not have been welcomed.

The Florida Supreme Court buttressed its holding by also deciding that the act constituted an unconstitutional delegation of legislative authority to the Governor.[14] Of course, the court apparently did not see any irony in examining the delegation of a "power" that the court just held the legislature did not possess.

The *Bush v. Schiavo* case represents the most direct challenge to the power of a court by a legislature since *City*

of Boerne v. Flores.[15] And just as the Supreme Court defended what it viewed as its constitutional role to interpret the Constitution, so the Florida Supreme Court defended the finality of its decisions, and those of the lower courts, reached through application of the judicial power. Following the lead of the United States Supreme Court, state Supreme Courts will not hesitate to defend their institutional "turf" when challenged by other branches. As Walter Dellinger has put it, "non-deference"[16] has become the primary characteristic marking the U.S. Supreme Court, and we can expect that to become—or as some might say, remain—the primary characteristic of state Supreme Courts when they address separation of powers issues regarding the judicial branch.

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Footnotes

[1] *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), addressed and decided a separation of powers issue. Other cases sidestepped such concerns. *See, e.g.*, Rasul v. Bush, 124 S. Ct. 2686, 2699-01 (2004) (Kennedy, J., concurring).

[2] 885 So. 2d 321 (Fla. 2004).

[3] Schindler v. Schiavo, 780 So. 2d 176, 178 (Fla. Dist. Ct. App. 2001).

[4] *Schiavo*, 885 So. 2d at 325 (quoting *Schindler*, 780 So. 2d at 177, 180).

[5] *Id.* at 328 (quoting 2003 FLA. LAWS ch. 418, § 1(2)).

[6] 2003 FLA. LAWS ch. 418, § 1(2).

[7] Some might place *Guinn v. Nevada*, 71 P.3d 1269 (2003), in a similar category. But even that case, in which the Nevada Supreme Court held that a "substantive" provision of the Nevada State Constitution trumped the "procedural" requirement for a two-thirds vote of the legislature in order to raise taxes, involved the interpretation of specific sections of the document, rather than a direct challenge to legislative authority by the court.

[8] *Schiavo*, 885 So. 2d at 329 (quoting State v. Cotton, 769 So. 2d 345, 353 (Fla. 2000)).

[9] *Id.* at 330 (quoting Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 218-19, 227 (1995)).

[10] *Id.* (quoting *In re* Advisory Opinion to the Governor, 213 So. 2d 716, 720 (Fla. 1968)).

[11] *Id.* at 331.

[12] *Id.* at 332 (emphasis added).

[13] 2003 FLA. LAWS ch. 418, § 1(3).

[14] *Schiavo*, 885 So. 2d at 332.

[15] 117 S. Ct. 2157 (1997).

[16] Walter Dellinger, Remarks at the American Constitution Society Supreme Court Roundup at the National Press Club, Washington, D.C. 3 (July 1, 2003); *available at* http://www.acslaw.org/pdf/SCOTUStrans.pdf.

FINANCIAL SERVICES AND E-COMMERCE

THE WORLDCOM AND ENRON SETTLEMENTS: POLITICS REARS ITS UGLY HEAD

*BY PETER J. WALLISON**

The recent settlements of lawsuits against WorldCom and Enron involved something entirely new in securities litigation—the introduction of political considerations into the process of settling class actions. In both cases, public officials acting as lead plaintiffs refused to settle unless the outside directors of the companies made payments out of their own pockets, and the officials were widely praised in the media for doing so. This development will increase the likelihood that similar concessions will be demanded of settling directors in the future and will make the recruitment of directors for the boards of public companies considerably more difficult. That result cuts against the policy of the Sarbanes-Oxley Act—which was intended to place more responsibility on the independent directors of public companies—and suggests that a revision of the liabilities of directors under the federal securities laws, in cases of management fraud, may be appropriate.

Recent news that the independent directors of WorldCom and Enron had agreed to settle outstanding securities class action suits with payments from their personal assets should be getting more attention than it has. Although the WorldCom settlement was rejected by the court for technical reasons, it established a precedent that is likely to bedevil corporate governance well into the future.

At the most fundamental level, these settlements raise questions about the scope of directors' liabilities under the securities laws, and may also challenge a principal objective of the Sarbanes-Oxley Act, which was intended to place more control over such things as financial disclosure by public companies in the hands of independent directors. But the most troublesome aspect of the settlements was the involvement of political officials and political objectives—a new factor that considerably enlarges the risk that individuals must weigh when they consider whether to become or remain as directors of public companies.

In the WorldCom settlement, ten directors agreed to pay an aggregate of $18 million to settle their liability to WorldCom bondholders. Similarly, ten Enron directors agreed to a settlement of $13 million. At the insistence of the lead plaintiffs in both cases, the directors' payments were not to be reimbursed by insurance or by the companies involved. The collapse of both WorldCom and Enron was the result in both cases of management's falsification of the company's financial statements, and in both cases it was determined by the court that the directors had not participated in the misrepresentations involved; they had simply failed to detect it. Thus, the directors involved were required to make payments out of their personal assets for failing to detect a fraud, even though a fraud—by definition—is designed to escape detection.

Directors' Liability

The Enron and WorldCom class actions both arose under the securities laws, since both companies had sold securities using registration statements filed with the Securities and Exchange Commission that contained false financial statements. Under the securities laws, a director who signs a registration statement that contains materially false information is liable to any purchaser of those securities—no intent to deceive is required—but may establish a defense of due diligence: that he or she made a good faith effort to ascertain that the information in the registration was correct.

This is a tougher standard than is generally required of directors under ordinary corporate law, which is based on state standards derived from the common law. There, directors are deemed to have a "duty of care," which is defined in the model corporate law developed by the American Law Institute as "the care that a person in a like position would reasonably believe appropriate under similar circumstances." A special committee of the American Bar Association has developed a handbook for directors that further elucidates this standard, noting that in exercising his or her responsibilities:

> ...a director is entitled to rely on management and on board committees on which the director does not serve to perform their delegated responsibilities. A director is entitled to rely on reports, opinions, information and statements, including financial statements and other financial data, presented by . . . the corporation's officers or employees whom the director reasonably believes to be reliable and competent in the matters presented [and] . . . legal counsel, public accountants or other persons as to matters that the director reasonably believes to be within the person's professional or expert competence or as to which the person merits confidence.[1]

Thus, in acting under ordinary corporate law, directors can rely on management and accountants whom they reasonably believe to be reliable, and shareholders and others who complain about directors' actions must prove that they acted in violation of their duty of care. But under the securities laws directors are liable for material misstatements in a registration statement unless they can carry the burden of establishing their own diligence in determining whether the facts were correct.

Under the egregious facts of both the WorldCom and Enron cases, it is certainly possible to argue—in hindsight—that the directors should have asked more questions or not relied on the statements of management, or the companies'

accountants or counsel. But it is important to note that both Enron and WorldCom were cases of fraud, where management took affirmative steps to withhold the truth from the directors; the settlements demonstrate that directors can be held responsible for failing to discover that management was lying. Given the difficulty, in general, of determining another person's honesty and trustworthiness—certainly before becoming a director, and even afterward—there can be no denying that these settlements signal increased risks for directors, at least in cases where securities law liabilities are involved.

This in itself would be a reason for Congress to revisit the question of director liability under the securities laws. Currently, the law makes no distinction between cases where management has committed deliberate fraud—having taken affirmative steps to hide the facts—and cases where registration statements merely contain material misstatements that could have been discovered with diligence.

There is good reason for the securities laws to make this distinction. The failure of a director to detect a material misrepresentation or omission could be negligence, which by definition is a violation of a duty of care and strong evidence of the absence of due diligence. The lack of attention to detail that gave rise to this failure is at least within the control of the director. But that is not true of a failure to detect a fraud. Since those who commit fraud are engaged not only in misrepresentation of facts but in taking affirmative action to prevent the discovery of the truth, as a matter of simple justice it seems unreasonable to hold directors responsible for discovering something that has been deliberately withheld from them. The same principle would appear to be applicable to underwriters, who have the same liabilities under the same circumstances as directors. It seems unreasonable to hold them responsible for failing to discover facts that management has taken steps to hide.

Thus, it seems sensible that whenever the courts have found that management has perpetrated a fraud, the company's independent or outside directors and underwriters should not be held responsible for failing to discover management's deception. Of course, there can be cases where the directors or underwriters have been so lax that an obvious fraud escaped their notice. But in these cases securities law should require the complaining party to demonstrate the director's gross negligence, instead of placing on the directors and underwriters the burden of establishing a due diligence defense.

As a matter of policy, too, it also seems sensible to reduce the potential liabilities of directors where the courts have found evidence of management fraud. The Sarbanes-Oxley Act assumes that it will be possible to recruit independent directors to serve on corporate boards. This has already turned out to be more difficult than initially anticipated. Discussion at an AEI conference in May 2004[2] confirmed reports from corporate recruiters that the field of desirable directors had narrowed considerably after Sarbanes-Oxley, principally because of the extra time now required of directors in meeting the act's requirements, concern about additional liability, and the reluctance of CEOs to serve on nonaffiliated boards. Now, the settlements in the WorldCom and Enron cases—which seem to put the personal assets of directors at risk—can only make it even more difficult to recruit qualified independent directors to serve on the boards of public companies.

Politics Enters the Picture

Complicating this question, moreover, is the fact that the settlements in these two cases contain one element that is entirely different from anything seen before—the sudden introduction of political considerations in the settlement process. In both cases the lead plaintiffs were public organizations—the New York state employees' pension fund in the case of WorldCom and the California university system in Enron. The New York fund is headed by the state comptroller, Alan G. Hevesi, an elected official with the usual motives for seeking publicity as a way of advancing to higher office.

According to Comptroller Hevesi's own statements, he refused to settle with the WorldCom directors unless they made substantial payments out of their own pockets: "I felt personally," he told the *Washington Post* for a January 8 article, "that this would be unfair and not a deterrent for future failure on the part of the directors if they were not held personally responsible." Thus, Comptroller Hevesi's personal views about how to discipline directors—not the question of what would be best for the pension fund he heads—was the determining factor in proceeding with the settlement. Eventually, the settlement required the directors to pay 20 percent of their net worth, exclusive of the value of their personal residences.

This is something seemingly without precedent. Previously, a decision whether to settle with one or more defendants was made on the basis of whether additional litigation would produce a larger award. The strength of the case was balanced against the costs of further litigation. In this case, however, the lead plaintiff was seeking a political goal, a factor that will undoubtedly make directors and prospective directors far more wary of serving on boards than they have been in the past. Under the Hevesi Rule, they will be specially singled out for punishment, because that will presumably make other directors more diligent.

The settlement arrangements were widely reported in the press, with Comptroller Hevesi lionized for his position. This, for example, from Gretchen Morgenson in the *New York Times* (January 9, 2005):

> Hats off to Alan G. Hevesi, comptroller of New York State and trustee of its Common Retirement Fund, who has proved that, yes, shareholders can hold individuals responsible for wrongdoing at companies. Institutional shareholders can no longer hide behind lame excuses for not following Mr. Hevesi's lead and demanding that the right people pay for malfeasance.

It is not hard to imagine that with declarations like this

in the media there will be no shortage in the future of political officials, heading up public pension funds or in other capacities, who are looking for opportunities to make directors pay out of pocket for alleged malfeasance in supervising corporate managements. This has been made to sound like good policy, and—considering the media image of directors as the wealthy, underworked beneficiaries of corporate largesse—it will certainly be good politics. If politically motivated settlement demands of this kind are to be the wave of the future, it is difficult to understand why anyone would serve on the board of a public company. As difficult as it has been to find corporate directors since the advent of Sarbanes-Oxley, it will now be more difficult still.

Too Unusual to Set Precedent?

One important question is whether the WorldCom and Enron cases are so unusual that their settlements are *sui generis* and should not be seen as precedents for the future. They were both huge frauds, resulting in bankruptcy when discovered. The fact that the companies were both bankrupt was one reason the directors felt compelled to settle, since they could no longer be indemnified by the companies. This fact in itself is unlikely to provide much consolation to directors at other companies, since significant frauds can easily bankrupt even healthy companies. Accordingly, risk-averse directors, when considering whether to join or remain on corporate boards after the Enron and WorldCom settlements, are likely to take little comfort from provisions in a corporate charter that permit full reimbursement of directors under most foreseeable circumstances.

That leaves directors and officers' liability (D&O) insurance. All such policies have limitations on liability, which can be exceeded in large frauds such as Enron and WorldCom. In the WorldCom case, the damages demanded by the bondholders were $17 billion for the bond sales in 2000 and 2001 alone. It appears that one of the reasons the WorldCom and Enron directors agreed to settle was the likelihood that the dollar limitations in their D&O policies would be exceeded by defense costs, together with the ultimate liability that might be assessed against them at trial. Thus, although D&O coverage with high enough limits might enable directors to avoid having to dip into their personal resources, that will not always be the case—especially in large frauds involving securities offerings.

Even if the D&O coverage for WorldCom's directors had been sufficient to cover their liabilities and defense costs, it appears that a plaintiff determined to require them to pay out of their own pockets could have obtained this result. Many D&O policies allow the insurer to settle the case, with the consent of the directors. If the directors do not consent, the insurer's liability is limited to the amount of the proposed settlement, and the directors bear the risk of litigating, including the litigation costs.

What would happen if a plaintiff refused to settle with the insurer unless the directors agreed to waive all or a portion of the reimbursement they would receive from the D&O insurer? The answer is not entirely clear, but it appears that in this case the directors would be in much the same position as the WorldCom and Enron directors. If they refused to agree to the terms of the settlement, which would include their paying unreimbursable out-of-pocket costs, they would be required to take the risk of litigating.

It is important to note that this scenario is likely to occur only where the lead plaintiff has political objectives such as those of Comptroller Hevesi. In the ordinary case, the lead plaintiff would be interested solely in obtaining the maximum recovery for the plaintiff group, taking into account the probable costs and risks of litigation, and would not care whether the dollar payment came from the insurer or the pockets of the directors themselves.

WorldCom Precedent May Survive Rejection of Settlement

Finally, there is the question whether the court's refusal in the WorldCom case to approve the settlement suggests that future efforts to force directors to make out-of-pocket payments are not tenable. The Private Securities Litigation Reform Act (PSLRA), adopted in 1995, attempted to provide for the proportionate allocation of damages awarded in securities class actions in cases where outside directors were not knowing participants in a violation of the securities laws. It permitted pretrial settlements by the directors, but provided that the ultimate award, if any, after trial, would be reduced for all defendants who went to trial by *the greater of* (i) the amount actually paid in settlement by a settling director, or (ii) the amount of the total award won by the plaintiff that corresponds to the percentage of responsibility (for the loss) of a director who settled before trial. Under this procedure, the trier of fact (usually a jury) first determines the amount to be awarded to the plaintiff, and then the percentage of liability of each defendant, including those who had previously settled.

Thus, if the award were $100 million, and the settling directors had paid $1 million, the defendants who had not settled would be required to pay $99 million to the plaintiff. However, if the defendants who had previously settled were deemed responsible for 50 percent of the loss, the defendants who had not settled would be responsible for paying only 50 percent of the award to the plaintiff, or $50 million. Obviously, this provision can substantially reduce the liability of defendants who go to trial, even if they lose.

This in itself would not have prevented the settlement, were it not for a quirk in the law. The PSLRA contemplates two classes of director defendants—those who are knowing participants in the violation of the law and those who are not—and special liability provisions apply to each. Those who are found after trial not to be knowing participants can only be required to pay for their share of the total award up to their percentage of responsibility; those who are found to be knowing participants are jointly and severally liable, which means that a winning plaintiff can collect the entire judgment from a single wealthy defendant such as an underwriter, who then has a right to collect from other defendants up to their respective shares of the loss. However, the PSLRA provides

that if a non-knowing director has settled before trial, the percentage of that director's responsibility must be subtracted from the total award, even though it reduces the liability of the other defendants.

To avoid this possibility, the settlement with the WorldCom directors attempted to revise that rule by capping the possible reduction of the award at the amount the settling directors were able to pay. The non-settling defendants—the underwriters—objected to this provision, because it deprived them of the full benefits that they could have obtained from the settlement. The court agreed, and threw out the settlement.

That outcome will certainly make settlements with directors before trial much more difficult, and it is certainly bad news for directors, who may not now be able to settle before trial. But it will not prevent plaintiffs who have motives similar to those of Comptroller Hevesi from requiring that directors pay a portion of any award from their own pockets. After a trial, the maximum liability of a non-knowing director defendant is that defendant's net worth, so a plaintiff appears to have the option of reducing the amount collected from any indemnifying party (such as the company itself or a D&O insurer) to something less than the directors' net worth if the directors will agree to pay a portion of the award from their personal assets.

Conclusion

Accordingly, we are left with this result: Because directors have the burden of proving their own due diligence in securities class actions, even in cases of fraud by management, the risk that they will be held liable is higher than in ordinary cases of director malfeasance—where directors are held only to a duty of care. The fact that this liability has now resulted in directors paying an award out of their own pockets will make it even more difficult than before to recruit qualified independent directors to serve on boards of directors, and is thus in conflict with the purpose and policy of the Sarbanes-Oxley Act.

This problem—already serious—has now been compounded by the introduction of political objectives into the settlement process, making it substantially more likely that directors will be required to face personal liability in securities class actions. Under these circumstances, it may be necessary for Congress—in order to fulfill the purposes of Sarbanes-Oxley to modify both the settlement provisions of the PSLRA and the scope of directors' liability under the securities laws in cases where the directors were not knowing participants in a fraud perpetrated by management.

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Footnotes

[1] American Bar Association, *Corporate Director's Guidebook* (May, 2004), available through www.lexis.com.

[2] "Sarbanes-Oxley: A Review"; conference materials are available at http://www.aei.org/event809.

Free Speech and Election Law

Rethinking Campaign Finance Prohibitions

*By Allison R. Hayward**

Modern politicians and activists face a sea of complex and contradictory campaign finance regulations. Every step is governed by limits, prohibitions, reporting requirements — all run through with a maze of exceptions. The Federal Election Campaign Act (FECA) as it has evolved is simultaneously complex, restrictive and porous. The confusion and doubt created by such complicated laws seem to serve the interests of no one, certainly not the voters and citizens who they are intended to benefit.

In general, the evolution of campaign finance law demonstrates a lack of means-to-ends fit between political conduct and particular reforms. One might expect that public controversies would yield regulations that address the core conduct in the controversy. Instead, the political will for reform created after a scandal has generally been applied to pass reforms that were already "on the shelf," whether or not the reforms would address the scandal's specifics.

This is as true for those aspects of the laws that prohibit contributions or expenditures as for other aspects of the law. These prohibitions are the most extreme aspects of our law, and they forbid equal political participation based upon the status of an entity. Yet, absent a means-ends fit between scandal and reform, it is open to question whether campaign finance rules as they exist today are a result of experience and considered policymaking by Congress. If they are not, it may be past the time to step back and reconsider the law's scope, in particular its prohibitions upon certain entities from participating.

How Did We Get Here?

The first example of this lack of fit is the corporate contribution ban. In the wake of civil service reforms, which curtailed political party funding from patronage assessments, politicians looked elsewhere for political funding and found it, in part, from corporations. After President Theodore Roosevelt's election in 1904, and in pursuit of an entirely different examination into business abuses, New York investigators found that major corporations financially supported Roosevelt during his campaign, and ultimately it was learned that 73.5 percent of Roosevelt's 1904 campaign fund came from corporations.[1] Roosevelt, in a defensive response, embraced a corporate contribution ban – but was opposed to mandatory disclosure requirements. Democrats, who did not benefit from corporate largess to the same degree, favored a corporate contribution ban *and* disclosure, believing that publicity would drive corporations out of politics.[2] The corporate ban alone carried the day, and in 1907 Congress passed and Roosevelt signed the Tillman Act, prohibiting any contributions by corporations in federal elections.

The controversy surrounding Roosevelt's activities was about secrecy, yet the law in the end prohibited a class of contributors from participating in federal politics, but did not address the publicity issue. Another possible approach — corporate contribution limits — would have reduced the role of large corporations, while allowing small businesses the ability to support candidates. Yet what passed was a ban without effective disclosure, and thus without a means for voters to become more informed about candidates' supporters, or for monitoring or enforcement short of a specific investigation.[3] The inability to secure meaningful disclosure would remain a problem for some decades.

The next wave of reform came out of the Teapot Dome bribery scandal. Albert Fall, Secretary of the Interior to President Warren Harding, personally received payments from oil interests in return for leases, and was prosecuted and imprisoned for his crimes. In related investigations, it was learned that the lessors also contributed to the Republican Party, but these funds were never disclosed since the law did not require off-election year reporting.[4] The problems with the disclosure law's reach were evident years earlier, and the Teapot Dome scandal revolved around bribery – already against the law. Nevertheless, the scandal resulted in the 1925 Federal Corrupt Practices Act, which strengthened disclosure laws by requiring political committees active in two or more states to report quarterly.

But the 1925 reform did not provide for dissemination of those reports, or for their review. The disclosure laws did not provide good information about key political actors, and did not sweep in non-party and non-candidate groups.[5] Enforcement had its own problems - the one prosecution attempted against outside groups ended in acquittal.[6] In short, despite a generation having passed in which scandals revolved around the lack of disclosure, unless the financing of an election became the subject of a congressional investigation or a topic for scholarly attention, comprehensive information about campaign finance was not available to the voters.

Yet the policy disconnect persisted. In 1940, Congress passed an extension of the Hatch Act of 1939, which among other things banned federal government contractors from making federal contributions.[7] The law did not come about from any scandal but represented the antipathy Republicans and southern Democrats felt for the second Roosevelt administration's use of federal funding for political advantage.[8] In 1943, Congress extended the corporate contribution ban to labor unions as part of the War Labor Disputes Act, which extended only for the duration of the Second World War.[9] The most proximate cause of the legislation's passage was congressional pique at a massive coal miner's strike that year, coupled with Republican alarm over growing labor contributions to Democrats.[10] Labor union prohibitions were renewed in 1947 in the Taft-Hartley Act, and clarified to

ban labor "expenditures" as well.[11] The labor union ban was justified at the time as a measure necessary to protect dissenting members, and to protect elections from the wealth of unions, but was not precipitated by any particular scandal.[12] In short, while *post hoc* policy justifications for the ban on government contractors and labor organizations can be created, the true motives supporting their passage were political.

In 1966, Congress amended the Foreign Agents Registration Act to prohibit contributions by foreign agents on behalf of their principles in federal and nonfederal campaigns.[13] These amendments passed after hearings led by Senator William Fulbright revealed that foreign interests with interests in sugar import guidelines and Central American policy had directed contributions through intermediaries.[14] The law was strengthened to apply to contributions from foreign nationals in the 1974 amendments to the Federal Election Campaign Act, in response to revelations out of the Senate Watergate Committee that the Nixon Administration had sought campaign funding directly from foreign sources.[15]

The Watergate scandal involved, among other things, burglary, wiretapping, perjury, false campaign disclosure, and raising funds from illegal corporate and foreign sources. Watergate conduct for the most part violated existing law – hence the scandal. Yet Congress took the opportunity to drastically revise campaign finance laws in 1974 amendments to the Federal Election Campaign Act of 1971 (FECA). It hardly seems likely that had the limits, prohibitions, and reporting requirements – or the public funding provisions – of the 1974 Amendments been in effect in 1972, that the Watergate players would have renounced their methods, since they demonstrated willingness to break so many other, more serious, laws. Nor did the reform provide significant additional sanctions for their conduct. The 1974 Amendments set contribution and expenditure limits, limited independent expenditures and party expenditures on behalf of candidates, provided optional public funding for presidential campaigns, and created an independent agency (the Federal Election Commission) to administer the law.

Observe again the poor fit between Watergate and many of the 1974 reforms. As before, a scandal made possible the enactment of an assortment of existing reform proposals into law, even though those specific reforms had little to do with the conduct behind the scandal. Nevertheless, effective disclosure of party and candidate finances, a goal that had eluded reformers from the first, was made closer to reality with the 1974 amendments to FECA.

Similarly, the passage of the Bipartisan Campaign Reform Act (BCRA) depended on a mostly unrelated scandal. Reformers had for some years sought to curb nonfederal or "soft money" activities by parties and outside groups. But it was the corporate management scandals and the implosion of Enron that provided the political will for Congress to ban national party nonfederal fundraising and prohibit corporate and union money for electioneering advertisements within 30 days of a primary or 60 days of a general election.

As before, the scandal that precipitated reform had little to do with the particulars of the reform measure. Enron used unconventional accounting techniques and off-books partnerships to hide mounting debts. In December 2001, after disclosing enormous losses and watching it share prices tumble, Enron filed for bankruptcy protection. Disclosure databases showed that Enron gave soft money even as it approached bankruptcy. Enron executives and employees were active political donors to Republicans and Democrats, though it was never established that its political activities related to its failure as a business venture, or that it received special treatment from politicians.[16]

Yet, reformers rushed to associate the ensuing furor over Enron with their lagging campaign finance reform efforts.[17] One group argued that to "de-Enron America Now" required passage of their existing package of reforms in Shays-Meehan, their measure blocked up in the House of Representatives.[18] During the debate preceding passage in the House of Representatives, reform sponsor Marty Meehan described a "cloud over the Capitol and the White House because of the Enron scandal" and that voting for reform would remove the cloud.[19] The House passed reform in February of 2002, and President Bush signed it into law in March.

This history necessarily presents an abbreviated summary of these scandals, but even so it is illuminating. In political scandals, the campaign finance aspect of the scandal often involves secrecy. The real story in our campaign finance history thus may not be about the "buying of America" by particular entities or the role of "money in politics" but the legal system's inability to secure prompt, accurate, accessible and comprehensible disclosure.

What Are We Doing?

Policy makers have not been content to work toward better disclosure. Laws also prohibit a number of society's players from participating financially in federal elections. We now turn to the rationale made for its prohibitions, whether the goals sought are appropriate, and whether there may be less extreme (or just better) policies for achieving them.

In its modern form the statute prohibiting corporate contributions or expenditures in federal election is a model for confusion. It begins with one 185-word sentence that reads:

> It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or in

> connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section, or any officer or any director of any corporation or any national bank or any officer of any labor organization to consent to any contribution or expenditure by the corporation, national bank, or labor organization, as the case may be, prohibited by this section.[20]

The upshot of this impenetrable statute is that national banks and corporations organized by Congress may not give "in connection with" federal, state or local elections, and that other corporations and labor organizations – regardless of type or size, cannot contribute or spend in federal elections. The federal law continues with a section that defines the term "labor organization" and a section that excludes from these prohibited contributions and expenditures communications by a corporation to its shareholders or executive and administrative personnel and their families, and by labor organizations to their members and families (called the "restricted class"); nonpartisan registration and get-out-the-vote efforts aimed at the restricted classes, and PAC solicitations to the restricted class. The statute prohibits PACs from using money that was secured through use of threats or other coercion.

Additionally, federal law bars government contractors (regardless of organizational form) from making federal contributions, but specifically allows such entities to establish PACs under the guidelines set up for corporations, thus treating incorporated contractors somewhat more leniently that other kinds.[21] The Act also prohibits foreign nationals from making donations or contributions in federal, state or local elections.[22] Federal law is by no means unique in singling out particular economic entities for disfavored treatment in the campaign finance arena. Twenty-one states also prohibit corporate contributions,[23] and several states impose special restrictions on particular kinds of entities, notably gaming companies,[24] regulated industries,[25] lobbyists[26] and liquor distributors.[27]

The purpose of such laws is, in general, to reduce the political power and influence of the prohibited source. But why these particular entities? The rationale for the federal corporate and labor organizations ban was set forth by the Supreme Court in *United States v. Auto Workers*.[28] In that decision, upholding the application of a labor expenditure ban against a union using treasury funds for television advertisements to influence the election of members to Congress, Justice Frankfurter observed that corporate restrictions grew out of "popular feeling that aggregated capital unduly influenced politics, an influence not stopping short of corruption."[29] He noted that Elihu Root, speaking on behalf of a corporate contribution ban in New York law, had explained that:

> The idea is to prevent . . . the great railroad companies, the great insurance companies, the great telephone companies, the great aggregations of wealth from using their corporate funds, directly or indirectly, to send members of the legislature to these halls in order to vote for their protection and the advancement of their interests as against those of the public.[30]

According to Justice Frankfurter, the corporate contribution ban was "merely the first concrete manifestation of a continuing congressional concern for elections 'free from the power of money.'"[31]

The rationale for extending the corporate restrictions to labor organizations, as expressed by a sponsoring Congressman, was that unions "should be granted the same rights and no greater rights than any other public group" and to put them "on exactly the same basis, insofar as their financial activities are concerned, as corporations have been on for many years . . ."[32] Supporters also stressed the interests of dissenting members, and the impropriety of using money raised for one purpose for a different purpose. But the animating factor in Taft-Hartley appeared to be the leveling of the campaign finance playing field. The explanation for the government contractor prohibition, which is coterminous with the corporate contribution ban in the case of incorporated contractors, seemed similarly to be based on considerations of political advantage. In contrast, the foreign national contribution ban rested upon congressional investigations and hearings, leading to the particular judgment based on that record that foreign individuals and interests should not be allowed to contribute to elections.

The rationale for the contribution and expenditure bans may make sense when discussing large institutions, but in reality the bans extend to Subchapter S corporations, other small businesses, and nonprofit entities – in fact any corporation, labor organizations, or government contractor. The reasons given by Elihu Root for keeping "the great railroad companies" from electing candidates "to vote for their protection" do not justify a contribution and expenditure ban for small or nonprofit incorporated entities. In fact, Root's concerns would seem to be more directly met by some form of "pay to play" regulation, which could prohibit entities that lobby Congress from making contribution or expenditures, rather than an outright ban that extends to the funds of, for example, a sole proprietorship controlled by an individual.

The purpose served by the corporate, labor, and government contractor bans could also be served by a limit on contributions from these entities. It should be acceptable for such groups to contribute to candidate and political committees at a level which Congress has found appropriate in light of concerns about corruption. An instructive example would be the $2,000 per election limit individual donors may give to candidates. Extend to those limits an aggregate limit – perhaps less generous than the aggregate limit applicable to individuals, and the law would allow these groups, as such, to participate while addressing the concerns about "aggregations of wealth." Limits, rather than prohibitions, could serve to make the law less complex in practice. Corporate and

labor facilitation regulations, designed to ensure that not one cent of their resources improperly subsidize political activity, could be reconfigured so entities could account for in-kind support attributable to political activity. To be sure, corporations or unions could still exceed the limit, and would be held liable for making excessive contributions unless reimbursed.

A more controversial element would be whether to allow corporations and labor organizations to make independent expenditures advocating the election or defeat of candidates. Here, court cases have concluded that, when done by individuals, independent expenditures may not be limited. If Elihu Root's "aggregation of wealth" justification has some merit, then it may nevertheless be reasonable to place a cap on independent expenditures by corporations and labor organizations, or place corporate or labor governance restrictions on such expenditures to protect the interests of shareholders and union members. But the effect of the ban on independent expenditures, when advocacy to a corporation or labor organization's restricted class is allowed, and corporations and labor organizations engage in issue advertising (restricted by the electioneering communications provisions of BCRA within thirty days of a primary and 60 days of a general election) is to channel and distort corporate and labor speech, complicate the law, generate enforcement matters, and confuse the public. The political system can apparently tolerate restricted-class communications and issue advertising – is it beyond the pale to suggest that it might also be able to tolerate corporate and labor independent expenditures? Even were the law to continue to apply a 30 and 60 day preelection restriction, such a change would simplify the rules. The present regulation of corporate and labor political speech may be the best example of the law as complex, restrictive and porous.

Even so, if government is to persist in excluding these entities from making contributions and expenditures in federal elections, it should be expected to offer a contemporary rationale for such drastic regulation. The pervasive use of the corporate form in modern life bears little resemblance to the industrial powers Root invoked. The role of unions in American life has also changed in the years since the contribution and expenditure ban was extended to them. At that time, unions represented over one-third of the workforce. In 2003 that figure was 13%, and union membership continues to fall in absolute numbers.[33]

On the other hand, if corporate and labor activity in connection with federal elections cannot be tolerated, then the laws are overly permissive. Congress has seen fit to prohibit national banks and corporations chartered by Congress (and foreign nationals, for that matter) from activities in connection with federal, state, or local elections. Were the scope of this ban extended to corporations and unions generally, many of the "problems" the federal system has had with nonfederal funds (i.e. "soft money') subsidizing federal activity would go away, since those funds would no longer be a part of state and local election accounts. If corporate and labor funds should not subsidize federal election activity, then perhaps they should not be available to pay the administrative costs of corporate and labor PACs, which at present enjoy an advantage against non-connected political committees in that their sponsoring organizations can pay all administrative and fundraising costs out of general treasury funds. Perhaps corporate and labor treasury funds also should not be available for restricted class and member communications. Rather, any political committee could be able to speak directly to the public and raise funds from any permissible source using money acquired under the federal limits.

The point of this series of speculations is not to suggest that corporations and labor organizations should be freed from all regulation, or regulated out of politics altogether. It is instead an attempt to show that the regulation of these groups is schizophrenic. At once, our laws express a prohibition on corporate and labor contributions and expenditures, seemingly because in Congress's policy judgment such involvement is unacceptable. But the law allows special treatment for corporate and labor committees, communications with restricted classes, which in the case of unions include *all members*, and a host of other activities that would seem *ultra vires* to the purpose of a corporation or union. What function, then, is served by the contribution and expenditure ban?

Our system also leaves unregulated a multitude of other activities that would seem to pose at least the same potential for corruption as campaign contributions. Lobbying disclosure, as compared with campaign disclosure, is rudimentary and inexact, and the law sets no source or amount limits on lobbying funding beyond the general prohibition against using federal appropriations. While it is true that the U.S. Constitution guarantees the right to petition, one could see where courts would balance that right against competing governmental interests, much as courts do with campaign finance regulation. The Supreme Court in *McConnell* has already identified a legitimate Congressional interest in legislation to curb undue influence on officeholders and "peddling access," which would seem to implicate at least some lobbying.[34] News, commentary, and editorials are exempt from the limits, prohibitions and reporting requirements in campaign finance law, even if the purpose of the news or commentary is plainly to influence an election. The content of political advertising is essentially immune from any action for libel or defamation.

If lawmakers wish to institute a campaign finance system that is more straightforward, effective, and creates fewer distortions, thus enhancing political debate, compliance, and respect for the rules, they should revisit the contribution and expenditure bans on corporate, labor and perhaps even government contractors. As they now stand, these rules prohibit political activity by certain entities for reasons that are hard to fathom or defend. They are rife with exceptions that would seem to undermine their purported rationale. They are traps for the unsophisticated, and seem to serve the interests only of those who seek grounds for investigating their political opponents, or for those left relatively more influential by the silencing of competing views. Perhaps it is time to reform

the "reform" under which our system labors.

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Footnotes

[1] ROBERT E. MUTCH, CAMPAIGNS, CONGRESS AND THE COURTS 3-7 (1988).

[2] *Id*. at 8.

[3] A series of legislative battles led to the passage of disclosure and spending limits in 1910 and 1911, but the Supreme Court in *US v. Newberry* found in 1921 that these regulations could not constitutionally be applied to primaries, deciding that as part of the "nomination" process primaries were not "elections" regulated by Congress. (That interpretation remains the law until it was reconsidered by the Court in the 1941 decision *U.S. v. Classic*, yet Congress did not enact laws covering primaries until the 1971 Federal Election Campaign Act.)

[4] *See* Leslie E. Bennett, *One Lesson From History: Appointment of Special Counsel and the Investigation of the Teapot Dome Scandal* (Brookings 1999), available at www.brook.edu/gs/ic/teapotdome/teapotdome.htm.

[5] LOUISE OVERACKER, MONEY IN ELECTIONS 259-70 (1930); Mutch at 25-27.

[6] *See* Mutch at 28 (discussing *Burroughs v. United States*).

[7] *See* 2 U.S.C. 441c (formerly 18 U.S.C. 611).

[8] Mutch at 34.

[9] 57 Stat. 1167 (1943). The ban on labor union contributions or expenditures is incorporated into the prohibitions at 2 U.S.C. 441b.

[10] Mutch at 153.

[11] *See* United States v. Congress of Industrial Organizations, 335 U.S. 106 (1948) (discussing scope of legislation).

[12] Mutch at 156-57.

[13] Pub. L. No. 89-486 Sec. 8(a), 80 Stat. 244 (1966) (codified at 18 USC 613) The provision is now codified at 2 USC 441e.

[14] For a longer discussion, see Bruce D. Brown, *Alien Donors, the Participation of Non-Citizens in the U.S. Campaign Finance System*, 15 YALE L. AND PUB. POL'Y REV. 503 (1997).

[15] *Id*. at 510 & n. 37.

[16] *See e.g*. Robert J. Samuelson, *It's not Reform, It's Deception* (Editorial), WASH. POST, Feb. 13, 2002 at A27. Samuelson described the claim that Enron justified the need for campaign finance reform as "complete make-believe."

[17] John Lancaster, et al., *Grass-Roots Effort Given Key Boost by Enron* Scandal, WASH. POST Feb. 14, 2002 at A06.

[18] Public Citizen Press Release, *De-Enron America Now, Pass Campaign Finance Reform*, Feb. 6, 2002, available at http://www.citizen.org/pressroom/release.cfm?ID=1018.

[19] Susan Milligan, *Campaign Finance Bill Gets Key Boost*, BOSTON GLOBE, Feb. 14, 2002 at A1.

[20] 2 U.S.C. 441b(a).

[21] *Id*. 441c, previously 18 USC 611 (Acts June 25, 1948). *See* FEC v. Weinstein, 462 F.Supp. 243 (S.D.N.Y. 1978) (considering constitutionality of government contractor ban).

[22] *Id*. 441e, previously 18 USC 613 (Pub. L. 89-486 S. 8(a) July 4, 1966).

[23] *See* Contribution and Solicitation Limitations, available at www.fec.gov/pubrec/cfl/cfl02/cfl02chart2a.htm.

[24] Casino Ass'n of Louisiana v. State, 820 S. 2d 494 (La. 2002) (upholding Louisiana Rev. Stat. 18:1505.2 (L) prohibition corporate contributions from gaming corporations).

[25] *See* Georgia Code Ann 21-5-30.1 (prohibiting certain regulated industries from contributing to state executive officers).

[26] Alaska Stat. 15.13.074(g), *see also* State v. Alaska Civ. Lib. Union, 978 P.2d 597, 617-20 (Alaska 1999) (prohibiting lobbyists from contributing to legislator unless resident of district).

[27] Schiller Park Colonial Inn v. Berz, 349 NE2d 61 (Ill. 1976) (upholding Liquor Control Act contribution ban).

[28] 352 U.S. 567 (1957).

[29] *Id*. at 570.

[30] *Id*. at 571 (quoting Elihu Root, Addresses on Government and Citizenship 143 (1916)). Lest any reader think that the reliance upon Elihu Root is an artifact, the Supreme Court in *McConnell v. FEC* apparently found it effective enough to begin its opinion with the same quotation. *See* McConnell v. FEC, 124 S. Ct. 619, 643-44 (2003).

[31] *Id*. at 575.

[32] *Id*. at 579 (quoting Congressman Landis before the House Committee on Labor, Hearings on H.R. 804 and H.R. 1483, 78th Cong. 1st Sess. 1,2,4 (1943)).

[33] *See Union Members in 2003*, available at http://www.bls.gov/news.release/union2.nr0.htm.

[34] McConnell v. FEC, 124 S. Ct. at 664.

Voting by Military Personnel and Overseas Citizens: The Uniformed and Overseas Citizens Absentee Voting Act

*By Hans A. von Spakovsky**

All United States military personnel and their dependents, as well as American citizens located abroad, have a statutory right to vote by absentee ballot in all federal elections. In 1986, Congress passed the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. §1973ff *et seq*. ("UOCAVA"), to "update and consolidate provisions of current law relating to absentee registration and voting in elections for Federal office by members of the uniformed services and by citizens of the United States who reside abroad." H.R. Rep. No. 765, 99th Cong., 2d Sess. 5 (1986). The predecessor statutes were the Overseas Citizens Voting Rights Act, 42 U.S.C. §1973dd *et seq.*, and the Federal Voting Assistance Act, 42 U.S.C. §1973cc *et seq.*

Summary of Statutory Provisions

Administration:

Under 42 U.S.C. §1973ff, the President was required to designate the head of an executive department to have primary responsibility for federal functions under UOCAVA. In 1988, President Ronald Reagan designated the Department of Defense and DOD in turn set up an office to administer its responsibilities, the Federal Voting Assistance Program ("FVAP"). Exec. Order No. 12,642, 53 Fed. Reg. 21,975 (June 8, 1988). FVAP provides assistance to military and civilian personnel who are eligible to vote under UOCAVA and its website contains detailed information on voting, including state-by-state instructions on registering and obtaining absentee ballots. See www.fvap.gov.

Enforcement:

Enforcement of UOCAVA is the responsibility of the Department of Justice. 42 U.S.C. §1973ff-4. The Attorney General may bring a civil action for declaratory or injunctive relief. As described *infra*, the Department of Justice has instituted numerous enforcement actions against states violating the requirements of UOCAVA.

State Requirements:

In essence, UOCAVA requires all states to "permit absent uniformed services voters and overseas voters to use absentee registration procedures and to vote by absentee ballot in general, special, primary, and runoff elections for Federal office." 42 U.S.C. §1973ff-1(1). "Absent uniformed services voters" are defined as (i) a member of a uniformed service who is absent by reason of active duty from the place of residence where the member is otherwise qualified to vote; (ii) a member of the merchant marine who is absent due to his service; and (iii) a spouse or dependant who is also absent from the place of residence of the spouse or dependent because of that active duty or service. 42 U.S.C. §1973ff-6. In addition to the usual services one would expect to have included in the term "uniformed services" (the Army, Navy, Air Force, Marines, and Coast Guard), the term also includes the commissioned corps of the Public Health Service and the National Oceanic and Atmospheric Administration. 42 U.S.C. §1973ff-6(7).

The "states" covered by UOCAVA include the 50 states, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, and American Samoa. 42 U.S.C. §1973ff-6(6). This leads to the somewhat confusing result that a civilian who is temporarily working overseas in a United States territory such as Guam, but whose state of residence for voting purposes is, for example, Georgia, is not considered an "overseas" voter who would be covered by UOCAVA's protections. See 42 U.S.C. §1973ff-6(8). That voter would be limited to his state's statutory provisions for absentee voting. All of the states and territories have their own laws on absentee and early voting.

UOCAVA voters who take advantage of the statute's provisions do not affect their "residence or domicile" for Federal, State or local tax purposes. 42 U.S.C. §1973ff-5.

UOCAVA requires states to:

· accept any valid voter registration application and absentee ballot application that is received not less than 30 days before the election;
· permit the use of a special Federal Write-in Absentee Ballot ("FWAB)" as a back-up ballot under certain circumstances; and
· use the official post card prescribed in the statute for simultaneous voter registration application and absentee ballot requests.

42 U.S.C. §1973ff-1.

Voter Registration and Absentee Ballot Requests:

As required by UOCAVA, FVAP has developed a Federal Post Card Application ("FPCA") form that doubles as both a registration form and an absentee ballot request form. 42 U.S.C. §1973ff(b)(2). It is a postage-free postcard, printed and distributed by FVAP to embassies and military bases. The FPCA is also available online at www.fvap.gov/pubs/onlinefpca.pdf as Standard Form 76A. This form can be used by UOCAVA voters in place of a state's registration form to become registered to vote and in place of a state's absentee ballot request form to request that an absentee ballot be sent to the voter.

If a voter using the FPCA "requests that the application be considered an application for an absentee ballot for each subsequent election for Federal office held in the state through the next 2 regularly scheduled general elections for Federal office," the state has to send the voter an absentee ballot for each such subsequent federal election. 42 U.S.C. §1973ff-3(a). This requirment is abrogated if (i) the voter notifies the state that he no longer wants to be registered or

(ii) the state determines that the voter has registered in another state. *Id.* at (b). If a state rejects a voter's registration or ballot request, the voter must be provided the reason for the rejection. 42 U.S.C. §1973ff-1(d).

Some states bar absentee ballot request forms from being submitted before a certain date prior to an election. Section 1973ff-3(e) prohibits a state from refusing to accept or process a ballot request form "submitted by an uniformed services voter during a year on the grounds that the voter submitted the application before the first date on which the State otherwise accepts or processes such applications for that year submitted by absentee voters who are not members of the uniformed services."

Federal Write-In Absentee Ballot:

FVAP has also developed the FWAB form, which is widely available at embassies and military bases. It is available online at www.fvap.gov/pubs/ofwab.pdf as Standard Form 186A. The FWAB can be used by UOCAVA voters to cast a ballot in a general election if they have not received the state absentee ballot they requested. UOCAVA does not require a state to accept the FWAB for a primary or special election.

One very significant change to the FWAB went into effect just days before the November 2, 2004 election. On October 28, 2004, President Bush signed into law the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 ("2005 Authorization Act"), which among other things, amended UOCAVA. Pub. L. No. 108-375 (H.R. 4200). Section 566 of the 2005 Authorization Act amended the definition of "overseas voter" in §1973ff-1 and §1973ff-2 to specify that the FWAB can be used by "absent uniformed services voters and overseas voters." In other words, military personnel, whether located in the United States or abroad, and overseas civilians, can now use the FWAB as a back-up ballot. Prior to this amendment, the FWAB could only be used by *overseas* voters, both civilian and military. The 2005 Authorization Act also amended the deadline for the FWAB to be received by a state.

UOCAVA specifies that the FWAB will not be counted by a state:

> (1) in the case of a ballot submitted by an overseas voter who is not an absent uniformed services voter, if the ballot is submitted from any location in the United States;
> (2) if the application of the absent uniformed services voter or overseas voter for a State absentee ballot is received by the appropriate State election official after the later of
> (A) the deadline of the State for receipt of such application; or
> (B) the date that is 30 days before the general election; or
> (3) if a State absentee ballot of the absent uniformed services voter or overseas voter is received by the appropriate State election official not later than the deadline for receipt of the State absentee ballot under State law.

See 42 U.S.C. §1973ff-2 as amended by Pub. L. No. 108-375, Section 588.

The amendment by the 2005 Authorization Act added part (2)(A), the deadline of the state for receipt of an absentee ballot application. Prior to this amendment, a voter had to get his application to the state at least 30 days before the election to use the FWAB.

Basically, the FWAB is supposed to be used if a voter has requested an absentee ballot, but for some reason, whether it is delayed by mail problems or otherwise, the voter fails to receive the state absentee ballot. Under such circumstances, the voter can complete the FWAB and send it back to state election officials. If he then receives the state absentee ballot in the mail, completes it, and mails it back to state election officials, the state will not count the FWAB if the state ballot gets back before the deadline. If the state ballot is not received by election officials or arrives after the state-imposed deadline for receipt, the state must count the FWAB if it was received before the deadline.

Special rules apply to the completion of the FWAB that were designed to prevent state election officials from not counting ballots because of minor problems in the way the voter completed the write-in ballot. The voter can designate a candidate by writing in the name of the candidate or his political party; for the offices of President and Vice President, a vote for a named candidate or his political party will be considered a vote for the electors supporting the candidate; and any abbreviation, misspelling, or other minor variation in the name of the candidate or political party must be disregarded if the "intention of the voter can be ascertained." 42 U.S.C. §1973ff-2(c).

States can use their own absentee ballot in place of the FWAB if the state ballot is approved by FVAP and is made available at least 60 days before the deadline for receipt of a state ballot. 42 U.S.C. §1973ff-2(e). A state also does not have to permit use of the FWAB (i) if the state has in effect a law that requires absentee ballots to be available to *uniformed services voters* at least 90 days before the general election and (ii) that requires absentee ballots to be available to *other overseas voters* as soon as the official list of candidates in the general election is complete. 42 U.S.C. §1973ff-2(f).

Information on UOCAVA:

UOCAVA requires each state to designate a single office responsible for providing information to UOCAVA voters on voter registration and absentee ballot procedures. 42 U.S.C. §1973ff-1(b)(2). The Help America Vote Act of 2002 amended this section to require states to send the new Election Assistance Commission information on the number of absentee ballots transmitted and returned within 90 days of each general election for federal office. *Id.* at (c). Although FVAP has sporadically collected some of this information in the past, this amendment will for the first time legally require

information on the actual number of absentee ballots cast by UOCAVA voters in each state to be provided to the federal government. The initial reports will be filed after the November 2, 2004 election.

Enforcement of UOCAVA

Violations of UOCAVA:

The Department of Justice has filed more than 20 enforcement actions against state election officials pursuant to UOCAVA starting in 1988 and continuing through 2004, and filed numerous suits prior to 1988 under the predecessor statutes to UOCAVA. Information about those suits is available at www.usdoj.gov/crt/voting/misc/activ_uoc.htm. Generally, these suits were filed when absentee ballots were mailed out so late by state and local officials that there was a substantial risk that many overseas voters would not receive the ballots in time to be able to complete and return them to the state by the deadline for receipt established by state law.

UOCAVA does not specify the exact number of days prior to the election that requested absentee ballots must be mailed out by state election officials. However, UOCAVA does require that states permit absent uniformed service voters and overseas voters to use absentee ballots to vote in elections. As a result, the Department has successfully argued that this requirement imposes a duty on states to mail absentee ballots to voters early enough before an election so that the ballots have sufficient time to travel overseas, provide a reasonable amount of time for the voters to review and complete the ballots, and then mail them back to the United States, taking into account average overseas mail transit time as established by military and U.S. Postal Service experts.

The mail transit delays experienced by overseas voters has not changed in the almost 20 years since UOCAVA was passed. At that time, Congress reported:

> Mail delivery is a problem for overseas voters. Members of the military may be in locations where mail service is sporadic, or they may be away for days or weeks at a time on temporary duty or on maneuvers. Among civilians overseas, missionaries and Peace Corps Volunteers in particular often work in remote areas where mail delivery is slow. Citizens working on oil rigs or on remote construction sites regularly encounter mail delays.

H.R. Rep. No. 765, 99th Cong., 2d Sess. 10-11 (1986).

Congress also found that "[b]ased on surveys of the U.S. Postal Service and of military postal authorities, ballots should be mailed to overseas addresses *at least* 45 days prior to an election in order to ensure adequate time for a ballot to reach a voter and be returned." *Id*. The 45-day transit time was emphasized again recently by the United States Election Assistance Commission ("EAC") in a report it released in September, 2004 on the best practices for facilitating voting by overseas citizens covered by UOCAVA. The EAC's first recommendation in the Executive Summary is that States should "[m]ail absentee ballots at least 45 days prior to the deadline for receipt of voted absentee ballots." Report of the U.S. Election Assistance Commission, *Best Practices for Facilitating Voting by U.S. Citizens Covered by the Uniformed and Overseas Citizens Absentee Voting Act* (2004). *See* http://www.eac.gov/fvap.asp?format=none.

Special rules for overseas voters are particularly important given that many overseas voters are members of the armed forces, based in the war zones of Iraq and Afghanistan where mail delays are all too common. A report released by the General Accounting Office cited the wartime standard of 12 to 18 days for one-way mail delivery to Iraq and found that the average transit times for letters and parcels into the theater was between 11 and 14 days, although "the method used to calculate these averages consistently masks the actual times by using weighted averages that result in a significant understating of transit times." *Operation Iraqi Freedom: Long-standing Problems Hampering Mail Delivery Need to Be Resolved*, GAO-04-484 (April 2004), at page 2.

Constitutionality of UOCAVA:

Courts have rejected constitutional challenges to UOCAVA. States are not precluded from treating voters covered by UOCAVA differently than other voters. *See Igartua De La Rosa* v. *United States*, 32 F.3d 8 (1st Cir. 1994), *cert. denied*, 514 U.S. 1049 (1995). In *Igartua*, residents of Puerto Rico brought an action alleging that UOCAVA violated their equal protection rights because it permitted United States citizens residing outside the United States to vote by absentee ballot in presidential elections, but did not permit United States citizens residing in Puerto Rico to do so. The First Circuit dismissed this challenge, holding that UOCAVA merely drew a distinction between citizens living abroad and citizens who move anywhere within the United States. *Id.* at 10. The court further reasoned that this distinction neither affected a suspect class nor infringed a fundamental right, noting that although the distinction between the classes "affects the right to vote, [UOCAVA] does not *infringe* that right but rather limits a state's ability to restrict it." *Id.* at 10 n.2 (emphasis added). As such, the court reasoned that the distinction need only be supported by a rational basis. *Id.* at 10.

Similarly, the Second Circuit has also held that UOCAVA's distinctions between citizens residing abroad and citizens residing within the United States and its territories is not subject to strict scrutiny. See *Romeu v. Cohen*, 265 F.3d 118 (2d Cir. 2001) (holding that Congress acted in accordance with the Equal Protection Clause in requiring States and territories to extend voting rights in federal elections to former resident citizens residing outside the United States, but not to former resident citizens residing in either a State or territory of the United States).

The Supreme Court has also upheld absentee voting statutes that were "designed to make voting more available

to some groups who cannot easily get to the polls," without making voting more available to all such groups, on grounds that legislatures most often approach identified problems gradually. *McDonald* v. *Board of Election Comm'rs*, 394 U.S. 802, 807 (1969). Thus, a "statute is not invalid under the Constitution because it might have gone farther than it did." *Katzenbach* v. *Morgan*, 384 U.S. 641, 657 (1966) (internal quotation marks omitted). Indeed, the Supreme Court has expressly recognized that "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 489 (1955).

2000 and 2004 General Elections:

UOCAVA and its provisions were in the national spotlight after the 2000 presidential election. In *Harris* v. *Florida Elections Canvassing Comm'n*, 122 F. Supp. 2d 1317, 1323 (N.D. Fla. 2000), *aff'd* 235 F.3d 578 (11th Cir. 2000), *cert. denied*, 531 U.S. 1062 (2001), the plaintiffs attempted to overturn a Florida administrative rule that provided overseas voters with a ten-day extension after the election to return their absentee ballots. *See also Bush v Hillsborough County Canvassing Board*, 123 F.Supp.2d. 1305 (N.D. Fla. 2000). Florida's administrative rule had been promulgated to settle an enforcement action filed by the United States in 1980 against Florida under the predecessor statutes to UOCAVA. Florida was not sending out absentee ballots until at most 20 days before the election and in some cases only several days before the election. *Harris* at 1321.

In the enforcement action, the district court issued a TRO, "recognizing the late mailing out of the ballots and directing that overseas absentee ballots for the federal elections of November 6, 1980 should be received and counted if they were received within 10 days of election day." *Id.* at 1321-1322. In 1982, due to continuing problems, Florida entered into a consent decree with the United States that included requiring Florida to submit a plan of compliance. After the Florida legislature failed to comply with the plan by passing necessary legislation, the district court issued a series of orders that finally resulted in Florida issuing an administrative rule that required absentee ballots for UOCAVA voters to be mailed out 35 days prior to the election and provided a 10-day extension of time after the election for their receipt. *Id.* at 1322-23. Florida's administrative rule was upheld in *Harris* and a Florida statute requiring receipt of absentee ballots by election day was held to conflict with the federal statutes guaranteeing armed services members' right to vote.

After the 2004 Presidential election, Florida's absentee ballot extension for UOCAVA voters was again attacked, this time by the ACLU, claiming that not giving the same 10-day extension to all other absentee voters violated the Civil Rights Act of 1957, 42 U.S.C. §1971(a)(2)(B), as well as the Equal Protection Clause of the 14th Amendment. The ACLU's motion for a preliminary injunction was denied after the court found no violation of the law and the case was subsequently dismissed. *Friedman v Snipes*, Case No. 04-22787 (S.D. Fla. November 9, 2004).

UOCAVA and New Technology – Electronic Transmission:

In 2004, the Department of Justice filed two enforcement actions in Pennsylvania and Georgia prior to each State's federal primary due to late mailing of absentee ballots by local election officials. In both cases, district courts ordered extensions of time as well as other remedies such as the States paying for voters' use of expedited mail delivery services to send back absentee ballots. See *United States* v. *Georgia*, Case No. 1:04-CV-2040 (N.D. Ga. July 15, 2004) (obtaining a 3-day extension of time in Georgia for the primary and primary runoff election for all federal ballots cast by UOCAVA voters); *United States* v. *Pennsylvania*, C.A. No. 1:CV-04-830 (M.D. Penn. April 16, 2004) (obtaining a 21-day extension of time in Pennsylvania for the primary election for all federal ballots cast by UOCAVA voters).[1] In the Georgia case, the Department also obtained a remedy it had never obtained before – the district court gave the State the authority to send requested ballots to UOCAVA voters by facsimile and email and to accept the returned and completed ballots by facsimile machine. *Slip Op.* at 6. FVAP has had an electronic transmission service for a number of years that allows both voters and state and local election officials to send election materials by facsimile, such as a request for registration or a ballot, a blank ballot sent to the voter by the election official, or a voted ballot returned to the local election official. Information on this service is available at www.fvap.gov/services/faxing.html.

State laws on facsimile and email transmission of election materials vary widely. All states allow voters to fax absentee ballot request forms to election officials; over half the states allow election officials to fax ballots to voters; and about half the states allow voters to fax completed ballots to election officials, although many of these statutes have certain conditions and requirements that apply. However, only a small handful of states allow election officials to email ballots to voters and only three allow a voter to email a completed ballot to election officials (Missouri, Montana, and North Carolina). See Mo. Rev. Stat. 115.279(1); 115.291(2),(3); Mont. Code Ann. 13-21-207, Mont. Admin. R. 44.3.1403; and N.C. Gen. Stat. 163-257, as amended by N.C. Legis. 2004-127, 8 N.C. Admin. Code 12.0101-12.0111. Facsimiles and emails present a marked improvement in delivery of ballot materials over regular mail because of their instantaneous transmission, but also present different security and possible integrity problems.

In 2001, FVAP was authorized by another defense authorization bill to implement an electronic voting system for UOCAVA voters and originally planned to have the system (SERVE - the Secure Electronic Registration & Voting Experiment) in place for the 2004 election. *See* Pub. L. No. 107-107, Div. A, Title XVI, §1601 (Dec. 28, 2001), 115 Stat. 1274. However, after undergoing extensive development, the project was cancelled after a number of computer scientists raised questions regarding its security. SERVE would have allowed voters to register to vote and cast a ballot electronically over the Internet. *See "Pentagon Decides Against Internet Voting This Year,"* American Forces Press Service, February 6, 2004, at www.defense.gov/news/Feb2004/n02062004200402063.html. This electronic voting project has been postponed

until "the first regularly scheduled general election for Federal office which occurs after the Election Assistance Commission notifies the Secretary that the Commission has established electronic absentee voting guidelines and certifies that it will assist the Secretary in carrying out the project." 2005 Authorization Act, Section 567.

Conclusion

There is no question that American military personnel and other overseas citizens can face significant problems in trying to exercise their right to vote. The inherent problems in overseas mail delivery and associated delays are often difficult to overcome. UOCAVA does provide protections for such voters but it is not a panacea. There are many steps that state and local election officials can take to make this process easier and more efficient. It is up to state legislators and election administrators to ensure that the absentee voting process is made as efficient as possible for all such voters.

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[1]It is important to remember that UOCAVA only applies to federal elections. It does not apply to local or state elections. In some instances, however, when faced with a federal enforcement action because of a failure to properly send out absentee ballots to voters, States will move to extend the same remedies ordered or agreed to for UOCAVA voters on the federal portion of a ballot to the state portion of the ballot. In both of the enforcement actions filed in Pennsylvania and Georgia, the States moved to obtain orders protecting voters casting their ballots for state offices after they were ordered to provide such remedies for ballots cast for federal offices. *See Larios v Cox*, Civil No. 1:03-CV-693-CAP (N.D. Ga. July 15, 2004) and *Pennsylvania v. Board of Elections of Allegheny County*, Action No. 300-MD-2004 (Pa. Commw. Ct. April 21, 2004).

INTELLECTUAL PROPERTY

STATE SOVEREIGN IMMUNITY FOR PATENT INFRINGEMENT CLAIMS, FIVE YEARS AFTER *FLORIDA PREPAID*

*BY MICHAEL K. FRIEDLAND AND LAUREN J. KELLER**

In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[1] the Supreme Court held that the states are immune under the Eleventh Amendment from patent infringement lawsuits in federal court. The Supreme Court reached this decision despite the fact that Congress passed legislation expressly abrogating the states' immunity, despite the fact that the states (mostly through their universities) regularly obtain and enforce patents, and despite the fact that, unable to sue in federal court, patent owners would have no choice but to seek damages through unknown, uncertain, and potentially inconsistent procedures established by the states themselves.

While the Supreme Court acknowledged these equitable and practical concerns, the Court focused on a central and undisputed factual circumstance: the states are rarely accused of infringing patents. In the absence of a pattern of violation by the states, the Court found that abrogation of sovereign immunity was unjustified.

There was no shortage of critics. The Supreme Court's decision was called, among other things, bizarre,[2] unfair, and intolerable,[3] and would lead to the erosion of intellectual property rights.[4] In the time since, legislators have introduced bills to deprive the states of the immunity confirmed in *Florida Prepaid*. The bills have not advanced, and the states still obtain their patents, still enforce them, and still enjoy sovereign immunity.

Five years after *Florida Prepaid*, the decision does not seem all that bizarre, unfair, or intolerable. Patent rights do not appear to have eroded. The states still may be enjoined from committing acts of infringement pursuant to *Ex parte Young*.[5] And proposed remedial legislation, although drafted to avoid the Eleventh Amendment, does not appear to be needed.

From the Eleventh Amendment to *Florida Prepaid*

For approximately two centuries, the federal patent laws and the Eleventh Amendment[6] coexisted peacefully. Although it is difficult to determine conclusively how many suits were brought against the states for patent infringement, the Federal Circuit in its opinion in *Florida Prepaid* could identify only *eight* such cases from 1880 and 1990.[7]

In light of the infrequency of allegations of patent infringement against the states, it is not surprising that the issue did not first arrive at the Federal Circuit until 1990. There, in *Chew v. State of California,*[8] the Federal Circuit held that the Eleventh Amendment granted the states immunity from suit for patent infringement. The Federal Circuit rejected arguments that in enacting successive patent acts, Congress had abrogated the states' immunity from suits for patent infringement. For a statute to abrogate the states' Eleventh Amendment immunity, "Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself."[9] Because Congress had not included in any patent statute a statement expressing its intent to abrogate sovereign immunity from patent infringement suits, the states continued to enjoy immunity from them.

The Patent and Plant Variety Protection Remedy Act

Congress responded to *Chew* by enacting the Patent and Plant Variety Protection Remedy Clarification Act (the "Patent Remedy Act").[10] In the Patent Remedy Act, Congress explicitly articulated its intent to abrogate the states' Eleventh Amendment immunity. The Patent Remedy Act stated:

> Any state, any instrumentality of a State, and any officer or employee of a State or instrumentality of State acting in his official capacity, shall not be immune under the eleventh amendment of the Constitution of the United States or under any other doctrine of sovereign immunity, from suit in Federal court by any person . . . for infringement of a patent. . . .[11]

The Patent Remedy Act reached the Supreme Court in *Florida Prepaid,* and the Supreme Court found that the act was invalid.

In accordance with the Federal Circuit's opinion in *Chew*, Congress expressed unambiguously its intent to abrogate the states' Eleventh Amendment immunity. In addition, Congress attempted to justify the Patent Remedy Act under three sources of constitutional authority: the Patent Clause, the Interstate Commerce Clause, and the Fourteenth Amendment's protection against deprivation of property without due process of law.[12]

Prior to its decision in *Florida Prepaid*, the Supreme Court had made it clear that Congress did not have authority to abrogate the states' sovereign immunity pursuant to its powers under Article I.[13] Because Congress' powers under both the Patent Clause and the Interstate Commerce Clause arise under Article I, neither could provide Congress with authority to enact the Patent Remedy Act. Thus, the Patent Remedy Act could only be justified, if at all, as an exercise of Congress' powers under the Fourteenth Amendment.[14]

The argument in favor of abrogation was straightforward. Section 5 of the Fourteenth Amendment grants Congress power to abrogate the states' sovereign immunity where

necessary to enforce constitutional rights guaranteed by the Fourteenth Amendment.[15] The Fourteenth Amendment protects property rights. Patents are property rights. Therefore, Congress has the power to abrogate the states' Eleventh Amendment immunity to patent infringement claims.

Florida Prepaid

The Supreme Court rejected this argument. Congress' Fourteenth Amendment power to abrogate Eleventh Amendment immunity, the Court held, is limited. Although Congress has the power to abrogate, Congress can only exercise that power where a constitutional violation is sufficiently widespread that abrogation is necessary. As the Supreme Court stated, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[16]

The Supreme Court did not find such congruence and proportionality between the threat of patent infringement by the states and Patent Remedy Act.

> [W]e must first identify the Fourteenth Amendment "evil" or "wrong" that Congress intended to remedy, guided by the principle that the propriety of any § 5 legislation "must be judged with reference to the historical experience . . it reflects." The underlying conduct at issue here is state infringement of patents and the use of sovereign immunity to deny patent owners compensation for the invasion of their patent rights. . . . It is this conduct then—unremedied patent infringement by the States—that must give rise to the Fourteenth Amendment violation that Congress sought to redress in the Patent Remedy Act.
>
> In enacting the Patent Remedy Act, however, Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations.[17]

Instead, the Supreme Court noted, Congress heard testimony focusing more on the unfairness of sovereign immunity. The Supreme Court noted that testimony of one Congressional witness stating that, "the rights of a patent owner should not be dependent upon the identity of the entity who is infringing, whether it be a private individual, or corporation, or State."[18] Accordingly, "as a general philosophical matter," Congress should abrogate sovereign immunity.[19]

The Supreme Court also suggested that even widespread patent infringement might not necessarily justify abrogation, because unintentional infringement by a state would not constitute a Constitutional violation. To violate the Constitution, a state would have to infringe a patent intentionally or recklessly,[20] and provide no remedy or only an inadequate remedy.

> [A] State's infringement of a patent, though interfering with a patent owner's right to exclude others, does not by itself violate the Constitution. Instead only where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent could a deprivation of property without due process result.[21]

The states could provide their own remedies based on tort and other state law causes of action. As the Supreme Court observed, proponents of the Patent Remedy Act did not contend that the states provided no remedies or only inadequate remedies. Instead, the proponents really argued only that the states provided inconvenient or inconsistent remedies.

> The primary point made by [the witnesses who testified before Congress] . . . was not that state remedies were constitutionally inadequate, but rather that they were less convenient than federal remedies, and might undermine the uniformity of patent law.[22]

In light of this record, the Supreme Court concluded that "the provisions of the Patent Remedy Act are so out of proportion to a supposed remedial or preventive object that they cannot be understood as responsive to or designed to prevent, unconstitutional behavior."[23]

Foreclosing another avenue of argument, the Supreme Court in *College Savings v. Florida Prepaid* stated that the states do not "constructively" waive their sovereign immunity by accepting the benefits of the federal intellectual property system.[24] Accordingly, in *Xechem International v. University of Texas*, the Federal Circuit declined to find a waiver of sovereign immunity based on a state applying for a patent, accepting a grant of a patent, entering into a collaborative research agreement, or contracting to license a patent.[25] Thus, perhaps the only means by which a state can constructively waive sovereign immunity is by asserting its own patents in a lawsuit. Even then, the constructive waiver is limited to counterclaims arising from the same transactions or occurrences giving rise to the state's claims.[26]

A General Philosophical Problem

Although patent rights have not eroded, the "general philosophical" arguments against sovereign immunity still have some intellectual appeal. Five years later, it still appears at least incongruous, if not completely unjust, that the states, entities that take great advantage of the patent system, would receive any immunity at all from liability under that system. In 2001, the General Accounting Office prepared a comprehensive study on sovereign immunity and patent infringement by the states.[27] The GAO found that the states and their instrumentalities owned 11,826 unexpired patents as of the end of 1999.[28]

In addition, it is still entirely unclear that any state has provided an effective procedure for addressing its own acts of patent infringement. Among other things, the GAO surveyed state attorneys general and bar associations to determine whether the states offered a procedure (such as state law cause of action) that could provide a remedy for infringement of patents. Of the 36 attorneys general who responded, 13 believed that claims for patent infringement might be viable. These attorneys general stated that patent infringement claims might be brought before state courts or claims boards under such varied theories as taking, reverse eminent domain, tort, contract, unfair competition, or trespass to chattel.[29] Of the 21 bar associations that responded, 17 believed that their states might provide remedies for patent infringement.[30] The bar associations identified the same causes of action as the attorneys general. In addition, the bar associations identified trade secret misappropriation and criminal law as bases for state liability.[31] Manifestly, even if each state did provide its own procedure for compensating patent owners (which is far from clear), the multitude of procedures would undermine the national uniformity of patent laws, a primary purpose of Article I, section 8 of the Constitution.[32]

In light of these arguments, it is tempting to devise a legislative solution to overrule *Florida Prepaid*. Although *Florida Prepaid* held that Congress failed to abrogate the states' Eleventh Amendment immunity through the Patent Remedy Act, the Supreme Court's standard articulated in *Florida Prepaid* hardly creates an insurmountable barrier to abrogation. Indeed, one bill, the Intellectual Property Restoration Act of 2003 (the "IP Restoration Act"),[33] appears to provide a means to abrogate the states' Eleventh Amendment immunity. Whereas in the Patent Remedy Act, Congress sought to strip the states of their immunity, the IP Restoration Act would require the states to expressly waive their immunity voluntarily, as a condition for enforcing their patents in federal court. The bill states:

> No remedies under [the Patent Act] shall be awarded in any civil action brought under this title for infringement of a patent issued on or after January 1, 2004, if a State or State instrumentality is or was at any time the legal or beneficial owner of such patent, except upon proof that—
> (A) on or before the date the infringement commenced or January 1, 2006, whichever is later, the State has waived its immunity, under the eleventh amendment of the United States Constitution and under any other doctrine of sovereign immunity, from suit in Federal court brought against the State or any of its instrumentalities, for any infringement of intellectual property protected under Federal law. . . .[34]

An Unnecessary Solution

Although the IP Restoration Act appears to avoid the pitfalls that doomed the Patent Remedy Act, and the objections to sovereign immunity retain their intellectual appeal, there remains the question of whether there is any need to overrule *Florida Prepaid.*

Proponents of the IP Restoration Act argue that *Florida Prepaid* is unfair; if states want to enforce patents, they should not be immune from patent infringement lawsuits. As one senator put it,

> [i]f we truly believe in fairness, we cannot tolerate a situation in which some participants in the intellectual property system get legal protection but need not adhere to the law themselves. If we truly believe in the free market, we cannot tolerate a situation where one class of market participants have to play by the rules and others do not.[35]

As previously mentioned, however, the Federal Circuit was able to identify only eight instances in which patent infringement cases were brought against the states and their instrumentalities from 1880 and 1990. In its report, the GAO found that states were named as defendants in eight federal and four state patent infringement lawsuits from 1985 to 2000.[36] Although the GAO's analysis suggests a higher rate of accusations of patent infringement against the states than the Federal Circuit's analysis, the total of 12 such suits is still an exceedingly low 0.04 percent of the total 25,521 patent cases filed in federal court in the same time period.[37] Thus, it does not appear that "one class of market participants have to play by the rules" while the states "do not."

This should be unsurprising because of the fact that the states are not really "market participants" at all. Corporations that prolifically create intellectual property are also frequently accused of infringing the intellectual property rights of others. This is because corporations that devote extensive resources to research and development also ordinarily engage in extensive commercialization of technology—they make, use, sell, offer for sale, or import devices that incorporate patented technology. The states, however, are typically one-dimensional participants in the intellectual property market. Through their universities, the states create intellectual property. They enforce and license the patent rights they receive, but they rarely, if ever, manufacture or sell anything other than vehicle license plates and lottery tickets.

Any concern that the states will be emboldened by *Florida Prepaid* to take commercial advantage of their immunity is disproved by the five years of experience since the Supreme Court's decision and is contrary to logic. There has been no rush by states to infringe others' patent rights. This is no doubt due in part because there is no political interest on the part of the states to become commercial enterprises, and in part because, even if the states were inclined to exploit their immunity, they realize that their immunity is limited by *Ex parte Young*. Although *Ex parte Young* does not permit recovery of damages, it still allows a patent owner to obtain an effective injunction, which is surely enough to discourage a state from making an investment to produce infringing devices or even to import infringing prescription drugs.

Under these circumstances, it is difficult to understand the hostility to the Supreme Court's decision in *Florida Prepaid* or the necessity for legislation overruling it. At most, *Florida Prepaid* created a "general philosophical" problem. Such a problem does not require a legislative solution.

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Footnotes

[1] 527 U.S. 627, 119 S. Ct. 2199, 144 L. Ed. 2d 575 (1999).

[2] Charles Fried, *Supreme Court Folly*, N.Y. TIMES, July 6, 1999.

[3] Senator Patrick Leahy, *Hearing on the Intellectual Property Restoration Act of 2003* (June 17, 2003).

[4] R. Bruce Josten, Executive Vice President, U.S. Chamber of Commerce, *Subcommittee on Courts, the Internet and Intellectual Property of the Committee on the Judiciary on H.R. 2344, the Intellectual Property Restoration Act of 2003*.

[5] 209 U.S. 123 (1908).

[6] "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const., 11th Amend.

[7] *Florida Prepaid*, 527 U.S. at 640.

[8] Chew v. State of California, 893 F.2d 331 (Fed. Cir. 1990).

[9] *Id.*

[10] 35 U.S.C. §§ 271(h), 296(a).

[11] 35 U.S.C. § 296(a).

[12] *Id.*

[13] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 116 S.Ct. 1114 (1996).

[14] Because Congress did not invoke the Fifth Amendment, the Supreme Court believed it was "precluded" from considering other possible bases, such as the Just Compensation Clause, as grounds for the Patent Remedy Act. *Florida Prepaid*, 527 U.S. at 642.

[15] The Fourteenth Amendment provides,

> Section 1 . . . . No state shall . . . deprive any person of life, liberty, or property, without due process of law.. . .
>
> Section 5. The Congress shall have to power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. Fourteenth Amend.

[16] *Florida Prepaid,* 527 U.S. at 639.

[17] *Id*. at 640 (citations omitted).

[18] *Id.* at 641, n.6 (quoting Jeffrey M. Samuels, Acting Commissioner of Patents and Trademarks).

[19] *Id*.

[20] A "state actor's negligent act that causes unintended injury to a person's property does not 'deprive' that person of property within the meaning of the Due Process Clause." *Id.* at 644.

[21] *Id.* at 643.

[22] *Id.* at 644.

[23] *Id*.

[24] College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 527 U.S. 666, 684, 144 L. Ed. 2d 605, 119 S. Ct. 2219 (1999). *College Savings* was the companion case to *Florida Prepaid* and related to a Lanham Act claim against the state.

[25] Xechem Int'l., Inc. v. Univ. of Texas M.D. Anderson Cancer Center, 382 F.3d 1324, 1331 (Fed. Cir. 2004).

[26] Regents of the University of New Mexico v. Knight, 321 F.3d 1111, 1126 (Fed. Cir. 2003).

[27] U.S. General Accounting Office, *Report to Hon. Orrin Hatch, Senate Committee on the Judiciary, Intellectual Property: State Immunity in Infringement Actions* (September 2001).

[28] *Id.* at 43.

[29] *Id.* at 20.

[30] *Id*.

[31] *Id*.

[32] Of course, inherent in the doctrine of sovereign immunity is that each sovereign will determine for itself the manner in which it compensates its citizens for loss. *See* Alexander Hamilton, Federalist No. 81 (the states enjoy "the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith.")

[33] S. 1991, 108th Congress (2003).

[34] *Id.*, § 3.

[35] Senator Patrick Leahy, *Hearing on the Intellectual Property Restoration Act of 2003* (June 17, 2003).

[36] *Report to Hon. Orrin Hatch,* at 66.

[37] *Id.* at 68.

Intellectual Property and "Cheap Exclusion"

*By John T. Delacourt**

The transition in the Federal Trade Commission's leadership from Chairman Timothy Muris to Chairman Deborah Platt Majoras has, naturally, raised questions within the Bar regarding the agency's enforcement priorities. One intriguing answer to such questions was recently unveiled at the FTC's 90th Anniversary Symposium. During that program, the Director of the Bureau of Competition – the agency's antitrust enforcement arm – indicated that Commission staff would be taking a harder look at commercial and regulatory environments that may lend themselves to "cheap exclusion" strategies.[1] In other words, rather than applying an identical level of scrutiny to *all* potential competitive threats, the agency would devote more of its investigatory resources to those situations in which anticompetitive conduct is most likely to occur. Such "cheap exclusion" scenarios tend to arise in environments in which firms can effectively exclude rivals at low cost often, though not always, through manipulation of governmental processes.[2] This development is likely to be of particular interest to intellectual property practitioners as, to date, many of the Commission's most high profile "cheap exclusion" cases have focused on anticompetitive efforts to extend the scope or duration of intellectual property rights.

I. "Cheap Exclusion" Defined

One way to define a term is by first identifying what it is *not*. "Cheap exclusion" is, logically, the opposite of "expensive exclusion" – an approach which is perhaps best exemplified by the strategy of predatory pricing. Under traditional predatory pricing theory, a firm sells at a price below some measure of cost in order to drive its competitors out of business. Once its competitors have been driven from the marketplace, the predatory pricer recoups its losses by selling at a monopoly price which, presumably, it can maintain into the foreseeable future.[3]

Predatory pricing constitutes an "expensive collusion" strategy for a number of reasons. First, during the initial phase, the predatory pricer must forego profits and actually lose money on every sale. Second, the firm may have to price below cost for a substantial period of time before forcing its rivals from the market. Third, and most importantly, a predatory pricer's ability to recoup its losses is highly speculative. Despite the substantial expense of pricing its products below cost, it may not succeed in driving its rivals from the market. Furthermore, even if it does, new entrants may prevent the firm from maintaining a monopoly price long enough to recover its investment.

Rather than devoting a substantial portion of its scarce enforcement resources to such unlikely, and economically irrational, scenarios,[4] the Bureau of Competition has indicated that it will place greater emphasis on "cheap exclusion" scenarios. A "cheap exclusion" strategy is both more feasible and more rational than a long term, high risk approach like predatory pricing. As a result, it is also likely to be a great deal more common.

In practical terms, the Bureau's focus on "cheap exclusion" scenarios will entail devoting greater scrutiny to situations in which the alleged anticompetitive restraint, or practice, through which the exclusionary scheme is carried out satisfies three criteria:

1. *The restraint is cheap*. The restraint must be inexpensive for the defendant to maintain, in the sense that the cost of imposing or triggering the restraint is asymmetrical (*i.e.*, it is less expensive for the defendant to enact the restraint than it is for competing firms to challenge or remove it).

2. *The restraint is effective*. The restraint must successfully serve its anticompetitive end, in that it confers, or is likely to confer, durable market power on the defendant.[5]

3. *The restraint is inefficient*. The restraint must clearly result in consumer harm, in the sense that it does not advance any particular regulatory objective. In contrast, governmental restraints that impair competition, but in doing so advance a *bona fide* regulatory objective, are not a proper focus of antitrust enforcement, and are frequently shielded by specific antitrust exemptions.[6]

II. Common Cheap Exclusion Scenarios

Recent FTC experience suggests that "cheap exclusion" strategies may be most common where firms discover a weakness, or flaw, in an industry-wide regulatory scheme. Whether the result of initial poor drafting, a clever legal or business strategy, or unforeseen changes in the competitive landscape, such regulatory loopholes may confer substantial commercial advantage on firms willing to exploit them. Manipulation, or "gaming," of a regulatory scheme may enable a firm to achieve results it could not achieve through competition on the merits, and at substantially lower cost.

The strategic use of public, or governmental, restraints is superior to a purely private anticompetitive scheme in at least two respects, both of which are likely to make public restraints a more attractive alternative to firms intent on pursuing a "cheap exclusion" strategy. First, the cost of enforcing the restraint is borne by the government, rather than the triggering firm. This ensures that the exclusionary strategy satisfies the first criteria: it is cheap. Second, governmental enforcement of the restraint is likely to be far more effective than private enforcement. For starters, a governmental restraint can be open and notorious.[7] In contrast to private restraints, which must be maintained in secret to avoid antitrust prosecution, governmental restraints are often shielded by some applicable antitrust exemption, such as the *Noerr-Pennington* doctrine.[8] Furthermore, the government is likely to have far greater enforcement resources. As a result, the government will have a greater ability to police and, where necessary, discipline the type of cheating that frequently undermines private restraints of trade, and ultimately prevents them from delivering durable market power.[9]

The temptation to "game" a specific governmental process may be particularly strong where the process involves the application or enforcement of intellectual property rights. Although the U.S. antitrust enforcement agencies have acknowledged that intellectual property rights are comparable to other property rights,[10] and that mere possession of IP rights does not create a presumption of market power,[11] it is also clear that, in many instances, the possession of IP rights confers a competitively significant right to exclude. A patent, for example, confers the right to prohibit rival firms from making, using, or selling the claimed invention in the United States for a period of twenty years.[12] Thus, even while acknowledging that most business conduct with respect to patents is procompetitive, the federal courts have recognized that certain practices – such as extending royalty payments beyond a patent's expiration date[13] and tying the purchase of patented product to the purchase of an unpatented product[14] – raise heightened antitrust concerns. While thankfully shorter than in days past, this list of "red flag" practices continues to serve as a reminder that intellectual property is competitively sensitive, and may have a greater impact on the marketplace than other types of property.

In addition to the fact that "gaming" a governmental process affecting IP rights may confer a particularly valuable competitive advantage, the likelihood that a firm will pursue a "cheap exclusion" strategy in this context is heightened by the sheer number of opportunities. For better or worse, the process of obtaining, exploiting, and protecting IP rights is suffused with government involvement at almost every level. The process of obtaining a patent, for example, involves extensive interaction with the U.S. Patent and Trademark Office. Not surprisingly, allegations that patent applicants have attempted to subvert this process for anticompetitive ends – whether through inequitable conduct[15] or outright fraud[16] – have been a substantial source of litigation. Those familiar with patent prosecution proceedings, however, will recognize that they are sufficiently time-consuming and costly that efforts to manipulate this particularly process can hardly be characterized as "cheap" exclusion. Interestingly, the same cannot be said for a growing number of peripheral governmental processes bearing on the application and enforcement of IP rights. As recent FTC experience has shown, these proceedings – which include both IP-centered regulatory approvals and government-sponsored standard setting proceedings – may be among the most fertile terrain for "cheap exclusion" strategies identified to date.

III. Recent FTC Cases Involving IP and Cheap Exclusion

Two IP-related Commission enforcement matters are particularly illustrative of this point. The first is the Commission's case against Bristol Myers Squibb, which involved allegations that the company had "gamed" the Food and Drug Administration's approval process for the marketing and sale of generic drugs. Pursuant to the Hatch-Waxman Act,[17] and related FDA regulations,[18] a pioneer drug company that files a New Drug Application ("NDA") is obligated to list any patent that claims the drug in an administrative publication known as the Orange Book. Listing a patent in the Orange Book entitles the pioneer company to certain procedural rights, the most competitively-sensitive of which is the right to trigger an automatic 30-month stay of FDA approval of a potential generic competitor's Abbreviated New Drug Application ("ANDA") by filing a lawsuit alleging that the generic product that is the subject of the ANDA infringes a listed patent.[19] Without FDA approval of its ANDA, the would-be generic competitor cannot enter the market, thereby shielding the pioneer company from potentially significant price competition.

The Commission's complaint against Bristol Myers asserted, among other allegations, that the company had "gamed" the FDA's process by listing patents in the Orange Book that did not satisfy the statutory listing criteria.[20] This strategy was facilitated by the FDA's express policy of receiving and processing Orange Book filings on a ministerial basis, accepting the claims made therein at face value, rather than conducting an independent determination of whether the proferred patents did, in fact, claim the drug product described in the NDA.[21] As a result, by making a relatively small investment in fraudulent Orange Book filings, as well as the related infringement litigation necessary to trigger the automatic stay of its competitor's ANDA, Bristol Myers was able to effectively block generic competition for a period of two and a half years. In order to resolve these allegations, the Commission and Bristol Myers entered into a consent order which, among other restrictions, bars the company from seeking to obtain a 30-month stay when its conduct during the Orange Book listing processes has involved certain objectionable practices.[22]

The second, and more recent, matter demonstrating the intersection of intellectual property and "cheap exclusion" is the Commission's ongoing case against Unocal. Unlike the *Bristol Myers* case, which involved IP-centered regulatory approvals, the *Unocal* case involves allegations that the company engaged in "gaming" of a government-sponsored standard setting proceeding. The object of the proceeding in question, before the California Air Resources Board ("CARB"), was to develop and adopt a common formula for the production of cleaner-burning, low-emissions "summer- time" gasoline.[23] According to the Commission's complaint, all participants in the CARB proceeding understood that the resulting regulations would require gasoline producers to make substantial capital investments to reconfigure their refineries.[24] In other words, once a particular formula was adopted, and the resulting capital investments were made, the CARB fuel standard would likely be locked-in for a substantial period of time.

The Commission's complaint alleges that Unocal "gamed" the CARB proceeding by making intentional misrepresentations regarding the nature of it patent rights. Specifically, the complaint alleges that Unocal represented that key results of its emissions research were non-proprietary or in the public domain, and that incorporation of these results into the CARB standard would be "cost effective" and "flexible," while failing to mention that these results were covered by pending patent claims.[25] However, once the CARB standard had been adopted, and industry-wide lock-in had taken place, Unocal engaged in an aggressive campaign of patent

enforcement, and sought to exact supra-competitive royalties.[26] As a result of this relatively low cost "patent ambush" strategy, the complaint estimates that the company was able to reap more than $500 million annually, almost ninety percent of which would be passed on to consumers at the gas pump.[27] The *Unocal* trial was completed on January 28, 2005, and a decision from the Administrative Law Judge remains pending.

IV. Strategies for Combating "Cheap Exclusion"

In addition to bringing cases to address the "cheap exclusion" strategies of specific firms in the intellectual property context, the Commission has undertaken longer term, more systematic efforts to address the root causes of the problem. The Commission's recent experience suggests that certain factors may make a particular commercial or regulatory environment more susceptible to "cheap exclusion" strategies. Having preliminarily identified at least a few of these factors, the Commission is currently taking three principal steps to minimize their impact.

First, the Commission has sought, through the work of two task forces, to clarify the scope of antitrust exemptions. The State Action Task Force, for example, is examining whether overly broad interpretations of the state action exemption, which weaken such key limitations on the doctrine as whether the proponent of the exemption must demonstrate conformity with a "clearly articulated" state policy and "active supervision" by the state, may unwittingly shield anticompetitive efforts to manipulate state regulatory processes. In late 2003, the task force issued a detailed report,[28] including specific recommendations for clarifications of the doctrine, which it has sought to implement through a series of recent cases against the South Carolina State Board of Dentistry,[29] the Virginia Board of Funeral Directors and Embalmers,[30] and the Kentucky Household Goods Carriers Association.[31] Likewise, the *Noerr-Pennington* Task Force has sought to address concerns that the exemption for "petitioning" conduct has been expanded in ways that would shield anticompetitive schemes based on *de minimis* governmental involvement, and even efforts to subvert governmental processes through misrepresentations and omissions. Although the report of the *Noerr* Task Force is still a work in progress, the task force has developed a set of preliminary recommendations,[32] which it has sought to implement through litigation. It is notable, for example, that neither the Commission's case against Bristol Myers or Unocal could have proceeded without first overcoming a *Noerr* defense.[33]

Second, the Commission has advocated reform of specific problematic governmental processes. This approach has necessarily been more incremental, as the sheer number of governmental processes – at the federal, state, and local level – as well as the number of ways in which they can potentially be manipulated, is daunting. The FTC's ability to effect substantial change through this approach is also, appropriately, limited by jurisdictional constraints. The Commission has not sought to establish itself as the ultimate reviewer of *every* regulatory scheme, but rather has endeavored to offer limited recommendations, based on its competition policy expertise, as to how particular regulations might be amended to discourage and frustrate "cheap exclusion" strategies.[34] Notable successes in this area in include the Commission's study on Generic Drug Entry Prior to Patent Expiration,[35] which advocated specific reforms of the FDA's process for the approval of generic drugs. The FTC's report led to important, procompetitive amendments to both the Hatch-Waxman Act and the FDA's implementing regulations. The Commission has also made a more broad based effort to address so-called "legacy" laws, enacted in a pre-Internet environment, that may be impeding the development of e-commerce competition.[36] For example, the Commission's opposition to state licensing regimes that inhibit Internet sales of contact lenses[37] was instrumental in spurring passage of the Fairness to Contact Lens Consumers Act,[38] which enhances consumers' ability to fill contact lens prescriptions from sources other than their prescribing optometrist. The Commission also issued a report on Internet wine sales, which concluded that restrictions on interstate direct shipping increase price and reduce consumer choice, while doing little to promote temperance or reduce underage drinking.[39] This issue was recently taken up by the Supreme Court.[40]

Finally, and of greatest interest to the intellectual property practitioner, the Commission has advocated reforms of the patent system to improve patent quality. As noted earlier, while the U.S. antitrust agencies have long since abandoned the hostility toward intellectual property that characterized prior eras, patents and other IP may still have substantial competitive significance in certain markets. Consequently, there has been growing concern in some sectors that the increasing number of patents issued by the PTO,[41] as well as the expense and complexity involved in determining their scope, may be facilitating "cheap exclusion" strategies. In order to address these concerns, the FTC, in conjunction with the Antitrust Division of the Department of Justice, conducted an extensive series of hearings on the interface between antitrust and intellectual property policy. The resulting FTC report made a number of important recommendations, including advocating the creation of a new PTO procedure that would enable firms to contest patent validity in a less expensive and time-consuming manner than a federal court challenge.[42] The report also recommended enhancing courts' ability to weed out questionable patents by lowering the burden of proof on issues of patent validity from "clear and convincing" to "preponderance of the evidence."[43] While the impact of these recommendations remains to be seen, the issue of patent quality continues to generate significant interest, and has recently been taken up by other leading public policy groups.[44]

V. Conclusion

In many ways, the FTC's focus on "cheap exclusion" is not a new development. The antitrust agencies have always sought to identify and prevent anticompetitive practices, and cheap and effective anticompetitive practices have always been among the most popular. What is new, however, is the FTC's focus on the role of government as a sometimes unwitting, and sometimes unwilling, accomplice in "cheap exclusion" strategies. As early as 1978, Robert Bork observed

"an enormous proliferation of regulatory and licensing authorities at every level of government," and warned that the "profusion of such governmental authorities offers almost limitless possibilities for abuse."[45] These sentiments seemed to be echoed by then FTC Chairman Timothy Muris in 2003, when he observed that "[i]f you create a system in which private price fixing results in a jail sentence, but accomplishing the same objective through government regulation is always legal, you have not completely addressed the competitive problem. You have simply dictated the form that it will take."[46] The FTC's antitrust enforcement efforts have increasingly begun to take this reality into account, and thereby advance a more comprehensive and effective – if admittedly still far from flawless – competition policy. The Commission's focus on "cheap exclusion" strategies should thus be regarded not so much as an *anti*-government approach, as an approach that prizes, and endeavors to foster, better and more consumer-friendly government.

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Footnotes

[1] *See* Susan A. Creighton, D. Bruce Hoffman, Thomas Krattenmaker & Ernest A. Nagata, *Cheap Exclusion,* __ ANTITRUST L.J. __ (forthcoming 2005) (manuscript on file with authors).

[2] Creighton and her co-authors describe a number of "cheap exclusion" scenarios in which the manipulation of a governmental process is *not* a factor, such as opportunistic behavior in a non-governmental standard setting proceeding or tortious conduct against a rival. *Id.* at 18-22. These scenarios are not encompassed by this article's more abbreviated treatment of the issue.

[3] *See* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-24 (1993) (the proponent of a predatory pricing theory must show: (1) "that the prices complained of are below an appropriate measure of its rival's costs," and (2) "a dangerous probability [of its rival] recouping its investment in below-cost prices."). *See also* Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 698 (1975) ("[T]he classically-feared case of predation [predatory pricing] has been the deliberate sacrifice of present revenues for the purpose of driving rivals out of the market and then recouping the losses through higher profits earned in the absence of competition.").

[4] Although the view that predatory pricing is economically irrational and rare is not without its detractors, it remains the majority position of both Supreme Court Justices and antitrust commentators. *See* Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986) ("[T]he success of [predatory pricing] schemes is inherently uncertain: the short-run loss is definite, but the long-run gain depends on successfully neutralizing the competition. Moreover, it is not enough simply to achieve monopoly power, as monopoly pricing may breed quick entry by new competitors eager to share in the excess profits." As a result, "there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful."). *See also* Kenneth G. Elzinga & David E. Mills, *Predatory Pricing and Strategic Theory*, 89 Geo. L.J. 2475, 2494 (2001) ("[T]hose who want antitrust law to assume an aggressive posture against price-cutting have been unable to assemble a theoretical and empirical case that has persuaded the antitrust community or the courts. For this consumers can be grateful."); Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263, 264 (1981) ("I conclude that there is no sufficient reason for antitrust law or the courts to take predation seriously.").

[5] In the antitrust context, the Supreme Court has generally defined the term "exclusion" as conduct that contributes to the acquisition or maintenance of market power by means other than competition on the merits. *See* Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 406-08 (2004); Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602 (1985).

[6] *See*, *e.g.*, Parker v. Brown, 317 U.S. 341 (1943) (articulating the state action doctrine, which provides an antitrust exemption for the regulatory actions of state governments); Gordon v. New York Stock Exchange, 422 U.S. 659 (1975) (articulating the doctrine of implied repeal, which provides a parallel exemption for the regulatory actions of the federal government).

[7] *See* Timothy J. Muris, *State Intervention/State Action – A U.S. Perspective*, Address Before the Fordham Annual Conference on International Antitrust Law & Policy 2 (Oct. 24, 2003), *at* http://www.ftc.gov/ speeches/muris/fordham031024.pdf ("In many ways, public restraints are far more effective and efficient at restraining competition. Unlike private restraints, there is no need to maintain backroom secrecy or to incur the costs of conducting a covert cartel.").

[8] The *Noerr-Pennington* doctrine provides an antitrust exemption for conduct that constitutes "petitioning" of a governmental body. *See* Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961); United Mineworkers of America v. Pennington, 381 U.S. 657 (1965).

[9] *See* Muris, *supra* note __, at 2 ("Perhaps the clearest advantage of public restraints is that they frequently include a built-in cartel enforcement mechanism.").

[10] *See* U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 2.1 (1995), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,132.

[11] *Id.* at § 2.2.

[12] 35 U.S.C. § 154 (1994).

[13] *See* Brulotte v. Thys Co., 379 U.S. 29 (1964).

[14] *See* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992).

[15] *See* Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806 (1945).

[16] *See* Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965).

[17] 21 U.S.C. § 355.

[18] 21 C.F.R. § 314.53.

[19] 21 U.S.C. § 355(j)(5)(B)(iii).

[20] In re Bristol Myers Squibb Co., FTC Dkt. No. C-4076 at ¶¶ 34-58 (Apr. 18, 2003) (Complaint), *at* http://www.ftc.gov/os/2003/04/bristolmyerssquibbcmp.pdf.

[21] *See* 59 Fed. Reg. 50338, 50343 (1994). *Accord* Abbott Laboratories v. Novopharm Ltd., 104 F.3d 1305, 1307 n.1 (Fed. Cir. 1997) ("[t]he FDA must accept as true the patent information supplied by the patentee"). The FDA has consistently maintained that it has neither the resources nor the expertise to resolve patent issues. *See* 54 Fed. Reg. 28872, 28910 (1989) (preamble to proposed regulations); 59 Fed. Reg. at 50345 (cols. 2, 3) (preamble to final regulations in which FDA rejected two comments that asserted that "FDA should ensure that patent information submitted to the agency is complete and applies to a particular NDA").

[22] In re Bristol Myers Squibb Co., FTC Dkt. No. C-4076 at Part VII (Apr. 18, 2003) (Consent Order), *at* http://www.ftc.gov/os/2003/04/bristolmyerssquibbdo.pdf.

[23] In re Union Oil Co. of California, FTC Dkt. No. 9305 at ¶¶ 19-27 (Mar. 4, 2003) (Complaint), *at* http://www.ftc.gov/os/2003/03/unocalcmp.htm.

[24] *Id.* at ¶ 24.

[25] *Id.* at ¶ 78.

[26] *Id.* at ¶¶ 68-72.

[27] The $500 million figure is based on estimates that: (1) California consumers will purchase 14.8 billion gallons of gasoline per year, (2) CARB "summer-time" fuel requirements will be in effect up to 8 months per year, and (3) Unocal will receive a royalty of 5.75 cents per gallon of "summer-time" gasoline. *Id.* ¶ 10. The ninety percent pass-on figure is based on the sworn testimony on Unocal's own expert. *Id.*

[28] Office of Policy Planning, Federal Trade Commission, Report of the State Action Task Force (2003), *at* http://www.ftc.gov/os/2003/09/stateactionreport.pdf.

[29] In re South Carolina State Board of Dentistry, FTC Dkt. No. 9311 (Sept. 15, 2003) (Complaint), *at* http://www.ftc.gov/os/2003/09/socodentistcomp.pdf. The full Commission issued an opinion denying the Board's state action defense on July 30, 2004. The Board subsequently appealed the Commission's opinion to the Fourth Circuit, where the case remains pending.

[30] In re Virginia Board of Funeral Directors and Embalmers, FTC Dkt. No. C-4124 (Oct. 5, 2004) (Consent Order), *at* http://www.ftc.gov/os/caselist/0410014/ 041005do0410014.pdf.

[31] In re Kentucky Household Goods Carriers Ass'n, Inc., FTC Dkt. No. 9309 (July 9, 2003) (Complaint), *at* http://www.ftc.gov/os/2003/07/ktadmincmp.pdf. The Administrative Law Judge issued an Initial Decision in favor of FTC Complaint Counsel on June 25, 2004, and the case is currently on appeal to the full Commission.

[32] *See* Timothy J. Muris, *Clarifying the State Action and Noerr Exemptions*, 27 Harv. J. L. & Pub. Pol'y 443 (2004). *See also* John T. Delacourt, *Protecting Competition by Narrowing Noerr: A Reply*, Antitrust, Fall 2003, at 77; John T. Delacourt, *The FTC's Noerr-Pennington Task Force: Restoring Rationality to Petitioning Immunity*, Antitrust, Summer 2003, at 36.

[33] *Noerr* protection for Orange Book filing conduct analogous to that in the Commission's *Bristol Myers* case was rejected by a federal district court in a related pharmaceutical matter in which the Commission filed an influential *amicus* brief on the *Noerr* issue. In re Buspirone Patent Litigation/In re Buspirone Antitrust Litigation, 185 F. Supp. 2d 363 (S.D.N.Y. 2002). *Noerr* protection for Unocal's participation in the CARB standard setting proceeding was rejected by a decision of the full Commission. In re Union Oil Co. of California, FTC Dkt. No. 9305 (July 7, 2004) (Opinion), *at* http://www.ftc.gov/os/adjpro/d9305/040706commissionopinion.pdf.

[34] *See* Deborah Platt Majoras, *A Dose of Our Own Medicine: Applying A Cost/Benefit Analysis to the FTC's Advocacy Program*, Address Before the Charles River Associates' Conference on Current Topics in Antitrust Economics and Competition Policy 1 (Feb. 8, 2005), *at* http://www.ftc.gov/speeches/ majoras/050208currebttopics.pdf ("While the Commission's competition advocacy program is rooted in fundamental antitrust concepts and the same types of empirical economic evidence that undergird enforcement, our advocacy promotes these concepts in a variety of arenas in which competition concerns are vital but may be overlooked.").

[35] Federal Trade Commission, Generic Drug Entry Prior to Patent Expiration (2002), *at* http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf.

[36] In order to address these issues in a more systematic manner, the Commission hosted a public workshop in October 2002. The workshop was intended to enhance the Commission's understanding of particular practices and regulations, and focused on a variety of industries, including: (1) wine sales; (2) cyber-charter schools; (3) contact lenses; (4) automobiles; (5) casket sales; (6) on-line legal services; (7) telemedicine and on-line pharmaceutical sales; (6) auctions; (7) real estate, mortgages, and financial services; and (8) retailing. *See* Federal Trade Commission, Public Workshop, Possible Anticompetitive Efforts to Restrict Competition on the Internet (Oct. 8-10, 2002), *at* http://www.ftc.gov/opp/ecommerce/ anticompetitive/index.htm.

[37] *See* Office of Policy Planning, Federal Trade Commission, Possible Anticompetitive Barriers to E-Commerce: Contact Lenses (2004), *at* http://www.ftc.gov/os/2004/03/040329clreportfinal.pdf; FTC Staff Comment before the Connecticut Board of Examiners for Opticians (Mar. 27, 2002), *at* http://www.ftc.gov/be/v020007.htm.

[38] 15 U.S.C. 7601 *et seq.*

[39] *See* Office of Policy Planning, Federal Trade Commission, Possible Anticompetitive Barriers to E-Commerce: Wine (2003), *at* http://www.ftc.gov/os/2003/07/winereport2.pdf.

[40] Swedenburg v. Kelly, 358 F.3d 223 (2d Cir. 2004), *cert. granted*, 124 S. Ct. 2391 (2004); Heald v. Engler, 342 F.3d 517 (6th Cir. 2003), *cert. granted*, 124 S. Ct. 2389 (2004). Oral argument was held on December 7, 2004, and a decision by the Court remains pending.

[41] *See* Gerald J. Mossinghoff & Vivian S. Kuo, *Post-Grant Review of Patents: Enhancing the Quality of the Fuel of Interest*, 85 J. Pat. & Trademark Off. Soc'y 231, 231 (2003) ("In fiscal year 1981, there were 114,710 patent applications filed and 71,010 U.S. patents granted. Just twenty years later, in fiscal year 2001, there were 344,717 patent applications filed and 187,822 U.S. patents granted – a three-fold increase.").

[42] Federal Trade Commission, To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy 7-8 (2003), *at* http://www.ftc.gov/os/2003/10/innovationrpt.pdf.

[43] *Id.* at 8-10.

[44] *See, e.g.*, Science, Technology, and Economic Policy Board, National Academies, Patents in the Knowledge-Based Economy (2003).

[45] Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself 347 (1978).

[46] Muris, *supra* note __, at 2.

International and National Security Law

Immigration and Identity Fraud

*By David Morgan Frost**

The Stranger within my gates,
He may be evil or good,
But I cannot tell what powers control—
What reasons sway his mood;
Nor when the Gods of his far-off land
Shall repossess his blood.
—Rudyard Kipling

Introduction

Identity fraud presents a host of problems to various parts of society. The commercial ramifications of this problem are well-known—indeed, financial institutions continue to spend (and lose) billions of dollars in connection with identity fraud. The impact of this problem on national security issues is also matter of growing public concern.

Indeed, under the heading of "national security concerns," identity fraud rears its head as a current or potential problem in terms of physical security (*e.g.*, access to buildings, airplanes, etc.); cyber-security (*e.g.*, access to databases and systems); or simply routine law enforcement (*e.g.*, catching identity thieves). One of the largest and most significant areas where identity fraud can impact national security is immigration.

Ironically, the government's ability to combat identity fraud may be simultaneously augmented and restricted with regard to immigration. The absence of commercial data (or, indeed, any data) on most foreign visitors makes identity verification or authentication a great deal more difficult. However, the reduced expectation of privacy at national borders—together with the more limited rights enjoyed by non-citizens—tends to improve the government's position.

I. The Problem

Islamic extremists (the primary threat to this country's security), as a group, would be but short work for American military might. The very fact of terrorism is a function of this comparative weakness on the part of our enemies, who "must therefore resort to asymmetric means" in order to attack us, which is to say that they must resort to non-conventional strategy.[1] To put things more colloquially, they have to "fight dirty." The strategy of choice is terrorism; as Mark Krikorian puts it in an admirable article in "The National Interest," the "Holy Grail of such a strategy is mass casualty attacks on America."

Before the enemy can launch his "mass casualty attacks on America," he must first be in America. To get to America, the enemy must exploit or violate our immigration policies.[2] For the terrorist-immigrant, identity fraud may be a key part of his strategy to enter and remain in the United States. Immigration is thus a front-line battlefield in the war on terrorism while identity fraud and the efforts to prevent it are among the key weapons of the contending sides.

It is difficult to find a more compelling illustration of the potential dangers posed by immigration-related identity fraud than is found in the testimony of United States Attorney Paul McNulty, of the Eastern District of Virginia, before the House Judiciary Committee Subcommittee on Immigration, Border Security and Claims and the Subcommittee on Crime, Terrorism and Homeland Security.

Mr. McNulty described a seemingly mundane crime which took place at the end of the summer of 2001:

> Victor Lopez-Flores and Herbert Villalobos were sitting out front of the Dollar Store in Arlington, Virginia, across the street from … the Department of Motor Vehicles…. The reason why they hung out there was because of the location of the DMV across the street. You see, Victor and Herbert were in the business of helping people acquire false, fraudulent, driver's licenses or ID cards from the Department of Motor Vehicles.
>
> Well, one day …, as they were sitting in front of the Dollar Store, a van pulled up. … three men got out of the van, three Middle Eastern men, and they approached Victor.[3]

A quick transaction ensued; a few forms were filled out at a nearby attorney's office and notarized by a less-than-scrupulous notary public. The men then returned with their fraudulent forms and acquired genuine identification cards from the Commonwealth of Virginia. McNulty continues:

> A few weeks later, those three men were on Flight 77, and they were the alleged hijackers of that plane that flew into the Pentagon and killed 189 people, the worst violent crime in the history of Virginia, and part of the tragedy and attack of September 11.[4]

In conclusion, McNulty testifies that the three individuals in question were among seven of the 19 September 11 hijackers who had obtained false Virginia identification cards. McNulty suggested that the need for the cards " was that, in order to get the tickets at the counter, they needed to show proof of identity. And what better proof at Dulles International Airport than a Virginia identification card or a Virginia driver's license." [5]

As alarming as McNulty's illustration may be, it does not overstate the case. In fact, immigration violations (apart from the violation implicit in simply entering the United States with the intention of supporting or engaging in terrorism) have played a substantial role al Qaeda's activities in this

country. Citing an analysis by the Center for Immigration Studies, Krikorian states that of the 48 known al Qaeda operatives involved in terrorist activities in the United States between 1993 and 2001 (including the 19 September 11 hijackers), one fourth were illegal aliens, and nearly half had, at some point, violated immigration law.[6]

It would be over-optimistic to state that the ability to confirm an individual immigrant's identity would be a panacea for the terrorist problem. Nevertheless, it would be foolish to suggest that such knowledge would not make the government's job of stopping terrorists before they are able to strike a good deal easier.

The knowledge itself may be difficult to obtain. According to CNN, there are some 7 million illegal immigrants in the United States (some 70% of these from Mexico).[7] Of the illegal population, nearly 115,000 are from Middle Eastern countries.[8] The numbers are large enough to be unmanageable without the use of technology.

II. The Challenges

In a thoughtful paper on terrorism and identity fraud, Norman Willox and Thomas Regan propose enhanced identity authentication as a means of fighting terrorism. In a telling passage, the authors point out that

> ...the most difficult identification environment is where the individual who is seeking identity verification is unknown to the verifier, and has not been previously verified. This initial phase of identity verification can only occur through a knowledge-based, authentication solution. … To utilize a biometric or token based system, without first authenticating an individual, simply provides an opportunity for an impostor to link a false name, or other false identifiers with the imposter's biometrics or token.[9]

In other words, without a fairly substantial knowledge base (*e.g.*, such as would be available to credit card issuers from commercial data providers), authentication of an individual's identity is a fairly speculative prospect at best.

Not surprisingly, the availability of the kind of data used for the knowledge-based authentication described by Willox and Regan is less readily available outside the United States. Accordingly, while the ability to authenticate the identities of foreign visitors seems crucial, it is not so easily done as said. The numbers referenced above—115,000 illegal immigrants from the Middle East—lend an air of urgency to the matter.

III. The Advantages

Identity authentication has become routine in America, most notably in the financial community. The ease with which it is accomplished is, as indicated above, a function of the large available knowledge base against which data provided by an individual seeking authentication can be confirmed.[10] In the case of people who have not yet been to the United States, this advantage is, quite simply, absent; most countries do not have the wealth of commercial data that exists here. Moreover, in many countries (and, notably, throughout the EU), privacy considerations make it extremely difficult for such data sets to be aggregated.[11]

There are, however, certain advantages in the field of immigration which may remedy, or at least counterbalance, the difficulties posed by the absence of sufficient data for authentication purposes. In brief, the advantages lie in the far broader authority that the government enjoys in the immigration context than with regard to domestic policies.

Americans are generally suspicious of technologies used by the government that process personal information; we tend to see such technologies as violating, or at least likely to violate, our privacy. Accordingly, efforts to implement those technologies domestically are often greeted with suspicion, if not outright hostility.[12] However, as sensitive as Americans may be about their privacy rights, there is a general acceptance of the fact that aliens do not partake in these rights to the same extent as citizens or permanent residents.

Indeed, no less an authority than the Supreme Court has held that:

> Admission of aliens to the United States is a privilege granted by the sovereign United States Government. Such privilege is granted to an alien only upon such terms as the United States shall prescribe. It must be exercised in accordance with the procedure which the United States provides.[13]

Not surprisingly, Congress has determined that an alien who fraudulently procures or attempts to procure admission into the United States or any other immigration-related benefit is inadmissible to the country.[14]

The government's discretion with regard to aliens is not limited to the question of entry. Aliens, including those lawfully admitted for entry, may be compelled to leave for a host of different reasons, including, but not limited to, domestic violence, drugs, voting, failure to comply with registration requirements, and even "any activity a purpose of which is the opposition to …the Government of the United States by … unlawful means."[15] Needless to say, an alien who engages in document fraud in connection with his immigration status is subject to deportation.[16]

The government's authority with regard to immigration and immigrants extends even so far as to compel the production by aliens seeking to enter the country of significant personal information, including a biometric. The government has taken this step with regard to certain aliens in the so-called "United States Visitor and Immigrant Status Indicator Technology Program," or "US-VISIT."[17] This program represents a tremendous first step in addressing the problem of identity fraud and immigration.

IV. A Solution

Solutions to the problem presented by identity fraud in the immigration context must, at least to some extent, include a workable system of identity authentication. The inability to say with any degree of certainty just who a particular individual really is translates into a blanket permission for illegal aliens to disappear into the country in numbers that have already become unmanageable. To illustrate the point, it need only be noted that, of the 115,000 illegal aliens from Middle Eastern countries, a mere 6,000 were (as of January 2002) the focus of post-9/11 Justice Department efforts to enforce deportation orders.[18]

Obtaining biometrics from aliens (as is done with US-VISIT), certainly provides additional information that can be used in the identity authentication process. However, US-VISIT, as currently structured, has its limitations. The information collected by US-VISIT is, in fact, not collected at all from a substantial percentage of immigrants.[19]

Furthermore, as Willox and Regan point out, a biometric alone may be inadequate for identity authentication purposes. The perpetrator of an identity fraud might simply link any plausible story to his biometric, thus making the collector of the biometric an unwilling accomplice in the creation of a new false identity.

Finally, such information as is collected by US-VISIT (currently a photo and two fingerprints) may not be used as effectively as possible. A review of the US-VISIT Privacy Policy reveals that:

> The personal information collected and maintained by US-VISIT is accessed by employees of DHS—Customs and Border Protection (CBP), Immigration and Customs Enforcement (ICE), and United States Citizenship and Immigration Services (USCIS)—and Department of State who need the information to carry out mission-related responsibilities. In accordance with DHS's policy . . . DHS also shares this information with federal, state, local, tribal, and foreign government law enforcement agencies.[20]

In short, the system focuses on national security and law enforcement, even to the extent of denying access to state and local officials (and others) not directly charged with law enforcement responsibilities. This, unfortunately, is a glaring defect, and limits the ability of the system to defeat immigration-related identity fraud.

If the immigrant's interactions with this country were limited to the immigration and law enforcement contexts, then the information sharing restrictions on US-VISIT would be acceptable. However, immigrants and visitors (legal and otherwise) obtain driver's licenses, pay taxes, purchase property, obtain credit and, on occasion, seek access to secure areas. In short, they constantly find themselves in a position where identity authentication is vital—and, due to the lack of available data—hardly possible.

Ultimately, if the goal is identity authentication, then, as shown by Willox and Regan, a knowledge base must be available. Moreover, it goes without saying that the knowledge base must be available to the people responsible for authentication—and this is where US-VISIT falls short.

If the data collected by US-VISIT were made available on a broader level to authorities and institutions who have a need for identity authentication, then identity fraud in immigration could be greatly reduced. The first question with regard to this solution is the one raised by Willox and Regan —the biometric by itself is not an adequate solution to problems with identity authentication. The obvious response, of course, is that biometrics collected by US-VISIT must be accompanied by other information as well (*i.e*., biographical data from the individual's passport, visa or other travel documents required for entry). This will make it much more difficult for the alien to escape his identity or create a new one. Further, US-VISIT should be expanded to cover a larger segment of the aliens arriving in this country.

Next, the Federal Government must recognize that the drivers license is the de facto "national identity card," and pass legislation regulating the circumstances under which it can be issued and to whom.[21] State motor vehicle authorities (not just law enforcement officers) should be provided access to the biometric and biographic data collected by immigration authorities, and should be required by law to authenticate an applicant's identity before issuing a driver's license; the license should contain a biometric such as a fingerprint, and licenses issued to non-citizens should contain a clear indication of the license-holder's immigration status.

Further, credit reporting companies, financial institutions and commercial data providers should be given access to the data collected in the immigration context—in other words, that data should become part of the overall body of knowledge used for identity authentication in the commercial context.[22] It might well be expected that the companies would be willing to pay for the information, thus defraying the costs of the additional collection.

Conclusion

While civil liberties and immigration advocacy groups may be troubled by the idea of increased federal regulation of drivers licenses and more intrusive immigration policies (which might well be reciprocated by other countries), the fact is that such policies are not a departure from, or alteration of, the fundamental liberties enjoyed by American citizens. A driver's license with a biometric is hardly an intrusion and, indeed, will help to prevent not only terrorism, but simple identity theft (enough of an inconvenience in its own right).

The easy availability of personal data on immigrants to commercial data providers will, without a doubt, be rather shocking to the sensibilities of European Union privacy authorities—a fact to which the United States should reply with a resounding "so what!" As shown above, immigrants and visitors to the country have no legal right that could be said to be violated by making it more difficult for them to

engage in identity fraud. Ultimately, the additional data available on immigrants will have little or no appreciable effect on legitimate immigrants, and will enhance the security of the United States.

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Footnotes

[1] Krikorian, M., *Keeping Terror Out—Immigration Policy and Asymmetric Warfare,* 75 The National Interest, (2004).

[2] It but states the obvious to note that, since terrorism is not (at least from the perspective of the U.S. government) a legitimate purpose for travel to the United States, one who enters the U.S. for the purpose of committing an act of terrorism does so illegally. *See* 8 U.S.C. §1182(a)(3)(B).

[3] McNulty, P. (2002) Statement before the Subcommittee on Immigration, Border Security and Claims and the Subcommittee on Crime, Terrorism and Homeland Security of the House Committee on the Judiciary, One Hundred Seventh Congress, Second Session, June 25.

[4] *Id.*

[5] *Id., See also*, Willox, N. and Regan, T. *Identity Fraud—Providing a Solution*, 1 Journal of Economic Crime Management, Issue 1, (2002).

[6] Krikorian, *supra* note 1.

[7] Frieden, T. (2003) INS: 7 Million Illegal Immigrants in United States. *http://www.cnn.com/2003/US/01/31/illegal.immigration/.*

[8] Marquis, C., *Census Bureau Estimates 115,000 Middle Eastern Immigrants are in the U.S. Illegally*, New York Times, January 23, 2003.

[9] Willox and Regan, *supra* note 5.

[10] Id.

[11] McCullagh, D., *U.S. Twitchy on EU Data Privacy*, Wired News, Oct. 16, 1998.

[12] Blumner, R., *Fly the Suspicious Skies*, St. Petersburg Times, August 31, 2003. *See also* the Computer Matching and Privacy Protection Act of 1988, 5 U.S.C. § 552a(o). A Congress that might be condemned as Luddites or praised as defenders of privacy (or, perhaps, both) restricted the use of personal data in "computer matching programs."

[13] United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950).

[14] *See* 8 U.S.C. § 1182(a)(6)(C)(i).

[15] *See id.*, § 1227 (general classes of deportable aliens)

[16] *Id.*, 1227(a)(3)(C)(i). Indeed, such an individual is subject not only to deportation but to prosecution for a felony. *See* 18 U.S.C. § 1546(a).

[17] *See* Federal Register, Vol. 69, No. 2, Monday, January 5, 2004, pp. 468 – 481.

[18] Marquis, *supra* note 8.

[19] The US-VISIT program is not used on foreign nationals entering the U.S. through land ports of entry, or who seek to enter under the Visa Waiver Program. *See* Fed. Reg., Vol. 69, No. 2, p. 472.

[20] US-VISIT Program, Privacy Policy, September 14, 2004, http://www.dhs.gov/interweb/assetlibrary/USVISITPrivacyPolicy.pdf.

[21] Congress has taken a step in the right direction by requiring the issuance by the Department of Transportation in consultation with the Department of Homeland Security of minimum standards for drivers' licenses and identity cards. *See* Pub. Law 108-458, Intelligence Reform and Terrorism Prevention Act of 2004, sec. 7212.

[22] Indeed, the government might well cover a significant part of the costs of the program by selling the data.

Does the Right to Arms Impede or Promote Economic Development?

*By David B. Kopel, Paul Gallant & Joanne D. Eisen**

*Editor's note: In July of 2001, the United Nations concluded a Conference on the Illicit Trade in Small Arms and Light Weapons (SALW) in All Its Aspects, designed to address security and humanitarian threats posed by unlawful trade in these weapons. The resultant Program of Action called for a follow-up review conference to be held no later than 2006, and suggested eventually moving toward a treaty to regulate the international trade of SALW. The United States supported the goals of the Program of Action because, as negotiated, they did not undermine American sovereignty or rights enshrined in the Second Amendment. During the conference, however, delegates from several nations had sought to expand the scope of the Conference to include restricting the private ownership of weapons, which has raised concern that U.S. domestic rights could be threatened in the future. For more information, see T*he United Nations Conference on the Illicit Trade in Small Arms and Light Weapons: An Encroachment on the Second Amendment to the U.S. Constitution? *by Daniel B. Pickard, available at http://www.fed-soc.org/Intllaw& %20AmerSov/smallarms.pdf.*

Increased regulation of SALW has received strong endorsement among many in the international community. In the following article, the authors assess this movement and address some of the substantive arguments presented by its supporters.

Introduction

In the 1960s, the United Nations resolved to "take on the development challenge."[1] The objectives were eradicating poverty, educating the ignorant, and giving each human being a broader range of life choices.[2]

Although some regions, such as parts of East Asia, have made spectacular progress, others, especially Africa, have not. Advocates of prohibiting the civilian possession of firearms have recently begun attempting to link failed development with the proliferation of Small Arms and Light Weapons (SALW).[3] With the support of UN Secretary-General Kofi Annan, the prohibition community has been conducting an intensive public relations campaign that constantly reinforces the alleged relationship.[4]

"Small arms" is a term of art used by the international disarmament community. As used by some gun prohibitionists, the term includes all firearms except heavy machine guns. More narrowly, "small arms" refers only to military firearms. "Light weapons" encompasses more powerful portable weapons, such as heavy machine guns, grenade launchers, some mortars, and portable anti-tank guns.[5]

Although prohibitionist claims are frequently stated in unequivocal terms, careful researchers acknowledge that the connection between arms and development is unclear. Even gun prohibitionists such as the authors of *Small Arms Survey 2003: Development Denied* hedged: "Research on this linkage is in its infancy...At the macro level, simple relationships between small arms and underdevelopment are extremely difficult to demonstrate."[6]

At the simplest level, there is an obvious connection between SALW and underdevelopment: SALW are among the weapons used in war. Although wartime can be a period of economic development in countries which are producing goods for the war (as in the United States during World War II), it is rare for countries where combat is taking place to advance economically during the fighting.[7] Likewise, the costs of prosecuting war are high, and war resources would better serve to promote human development. In addition, the costs of rebuilding damaged infrastructure are often high, as are the accompanying economic and human losses.

Of course warfare which removes a tyrannical government can help economic development in the long run. For example, Western Europe developed very rapidly in the two decades after liberation from the Nazis, who plundered the region for their own benefit.

However, the obvious fact that *warfare* impedes economic development during wartime does not mean that small arms *per se* impede economic development. Small arms are only some of the many tools used in warfare; other tools include aircraft carriers, missiles, heavy artillery, airplanes, poison gas, and atomic bombs. During the Cold War, the United States procured vast quantities of many types of weapons (including SALW) while enjoying tremendous economic growth. The Soviet Union also procured enormous weapons stockpiles, while development stagnated, especially after the 1950s. Accordingly, the most important variable might not necessarily be the mere presence or procurement of weapons.

Warfare often involves the procurement of large quantities of goods and infrastructure to feed and supply the fighters: food, utensils, pants, coats, hats, hospitals, medicine, and so on. These war goods also have many peacetime uses, and it would obviously be foolish to claim that the proliferation of such goods is, in itself, a cause of underdevelopment.

The same may be said for firearms. After all, in the nineteenth century, both England and the United States enjoyed phenomenal economic growth, during a period in which both countries had very few restrictions on firearms, and civilian gun ownership was widespread.[8]

Blaming SALW for development failure serves several political purposes. The rhetoric attempts to enlist the development community in the arms prohibition movement, and even to divert development funds into arms confiscation projects. For example, the authors of *Small Arms Survey 2003* argue that "if development organizations such as the [World]

Bank are to have maximum impact in the alleviation of poverty, they must give more weight to practical disarmament."[9]

The countries which have been the greatest recipients of development aid, such as most of sub-Saharan Africa, are worse off today than they were half a century ago. One of the very few examples of a heavy aid recipient which is making economic progress is India, and India's current growth seems more related to outsourcing and international communications than to development aid.

Indeed, development aid has been persuasively critiqued for *retarding* economic development: the aid tends to flow to the kleptocracies which govern most of the Third World, and the kleptocracies use the aid to buy political support, particularly among the urban elite. Relatively little aid reaches the intended beneficiaries; the aid that does reach the needy is controlled by the kleptocracy, and thus promotes dependence on the corrupt government. Not every international aid program has been a disaster, and some have been helpful. But, on the whole, development aid has failed.[10]

Another political constituency with a great interest in blaming SALW for underdevelopment is Third World governments. Because most Third World countries are governed by force rather than by consent, Third World governments have an interest in disarming their subjects.

In this article, we shall demonstrate that underdevelopment is largely the result of poor governance—including governance which promotes the spread of infectious disease. SALW may exist in underdeveloped countries, but they are generally not a causal factor in underdevelopment.

Part I of this article provides background on the history of development in the Third World. Part II examines two major impediments to economic development: the infectious diseases of malaria and AIDS. The former is a disaster manufactured by First World political correctness; DDT prohibition is scientifically indefensible, and is responsible for millions of deaths every year.[11] The latter is a product of poor leadership that continues to ignore scientific research, and has created a medical problem of horrific proportions. Malaria and AIDS kill an estimated 4 million people, worldwide annually, between approximately 7 to 11 times the number killed by SALW.[12]

Part III turns to the heart of the development problem: bad governance.[13] We examine two case studies: Zambia and Kenya. Blaming small arms exacerbates the problem of poor governance, because the focus on small arms helps bad governments distract attention from government policies (such as gross corruption and ethnic persecution) which do cause underdevelopment. By providing the means to remove harmful governments, SALW may be part of the solution to underdevelopment.

I. Background

If small arms impede development, then the data should show that development proceeds faster before the proliferation of small arms than afterwards. However, the data do not support the hypothesis that more small arms leads to less development.

Scholars have noted that the prevalence of small arms began to increase in the 1970s and 1980s. For example, Alejandro Bendaña, director of the Center for International Studies in Nicaragua, described the timing of the arms flow into Latin America: "During the Cold War, hundreds of millions of dollars worth of weapons poured into Central America...After the 1979 Nicaraguan revolution, Central America became a hot battleground of the Cold War, and the region became armed to the teeth."[14]

The prohibition community agrees that SALW availability dramatically increased at the conclusion of the Cold War in 1989. The first edition of *Small Arms Survey*, published in 2001, noted: "There have been ominous reports documenting the proliferation of millions of small arms and light weapons as the world's major military powers reduced their armed forces or, as in the case of the former Soviet Union, collapsed outright."[15] According to Michael Klare, Director of the Five College Program in Peace and World Security Studies, "the end of the Cold War has left the world with huge quantities of surplus weapons—many of which have begun to seep into world markets via licit and illicit channels."[16] Disarmament activist Lora Lumpe explained: "Several trends in the 1990s gave prominence to the issue of gun-running. Newly opened borders, massive post-Cold War arms surpluses and the rapid expansion of free trade contributed to arms availability and the ease of smuggling."[17]

Clearly the proliferation of SALW in the 1980s escalated during the 1990s. If the presence of SALW were the key impediment to development, then economic development[18] should have faltered only after the increased availability of such weapons in the 1980s, and especially in the 1990s. However, the failure of development in much of the Third World was well-established by the early 1970s.[19]

A. Latin America

Referring to Latin America, Albert Hirschman, a developmental economist at the School of Social Science of the Institute for Advanced Study, asked in 1961, "where lies the responsibility for our lag? In ourselves or in the outside world which exploits us?"[20]

The same year, President John F. Kennedy, addressing the failure of older programs, created the Alliance for Progress, an assistance program for Latin America "designed to make the benefits of increasing abundance available to all." Congress allocated $500 million for the new effort and President Kennedy hoped that "the close of this decade will mark the beginning of a new era…."[21] A few years later, Lauchlin Currie, a world-renowned economist, observed: "The accelerated rate of deterioration [of development] during the past four years...is particularly alarming, as it coincides exactly with the period of the Alliance for Progress."[22] As Currie noted, "In Colombia...there is considerable evidence that not only has inequality grown but that the condition of the peasant has worsened…."[23]

In 1971, ten years after Kennedy began the Alliance for Progress, Raúl Prebisch, an international development economist, remarked:

"Thirty years ago you could have said 'Well, let's wait for a few decades; this process of development will gradually improve the lot of the whole population.' But that has not come to pass."[24]

In 1976, Celso Furtado, Brazil's most influential economist of the 20th Century, noted about the 1950s and 1960s: "the figures show that the pace of growth of the regional economy has not even been sufficient to maintain the region's relative position in the world economy."[25]

Significantly, the disappointing results of failed development in Latin America all occurred prior to the proliferation of weapons in that region. During the 1950s and 1960s, there were many armed changes of government in Latin America, but they were mostly military coups, and therefore unrelated to the modern campaign against arms possession by civilians. There were some cases of long-running revolutionary warfare—most notably Ché Guevera's failed effort to lead a Communist revolution in Colombia. However, a few cases of unsuccessful revolution in Latin America cannot explain the region-wide economic failure in the 1950s and 1960s.

B. Sub-Saharan Africa

A similar pattern of failed development prior to the influx of SALW can be seen in sub-Saharan Africa.[26] The Lagos Plan of Action, adopted in 1980, explained, "The effect of unfulfilled promises of global development strategies has been more sharply felt in Africa....Thus, Africa is unable to point to any significant growth rate, or satisfactory index of general well-being, in the past 20 years."[27]

The 1981 World Bank report was gloomy about "Africa's disappointing economic performance during the past two decades."[28] The report stated: "for most African countries, and for a majority of the African population, the record is grim and it is no exaggeration to talk of crisis. Slow overall economic growth, sluggish agricultural performance coupled with rapid rates of population increase, and balance-of-payments and fiscal crises—these are dramatic indicators of economic trouble."[29]

William Easterly (professor of economics at New York University and Senior Fellow at the Center for Global Development) and Ross Levine (professor with the Finance Department at the University of Minnesota) also confirmed the early failures of African development: "Africa's economic history since 1960 fits the classical definition of tragedy: potential unfulfilled, with disastrous consequences."[30]

C. Summary

Development failure long pre-dated the influx of SALW into undeveloped countries. Therefore, the lack of development cannot logically be attributed to SALW in the hands of citizens. In fact, the World Bank stated: "the key root cause of conflict is the failure of economic development."[31] In other words, the arms prohibition community has causality backwards: the "key root cause of conflict," and hence the reason for the use of SALW in such conflicts, is the absence of economic development.

The World Bank elaborated: "Economic development is central to reducing the global incidence of conflict...."[32] The Bank described the vicious cycle of "the conflict trap," wherein countries which have already sunk into violent conflict tend to see such conflicts recur.[33] However, when the arms prohibition community describes such conflicts, it invariably casts the blame on ownership of SALW by so-called "non-state actors" (the prohibitionists' term for "citizens"). As the Bank more accurately observed: "War retards development, but conversely, development retards war."[34]

Accordingly, one effective strategy in reducing armed conflict would be to address the root causes of the conflict, by ending the terrible economic conditions which cause the desperate resort to civil war.

II. The Burden of Infectious Disease on Development

The hindrance to development from infectious and parasitic diseases[35] dwarfs any drag on development accruing to the civilian possession of SALW. According to the World Health Organization (WHO), in the year 2002, infectious and parasitic diseases killed 11,122,131 people, worldwide.[36] Shockingly, the United Nations has taken a lead role in hindering the prevention of malaria.

A. Malaria

Malaria infects up to a tenth of the world's population,[37] who suffer 300 million to 500 million episodes each year.[38] In the process, it destroys much of the human capital necessary for economic growth. According to the WHO's statistics, malaria alone was responsible for 1,222,180 deaths,[39] but the annual figure may sometimes rise to up to 3 million deaths.[40] The World Health Organization reported that, of the deaths in 2002, 1,098,999 were children under the age of five.[41]

The high number of deaths are only the beginning of malaria's devastating impact on development. Because the disease does not discriminate between rich or poor, it deters investment in areas where malaria is endemic. The labor market uncertainty caused by the risks of malaria deaths often causes farmers to plant crops which are quick and easy to harvest, rather than crops which would yield greater income to the farmer.

The link between malaria and poverty is well-established. In 1958, Nobel Laureate in Medicine T. H. Weller stated: "It has long been recognized that a malarious community is an impoverished community."[42] Or as the World Health Organization stated, malaria is "a major constraint to economic development."[43]

John Luke Gallup[44] and Jeffrey D. Sachs[45] reported that "countries with intensive malaria grew 1.3% less per person per year, and a 10% reduction in malaria was associ-

ated with 0.3% higher growth."[46] Further, "Not only are malarial countries poor, but economic growth in malarial countries over the past quarter century has been dismal. Growth of income per capita from 1965 to 1990 for countries with severe malaria has been 0.4% per year, while average growth for other countries has been 2.3%, over five times higher...More than a third of the countries with severe malaria (11 out of 29) had *negative* growth from 1965 to 1990."[47]

Every year, mortality from malaria kills approximately twice as many people as do all small arms and light weapons.[48] If we make assumptions which maximize the total numbers of SALW non-fatal woundings, malaria morbidity[49] is between 46 and 77 times greater than SALW morbidity.[50]

There exists a range of disability for malaria survivors. The largest segment of malaria victims is young sub-Saharan African children, who comprise 70 percent of malaria deaths. Many of the children who survive malaria become learning- and neurologically-disabled.[51] According to Joel Breman of the National Institutes of Health, there are about 600,000 persons each year who contract the cerebral form of malaria;[52] about 5-20 percent (approximately 30,000-120,000) of the survivors "may have gross neurologic sequelae" such as "generalized seizures, paralysis, speech and behavior disorders, hearing impairment, blindness, epilepsy and cerebral palsy…. Decreased 'executive functions' (i.e. the ability to initiate, plan, and carry out tasks) were some of the other deficits found."[53]

Other researchers have found that malaria in pregnant women predisposes them to bear low-weight babies, many of whom also have lingering medical complications.[54] It has also been recently discovered that women with malaria who are also HIV-positive are more likely to transmit HIV to their unborn children.[55] According to the British Broadcasting Corporation, "Malaria is one of the greatest barriers to Africa's economic growth...."[56] The problem is likely to worsen, because the malaria bacteria are increasingly resistant to existing drugs, and there is insufficient research being conducted for new drugs. UCLA's Diane Birnbaumer and Anne Rutkowski noted: "Both the sharp increase in plasmodium resistance to existing antimalarials and the dearth of research dedicated to the development of new antimalarials signal the potential for an uncontrolled malarial epidemic."[57]

As the world teeters on the verge of "an uncontrolled malarial epidemic," diverting development resources into gun confiscation does not appear to be a wise use of resources.

In some areas, malaria could be greatly reduced by introducing fish which eat mosquitoes.[58] This strategy is not practical on a large scale at the present time. By the time it becomes viable in the future, if ever, millions of lives will have been lost.

The *sine qua non* of preventing the imminent "uncontrolled malarial epidemic" is DDT.

It is arguable that broad-spectrum use of DDT (dichlorodiphenyl-trichloroethane) for agricultural purposes during the mid-20th century was harmful to the environment. But rather than limiting DDT use, the United Nations is actively encouraging a worldwide ban on DDT.[59] Donald Roberts, professor in the Department of Preventive Medicine/Biometrics, Uniformed Services University of the Health Sciences, warns:

> We are now facing the unprecedented event of eliminating, without meaningful debate, the most cost-effective chemical we have for the prevention of malaria. The health of hundreds of millions of persons in malaria-endemic countries should be given greater consideration before proceeding further with the present course of action.[60]

Roberts and his co-researchers demonstrated that there is a "powerful relationship between DDT-sprayed houses and malaria rates…when large numbers of houses are sprayed with DDT, malaria rates decline…."[61] They explain the difference in safety between the spot use of DDT in homes and the previous indiscriminate use of the chemical in agriculture. They point out that, "On a landscape scale, a sprayed house represents an infinitesimally small spot treatment of a closed and protected environment (the house)."[62]

Currently, the United Nations and the gun-prohibition NGOs are trying to eliminate guns from civilian homes, because of the danger that they supposedly cause to children. But in terms of the number of children killed, brain-damaged, or otherwise crippled, malaria-bearing mosquitoes are a vastly greater threat to the children of the world. Yet the United Nations, by promoting DDT prohibition, is attempting to deprive Third World families of a major tool which they could use to protect the children in the home from malaria.

The callousness of the UN's DDT-prohibition campaign is almost unfathomable. The environmental risks of in-home spraying of DDT are slight; the devastation of malaria is enormous.

B. HIV/AIDS

In 2002, HIV/AIDS was responsible for 2,821,472 deaths.[63] Thus, AIDS kills between 5 and 6 times as many people worldwide as do SALW.[64] Over 370,000 of the annual AIDS deaths are children under the age of 5.[65] The death toll from AIDS will keep rising in the foreseeable future because the number of new HIV infections is increasing faster than the number of persons dying. For example, in sub-Saharan Africa, there were 2.3 million deaths from HIV/AIDS in 2003, and about 3.2 million new cases diagnosed.[66] According to Peter Piot, head of the Joint United Nations Program on HIV/AIDS (UNAIDS), "We are only at the beginning of the impact of AIDS, certainly in Africa."[67]

In Malawi, where the average life expectancy was projected to rise to 57 in 2010, life expectancy has now been revised downward to 43 years.[68] The BBC reported that "the

country's worst famine in living memory" was, in large part, the result of AIDS.[69] Thengo Maloya, minister for lands, physical planning and surveys, admitted that, because of AIDS, his office suffered a deficit of 800 employees. Workers who remained were physically weakened and unable to work regular hours.[70]

The staggering toll of AIDS deaths has caused a decline in the Human Development Index, because one of the factors comprising the HDI is life expectancy.[71] According to *Human Development Report 2003*, "In recent decades the greatest shock to development has been HIV/AIDS....By killing and incapacitating adults in the prime of their lives, it can throw development off course....Much of the decline [of the HDI] in the 1990s can be traced to the spread of HIV/AIDS...."[72]

In addition, much of the decline in the rate of economic growth can be traced to HIV/AIDS. According to the Food and Agriculture Organization of the United Nations (FAO), "Recent estimates indicate that the pandemic has already reduced national economic growth rates across Africa by 2 to 4 percent a year."[73]

The number of deaths and the debilitation from illness directly impact developing economies by reducing the quality and the quantity of the work force.[74] Food production is a prime example. For example, in Zambia, it was recently noted that there was a 53 percent reduction in crops planted by farming families who had a member chronically ill with AIDS.[75] The FAO reported that up to 70 percent of farms have lost workers due to HIV/AIDS.[76] Also according to the FAO, "Hunger is on the rise again after falling steadily during the first half of the 1990s...."[77]

While AIDS has been increasing, armed conflict has been decreasing. Monty Marshall[78] and Ted Gurr[79] have documented a dramatic decline in the number and magnitude of armed conflicts in the late 1990s. Therefore episodes of SALW violence decreased in the late 1990s, compared to the first half of that decade. It is illogical to claim that the recent decline in the agricultural sector of Africa's economy in Africa is due to SALW; to the contrary, armed conflict using SALW has dramatically declined during the same period when the devastation from AIDS has dramatically risen.

Malaria has been retarding development for decades, and now AIDS is further impeding development. The severity of the African AIDS problem is widely recognized: "The scale of devastation caused by HIV/AIDS is unmatched…."[80] "By continuing to devastate Africa's economies, communities, and development, HIV/AIDS has undoubtedly become Africa's biggest challenge."[81] "[T]he HIV-AIDS pandemic [is]....the paramount threat to development in the region."[82] "AIDS has vastly compounded Africa's struggle for development....The effects of AIDS in Africa are eroding decades of development efforts....AIDS is now recognized as one of the developing world's largest impediments...."[83] "The churches in Africa consider HIV/AIDS to constitute the biggest challenge to their mission...."[84]

This unchecked epidemic is largely due to the failure of global leadership. In 2004, the XV International AIDS Conference in Bangkok, Thailand, included a leadership symposium which admitted that failure: "We acknowledge that *we have failed* to provide enough information, education, prevention tools and technologies, treatment, care and support. Our inability to ensure human rights, equity, opportunities, and a supportive and enabling environment for all has helped to fuel the epidemic."[85]

Much of this failure is due to government corruption which has starved local communities of needed funds by siphoning off huge percentages of donated monies; for example, up to 30 percent of World Bank funds donated for AIDS drug are stolen by corrupt governments.[86] The theft has created an atmosphere of mistrust among donors that has led to a reduction in funding.[87]

These serious problems are hardly acknowledged by UN Secretary-General Kofi Annan. A recent report by Annan[88] provoked the following response from the Canadian HIV/AIDS Legal Network:

> The focus on leadership obfuscates underlying issues of governance and accountability of leadership and government in countries with a weak response to HIV/AIDS. The Report does not address the reasons why donors may be reluctant to provide the necessary resources to governments, including poor governance, corruption and incompetence in managing funds.[89]

President Thabo Mbeki of South Africa exemplifies government obstruction to efforts that might ameliorate the HIV/AIDS epidemic. According to the *New York Times*, his most glaring failure is "his obstinate refusal to urgently address his nation's AIDS epidemic while H.I.V. spread to more than five million South Africans."[90] Instead, Mbeki denies that HIV causes AIDS, and has restricted the use of anti-HIV drugs.[91]

It is not just the people of South Africa who suffer poor leadership. According to Dr. Khin Saw Win,

> It is now well accepted in public health circles that the Burmese HIV epidemic is one of the world's fastest growing and most pervasive….The junta's refusal to recognize the epidemics [sic] clearly indicated that this political and humanitarian crisis is caused by their massive mismanagement, corruption and policy failure.[92]

IV. Good Governance

The most fundamental cause of underdevelopment is bad governance. Warfare and SALW are merely symptoms of the disease of bad governance. In the right hands, SALW are the cure for the disease, and hence the cure for the most important cause of underdevelopment.[93]

Theoretically, countries like Zambia or Kenya could have reasonable gun laws which say: "Everyone may receive a gun permit, unless he or she has one of the following disqualifying convictions…." Indeed, the gun laws in Britain's former African colonies often approximated this statutory model, based on Britain's gun laws of the 1920s. The problem is that in a country with pervasive corruption and police abuse, it is difficult to make a gun licensing system work fairly. The licensing system is more likely to inhibit good people (peaceful political dissidents, or ordinary citizens who can not afford the necessary bribes) than to prevent evil-doers from acquiring arms (at least the evil-doers who are part of organized crime groups, and already adept at bribing the police).

In any case, the security concerns of tyrannical government will still be paramount. As a study by the National Academies of Science recently observed, in an American context, "Because of the pervasiveness of the variety of legal and illegal means of acquiring them, it is difficult to keep firearms from people barred by law from possessing them." [94]

However, the existence of black markets does not mean that every person who legitimately needs a gun may be able to acquire one. Twentieth century history is replete with histories of genocide victims who were not able to arm themselves, or who, like the Jews in Eastern Europe, were extremely underarmed.

In this article, we do not mean to settle the question of whether the U.S. government, or other humanitarian-minded entities, should actively supply arms to freedom-fighters against tyrannical regimes, or to ordinary citizens in tyrannical regimes, who might at least be able to use arms to resist further depredations by government-allied thugs.

But it should be recognized that as long as government corruption and self-dealing persist, economic progress will be very difficult, or even impossible. As long as the international community tolerates these conditions, underdevelopment will persist.

As UN Secretary-General Kofi Annan has observed: "good governance is perhaps the single most important factor in eradicating poverty and promoting development."[95] As the UN now acknowledges, human rights and economic liberty are essential to economic development: "Good governance is essential for sustainable development. Sound economic policies, solid democratic institutions responsive to the needs of the people and improved infrastructure are the basis for sustained economic growth, poverty eradication and employment creation."[96]

A. Hindered Development in the Absence of Armed Conflict and SALW: The Case of Zambia

Zambia is an example of a country in which development should have been robust, but was just the opposite, despite the absence of SALW and armed conflict, and despite relatively low violence rates.[97] When Zambia achieved independence in 1964, there was reason for hope. Rich with copper deposits,[98] and with a healthy agricultural sector, Zambia received $3.2 billion in development aid from the World Bank.[99]

Zambia's people are now among the poorest in the world. With the country's debt at $5.4 billion as of December 2002,[100] with HIV/AIDS and malaria decimating the productive population,[101] life expectancy has dropped to 33 years for men, and 32 years for women.[102] Eighty percent of the population live on less than a dollar per day.[103] According to the World Bank, in the early 1990s more than 40 percent of Zambia's population was undernourished; by 1999-2001, undernourishment increased to almost 50 percent.[104]

In Zambia, it would be inaccurate to claim that the presence of SALW contributed to the decline of the economy. While Zambia does have some violent crime, its effect pales compared to other development obstacles, such as excessive government control over the economy[105]—a problem which has afflicted most of sub-Saharan Africa since independence.[106]

Poor governance—specifically theft of the country's resources for personal and political gain by the country's leaders—has greatly hindered development. Zambia's history of corruption dates back to its first dictator-president, Kenneth Kaunda.[107] Kaunda's long record of thievery has been eclipsed, however, by his successor, dictator-president Frederick Chiluba. According to the BBC, Chiluba has "bled the national treasury" and "is diverting state funds into privately held accounts."[108]

Corruption is not limited to the upper echelons of society. The national government is plagued by "ghosts"—people on the payroll who do not exist, and yet whose salaries are diverted. As the BBC noted, "In the past month, the main Zambian civil servants' union has called for a crackdown on what it says are more than 20,000 ghost workers, contributing to a budget over-run of 600bn kwacha (£80m; $132m)."[109]

Current President Levy Mwanawasa, who was sworn into office in January 2002, has attempted to repair the damaged economy, and has made revitalization of the country's agricultural sector his priority.[110]

If Zambia today has a problem with arms, the problem appears to involve a violent, unreformed, and abusive police force. The *Times of Zambia* wrote in December 2004:

> The high-handedness exhibited by members of the Zambia Police Service during the failed demonstration last Monday says a lot about how much the people's police have veered off from the reforms embarked on several years back….the amount of force applied on demonstrators appears to heighten fears that after all not much has changed at all. There was no iota of a show for respect for human rights during the operation on the failed demonstration. With impunity, defenceless people were clubbed and kicked, some of them struck with hard objects and they bled.[111]

B. Hindered Development: The Case of Kenya

Kenya, rich in natural resources, is another example of a country in which development should have proceeded robustly but did not. Like Zambia, Kenya imposed centralized state planning, under the pretext of efficiency and fairness; as the Kenyan government wrote in 1965, "African socialism must rely on planning to determine the appropriate uses of productive resources…."[112]

In practice, centralized control of the economy became a mechanism for the government and its allies to engage in self-dealing. From the beginning of independence from Great Britain in 1963, the country's first president, Jomo Kenyatta, ruled in a brutally repressive manner, eliminated political rivals, and abused the power of government in order to favor political and ethnic cronies.[113] The single-party rule imposed by Kenyatta made corruption endemic.[114]

Kenyatta's successor, President Daniel arap Moi continued the practice during his 24-year reign. The BBC blamed Moi for "exacerbating the culture of corruption that has crippled Kenya's economic development."[115] Moi and other corrupt officials siphoned over four billion dollars out of the country.[116]

It has been estimated by the BBC that the cost of corruption in Kenya is $1 billion each year—nearly one-fourth of the country's annual budget.[117] A survey by Transparency International found that every month an ordinary Kenyan must pay an average of 16 bribes, just to carry on normal life.[118]

Corruption became so grotesque that, by 2001, the World Bank and the International Monetary Fund cut off the flow of money to the Kenyan kleptocracy. In December 2002, Mwai Kibaki won the presidency in a landslide, giving him a mandate to curb the corruption that has plagued the country. Kibaki admitted that "Corruption has been one of the key problems with governance in the country...."[119] Even Kenya's top judges are corrupt; for the right price, a murderer or a rapist can buy his or her way out of trouble.[120] Kenya also suffers from the problem of "ghost" workers.[121] Corruption remains a persistent problem, and the civil "service" continues to loot the nation.[122]

Like Zambia, Kenya can hardly blame its four-decade development disaster on the ownership of SALW by "non-state actors." Kenya has seen occasional tribal conflicts. But as Gurr observed, "There is much evidence that the fighting was deliberately instigated by the government...."[123] President/dictator Daniel arap Moi promoted violent ethnic unrest, because tribal conflicts distracted the majority population directing their justifiable anger at abusive, centralized state power.[124]

In post-colonial Kenya, the most significant perpetrators of armed killings have been the Kenyan police. For example, in 1991, up to ninety percent of people shot dead in Kenya were shot by police.[125] As the BBC reported, President Moi "kept the Kenyan police busy rounding up all suspected enemies of his regime."[126] The police force remains extremely corrupt and violent, and prone to torture, rape and murder.[127]

Today, Kenya does suffer a great deal of criminal violence involving SALW. But the root cause, suggested the BBC, is "mass unemployment."[128]

Kenya's weapons laws, however, mean that "Most security guards in Kenya are armed with wooden clubs (*rungus*) and whistles while others have bows and arrows. On the other hand, criminals are armed with guns that have found their way into the country from the Horn of Africa, especially Somalia."[129]

Ordinary Kenyans are not even allowed to possess bows and arrows. Kenya's Coordinator of the National Campaign Against Drug Abuse (Nacada), Joseph Kaguthi, has "called for the repeal of laws barring Kenyans from keeping bows and arrows in their homes, saying this would enable them to defend themselves against robbers, who were drug abusers…Kenyans had become defenceless in the face of increasing crime….Kaguthi said laws that bar the carrying of traditional weapons were applied discriminately…"[130]

Once known as "the jewel of Africa," Kenya's current economic and crime disaster is the result of four decades of tyranny. In retrospect, it was a mistake for the world diplomatic community, including the United Nations, to treat Jomo Kenyatta, Daniel arap Moi, Kenneth Kaunda, and Frederick Chiluba as if they were legitimate heads of state, when they were in truth nothing more than extraordinarily successful organized crime bosses.

Conclusion

The *Small Arms Survey 2003: Development Denied* argues that firearms ownership by so-called "non-state actors" stunts human development.[131] We suggest instead that corrupt and dictatorial government is a better explanation of underdevelopment. We have documented a reduction in annual growth rates by between 3.3 and 5.3 percent as a result of African government malfeasance on dealing with malaria and AIDS.

The 2004 annual report of the Food and Agriculture Organization of the United Nations (FAO) highlights the man-made tragedy of underdevelopment: "Chronic hunger plagues 852 million people worldwide…Hunger and malnutrition cause tremendous human suffering, kill more than five million children every year, and cost developing countries billions of dollars in lost productivity and national income."[132]

As Article 25 of the Universal Declaration of Human Rights[133] states, "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing…." The governments which keep their victim populations hungry and diseased are the true obstacles to development. Empowering victim populations is an essential precondition to development, and dis-

arming victim populations, leaving them helpless against tyrants, simply makes things worse.

On the outdoor pavilion of the UN grounds in New York City is a huge sculpture of a revolver with a knotted barrel.[134] The sculpture symbolizes the UN's current efforts to disarm the people of the world (or as the UN calls them, "non-state actors"). We suggest that it is time to discard that twisted sculpture which celebrates the destruction of a human right.

The UN and the rest of the international community should stop trying to disarm the victims of tyranny. It is time for the international community to return its attention to the noble goals on which the UN was founded—the protection and advancement of human rights for all—in order to create conditions that optimize the potential for development of all the peoples and all their countries.

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Footnotes

[1] UNICEF, The State of the World's Children 1996 ch. 3, http://www.unicef.org/sowc96/1960s.htm.

[2] *See* Amartya Sen, Development as Freedom xii (2000)("Development consists of the removal of various types of unfreedoms that leave people with little choice and little opportunity of exercising their reasoned agency.") *See also* Lauchlin Currie, Obstacles to Development 2 (1967); United Nations Development Programme, Human Development Report 1995 11 (1995) ("Human development thus has two sides. One is the formation of human capabilities—such as improved health, knowledge and skills. The other is the use people make of their acquired capabilities—for productive purposes, for leisure or for being active in cultural, social and political affairs.").

[3] Small Arms Survey 2003: Development Denied 3 (2003)("This edition of the Survey documents how small arms availability and misuse can undermine the prospects for human development.") Small Arms Survey (SAS) describes itself as "an independent research project located at the Graduate Institute of International Studies in Geneva, Switzerland." Since 2001, it has annually published a Small Arms Survey. Each yearly volume is widely quoted in the disarmament community, and is devoted to negative aspects of civilian possession of firearms.

[4] *See, e.g.*, United Nations: Ma. Ceres P. Doyo, *Small Arms, Wrong Hands*, Philippine Daily Inquirer, Oct. 23, 2003 (Annan: "In short, the excessive accumulation and illicit trade of small arms is threatening international peace and security, dashing hopes for social and economic development, and jeopardizing prospects of democracy and human rights."); *Secretary-General Calls for Redoubled Efforts to Curb 'Global Scourge' that Kills 60 People an Hour, as Biennial Meeting opens on Small Arms*, M2 Presswire, July 8, 2003 (Kofi Annan: "Less quantifiable, but no less palpable, were the wider consequences of small arms proliferation, in terms of conflicts fueled, peacekeepers threatened, aid denied, respect for law undermined and development stunted."); *Unless Adequately Addressed, Proliferation of Small Arms, Mercenaries Will Continue to Pose Severe Threat to West Africa, SG Says*, SG/SM/8641 SC/7695 AFR/587, Mar. 18, 2003 (Secretary General's office: "The uncontrolled proliferation of small arms and light weapons...impedes political, economic and social development."); Center for Defense Information *Weekly Defense Monitor*, Feb. 11, 1999 (quoting Annan: "These weapons [small arms] of personal destruction impair economic and social progress and impede our best development efforts."); United Nations Development Programme, *Development Can Help Curb Small Arms Trade, UNDP Tells UN Conference*, Mar. 19, 2001 (Larry de Boice, Deputy Director of the UNDP Emergency Response Division: "The proliferation of arms...will prevent our development objectives from being reached.").

Government officials: Paul Eavis & David Mepham, *Small Arms: A Barrier to Development*, Fin. Times (London), Jan. 14, 2003 ("Last year's Group of Eight communiqué, heavily influenced by the UK, identified the proliferation of small arms as a significant barrier to development progress in Africa."); *New Campaign vs. Small Arms*, BusinessWorld, May 7, 2003 (Canadian ambassador Robert Collette: "Widespread small arms…[are] also a very real threat to economic development...."); *Short Calls for Action to Stamp Out Illegal Guns Trade*, Press Association, Jan. 14, 2003 (According to British International Development Secretary, Clare Short, "Small arms and light weapons…undermine development."); *Gambia; Transparency in Arms Transfer Advocated; VP Calls for 'Greater Accountability',* Africa News, June 9, 2003 (Gambian Vice President Isatou Njie-Saidy claiming that firearms and violence cause "a series of set-backs for development." Ousman Badjie, chairman of The Gambia's National Commission Against Small Arms, claiming that trafficking of small arms must be stopped: "'This must now be changed and replaced by a culture of peace if we are to attain meaningful development...."); Isaac Essel, *Metal Detectors for Borders*, Accra Mail (Ghana), June 26, 2003 (Hackman Owusu-Agyemang, Minister of Interior, called "for the urgent need to make Ghana arms-free, which is a prerequisite for peace, safety, stability as well as the attraction of local and foreign direct investment for accelerated development."); *Kenya: North Rift Awash with Illicit Arms*, Africa News, Mar. 30, 2003, quoting Jan Kamenju, M. Singo & F. Wairagu, Terrorized Citizens: Profiling Small Arms and Insecurity in the North Rift Region of Kenya (Nairobi, Kenya: Security Research & Information Centre, 2003)("The

ready availability of these weapons undermines security, erodes prospects of development, contributes to social disintegration and makes the resort to violence more likely and more deadly."); *Kenya Starts Destroying Illicit Small Arms*, Agence France Presse, Mar. 15, 2003 (Kenyan Vice President Michael Wamalwa: "Today we have launched the destruction of 1,000 assorted small arms and light weapons. It is my sincere hope that this event will become an enduring milestone in our concerted efforts to create an arms-free region with a conducive environment for sustained development and human security."); Jerry Ekandjo, Minister of Home Affairs of the Republic of Namibia, Statement at the First Biennial Meeting of the States on the Implementation of the Programme of Action of the 2001 United Nations Conference on the Illicit Trade in Small Arms and Light Weapons in All its Aspects (July 7, 2003) ("Development and progress for the betterment of the lots of our peoples, particularly in many of the developing countries is kept at bay by the use of these weapons."); *UK Government: UK Leads Global Effort to Combat Proliferation and Misuse of Small Arms and Light Weapons*, M2 Presswire, Jan. 14, 2003 ("Easy access to these weapons creates conflict and undermines post-conflict reconstruction and long-term sustainable development."); *Controlling the Proliferation of Small Arms and Light Weapons*, News from Senator Dianne Feinstein, July 26, 2001 ("I believe that the global flood of small arms is a real and pressing threat to peace, development, democracy, human rights, and U.S. national security interests around the world.").

NGOs: IANSA, *Implementing the Programme of Action 2003: Action by States and Civil Society*, at 14: ("small arms and light weapons (SALW)...escalate and exacerbate conflicts, obstruct achievement of peace and good governance and undermine efforts to promote development."); *Made-in-USA Guns Widely Available in Mexico*, Join Together Online, Oct. 29, 2003 (Jessica Galeria, Latin American coordinator for IANSA: "Made-in-U.S.A. guns continue to fuel conflicts, exacerbate poverty, and impede development.") ("IANSA" stands for "International Action Network on Small Arms." IANSA is the lead non-government organization coordinator for the international gun prohibition movement); *East Africa Economy Stunted by Flow of Illegal Small Arms: Experts*, Agence France Presse, Nov. 20, 2002 ("East Africa's economic development is stunted by the flow of illegal small arms in the region…experts attending a conference in the Ethiopian capital [sic] warned. 'The broad proliferation of small arms is a constant threat and a constant hindrance for the development of the region,' Kiflemariam Gebrewold of the Bonn International Centre for Conversion (BICC) said late Tuesday."); *Small Arms Issues in Different Regions of Ethiopia – Local Small Arms Control: Possible, to What Extent?* (Bonn International Center for Conversion, 2001), at 2 ("What are the effects of small arms and light weapons in Somali Region?. . .They impede development efforts."); *PanAfrica; Illicit Arms Still Proliferating, Peacemaker Reminds Africans*, Africa News, Sept. 29, 2003 (Peter Batchelor, Project Director of Small Arms Survey: "The availability and misuse of small arms in Africa have undermined the continent's development prospects.").

Scholars: A. Walter Dorn, *Small Arms, Human Security and Development*, Development Express No. 5 1999-2000 ("Widespread small arms...are also a major road-block to human development...small arms threaten human security and development...small arms can sabotage development....").

Media: Raenette Taljaard, *Small Arms Proliferation Also Threatens Global Stability*, Business Day (South Africa), Oct. 8, 2003: ("Small arms are intertwined with other challenges such as sustainable development…."); *Ghana: Radio Commentary Urges Curbing of Small Arms Trafficking in Subregion*, GBC Radio 1, Accra, June 13, 2003 ("The misuse of small arms has not only succeeded in disturbing the social and political order of a number of countries, but also economic development in these countries is killed towards arms procurement."); *West Africa; Gambia Hosts Regional Small Arms Seminar*, Africa News, June 3, 2003 ("the catastrophic costs to social and economic development of the deadly trade in small arms.").

[5] According to Small Arms Survey, small arms are "revolvers and self-loading pistols, rifles and carbines, assault rifles, sub-machine guns, and light machine guns." Light weapons are "heavy machine guns, hand-held under-barrel and mounted grenade launchers, portable anti-tank and anti-aircraft guns, recoilless rifles, portable launchers of anti-tank and anti-aircraft missile systems, and mortars of less than 100mm calibre." Small Arms Survey 2002: Counting the Human Cost 10 (2002).

[6] Small Arms Survey 2003: Development Denied 5. *See also Tackling Poverty by Reducing Armed Violence*, Department for International Development, Recommendations from a Wilton Park Workshop, Apr. 14-16, 2003, at 11, 13 ("There is a clear need for more evidence based on research and analysis to back up the assertion that availability and use of SALW undermines development, and that programmes to control SALW can significantly contribute to the achievement of development targets such as the MDGs [Millennium Development Goals]…A lack of relevant information was identified as a key reason for lack of engagement by development agencies."), http://www.smallarmsnet.org/Reports/wiltonpark.pdf.

[7] *See* Frances Stewart, Valpy Fitzgerald & Associates, War and Underdevelopment 1 (2001) ("War in general, and civil war in particular, is one of the main causes of human suffering and economic underdevelopment.").

[8] *See*, *e.g.*, Joyce Lee Malcolm, Guns and Violence: The English Experience (2002); Clayton Cramer, Firearms Ownership & Manufacturing in Early America (2001), http://www.claytoncramer.com/ArmingAmericaLong.pdf.

[9] Small Arms Survey 2003, at 152. *See also id.* at 156:

> Unlike the humanitarian community, development-oriented organizations have the potential to respond practically to small arms issues. Where humanitarian actors should concentrate on accumulating evidence of the impacts by tightening reporting procedures and undertaking focused studies, development actors should be developing practical interventions to reduce the demand for weapons. Fortunately, an incipient response is emerging within the development community.

T*ackling Poverty by Reducing Armed Violence*, at 17 ("In view of the obstacles of integrating SALW controls into development policy and programmes, and the limited progress so far, it is clear that those most concerned with wide availability and use of SALW need to do more to engage development agencies. This must include further development of evidence, arguments, and best practices that the development community will find useful and compelling."); *Id.* at 20 ("Change the language of the SALW community: A recurring recommendation...was the need to revolutionise the language of the SALW community to make it more relevant to poverty reduction and sustainable development.").

[10] *See*, *e.g.*, George B.N. Ayittey, Africa in Chaos 275 (1998) ("That Western aid to Africa has been ineffective can no longer be disputed."); Tom Bethell, The Noblest Triumph: Property and Prosperity through the Ages 190 (1998) ("By the end of the cold war, at least $2 trillion in foreign aid, adjusted for inflation, had been sent to what was by then called the Third World. Overall, this may have retarded economic development...."); James Morton, The Poverty of Nations:

THE AID DILEMMA AT THE HEART OF AFRICA 25 (1996) ("The conclusion, that the sheer volume of aid is the problem not the cure, strikes at the very basis of aid."); MARY B. ANDERSON, DO NO HARM: HOW AID CAN SUPPORT PEACE – OR WAR (1999)(aid can exacerbate civil conflict or can heal communities).

[11] *See*, *e.g., Science and Public Policy: Hearing before the House Subcomm. on Energy & Natural Resources*, 108th Cong. (2004)(statements by Paul Driessen, Director, Economic Human Rights Project, and a senior fellow with the Committee For A Constructive Tomorrow and Center for the Defense of Free Enterprise, nonprofit public policy institutes that focus on energy, the environment, economic development and international affairs),http://resourcescommittee.house.gov/archives/108/testimony/2004/pauldriessen.pdf; Richard Tren & Roger Bate, *When Politics Kills: Malaria and the DDT Story* (Competitive Enterprise Inst., 2001), http://www.cei.org/PDFs/malaria.pdf; Roger E. Meiners & Andrew P. Morriss, *Pesticides and Property Rights* (Political Econ. Res. Center, 2001), http://www.perc.org/pdf/ps22.pdf. For more, see text at notes 37-62.

[12] The World Health Organization, in 2002, estimated 3,925,236 deaths from the two diseases combined. *See infra* notes 40, 48-50, 63-64 for details on the calculations.

[13] Although there are multiple factors that contribute to a lack of development, we shall not discuss all of them in this Article. Among the issues beyond the scope of this Article are effects of culture, international debt, and certain aspects of globalization.

[14] Alejandro Bendaña, *Sources of Weapons Procurement, Diffusion and Violence in Central America*, in SMALL ARMS CONTROL: OLD WEAPONS, NEW ISSUES 169 (Jayantha Dhanapala et al., eds., 1999). *See also* Edward J. Laurance, *Central America, Haiti and Colombia: Problems, Initiatives and Additional Measures*, in SMALL ARMS CONTROL 179 ("These weapons poured into the region from a variety of sources in the 1970s and 1980s, due mainly to the tensions produced by the Cold War."); Silvia Cucovaz, *Interrelationship between Illicit Trafficking in Small Arms, Drug Trafficking, and Terrorist Groups in South America*, in CURBING ILLICIT TRAFFICKING IN SMALL ARMS AND SENSITIVE TECHNOLOGIES: AN ACTION-ORIENTED AGENDA 33 (Péricles Gasparini Alves & Daiana Belinda Cipollone, eds., 1998); Chris Smith, *Areas of Major Concentration in the Use and Traffic of Small Arms*, in SMALL ARMS CONTROL 83 ("This phenomenon has not been a purely post-Cold War reality, but rather an evolving trend over many years and decades.").

[15] SMALL ARMS SURVEY 2001: PROFILING THE PROBLEM 199 (2001).

[16] Michael Klare, *An Overview of the Global Trade in Small Arms and Light Weapons*, in SMALL ARMS CONTROL 7. The five colleges are Amherst, Hampshire, Mount Holyoke, Smith, and the University of Massachusetts at Amherst.

[17] See Lora Lumpe, Sara Meek & R. T. Naylor, *Introduction to Gun Running*, in RUNNING GUNS: THE GLOBAL BLACK MARKET IN SMALL ARMS 1 (Lora Lumpe, ed., 2000),

http://www.prio.no./page/Staff_detail/Staff_alpha_ALL/9375/37402.html. Lumpe is a researcher and activist with the International Peace Research Institute, in Oslo, Norway.

[18] "Economic development" defined as raising a country's gross domestic product is different from "economic development" defined as reducing the poverty rate. However, the difference is not particularly important for purposes of this Article, since the countries manifesting development failure are usually failures by any measurement.

[19] *See Obstacles to Progress, Cambridge Conference Report*, in DEVELOPING THE THIRD WORLD: THE EXPERIENCE OF THE NINETEEN-SIXTIES 37 (Ronald Robinson, ed., 1971) ("It might seem at first sight that the more the developing countries have tried to advance, the less they have succeeded, for the statistics of growth for the 1960s look slightly disappointing."); *See also* Gerald M. Meier, *Development Decade Perspective*, in DEVELOPING THE THIRD WORLD 18 ("the aggregate rate of growth has been slowing down for many poor countries in the first half of this decade as compared with the 1950s.").

[20] ALBERT O. HIRSCHMAN, A BIAS FOR HOPE 279 (1971).

[21] President John F. Kennedy, *On the Alliance for Progress, 1961*, Address by President Kennedy at a White House Reception for Latin American Diplomats and Members of Congress (Mar. 13, 1961) in Modern History SourceBook, http://www.fordham.edu/halsall/mod/1961kennedy-afp1.html.

[22] LAUCHLIN CURRIE, OBSTACLES TO DEVELOPMENT 44 (1967).

[23] *Id.*, at 37.

[24] Raúl Prebisch, *Latin America: A Problem in Development*, Hacket Memorial Lecture, Institute of Latin American Studies, University of Texas at Austin (Apr. 15, 1971), *quoted in* Nora Lustig, Omar Arias, & Jamele Rigolini, *Poverty Reduction and Economic Growth: A Two-Way Causality*, TECHNICAL PAPERS SERIES, INTER-AMERICAN DEVELOPMENT BANK, SUSTAINABLE DEVELOPMENT DEPARTMENT (2002),

http://www.iadb.org/sds/doc/GrowthIneqDualCaus.pdf. *See also* VICTOR BULMER-THOMAS, THE ECONOMIC HISTORY OF LATIN AMERICA SINCE INDEPENDENCE 323 (1994). Bulmer-Thomas concluded: "The economic development of Latin America since independence is a story of unfulfilled promise. Despite the abundance of natural resources and favorable ratio of land to labor, and after nearly two centuries of freedom from colonial rule, not one republic has achieved the status of a developed country." *Id.* at 410.

[25] CELSO FURTADO, ECONOMIC DEVELOPMENT OF LATIN AMERICA 170 (2d ed., Suzette Macedo, trans., 1976).

[26] Sadig Rasheed & Shetu Chole, *Human Development: An African Perspective*, UNDP OCCASIONAL PAPER 17 (1994) § I ("The 1980s have repeatedly and emphatically been described as a lost development decade....However, the fruits of independence had already begun to turn sour by about the mid-1970s...."), http://hdr.undp.org/docs/publications/ocational_papers/oc17.htm. *See also* Rupert Emerson, *The Prospects for Democracy in Africa*, in THE STATE OF NATIONS: CONSTRAINTS ON DEVELOPMENT IN INDEPENDENT AFRICA 251-52 (Michael F. Lofchie, ed., 1971) ("Independence has not brought with it the booms of development which it was hoped would follow in its train …. the UN Decade of Development has so far been an unhappy failure, widening rather than closing the gap between the rich and the poor countries...."); Robert M. Price, *Neo-Colonialism and Ghana's Economic Decline: A Critical Assessment*, 18 CANADIAN J. OF AFRICAN STUD. 163, 165 (1984):

> The optimistic expectations that surrounded the independence celebrations in 1957 could not contrast more dramatically and tragically with the reality that surrounded Ghana's silver jubilee, the anniversary in 1982 of twenty-five years of that independence. Production in all sectors was abysmally low….Economic deterioration had eroded Ghana's once impressive economic and social infrastructure. The systems of health care, education, transportation, and communication were in disarray…Unable to obtain paper, books, and food to feed its boarding students, the educational system was showing signs of disintegration...Likewise the system of health care delivery was in chaos.

[27] Lagos Plan of Action, 1980, Preamble, ¶1, http://www.uneca.org/adfiii/riefforts/ref/other2.htm. *See also* Herbert H. Werlin, *The Consequences of Corruption: The Ghanian Experience*, 88 Poli. Sci. Q. 71, 74 (1973):

> Whereas between 1955 and 1962 Ghana's GNP increased at an average annual rate of nearly 5 per cent, there was practically no growth at all by 1965, despite the increase of central government expenditure by 78 per cent between 1960 and 1965 at constant prices. Since Ghana's estimated annual rate of population growth was 2.6 per cent, her economy was obviously retrogressing...While personal per capita consumption declined by some 15 per cent between 1960 and 1966, the real wage income of the minimum wage earner declined by some 45 per cent during this period.

[28] Elliot Berg et al, Accelerated Development in Sub-Saharan Africa: An Agenda for Action 4 (World Bank, 1981).

[29] *Id.* at 2.

[30] William Easterly & Ross Levine, *Africa's Growth Tragedy: Policies and Ethnic Divisions*, 112 Q. J. Econ. 1203, 1204-5 (1997). *See also* Ayittey, *supra* n. 10, at 267 ("More than $400 billion in aid and credits have been pumped into Africa since the 1960s...Yet all these efforts have borne negligible results. The continent continues to sink deeper into an economic abyss."); David E. Sahn, Adjusting to Policy Failure in African Economies 3 (1994)("Growth rates were generally in decline from 1976 to 1983 and then followed an oscillating pattern in 1985-1990 that did not indicate any sustained improvement in performance....When the exceedingly rapid rate of population increase is taken into account, the average growth rate of GDP per capita was in fact negative over the entire period for all sub-Saharan Africa.").

[31] Paul Collier, Lani Elliott, Håvard Hegre, Anke Hoeffler, Marta Reynal-Querol & Nicholas Sambanis, Breaking the Conflict Trap: Civil War and Development Policy 53 (World Bank, 2003), http://econ.worldbank.org/prr/CivilWarPRR/text-26671.

[32] *Id.* at 6.

[33] *Id.* at 53-54.

[34] *Id.* at 1.

[35] In this Article, we have limited our discussion to malaria and HIV/AIDS, but other chronic infectious diseases, such as tuberculosis and hookworm, are acknowledged burdens on human development. Although the total number of deaths from hookworm is small compared to the death toll from AIDS, malaria, and TB, the economic effects can be large in developing areas. *See* Hoyt Bleakley & Fabian Lange, *Chronic Disease Burden and the Interaction of Education, Fertility and Growth*, Nov. 22, 2003, http://home.uchicago.edu/~fwlange/HookwormPaper.pdf (visited 1/30/04); World Health Organization, Global Burden of Disease 2002 (hookworm death toll in 2002 was 2,943),http://www3.who.int/whosis/menu.cfm?path=evidence,burden,burden_estimates%20, burden_estimates_2002,burden_ estimates_2002_ Region&language =english**.** *See also* J.M. Hawdon, T. Li, B. Zahn & M.S. Blouin, *Genetic Structure of Populations of the Human Hookworm, Necator americanus, in China*, 10 Molecular Ecology 1433, 1437 (2001) ("Infection with the human hookworms…remains a burden on the health and economies of many developing nations in the tropics...."); Michael Cappello, *Pathogenesis of Hookworm Anemia and Malnutrition* (Research in Pediatric Parasitology, Yale Child Health Research Center)("anemia and protein energy malnutrition attributable to intestinal hookworm infection affects between 1 and 2 billion people worldwide, including approximately 500 million children. Children with heavy hookworm infection suffer potentially severe delays in both physical and intellectual development."), http://info.med.yale.edu/pediat/PedID/Cappello/Labsite/research_hookworm.html; Dick Thompson, *Coordinates 2002: Charting Progress Against AIDS, TB and Malaria* 1 (World Health Organ. 2002)("Any effective effort to reduce the burden of disease faced by the world's poorest people must concentrate on AIDS, tuberculosis (TB) and malaria. Combined, these three diseases could account for 500 million or more illnesses a year and at least 6 million deaths.").

[36] World Health Organization, Global Burden of Disease 2002.

[37] *Malaria*, BBC News, Feb. 8, 2003 ("The parasitic disease is present in 90 countries and infects one in 10 of the world's population….").

[38] Diane M. Birnbaumer & Anne Rutkowski, *Malaria: A Comprehensive Review for the Emergency Physician*, 25 Topics in Emergency Med. 2, 2 (2003).

[39] World Health Organization, Global Burden of Disease 2002.

[40] There is some variability in these figures. *See* Edward T. Ryan, *Malaria: Epidemiology, Pathogenesis, Diagnosis, Prevention, and Treatment—An Update*, Current Clinical Topics in Infectious Disease, http://www.mgh.harvard.edu/id/hms/handoutscore02/ryan2002malaria.pdf (estimating that the annual death toll from malaria ranges from 1.5 to 2.7 million); Stephanie Kriner, *Malaria: Africa's Silent Killer*, http://www.disasterrelief.org/Disasters/000425malaria (malaria kills up to 2 million people annually.); Anuraj H. Shankar, *Nutritional Modulation of Malaria Morbidity and Mortality*, 182 J. Infectious Diseases S37, S37 (Supp. 1, 2000) (noting a figure of 2-3 million annual deaths from malaria worldwide).

[41] World Health Organization, The World Health Report (2004), http://www3.who.int/whosis/menu.cfm?path=evidence,burden,burden_estimates,burden estimates_ 2002N&language=English.

[42] Quoted in John Luke Gallup and Jeffrey D. Sachs, *The Economic Burden of Malaria* 1 (Center for Intl. Development at Harvard University, CID Working Paper No. 52 (2000), http://www2.cid.harvard.edu/cidwp/052.pdf.

[43] Roll Back Malaria, World Health Organization, *Economic Costs of Malaria*,http://www.rbm.who.int/cmc_upload/0/000/015/363/RBMInfosheet_10.htm (visited Dec. 10, 2004).

[44] Gallup is a Research Fellow at the Center for International Development, an Institute Associate at the Harvard Institute for International Development, and a Lecturer in the Department of Economics at Harvard University.

[45] Sachs is the Director of the Center for International Development and the Harvard Institute for International Development, and the Galen L. Stone Professor of International Trade in the Department of Economics.

[46] Gallup & Sachs, at Abstract. Gallup and Sachs controlled for variables such as historic, geographic, economic and policy factors, among others, but did not control for the tropical cluster diseases. *See also* Elsa V. Artadi & Xavier Sala-i-Martin, *The Economic Tragedy of the XXth Century: Growth in Africa*, *Columbia University, Department of Economics, Discussion Paper Series, Discussion Paper #:0203-17 13* (2003) ("if Africa had no malaria over the last four decades, its annual growth rate would have been 1.25 percentage points larger...."); Kara Hanson, Catherine Goodman, Jo Lines, Sylvia Meek, David Bradley & Anne Mills, *The Economics of Malaria Control Interventions*, (World

Health Organization, 2004), http://www.globalforumhealth.org/FilesUpld/78.pdf (visited Dec. 29, 2004).

[47] Gallup & Sachs, at 1. *See also* F. Desmond McCarthy, Holger Wolf, and Yi Wu, *The Growth Costs of Malaria* (1999), http://www.malaria.org/Wolf_Wu_McCarthy.pdf ("malaria affects an estimated three hundred million people....frequent debilitating attacks reduce the quality of life for chronic sufferers.").

[48] The total annual number of deaths from SALW is estimated to be approximately 500,000. *See* Small Arms Survey 2004: Rights at Risk 174-75 (2004) (estimating that the annual number of firearm-related deaths ranges in non-combat situations ranges from 200,000-270,000. Additionally, "In 2001, the Small Arms Survey cited the established estimate of 300,000 small arms-related deaths in armed conflict each year....There seems little doubt that the global estimate will be revised downward.") *Cf.* David B. Kopel, Paul Gallant & Joanne D. Eisen, *Global Deaths from Firearms: Searching for Plausible Estimates*, 8 Tex. Rev. L. & Pol. 114 (2003)(criticizing earlier estimates of global firearms deaths as not based on sound empirical data; also noting that estimates of 300,000 annual deaths from SALW in wartime were based on the mistaken assumption that all wartime deaths are caused by SALW, and no deaths are caused by heavier weapons).

[49] *See* Anuraj H. Shankar, *Nutritional Modulation of Malaria Morbidity and Mortality*, 182 J. Infectious Diseases S37, S37 (Supp. 1, 2000) ("Malaria currently accounts for about 200 million morbid episodes and 2-3 million deaths each year, estimates that have been increasing over the last three decades….") Morbidity is defined by the Centers for Disease Control and Prevention as "Any departure, subjective or objective, from a state of physiological or psychological well-being.", http://www.cdc.gov/reproductivehealth/epi_gloss2.htm.

[50] In war, the wounded-to-killed ratio from firearm injuries has been generally estimated at 2:1, but has been noted to be as high as 13:1. Robin M. Coupland and David R. Meddings, *Mortality Associated with Use of Weapons in Armed Conflicts, Wartime Atrocities, and Civilian Mass Shootings: Literature Review*, 319 Brit. Med. J. 407, 407 (1999). In one extreme instance, the ratio was reported as high as 45:1. *Id.* at 408. *See also* Firearm Injury Center at Penn, *Firearm Injury in the U.S.*, at 4 ("An estimated two nonfatal injuries occur for every firearm death…."), http://www.uphs.upenn.edu/ficap/resourcebook/pdf/monograph.pdf,; Gary Kleck, Point Blank: Guns and Violence in America 116 (1991)(ratio of non-fatal to fatal gunshot wounds in the U.S. is approximately 5.7:1). In general, **"**the wounded to killed ratios for all conventional weapons are comparable." Coupland & Meddings, at 408.

If we accept Coupland and Meddings' high figure (13 firearms woundings per one fatality), and if we apply the 13:1 ratio to SALW in general and we use the common estimate of 500,000 annual SALW-related deaths, we arrive at a morbidity figure of approximately 6.5 million non-fatal SALW-related injuries.

Thus, the upper plausible estimate for SALW morbidity is 6.5 million non-fatal cases per year. In contrast, there are 300 million to 500 million episodes of malaria among the affected population each year.

[51] Dick Thompson, *Coordinates 2002: Charting Progress Against AIDS, TB and Malaria* §1.3 (World Health Organization 2002), http://www.who.int/infectious-disease-news/Iddocs/Coordinates22.pdf.

[52] Joel G. Breman, Andréa Egan & Gerald Keusch, *The Intolerable Burden of Malaria: A New Look at the Numbers*, 64 Am. J. Tropical Med. & Hygiene iv, v (2001). For a discussion of cerebral malaria as distinguished from other manifestations of the disease, see "Cerebral Malaria," in *The Malaria Website* (Brown Univ.) ("an acute, widespread disease of the brain which is accompanied by fever"), http://www.brown.edu/Courses/Bio_160/Projects1999/malaria/cermal.html.

[53] Breman et al., at v.

[54] U.S. Agency for International Development (USAID), *Malaria Control Programs in Africa*, http://www.usaid.gov/pop_health/cs/csmalaria.htm (visited Dec. 13, 2003).

[55] *Malaria Increases Baby's HIV Risk*, BBC News, Nov. 6, 2003; H. Brahmbhatt, G. Kigozi, F Wabwire-Mangen, D. Serwadda, N. Sewankambo, T. Lutalo, M.J. Wawer, C. Abramowsky, D. Sullivan, & R. Gray, *The effects of placental malaria on mother-to-child HIV transmission in Rakai, Uganda*, 17 AIDS 2559 (2003).

[56] *Gates Boosts War on Malaria*, BBC News, Sept. 21, 2003.

[57] Diane M. Birnbaumer and Anne Rutkowski, *Malaria: A Comprehensive Review for the Emergency Physician*, 25 Topics in Emergency Med. 2, 2 (2003).

[58] *See* Richard Black, *Korean Fish Joins Malaria Fight*, BBC News, Dec. 7, 2003 ("Scientists in South Korea have found a local fish that could help control the spread of malaria. The fish, called the muddy loach, eats mosquito larvae and can completely remove them from rice fields.") The BBC news item further stated "The idea of using fish in this way dates back a century or so, but in recent decades it has fallen out of favour as more modern techniques for combating malaria, such as chemical insecticides, drugs and bednets have taken precedence." Richard Black, a BBC science correspondent, also reported on a similar strategy in India. *Fish Eat Away at Malaria in India*, BBC News, Jan. 5, 2004 (The BBC report noted that, according to Dr. VP Sharma, former director of India's Malaria Research Institute, "fish had virtually eliminated malaria-carrying *Anopheles* mosquitoes from some districts, though he [Dr. Sharma] cautioned that the strategy did not work everywhere.").

[59] *U.N. Protocol Banning DDT, Other Pollutants Enters Into Force*, U.N. Wire, Oct. 23, 2003. *See also* Paul Driessen, *Committing Malpractice on the World's Poor: These Unnatural Disasters Can No Longer Be Tolerated,* http://www.enterstageright.com/archive/articles/0105/0105unnatural.htm:

> Six years ago, the WHO and its Roll Back Malaria campaign promised to halve malaria rates by 2010. Since then, rates have actually increased by over 10 percent. A primary reason is that WHO and RBM – as well as UNICEF and the U.S. Agency for International Development – refuse to permit, promote or fund pesticide use to control mosquitoes, or even acknowledge the critical role of DDT and other pesticides in preventing malaria.

[60] Donald R. Roberts, Larry L. Laughlin, Paul Hsheih, and Llewellyn J. Legters, *DDT, Global Strategies, and a Malaria Control Crisis in South America*, 3 Emerging Infectious Diseases (Number 3, July-Sept. 1997)(web edition). *See also* Paul Driessen, *The Unnecessary Scourge*, Tech Central Station, Mar. 8, 2004 (Driessen is director of the Economic Human Rights Project; his article was adapted from his testimony before the U.S. House of Representatives Subcommittee on Energy and Natural Resources, cited in note 11. Driessen's article provides a concise history of the successful use of DDT in the eradication of mosquito-borne disease and of the subsequent unscientific activism which virtually eliminated DDT's use world-wide.).

[61] Roberts et al. *See also* Nicholas D. Kristof, N.Y. Times, Jan. 8, 2005: "But overall, one of the best ways to protect people is to spray the inside of a hut, about once a year, with DDT. This uses tiny amounts of DDT – 450,000 people can be protected with the same amount that was applied in the 1960's to a single 1,000-acre American cotton farm."

[62] Roberts et al.

[63] World Health Organization, Global Burden of Disease 2002. *See also* World Health Organization, UNAIDS, *AIDS Epidemic Update*, Executive Summary at 5 (Dec. 2004)(In 2003, "almost three million were killed by AIDS….").

[64] Based on the figure of 500,000 annual deaths from SALW, which may be too high an estimate. *See supra* note 48.

[65] The World Health Report, at Table 1.1. *See also* Neff Walker, Bernhard Schwartlander, Jennifer Bryce, *Meeting International Goals in Child Survival and HIV/AIDS*, 360 Lancet 284, 288 (2002). Walker et al. state that:

> one can calculate the number of under-5 deaths that could be saved through prevention of mother-to-child transmission. Use of the simpler and less costly interventions by all HIV-infected pregnant women could have reduced deaths in children younger than 5 years of age in the year 1999 by between 100000 and 250000 in countries in sub-Saharan Africa.

Id. at 288
The authors noted that the cost estimate per year would be US$ 640million. The figures of 100,000 to 250,000 correspond to between 20-50% of the approximate annual global estimate of SALW deaths in *all* age groups.

[66] See *Study Cuts Kenya HIV Estimates*, BBC News, Jan. 9, 2004.

[67] *World AIDS Deaths, Infections at New Highs*, N.Y. Times, Nov. 25, 2003.

[68] Hazwell Kanjaye, *Health-Malawi: AIDS is a Major Challenge to Development*, Inter Press Service, Jan. 4, 1999, http://www.aegis.com/news/ips/1999/IP990101.html. *See also Aids Toll Cuts African Lifespan*, BBC News, Dec. 18, 2003.

[69] *Malawi Famine Blamed on Aids*, BBC News, Nov. 26, 2002.

[70] Raphael Tenthani, *Malawi Minister's Aids Trauma*, BBC News, Feb. 18, 2003.

[71] For a definition and extensive discussion of the HDI, *see* UNDP, Human Development Report 1994, at 90-96 (1994).

[72] UNDP, Human Development Report 2003, at 41-42 (2003).

[73] Food and Agriculture Organization of the United Nations, The State of Food Insecurity in the World 2003, at 11, ftp://ftp.fao.org/docrep/fao/006/j0083e/j0083300.pdf.

[74] *See* Robin Lustig, *The Genocide of a Generation*, BBC News, Nov. 12, 2003.

[75] UNAIDS, *Accelerating Action Against AIDS in Africa*, Executive Summary at 2 (2003).

[76] Food & Agriculture Organization, *FAO Reports a Setback in the War Against Hunger*, Nov. 25, 2003, http://www.fao.org/english/newsroom/news/2003/24779-en.html. *See also Africa Devastated by Aids*, BBC News, Nov. 28, 2001 ("In Burkina Faso, 20% of rural families have cut back their farming activities because of Aids.").

[77] *FAO Reports a Setback in the War Against Hunger*.

[78] Monty G. Marshall, *Major Episodes of Political Violence 1946-1999* (2000), http://members.aol.com/CSPmgm/warlist.htm. Marshall identified 61 armed conflicts that commenced between 1990 and 1999; the conflicts resulted in 1,542,500 deaths. Examination of the data by 5-year intervals reveals that 38 armed conflicts commenced between 1990 and 1994, resulting in 1,273,500 deaths, and accounting for 82.6% of the total deaths that occurred in the 1990s from armed conflicts that commenced during the decade. In the latter half of the decade (1995-1999), only 23 armed conflicts commenced, resulting in an additional 269,000 deaths. Thus, only 37.7% of armed conflicts occurred during the last 5 years of the decade, and these conflicts accounted for only about 17.4% of the total deaths that occurred in the 1990s from armed conflicts that commenced during that decade. Admittedly, not all deaths from these armed conflicts would have been tallied by the time Marshall's paper was published, making it likely that the total would be a little higher.

[79] Ted Robert Gurr et al., *Peace and Conflict 2001: A Global Survey of Armed Conflicts, Self-Determination Movements, and Democracy* (2000), http://www.cidcm.umd.edu/inscr/PC01Web.pdf.

[80] World Health Organization, *We Can Beat AIDS, TB and Malaria, UN Agencies Says* [sic], Apr. 22, 2002, http://www.who.int/mediacentre/news/releases/release29/en/.

[81] *60 Million Africans Have Been Touched by AIDS, Says UNAIDS Executive Director*, UNAIDS/UNICEF/WHO Joint Press Release, July 10, 2003, http://www.thebody.com/unaids/africa_aids.html.

[82] World Bank, *AIDS Regional Update: Africa*, http://www.worldbank.org/afr/aids/overview.htm.

[83] UNAIDS, *Accelerating Action Against AIDS in Africa*, (Geneva, 2003), at 5, 71-72, http://www.unaids.org/html/pub/UNAdocs/ICASA_Report_2003_en_pdf.pdf.

[84] Sam Kobia, director of the World Council of Churches, quoted in World Council of Churches, *Facilitating Community Responses to HIV/AIDS*, http://www.wcc-coe.org/wcc/what/mission/hiv-aids-e.html.

[85] From a speech presented by Ms. Graca Machel, at the XV International AIDS Conference in Bangkok, on July 16, 2004, http://www.aids2004.org/admin/images/upload/565.pdf.

[86] *See* Global AIDS Alliance, *Key Principles for Implementing the President's Emergency Plan for AIDS Relief,* Dec. 12, 2003, http://www.globalaidsalliance.org/gaa_recommendations.cfm: ("Systematic, high-level, entrenched corruption in the prescription drug and commodities sector by many African governments is a critical obstacle preventing progress in combating HIV/AIDS. There are indications that up to 30% of drug sector resources funded by the World Bank are lost to corruption.") *See also AIDS-Africa-Corruption: AIDS Drugs Money Diverted, Wasted in Africa: World Bank*, Agence France-Presse, Sept. 13, 1999. (According to Callisto Madavo, World Bank deputy president for Africa: "Too much money is being

wasted and too much money is being diverted...."); American Foundation for AIDS Research, *amfAR's Report on AIDS in Africa: Zimbabwe*, http://www.amfar.org/cgi-bin/iowa/programs/globali/record.html?record=86:

> While Zimbabwe has taken measures to curb the epidemic through its National AIDS Coordination Programme, government corruption and mismanagement have hindered AIDS programs. Since January 2000, Zimbabwe's government has levied a 3 percent tax on personal and corporate income, ostensibly to fund AIDS control and prevention programs…the government has not accounted for how the funds will be spent….

See also Mpumalanga Corruption: Manana and the Health Department, Carte Blanche Interactive, Aug. 31, 2003 (Kate Barry Producer),http://www.mnet.co.za/CarteBlanche/Display/Display.asp?Id=2307. (In the South African province of Mpumalanga, "According to Price Waterhouse Coopers there was gross mismanagement in the handling of HIV/AIDS funds.").

[87] *See* Dagi Kimani, *Has War on Aids Been Compromised?*, Daily Nation on the Web, July 5, 2002, http://www.nationaudio.com/News/DailyNation/05072002/Comment/Comment85.html (In April 2002, Kenya's National Aids Control Council (NACC) "failed to win financial support from the Global Fund to Fight Aids, Tuberculosis and Malaria…." The NACC is a branch of the Office of the President, but that Office is "often associated with corruption, misappropriation and inefficiency…." Many donors find this situation unacceptable.) *See also* Elizabeth Piper, *HIV/AIDS: Ukraine Appeals to West for Help to Fight AIDS*, ArtUkraine.com, Feb. 13, 2004 ("late last month the Global Fund to Fight AIDS, Tuberculosis and Malaria suspended payments due to mismanagement."), http://www.artukraine.com/uasupport/appeal_west.htm; Sharier Khan, *Bangladesh Government Outsources Health to NGOs*, OneWorld.net, June 15, 2004 ("scores of key health programs in Bangladesh [are] stymied by corruption, mismanagement and political interference....the World Bank (WB) withdrew around half of the $52-million fund it had provided for the [HIV/AIDS] project."), http://www.oneworld.net/article/view/93093/1/58.

[88] *Review of the Problem of Human Immunodeficiency Virus/Acquired Immunodeficiency Syndrome in All its Aspects*, Special Session of the General Assembly on HIV/AIDS, Report of the Secretary-General, 55th Sess., Agenda Item 179, U.N. Doc. A/55/779 (2001), http://www.un.org/documents/ga/docs/55/a55779.pdf.

[89] Comments by the Canadian HIV/AIDS Legal Network on the Report of the Secretary-General Special Session of the United Nations General Assembly on HIV/AIDS, at ¶6, http://www.aidslaw.ca/Maincontent/events/ungass-revsecgen.htm.

[90] Sharon LaPraniere, *After Reconciliation, Steering South Africa to a Reckoning*, N.Y. Times, Apr. 27, 2004.

[91] *See* Colin McClelland, *In South Africa, only the funeral industry is booming*, 171 Can. Med. Ass'n J. 526, 526 (2004).

[92] Khin Saw Win, *Medicine is Politics*, Burma Watch International, Nov. 2, 2001, http://www.burmawatch.org/com-khin-med-pol.html. *See also* Patrick Brown, *Deadly Secret: AIDS in China*, CBC News, Apr. 7, 2004 ("An epidemic caused by official mismanagement, greed and corruption has struck at thousands of villages…."); American Foundation for AIDS Research, *amfAR's Report on AIDS in Africa: Zimbabwe* ("AIDS workers accuse Mugabe's government of being too distracted by its seizure of white-owned farms to deal effectively with the crisis.").

[93] *See* Richard H. Solomon, *Foreword*, in Ted Robert Gurr, People Versus States ix (2000): "Conflict, of course, is intrinsic to human society and is often an agent of reform, adaptation, and development." Solomon is President of the United States Institute of Peace.

[94] Firearms & Violence: A Critical Review 8 (Charles F. Wellford, John V. Pepper & Carol V. Petrie, eds., 2005).

[95] Global Corruption Report 2003 310 (Robin Hodess, ed., 2003).

[96] *Final Outcome of the International Conference on Financing for Development*, UN International Conference on Financing for Development, A/Conf.198/1 (Mar. 1, 2002), at ¶11, http://www.un.org/esa/ffd/0302finalMonterreyConsensus.pdf.

[97] *See Comments by Katherine McKenzie on the Firearms Control Bill,* Gun Control Alliance, South Africa, http://www.gca.org.za/bill/submssions/mckenzie.htm (In 1998, the murder rate in Zambia was 13 per 100,000, while the rate in South Africa was 65 per 100,000).

[98] *Country Profile: Zambia*, BBC News, Nov. 26, 2003 ("Zambia has moved from being a major copper producer and potentially one of the continent's richest countries at independence in 1964 to one of the world's poorest."), http://news.bbc.co.uk/1/hi/world/africa/country_profiles/1069294.stm. Despite the world-wide drop in copper prices in 1975, Zambia still had a flourishing agricultural sector, and should not have been so economically devastated.

[99] *World Bank Ready to Assist If...*, The Times of Zambia, Dec. 10, 2003.

[100] Christian Fraser, *Zambia's 'Matrix of Plunder'*, BBC News, Dec. 9, 2003, http://news.bbc.co.uk/1/hi/world/africa/3302419.stm. *See also We Demand Total Debt Cancellation*, The Post (Lusaka), Nov. 20, 2004 ("It is very clear that the colossal debt stock of the world's impoverished countries – to which category Zambia belongs – owed to the industrialized nations…are beyond repayment. Indeed the harsh effects of this huge debt-overhang has not spared Zambia."), http://allafrica.com/stories/200411290932.html; Kingsley Kaswende, *Zambia Debt Burden Has Hampered Development*, The Post (Lusaka), Jan. 18, 2004, http://fr.allafrica.com/stories/200401190050.html.

It is widely acknowledged that the burden of massive debt hinders development. A first cause of the debt burden is kleptocracy, which originally stole the funds from foreign loans, rather than investing them in projects which would improve economic growth, and would generate the revenue to repay the debt. A second cause is investment of the non-stolen money in central planning projects which enhanced urban elite control of the economy, while undermining property rights and economic freedom—and thereby harmed economic development. *See*, *e.g.*, Paul Craig Roberts, *Third World Debt: Legacy of Development Experts*, 7 Cato J. 231 (1987), http://www.cato.org/pubs/journal/cj7n1/cj7n1-12.pdf; James Bovard, *The World Bank vs. The World's Poor, Cato Inst. Policy Analysis no. 92* (1987), http://www.cato.org/pub_display.php?pub_id=958&full=1.

[101] *Country Profile: Zambia*, BBC News ("Aids is blamed for decimating the cream of Zambian professionals— including engineers and politicians—and malaria remains a major problem.").

[102] *Id.*

[103] Christian Fraser, *Zambia's 'Matrix of Plunder'*, BBC NEWS, Dec. 9, 2003.

[104] Food and Agriculture Organization of the United Nations, *The State of Food Insecurity in the World 2003*, (2003), at 7, ftp://ftp.fao.org/docrep/fao/006/j0083e/j0083300.pdf.

[105] *See* Lise Rakner, Nicholas van de Walle & Dominic Mulaisho, *Aid and Reform in Zambia: Country Case Study*, Final Report, Aid and Reform in Africa Project, (World Bank, 1999), http://www.worldbank.org/research/aid/africa/zambia2.pdf.

[106] GEORGE B.N. AYITTEY, AFRICA IN CHAOS 270 (1998)(noting that western economic advisers encouraged a high level of Zambian government control of the economy).

[107] *Economic Challenge for Zambia*, BBC NEWS, Jan. 2, 2002:

> From the 1960s right through to the early 1990s, under President Kenneth Kaunda, Zambia veered to the left. The country's huge copper mines became public property, as did its farms, in an attempt to solve issues of ownership once and for all. The result was underperformance – exacerbated by corruption at the top as Mr. Kaunda's United National Independence Party made Zambia's de facto one-party state into the law of the land.

[108] Fraser, *Zambia's 'Matrix of Plunder'*.

[109] *Kenya Seeks 'Ghosts' to Ease Budget Woes*, BBC NEWS, July 18, 2003. *Cf. Liberia Fights 'Ghost Soldiers'*, BBC NEWS, Aug. 17, 2001 ("Liberia has discovered that some 2,000 soldiers out of its 14,000 strong army do not exist." Senior officers have been collecting the salaries of those "ghosts.")

[110] Stephen Kapambwe, *Mwanawasa Seeks Recovery of Zambia's Agricultural Prowess*, THE TIMES OF ZAMBIA, Dec. 19, 2003.

[111] *Opinion*, THE TIMES OF ZAMBIA, Dec. 22, 2004.

[112] MORAG BELL, CONTEMPORARY AFRICA 25 (1986).

[113] Gray Phombeah, *Little to Celebrate as Kenya Turns 40*, BBC NEWS, Dec. 11, 2003.

[114] *See* Eugene Obiero, *Poverty in Kenya*, at Comments ¶2, http://www.ucalgary.ca/G8/tidalthought/Kenya%20%20Povery%20in%20Kenya.pdf (visited 12/25/03) ("The introduction of the single party regime by our founding father introduced room for unprecedented corruption and looting of public coffers....it will be a gross distortion of the truth to say that corruption is something that started in Kenya recently.").

[115] *World Bank Pledges Kenya Aid*, BBC NEWS, July 23, 2003. *See also* Mugo Njeru and Mugumo Munene, *Cbk Lost Sh13.5 Billion in Nine Days*, THE NATION (Nairobi), Jan. 8, 2004.

[116] *Kenya Hunts for Missing Billions*, BBC NEWS, Dec. 16, 2003. *See also Hearings Before the House Comm. on Fin. Services*, 107th Cong. (2002) (statement of Michael Chege), http://financialservices.house.gov/media/pdf/050902mc.pdf ("The authoritative British newsletter *Africa Confidential,* put Moi's external bank holdings at US $3billion two years ago. He denied it publicly but insisted that he could not vouch for his siblings who, together with Moi's supreme confidante Nicholas Biwott have been often linked to major corrupt deals in Kenya.").

[117] *Corruption 'Costs Kenya $1bn a Year'*, BBC NEWS, May 30, 2003.

[118] *Id.* See also Ishbel Matheson, *Poll Drives Change Through Kenya*, BBC NEWS, Jan. 4, 2003 ("Kenya is, in the words of a famous pop tune here, 'nychi ya kitu kidogo.' In Swahili, that means the 'land of something small' – a euphemism for the 'land of graft'.").

[119] *'Day of Reckoning' for Kenya Graft*, BBC NEWS, Oct. 20, 2003. *See also First Deputy Managing Director Anne Krueger's Statement at the Conclusion of a Visit to Kenya*, International Monetary Fund, Press Release No. 03/212 (Dec. 4, 2003).; *Joint Statement of the Government of the Republic of Kenya and the World Bank*, Consultative Group Meeting for Kenya, Nairobi, (Nov. 24-25, 2003) ("H.E. President Kibaki, welcomed the delegates and assured them that Kenya is committed to good governance, sound economic management and zero tolerance to corruption."), http://siteresources.worldbank.org/KENYAEXTN/Resources/final_joint_statement.pdf.

[120] *'Price List' for Kenya's Judges*, BBC NEWS, Oct. 3, 2003; Tony Kago and Jillo Kadida, *Top Judges Caught in Corruption*, THE NATION (Nairobi), Oct. 1, 2003.

[121] *Kenya Seeks 'Ghosts' to Ease Budget Woes*, BBC NEWS, July 18, 2003. ("In March 2003, wage spending took up 34.6% of government spending – but development spending was just 11.6%, meaning that even a small saving on wages and salaries could greatly boost the development budget.").

[122] Dagi Kimani, *Kenya's Filthy Rich Civil Servants*, THE EAST AFRICAN (Nairobi), Nov. 3, 2004, reprinted in WORLD PRESS REVIEW (Jan. 2004), http://www.worldpress.org/Africa/1701.cfm:

> As Kenyans this year launch a concerted war against corruption, which in governance is taken basically to mean the privatization of public funds through illegal means, they will also have to fight extremely hard to stop the looting of public coffers in legal ways….in what looks like a conspiracy by the top echelons of the political leadership and the civil service, the salaries of top public servants are being pushed to obscene levels….

See also Gray Phombeah, *Little to Celebrate as Kenya Turns 40*, BBC NEWS, Dec. 11, 2003 ("Despite dramatic moves to tackle corruption and the provision of free primary education places, internal feuding in the ruling coalition has undermined the credibility of the new government and eroded confidence among Kenyans in the new era."); Mugo Njeru, *Graft: Kenya Still Among the Worst*, THE NATION (Nairobi), Dec. 10, 2004 ("Parliament and political parties are ranked by Kenyans as some of the most corrupt institutions, a new report by Transparency International reveals….").

[123] TED ROBERT GURR, PEOPLES VERSUS STATES: MINORITIES AT RISK IN THE NEW CENTURY 261 (2000)("President Moi, a Kalenjin, encouraged communal violence against the Kikuyu and the Luo....").

[124] *Id.*

[125] *Police are Kenya's Top Killers*, BBC NEWS, Jan. 14, 2002. *See also Police Could Be at Centre of Extortion Ring in City*, THE EAST AFRICAN STANDARD (Nairobi), Jan. 26, 2004.

[126] Phombeah, *Little to Celebrate as Kenya Turns 40*.

[127] *See* Standard Team, *PC Cracks the Whip on Traffic Policemen*, The East African Standard (Nairobi), Dec. 13, 2004. ("Eastern Provincial Commissioner John Nandasaba yesterday accused traffic police officers in the province of giving the force a bad image by extorting money from motorists."); Mugo Njeru, *Graft: Kenya Still Among the Worst*, The Nation (Nairobi), Dec. 10, 2004 ("The sharp focus on corruption in the police force, is reflected in the high level of insecurity in the country. 'As long as bribery plays a significant role in the operations of the Kenya Police Force, it will not be able to effectively perform its core function of guaranteeing the security of the citizens,' said the TI [Transparency International]-Kenya director."); *Police Could Be at Centre of Extortion Ring in City*, The East African Standard (Nairobi), Jan. 26, 2004; *Police are Kenya's Top Killers*, BBC News, Jan. 14, 2002; Immigration and Refugee Board (IRB) of Canada, *Country of Origin Research: Kenya*, http://www.irb-cisr.gc.ca/en/research/ndp/ref/?action=view&doc=ken42855fe:

> Recent corroborating sources noted an increase in incidents of torture by Kenyan police…One source estimated the number of victims of torture and extrajudiciary killings in 2003 at 358…while another had the number at 458, compared with 140 cases reported in 2002…Many incidents involved the rape of women in police cells to get evidence….

[128] Phombeah, *Little to Celebrate as Kenya Turns 40* ("Because of mass unemployment, there is rising crime – armed robbery and carjackings – in Nairobi and other major towns."); *Cf.* Sabala Kizito, *The Proliferation, Circulation and Use of Illegal Firearms in Urban Centres. The Case of Nairobi – Kenya* (Bonn International Center for Conversion, 2001) http://www.saligad.org/workshops/addid/ papers_ conference_saligad.html; Godfrey Anyumba, Planning for Crime Prevention: The Case of the City of Nairobi (SaferAfrica, 2003).

[129] Robert Ndwiga, *Security Firms Divided over Gun Licenses*, The East African (Nairobi), May 7, 2001. Also noting:

> Security companies are lobbying the Kenya government to issue about 6,000 guards with firearms in the wake of escalating armed robberies in urban centers....According to the firearms Act cap 114, part 11, Section 4 (1), "No person shall purchase, acquire or have in his possession any firearm or ammunition unless he holds a firearm certificate in force at the time"...Illegal firearm possession attracts 15-year imprisonment in Kenya. Guns are granted by the licensing officer if he is satisfied that the applicant has a good reason for "purchasing, acquiring or having in his possession the firearm or ammunition."

[130] Samuel Mburu, *Repeal Laws Barring Kenyans from Keeping Arrows, Urges Kaguthi*, The East African Standard (Nairobi), Dec. 8, 2004.

[131] The authors of Small Arms Survey 2003: Development Denied (2003) cite researchers who ignore or minimize the social benefits of civilian firearm ownership, and who emphasize the negative social costs of firearms ownership. For quantification of some of the social benefits of firearms, see Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. Crim. L. & Criminology 150 (1995)(non-government actors in the U.S. accounts for approximately 2.5 million instances of defensive gun uses from criminal attack, annually). For the non-relationship of arms density and social problems, *see*, *e.g.*, Don B. Kates & Daniel D. Polsby, *Long-Term Nonrelationship of Widespread and Increasing Firearm Availability to Homicide in the United States*, 4 Homicide Stud. 185, 185 (2000):

> These data do not show a correlation over the long term between the distribution of firearms in the population at large and homicide rates. The two variables do cross occasionally, but they do not do so consistently. Rather, the trend in the period 1973-1997 was one of very large increases in firearms accompanied by essentially flat, even diminishing, homicide rates. That is the general rule for the period since the end of World War II to date.

See also Paul Gallant & Joanne Eisen, *Trigger Happy: Rethinking the 'Weapons Effect'*, 14 J. Firearms & Pub. Pol'y 89 (2002), http://www.saf.org/jfpp/jfpp14.pdf.

[132] Food and Agriculture Organization of the United Nations, FAO Newsroom, *Hunger costs millions of lives and billions of dollars—FAO hunger report*, Dec. 8, 2004,

http://www.fao.org/newsroom/en/news/2004/51809/index.html. *See also* FAO, *The State of Food Insecurity in the World 2004: Monitoring Progress Towards the World Food Summit and Millennium Developent Goals*, ftp://ftp.fao.org/docrep/fao/007/y5650e/y5650e00.pdf.

[133] Universal Declaration of Human Rights, G.A. Res. 217A (III) (1948), http://www.un.org/Overview/rights.html.

[134] The sculpture, named "Non-Violence," or "The Knotted Gun," was designed by Fredrik Reuterswäld, and was given by the government of Luxembourg to the United Nations, http://www.un.int/luxembourg/knotted%20gun.htm. Many gun prohibitionists equate non-violence with the absence of firearms, but they may be wrong. As we have detailed in another article, a world without firearms in the hands of "non-state actors" would likely be a much more dangerous and violent world, because physically stronger people could attack smaller victims with impunity, and because victims of genocide and oppression would have no practical means of resistance. *See* Dave Kopel, Paul Gallant & Joanne Eisen, *A World Without Guns*, Nat'l Rev. Online, Dec. 05, 2001, http://www.nationalreview.com/kopel/kopel120501.shtml.

LABOR AND EMPLOYMENT LAW

"NEUTRALITY AGREEMENTS" AND THE DESTRUCTION OF EMPLOYEES' SECTION 7 RIGHTS

*BY GLENN M. TAUBMAN**

I. Introduction.

There are few issues more critical in modern labor law than the legality under the National Labor Relations Act ("NLRA") of "neutrality and card check" agreements.[1] These agreements are eagerly sought by labor unions to ease the way toward unionization in a particular workplace. The use of neutrality and card check agreements (euphemistically called "voluntary recognition agreements" or "majority verification" by unions) has grown exponentially over the past decade, and the reasons are not surprising. Unions face a steady decline in the number of employees choosing union representation when given a free choice in a secret-ballot election, and financial self-interest has driven them to search for new ways of acquiring dues paying members.[2] The AFL-CIO's General Counsel has written that unions should "use strategic campaigns to secure recognition . . . outside the traditional representation processes."[3]

Unions are using "neutrality and card check" agreements because they silence employer opposition and eliminate employees' opportunity for a secret-ballot election. By design, employees have few legal protections "outside the traditional representation processes," and thus little possibility of protecting their NLRA § 7 rights to resist union organizing campaigns.[4] The demise of the secret-ballot election leads to an increase in union coercion and intimidation, as employees are pressured into signing authorization cards that are counted as "votes" for unionization.

Unions argue that substituting neutrality and card check agreements for secret-ballot elections enhances employees' freedom of choice by expeditiously determining whether a majority of them desire union representation.[5] Such arguments stem from the false premise that "unions" and "employees" are one and the same, with interests identical in every respect, and that the institutional goals of labor unions are of necessity the goals of employees. For example, one union advocate asserts that "voluntary recognition agreements are critical to the realization of *employees'* right to organize in the 21st century,"[6] even though most employees do not want to "organize" or have a third party stand between them and their employer.[7] Thus, while the negotiation of neutrality and card check agreements may be critical to the institutional efforts of unions to expand their power and influence, it is also undeniable that these practices subvert *employees'* § 7 rights to freely choose *or reject* unionization in an atmosphere free of restraint, threats and coercion.

The belief that what is expedient for the union is of necessity good for the employees ignores the NLRA's true guiding principle: employee freedom to choose or *reject* unionism. As one NLRB member cogently noted, "unions exist at the pleasure of the employees they represent. Unions *represent* employees; employees do not exist to ensure the survival or success of unions."[8] The United States Supreme Court agrees, recognizing that the heart of the NLRA is "voluntary unionism," the right to join *or reject* a union,[9] and that by "its plain terms . . . the NLRA confers rights only on employees, not on unions or their nonemployee organizers."[10] Nevertheless, employees' § 7 right to reject unionization—an equal corollary of their right to choose unionization—is destroyed by most neutrality and card check agreements.

Unions also insist that all permutations of neutrality and card check agreements are valid, because they are simply "arms length" transactions with employers, and that any agreements between these contending parties are encouraged by labor law and should be enforced by the courts and the NLRB. This construct ignores and omits the real players in all of this drama: the individual employees. These employees are the *only* parties with § 7 rights at stake.[11] However, they are rarely if ever consulted about the neutrality and card check deals cut by their employer and the union that covets them. In fact, the actual terms of most neutrality and card check agreements are held in strict secrecy by the union and the employer, and are not shared with the very employees whom they target—even though labor law condemns secret backroom arrangements between unions and employers.[12]

In sum, employees' § 7 right to freely choose *or reject* a union is under assault by neutrality agreements entered into by growth-starved unions and compliant (or coerced) employers.[13] This was recognized in a pending lawsuit brought under 29 U.S.C. § 186 to challenge such a secret "neutrality" agreement as an unlawful transfer of a "thing of value" from an employer to a union. In that case, the federal court denied motions to dismiss and stated that "Heartland Industrial Partners LLP [the employer] has apparently selected and contracted with a union of Heartland's choice," the Steelworkers.[14]

Agreements that place employer and union "labor peace" above the interests of the employees should be condemned in the same way that the courts and the NLRB have long condemned other collusive arrangements to force employees into unionization.[15] Most neutrality and card check arrangements are such collusive arrangements simply repackaged in an attempt to shield what would otherwise be unlawful employer support of a chosen labor union.[16] This article begins from the premise that most employees wish to hear all sides of the debate about the particular union that covets them, do not wish to be subjected to secret agreements between unions desperate for members and employers desperate for "labor peace," and that many have principled disagreements with union representation that must be protected.

II. Are These "Neutrality" Agreements or "Neutering" Agreements?

In a recent speech to the American Bar Association, NLRB Chairman Robert Battista criticized the growing use of neutrality agreements and stated that the "purpose of using neutrality agreements is not to expedite [employee free choice], but to silence one of the parties."[17] He is correct, as common "neutrality" provisions limit employer free speech and hinder or destroy employees' § 7 right to freely choose or reject unionization.

Gag Rule: Although most neutrality agreements purport to require an employer to remain "neutral," in reality they impose a gag on all speech not favorable to the union. Even front-line supervisors are prohibited from saying anything about the union or unionization during an organizing drive. Employees are only permitted to hear one side of the story: the version the union officials want them to hear.

For example, the model neutrality agreement used by the United Auto Workers ("UAW") states that an employer may not "communicate in a negative, derogatory or demeaning nature about the other party (including the other party's motives, integrity, character or performance), or about labor unions generally."[18] In practice, this requires employers to refrain from providing even truthful information in response to direct employee questions. In contrast to this employer silence, the Auto Workers' model agreement *requires* the signatory employer to affirmatively "advise its employees in writing and orally that it is not opposed to the UAW being selected as their bargaining agent."[19] Such limits on free speech, and requirements of forced pro-union speech, are purposefully designed to squelch debate and keep employees in the dark about the union that covets them.

It is for this reason that the Sixth Circuit was naive and wrong when it rejected an employer's challenge to the enforcement of the gag rule, stating: "As § 7 grants *employees* the right to organize or to refrain from organizing, . . . it is unclear how any limitation on [the employer's] behavior during a UAW organizational campaign could affect [the] employees' § 7 rights."[20] Factory workers, janitors, cooks and nurses aides seeking truthful information about a union and the effects of unionization in their workplace are entitled to truthful answers from their employer and a full debate, not rote incantations of "we do not oppose the union, and we can say nothing else." Employer silence extracted by a union and enforced by a federal court does not enhance *employee* free choice under § 7. Instead, by keeping employees in the dark, these union-imposed gag rules prevent the free flow of ideas that are critical to informed decision making.

Captive Audience Speeches: Unions often decry "captive audience" speeches in which employers criticize a union or unionization in general. But under many neutrality agreements, employers are required to conduct, and employees are mandated to attend, "captive audience" speeches in favor of the union. In these fora, high-level management officials do not simply declare "neutrality." Rather, a "strategic partnership" is announced, making it seem that unionization by an employer-chosen union is a foregone conclusion.[21] In some auto parts factories it is strongly implied (if not made explicit) that workers risk losing future job opportunities if they do not support the UAW's organizing effort.[22] Union leaders and apologists never explain why employer-paid captive audience speeches cajoling employees to sign cards in favor of the new "partner" union are acceptable, but employer speeches opposing the arrival of a new "partner" are to be condemned.

Union Access to Employees' Personal Information and Employers' Premises: Neutrality agreements frequently require the employer to provide the union with personal information about the targeted employees, including home addresses, phone numbers, and salaries. Employees are never asked if they agree with the release of their personal information. The union is also given permission to enter company property during work hours to solicit employee support and collect union authorization cards, even though unions normally have very limited rights of access to employer premises under the law.[23]

With this broad union access to them, both in the plant and at their homes, employees are subject to relentless group pressure to sign authorization cards. In one recent case where a hotel was pressured by the City of Pittsburgh to enter into a neutrality and card check agreement or lose its tax exempt financing, one of the housekeeping employees filed a sworn declaration in the resulting federal court litigation, stating:

> [After my employer gave the union my name and home address], two union representatives came to my home and made a presentation about the union. They tried to pressure me into signing the union authorization card, and even offered to take me out to dinner. I refused to sign this card as I had not yet made a decision at that time. Shortly thereafter, the union representatives called again at my home, and also visited my home again to try to get me to sign the union authorization card. I finally told them that my decision was that I did not want to be represented by this union, and that I would not sign the card.
>
> Despite the fact that I had told the union representatives of my decision to refrain from signing the card, I felt like there was continuing pressure on me to sign. These union representatives and others were sometimes in and around the hotel, and would speak to me or approach me when I did not want to speak with them. I also heard from other employees that the union representatives were making inquiries about me, such as asking questions about my work performance. I found this to be an invasion of my personal privacy. Once when I was on medical leave and went into the hospital, I found that when I returned to work the union representatives knew about my hospitalization and my illness. I felt

> like their knowledge about me and my illness was also an invasion of my personal privacy.
>
> I also saw the union representatives try to coerce another employee to sign a card, even though they never explained to the employee what this card meant, or told her that the union could be able to be automatically recognized as the representative of the employees without a secret ballot election. It was clear to me that this employee had no idea what this card meant when the union tried to get her signature.[24]

Sadly, this is the stock-in-trade of union organizers intent on procuring cards from fearful or unsuspecting employees. Another employee subject to a UAW card check drive at Dana Corporation attested as follows:

> The UAW put constant pressure on some employees to sign cards by having union organizers bother them while on break time at work, and visit them at home. I believe that the UAW organizers also misled many employees as to the purpose and the finality of the cards. Overall, many employees signed the cards just to get the UAW organizers off their back, not because they really wanted the UAW to represent them.[25]

Given such testimony, it is not surprising that the United States Supreme Court has recognized the untrustworthiness of authorization cards and the superiority of the secret-ballot election.[26]

Waiver of Secret-Ballot Election: Perhaps most egregious, neutrality agreements typically waive NLRB-supervised secret-ballot elections and substitute the "card check recognition" process, in which a signed authorization card counts as a "vote" for the union no matter how it was procured. Thus, the two most self-interested parties—the union that covets more dues payors and the employer that needs "labor peace"—prevent the employees from voting their conscience in private. Unions repeat the Orwellian mantra that "secret ballot elections are unfair,"[27] but experience shows that the process of soliciting union authorization cards relies upon coercion and misrepresentations, oftentimes with the complicity of the "neutral" employer.[28] Employees are sometimes told that authorization cards are health insurance enrollment forms, non-binding "statements of interest," requests for an NLRB election, or even tax forms. Sometimes they are threatened with bodily injury if they refuse to sign union cards.[29]

Hypocritically, the AFL-CIO argues that petitions and cards advocating decertification "are not sufficiently reliable indicia of the employees' desires" when employers seek to withdraw recognition from a union, and that already-unionized employees must resort to a secret-ballot election before they can remove the union.[30] Clearly, labor union officials are not advocating the "card check" process because they sincerely believe that cards or petitions reflect employee sentiment more reliably than a secret-ballot election. Rather, they advocate the card check process because they know that with it they can bring to bear enormous pressure on vulnerable employees.

In short, neutrality agreements are really "neutering agreements," using secrecy and coercion to stifle all dissent and quickly herd employees into unionization without a vote. Unions know that once they are "voluntarily recognized" by an employer, they will be entrenched for up to four years under the NLRB's pro-incumbency "voluntary recognition bar" and "contract bar" doctrines.[31]

III. "Neutrality and Card Check" Agreements Do Not Enhance Employees' § 7 Freedom to Choose or Reject a Union.

What is a typical hotel worker or truck driver to think when confronted with this array of special privileges given by their employer to a single, anointed union? Can it be said that such neutrality and card check agreements enhance the employees' freedom to choose or reject a union? Although unions' self-interest dictates use of card checks, "the Board itself has recognized . . . that secret elections are generally the most satisfactory—indeed the preferred—method of ascertaining whether a union has majority support."[32]

Indeed, the union-controlled process of collecting authorization cards (akin to the "rule of the jungle") should be contrasted with the NLRB's rules governing the conduct of a secret-ballot election. The contrast could not be more stark.[33] In an NLRB-supervised secret-ballot election, even subtle pressures have been found to violate employee free choice under the "laboratory conditions" standard for representation proceedings. Those pressures need not rise to the level of an unfair labor practice to allow the Board to set aside the election result.[34] But unions operating under neutrality and card check agreements often become exclusive bargaining representatives by engaging in intimidating actions that would have precluded them from obtaining such status if committed during the course of a secret-ballot election.

For example, in an NLRB-supervised secret-ballot election, the following conduct has been held to upset the laboratory conditions necessary to guarantee employee free choice, thus requiring invalidation of the election: electioneering activities at the polling place;[35] prolonged conversations by representatives of a union or employer with prospective voters in the polling area;[36] electioneering among the lines of employees waiting to vote;[37] speechmaking by a union or employer to massed groups or captive audiences within 24 hours of the election;[38] a union or employer keeping a list of employees who vote as they enter the polling place (other than the official eligibility list);[39] and a union official handling a prospective voter's ballot.[40]

Such conduct disturbs the "laboratory conditions" necessary for employee free choice when it occurs during NLRB-supervised secret-ballot elections, *yet it occurs in almost every card check drive*. When an employee signs (or refuses to sign) a union authorization card, he or she is not likely to be alone. Indeed, it is likely that this decision is

made in the presence of one or more union organizers soliciting the employee to sign a card. This solicitation could occur during or immediately after a union mass meeting or a company-paid captive audience speech, or it could occur in the employee's own home during an unsolicited union "home visit." In all cases the union handles the "ballot" of the prospective "voter." Finally, in all cases the employee's decision is not secret, as in an election, because the union has a master list of who has signed a card and who has not.

Thus, a choice against signing a card often does not end the decision-making process for an employee in the maw of a "card check campaign," but represents only the beginning of harassment and intimidation for that employee. The United States Supreme Court has recognized this fact: "We would be closing our eyes to obvious difficulties, of course, if we did not recognize that there have been abuses, primarily arising out of misrepresentations by union organizers as to whether the effect of signing a card was to designate the union to represent the employee for collective bargaining purposes or merely to authorize it to seek an election to determine that issue."[41]

In sharp contrast to the abuses inherent in any card check campaign, each employee participating in an NLRB-conducted election makes his or her choice one time, in private. There is no one with the employee at the time of decision. The ultimate choice of the employee is secret from both the union and the employer. Once the employee has decided "yea or nay" by casting a ballot, the process is at an end.

Thus, only in an Orwellian world can unions claim that "we safeguard employee freedom by doing away with the secret ballot election."[42] Employee free choice and § 7 rights are not enhanced by the demise of the secret-ballot election and the total exclusion of the NLRB from the representational process.

Indeed, securing "neutrality" from an employer undercuts the entire rationale for doing away with the secret-ballot election. For example, the UNITE HERE union's website states that:

> It might seem that a National Labor Relations Board-sponsored election would be the most democratic means of deciding the question of unionization. But these elections for Union representation, characterized by intense anti-union campaigns, are not like other types of elections because of the inherent coercive power an employer holds over an employee, i.e., the power to deprive a person of his or her livelihood.
>
> This imbalance of power is unparalleled in any other type of election in our society. Even if the employer does not expressly threaten employees with adverse consequences if they support the Union, employees can't help but be aware of this possibility any time an employer makes known his opposition to unionization.[43]

Even assuming, *arguendo*, that this self-righteous assertion is true, why does a union still need "card check recognition" and the elimination of the secret-ballot election once it has already secured "neutrality" (*i.e.*, gag rules and employer-paid captive audience speeches extolling the union), and thereby defanged the employer's supposed inherent coercive power to "terrorize" employees or "make known his opposition to unionization"? The true answer is that most unions dare not face any sort of secret-ballot election, even where complete neutrality is achieved, because they are still likely to lose. A case in point recently occurred at the Magna International plant in Lowell, Michigan. There, the UAW secured an agreement for strict employer neutrality, but with the stipulation that there be a privately-run secret-ballot election. The UAW lost soundly, with one employee publicly commenting to the local newspapers, "Unions are not needed in America anymore."[44] Is it any wonder that unions dare not chance a secret-ballot election even under the most favorable of conditions?

IV. To Protect Employees' § 7 Rights, the NLRB Must Strictly Scrutinize the Process by Which Unions Procure and Enforce "Neutrality and Card Check" Agreements.

Through a series of pending cases, the NLRB will soon have the opportunity to decide whether neutrality and card check agreements between unions and employers can trump employees' § 7 right to refrain from unionization. By a 3-2 vote, the Board recently granted Requests for Review and solicited amicus briefing in *Dana Corp.*, 341 N.L.R.B. No. 150 (2004). In that consolidated case, the UAW union secured neutrality and card check agreements from two employers, Dana Corporation and Metaldyne Corporation, and then secured "voluntary recognition" from both employers based upon purported majorities of card signers. But in each situation, dissatisfied employees filed decertification petitions within weeks of the voluntarily recognitions. At Metaldyne, a *majority* of employees signed the decertification petition, surely calling into question the validity of the initial recognition. NLRB Regional Directors nevertheless dismissed both decertification petitions, invoking the Board's so-called "voluntary recognition bar" doctrine, which provides that voluntary recognition of a union will bar a decertification petition for a "reasonable" period of time, up to one year.[45] In granting review in these cases, the Board recognized the need to re-examine policies that entrench unions anointed by an employer without a secret-ballot election:

> We believe that the increased usage of recognition agreements, the varying contexts in which a recognition agreement can be reached, the superiority of Board supervised secret ballot elections, and the importance of Section 7 rights of employees, are all factors which warrant a critical look at the issues raised herein.[46]

Through the *Dana* case, the Board will provide a long overdue answer to the question of whether employees' § 7 right to decertify an unwanted union is paramount, or whether voluntary recognition that springs from a neutrality agreement is of such "bar quality" as to prevent employees from challenging that employer-anointed union.

Additionally, the NLRB General Counsel has issued a series of complaints challenging the negotiation and enforcement of several Steelworkers and UAW neutrality agreements. These complaints arise under several different scenarios, and their resolution will also be critical in determining the supremacy of employees' § 7 rights over union institutional interests.[47]

In one case, the UAW and Freightliner (a Daimler-Chrysler subsidiary) signed a neutrality and card check agreement covering various plants, including Freightliner-owned Thomas Built Buses ("TBB") facilities.[48] These parties also signed an "Agreement on Preconditions to a Card Check Procedure" in which the UAW pre-negotiated numerous collective bargaining concessions that would take effect after the UAW organized the particular facility, notwithstanding the fact that the UAW did not then represent a single covered employee. In March 2004, the UAW and TBB launched a joint organizing drive against TBB's 1140 employees in High Point, NC, pursuant to the terms of the neutrality and card check agreement. This campaign featured several captive audience speeches in which high level company and union officials praised the UAW while dozens of UAW organizers simultaneously "worked the crowd" collecting union authorization cards. TBB subsequently recognized the union based on these cards.

The basic theories of the General Counsel's TBB complaint are: a) that the captive audience speeches were coercive and tainted the UAW's ostensible card majority: and b) that the "Agreement on Preconditions to a Card Check Procedure" constitutes unlawful, pre-mature bargaining over substantive employment terms with a minority union. On the latter point, the courts and the Board have long held that an employer may not choose the union it wants to represent its employees, work together with that union to secure employee support for it, and then negotiate basic contract terms in advance of majority employee support.[49] As the Board has ruled, negotiating with a union prior to the achievement of majority representative status constitutes "impressing upon a non-consenting majority an agent granted exclusive bargaining status," even though the negotiations may be conditioned on the union being able to "show at the 'conclusion' that they represented a majority of the employees."[50] Similar complaints have been issued and are awaiting trial in related cases.[51]

Some neutrality agreements are also being challenged by the NLRB General Counsel under § 8(e) of the Act, 29 U.S.C. § 158 (e). In *Heartland Industrial Partners, Collins & Aikman Co., and United Steelworkers of America*,[52] the parties negotiated a neutrality agreement that requires Heartland (the employer) to impose a neutrality agreement on any business enterprise in which it substantially invests or acquires control. The new business enterprise is then required to impose the neutrality agreement on all of its parents, affiliates, and joint ventures. (Agreements of this type have been referred to as "virus clauses" for the way in which they are spread exponentially from one employer to another). Also, all signatory companies must assist the Steelworkers with its organizing drives against their employees, and ultimately require that all organized employees pay union dues to the Steelworkers. The theory of the General Counsel's complaint in this case is that the neutrality agreement unlawfully forbids Heartland and signatory companies from doing business with employers who refuse to become a party to an agreement with the Steelworkers.

V. Conclusion.

Although the NLRB and the courts have yet to squarely decide many of the neutrality and card check issues that are pending, they are not without guidance from past cases. It has long been unlawful for an employer to select a particular union and pressure employees into supporting it. It has long been illegal for a minority union to negotiate terms of employment for employees it does not represent. It has long been unlawful for unions and employers to limit employees' § 7 rights to join or refrain from joining a union. And finally, the Board and the courts have long recognized that employee freedom is best protected through secret-ballot elections, not secret schemes that waive elections and exclude the NLRB from all oversight of the union selection or rejection process. The NLRB and the courts must act vigilantly to ensure that employees' § 7 rights remain at the pinnacle of the Act's considerations, not relegated to the status of an afterthought.

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Footnotes

[1] *See, e.g.*, Charles I. Cohen, *Neutrality Agreements: Will the NLRB Sanction Its Own Obsolescence?*, The Labor Lawyer (Fall 2000); Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 Berkeley J. Emp. & Lab. L. 369 (2001); Andrew Strom, *Rethinking the NLRB's Approach to Union Recognition Agreements*, 15 Berkeley J. Emp. & Lab. L. 50 (1994); Daniel Yager & Joseph LoBue, *Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-First Century*, 24 Empl. Rel. L.J. 21 (Spring 1999).

[2] The facts are well known: most unions are desperate for new dues paying members. In 2003, 12.9 % of wage and salary workers were union members, down from 13.3 % in 2002, according to the U.S. Department of Labor's Bureau of Labor Statistics. http://www.bls.gov/news.release/union2.nr0.htm (Jan. 21, 2004). The number of persons belonging to a union fell by 369,000 in 2003, to a total of 15.8 million. The union membership rate has steadily declined from a high of 20.1 % in 1983, the first year for which comparable union data is available. For example, in 1982, the Steelworkers union claimed 1.2 million members, but by 2002 the number was 588,000. In 1982 the United Auto Workers claimed 1.14 million members, by 2002 only 700,000. As of today, only 8.2% of the private sector workforce is unionized, and the other 91.8% does not appear to be flocking to join. *IBM Corp.*, 341 N.L.R.B. No. 148, at 19 n.9 (2004). In *UFCW Local 951 (Meijer, Inc.)*, 329 N.L.R.B. 730 (1999), Texas A & M labor

economist Morgan O. Reynolds testified that the single largest factor hindering union organizing is *employee* resistance. According to Prof. Reynolds, polling data commissioned by the AFL-CIO indicates that two-thirds of employees are not favorably disposed towards unions. (Hearing Transcript, pp. 1382-83).

[3] Jonathan P. Hiatt & Lee W. Jackson, *Union Survival Strategies for the Twenty-First Century*, LAB. L.J., Summer/Fall 1996, at 176.

[4] Section 7 of the NLRA, 29 U.S.C. § 157, states (emphasis added):

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities* except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

[5] *See, e.g.*, Brent Garren, *The High Road to Section 7 Rights: The Law of Voluntary Recognition Agreements,* 2003 LAB. L.J. 263 (2003).

[6] *Id.* (emphasis added).

[7] According to the Department of Labor's Bureau of Labor Statistics, only 8.2% of the private sector workforce is unionized. *See* source cited *supra* note 2. Even at their peak after World War II, unions never represented a majority of American workers.

[8] *MGM Grand Hotel, Inc.*, 329 N.L.R.B. 464, 475 (1999) (Member Brame, dissenting).

[9] *See* Pattern Makers League v. NLRB, 473 U.S. 95 (1985).

[10] Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992); *see also* Bloom v. NLRB, 153 F.3d 844, 849-50 (8th Cir. 1998) ("Enlisting in a union is a wholly voluntary commitment; it is an option that may be freely undertaken or freely rejected"), *vacated & remanded on other grounds sub nom*. OPEIU Local 12 v. Bloom*,* 525 U.S. 1133 (1999).

[11] Lechmere, Inc. v. NLRB, 502 U.S. 527, 532 (1992) ("By its plain terms, thus, the NLRA confers rights only on employees, not on unions or their nonemployee organizers.")

[12] For example, on August 13, 2003, Dana Corporation and the United Auto Workers announced a neutrality and card check agreement which they denominated as a "partnership," except that the "terms of the agreement were not disclosed by agreement of the parties."http://www.dana.com/news/pressreleases/prpage.asp?page=1295. *But see* Merk v. Jewel Food Stores Div. of Jewel Co., 945 F.2d 889 (7th Cir. 1991) (secret agreements violate federal labor policy); Aguinaga v. United Food & Commercial Workers, 993 F.2d 1463 (10th Cir. 1993); Lewis v. Tuscan Dairy Farms, Inc., 25 F.3d 1138 (2d Cir. 1984) (union breached duty of fair representation by making secret agreement with employer not to enforce seniority rights of employees).

[13] Most "neutrality and card check" arrangements are thinly disguised "bargaining to organize" schemes, in which union officials commit to act in a manner favorable to management interests in exchange for employer assistance with gaining and maintaining control over employees. Even the pro-union press has noted the United Auto Workers's proclivity to trade away employee wages and benefits for "neutrality." *See* "UAW Trades Pay Cuts for Neutrality," at http//www.labornotes.org/archives/2003/07/c.html and http//www.labornotes.org/archives/2003/10/b.html.

[14] Patterson v. Heartland Indus. Partners, LLP, Order Denying Motion to Dismiss at 3, Case No. 5:03CV1596 (N.D. Ohio Jan. 12, 2004), *mandamus denied sub nom.* United Steelworkers of America v. United States Dist. Ct., No. 04-3290 (6th Cir. Apr. 28, 2004).

[15] Duane Reade, Inc., 338 N.L.R.B. No. 140 (2003) (employer unlawfully assisted Needletrades union with organizing several of its stores); Fountain View Care Center, 317 N.L.R.B. 1286 (1995), *enforced*, 88 F.3d 1278 (D.C. Cir. 1996) (supervisors and other agents of the employer actively encouraged employees to support the union); N.L.R.B. v. Windsor Castle Healthcare Facility, 13 F.3d 619 (2d Cir. 1994), *enforcing* 310 N.L.R.B. 579 (1993) (employer provided sham employment to union organizers and assisted their recruitment efforts); Kosher Plaza Super Market, 313 N.L.R.B. 74, 84 (1993); Brooklyn Hosp. Center, 309 N.L.R.B. 1163 (1992), *aff'd sub nom.* Hotel, Hosp., Nursing Home & Allied Servs., Local 144 *v.* NLRB, 9 F.3d 218 (2d Cir. 1993) (employer permitted local union, which it had already recognized as an exclusive bargaining representative, to meet on its premises for the purpose of soliciting union membership); Famous Casting Corp., 301 N.L.R.B. 404, 407 (1991) (employer actions unlawfully supported union and coerced the employees into signing authorization cards); Systems Mgt., Inc., 292 N.L.R.B. 1075, 1097-98 (1989), *remanded on other grounds*, 901 F.2d 297 (3rd Cir. 1990); Anaheim Town & Country Inn, 282 N.L.R.B. 224 (1986) (employer found to have violated §§ 8(a)(1) and (2) when it actively participated in the union organizational drive from start to finish); Meyer's Café & Konditorei, 282 N.L.R.B. 1 (1986) (employer invited union it favored to attend hiring meeting with employees); Denver Lamb Co., 269 N.L.R.B. 508 (1984); Banner Tire Co., 260 N.L.R.B. 682, 685 (1982); Price Crusher Food Warehouse, 249 N.L.R.B. 433, 438-49 (1980) (employer created conditions in which the employees were led to believe that management expected them to sign union cards); Vernitron Elec. Components, 221 N.L.R.B. 464 (1975), *enforced,* 548 F.2d 24 (1st Cir. 1977); Pittsburgh Metal Lithographing Co., Inc., 158 N.L.R.B. 1126 (1966).

[16] *See generally* Daniel Yager & Joseph LoBue, *Corporate Campaigns and Card Checks: Creating the Company Unions of the Twenty-First Century*, 24 EMPL. REL. L.J. 21 (Spring 1999).

[17] Daily Labor Reporter, *Five Members Discuss Decisionmaking, Wide Variety of Issues at ABA Meeting*, Aug. 15, 2003, at B-1.

[18] The text of the UAW's model "Accretion to the Unit and Neutrality Agreement" can be accessed at http://www.nrtw.org/d/uawna.pdf.

[19] *Id.*

[20] International Union, UAW v. Dana Corp., 278 F.3d 548, 559 (6th Cir. 2002).

[21] On August 13, 2003, Dana Corporation and the UAW announced a "partnership agreement," which "is expected to benefit both Dana and the UAW by contributing to business growth, improved productivity, enhanced operational cost-efficiency, and continued workforce opportunities and options. Terms of the agreement were not disclosed by agreement of the parties." http://www.dana.com/news/pressreleases/prpage.asp?page=1295. This partnership agreement was quickly followed by the waiver of previously scheduled secret-ballot elections, captive audience speeches to employees extolling the "partnership," and announcement of "voluntary recognition" at several plants.

[22] For example, the text of such a captive audience speech, delivered by officials of Johnson Controls, is available on-line at http://www.nrtw.org/d/jci_captive.htm.

[23] *See* Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992).

[24] Declaration of Faith Jetter in Support of Motion to Intervene or, Alternatively, to File a Brief Amicus Curiae, Hotel Employees & Rest. Employees Union, Local 57 v. Sage Hospitality Res., LLC, 390 F.3d 206, (3d Cir. 2004).

[25] Declaration of Clarice K. Atherholt in Support of Her Decertification Petition, Dana Corporation and UAW, NLRB Case No. 8-RD-1976.

[26] Linden Lumber Div., Summer & Co. v. NLRB, 419 U.S. 301, 306 (1974) (in any given situation there may be "rational, good-faith grounds for distrusting authorization cards"); *id.* at 315 n.5 (Stewart, J., dissenting) (recognizing "the possibility of undue peer pressure or even coercion in personal card solicitation"); *see also* NLRB v. Gissel Packing Co., 395 U.S. 575, 601-10 (1969).

[27] The website of the recently merged Union of Needletrades, Textiles and Industrial Employees and Hotel Employees and Restaurant Employees International Union (UNITE HERE) claims that a "'card count neutrality agreement' . . . is . . . more democratic than an election." http://www.unitehere.org/about/organizing.asp#, "card check and neutrality."

[28] *See supra* note 15 for cases concerning the granting and receipt of unlawful employer assistance.

[29] An egregious example of union abuse in the card check process occurred in *HCF, Inc.,* 321 N.L.R.B. 1320 (1996). There, an employee testified that a union militant warned her that if she didn't sign an authorization card, "the union would come and get her children ... " *Id.* at 1320. The NLRB found that this flagrant threat did not require the upsetting of an election result, because the union militant was not a paid union agent and harming people's children was not a "'purported union policy.'" *Id.*

[30] Brief of the AFL-CIO to the NLRB in *Chelsea Indus. & Levitz Furniture Co. of the Pacific, Inc.*, Case No. 7-CA-36846, at 13 (May 18, 1998).

[31] These doctrines were not established by statute, but were created out of whole cloth by the Board. *See*, *e.g.*, MGM Grand Hotel, Inc., 329 N.L.R.B. 464 (1999) ("voluntary recognition bar" can last up to one year); Waste Mgmt., 338 N.L.R.B. No. 155 (2003) (after a contract is signed, employees are blocked from filing for decertification for up to three years).

[32] NLRB v. Gissel Packing Co., 395 U.S. 575, 602 (1969).

[33] On May 12, 2004, Rep. Charlie Norwood introduced H.R. 4343, the Secret Ballot Protection Act of 2004, to amend the NLRA to ensure the right of employees to a secret-ballot election conducted by the NLRB. This stands in sharp contrast to the so-called "Employee Free Choice Act," legislation introduced by Sen. Ted Kennedy (S. 1925) and Rep. George Miller (H.R. 3619), that would essentially ban secret-ballot elections by mandating the acceptance of card checks.

[34] General Shoe Corp., 77 N.L.R.B. 124, 127 (1948).

[35] Alliance Ware, Inc., 92 N.L.R.B. 55 (1950); Claussen Baking Co., 134 N.L.R.B. 111 (1961).

[36] Milchem Inc., 170 N.L.R.B. 362 (1968) ("The final minutes before an employee casts his vote should be his own, as free from interference as possible. Furthermore, the standard here applied insures that no party gains a last minute advantage over the other, and at the same time deprives neither party of any important access to the ear of the voter.")

[37] Bio-Medical Applications of P.R., 269 N.L.R.B. 827 (1984); Pepsi Bottling Co., 291 N.L.R.B. 578 (1988).

[38] Peerless Plywood Co., 107 N.L.R.B. 427 (1953).

[39] Piggly-Wiggly, 168 N.L.R.B. 792 (1967).

[40] Fessler & Bowman, 341 N.L.R.B. No. 122 (2004). In *Fessler*, the Board recognized the potential danger when a union official merely touched a prospective voter's ballot. On that basis, the Board set aside an election and created prophylactic rules to ensure the integrity of the election process.

[41] NLRB v. Gissel Packing Co., 395 U.S. 575, 604 (1969).

[42] Unions do make this outrageous claim. For example, UNITE HERE's web-site asserts that a "'card count neutrality agreement' . . . is . . . more democratic than an election." http://www.unitehere.org/about/organizing.asp, "card check and neutrality."

[43] *Id.*

[44] *"Neutral" union bid fails first local test,* GRAND RAPIDS PRESS, Sept. 27, 2003, at A-1. Similarly, when faced with strong employee opposition during an organizing campaign at another Magna International subsidiary, Optera, the UAW called off the campaign and withdrew its election petition at the NLRB, while vowing to extend a previous neutrality agreement with the parent company. Holland, MI, SENTINEL, Apr. 16, 2004, http://www.hollandsentinel.com/stories/041604/loc_041604022.shtml.

[45] MGM Grand Hotel, Inc., 329 N.L.R.B. 464 (1999) (3-2 decision) (voluntary recognition bar can last for over eleven months); *see also* Seattle Mariners, 335 N.L.R.B. 563 (2001) (2-1 decision) (voluntary recognition bar prohibits decertification elections even if employees signed a showing of interest for decertification prior to the employer's recognition).

[46] 341 N.L.R.B. No. 150, slip op. at 1. The briefs of the parties and the amici are available on the Board's website, www.nlrb.gov.

[47] On November 17, 2004, NLRB General Counsel Rosenfeld issued a Report on Recent Case Developments which explains his rationale for issuing complaints in many of these neutrality cases. This report can be accessed at http://www.nlrb.gov/nlrb/press/releases/r2544.htm.

[48] UAW and Thomas Built Buses/Freightliner, Case Nos. 11-CB-3455-1 and 11-CA-20338.

[49] International Ladies' Garment Workers' Union v. NLRB (Bernhard Altman), 366 U.S. 731 (1961); SMI of Worchester, 271 N.L.R.B. 1508, 1519 (1984), *citing* Majestic Weaving Co., 147 N.L.R.B. 859, 860, 866 (1964).

[50] Majestic Weaving Co., 147 N.L.R.B. 859, 860, 866 (1964).

[51] *See UAW and Freightliner/Daimler-Chrysler, Inc.,* Case Nos. 11-CA-20070-1, 11-CA-20071-1, 11-CB-3386-1, 11-CB-3387-1 (in these cases, Freightliner promised employees that they would get their customary raises in July 2003, but those raises were withheld after the UAW refused to give its permission, even though the union admittedly did not represent a majority of the affected employees); *see also UAW & Dana Corp. (Bristol, VA)*, Case Nos. 11-CB-3397, 11-CB-3398, 11-CB-3399, 11-CA-20134, 11-CA-20135, 11-CA-20136, *and UAW &*

*Dana Corp. (St. Johns, MI)***,** Case Nos. 7-CA-46965-1, 7-CB-14083-1, 7-CA-47078-1, 7-CB-14119, 7-CA-47079-1, and 7-CB-14120 (in these cases, the General Counsel alleges that the Dana-UAW "partnership" agreement constitutes unlawful premature bargaining by a minority union over substantive employment terms, and that any "voluntary recognition" flowing from that illegitimate relationship is tainted and must be dissolved).

[52] NLRB Case No. 8-CE-84-1 (Region 8, Cleveland, OH).

The High Road to Section 7 Rights: The Law of Voluntary Recognition Agreements

*By Brent Garren**

Voluntary recognition agreements ("VRAs"), also known as "neutrality agreements" or "card check agreements" depending on their features, are an increasingly widespread and important aspect of America's labor relations landscape. Unions are turning to VRAs with increasing frequency because of their enormous frustration at the weakness of the NLRB machinery to realize the promise of employees' right to organize. The great majority of newly-organized members of my union, UNITE, which organizes very aggressively, come in through VRAs. Both opponents and proponents of VRAs agree that they produce a far higher rate of union success than the NLRB's election process.[1] VRAs are critical to the realization of employees' right to organize in the 21st century.

As we argue below, VRAs are a good thing, because they further the twin goals of our national labor policy: employee freedom of choice and industrial stability. Moreover, VRAs further another cornerstone of our labor policy: the principle that voluntary agreements developed in the give and take between private parties best tailor solutions for their specific circumstances. Part I of this paper looks at the range of provisions available in creating VRAs. Part II demonstrates that VRAs further federal labor policy and, therefore, should be viewed favorably by courts and the NLRB. Part III examines specific issues concerning VRAs in light of their furthering national labor policy. Specifically, we argue that i) VRAs are and should be enforceable under Section 301 of the NLRA; ii) that VRAs should be considered mandatory subjects of bargaining more frequently than they are currently; iii) that VRAs should preclude utilization of the NLRB's representation proceedings when necessary to protect the parties' bargain; and iv) that requesting a VRA should not constitute a demand for recognition and therefore a trigger for an RM petition.

I. What Are Voluntary Recognition Agreements?

The general term "VRA" refers to a broad range of agreements between an employer and a union that affects the representation process for the employer's employees. We use the term "VRA" rather than "neutrality/card check agreement" because VRAs contain a very wide range of provisions. Many require neither employer neutrality nor card check recognition.

VRAs can occur when a union represents some of the employees and seeks to represent others, or when a union seeks representation for the first time with an employer's employees. Most VRAs address some or all of the following subjects[2]:

(1) Recognition procedures. Most agreements call for recognition based on a certification of the union's majority status demonstrated by a review of signed authorization cards by a third party. However, VRAs may instead provide for private, non-Board elections or NLRB-conducted elections. Some agreements have a hybrid, in which the nature of the recognition process depends on the strength of union support manifested by authorization cards.[3]

(2) Definition of the bargaining unit. Most agreements provide for a stipulated group of employees for which the VRA will operate and whom the union seeks to organize.

(3) Access provisions. Some VRAs provide for limited union access to the employer's facilities and/or the provision of employee rosters.

(4) Dispute resolution procedures. The vast majority of VRAs outline dispute resolution procedures to address violations of the VRA, unfair labor practices, or other disputes.

(5) Limits on campaigning. The variety of campaigning provisions is especially great. Some VRAs require that the employer be "neutral," by not supporting or opposing the union's organizing efforts. Many others limit the employer's campaign by prohibiting the fear-mongering attacks on unions and the dire predictions of disaster following unionization that have become commonplace in NLRB election campaigns. These provisions permit the employer to stress the positives of its employment record, or to conduct "fact-based" campaigns to present the company's position. In one such clause, the employer committed itself to "communicat[ing] with [its] employees, not in an anti-[union] manner, but in a positive pro-[company] manner."[4] In another agreement, the employer pledged "to communicate fairly and factually to employees in the unit sought concerning the terms and conditions of their employment with the company and concerning legitimate issues in the campaign."[5] Yet another variant is to limit the methods in the employer's campaign, rather than its content. In one UNITE VRA, we agreed that the employer would address all the employees at the onset of a short campaign period (in a debate format in which the union also spoke). It was free to argue against unionization in any manner it wished. It was, however, thereafter prohibited from campaigning, including holding captive-audience speeches or conducting one-on-one meetings. Finally, in some such clauses the employer merely pledges to "strive to create a climate free of fear, hostility, or coercion."[6]

Many VRAs also include restrictions on the union's campaigning. More than three-quarters of Eaton and Kriesky's sample of agreements set limits on the union's behavior.[7] Unions often commit to notifying the employer of the union's intention to initiate a union organizing campaign.[8] Commonly, they also prohibit the union from picketing or striking during the recognition process. They may also limit the length of the union's campaign period,[9] ban the union from denigrating or disparaging the employer,[10] or allow the employer special rights to respond to misstatements of fact by the union.[11] As noted above, they may require the union

to obtain a supermajority of employee support to obtain card check recognition.[12] Finally, if disputes occur, unions (as well as employers) are typically committed to participate in dispute resolution processes.[13]

II. The Policy Rationale for VRAs

The primary goals of national labor policy, as implemented by the Act, are twofold: to assure employee free choice to engage in or refrain from organizing and collective bargaining, and to maintain industrial peace.[14] In furthering these principles, federal labor policy highly values "freedom to contract" between employers and unions.[15] All three of these aims are promoted by giving deference to VRAs, and each will be examined in turn.

A. VRAs Promote Employee Free Choice

The differential in organizing success between VRAs and NLRB elections is undisputed. Are NLRB elections distorted by employer coercion, or is recognition under VRAs instead distorted by union coercion, as the critics of VRAs charge?[16] In today's labor relations landscape, scarred by massive employer interference with employee Section 7 rights, the answer is crystal-clear: VRAs are an antidote to venomous employer "vote no" campaigns which routinely poison the NLRB election process.

1. NLRB Elections Do Not Protect Employee Free Choice

The current framework of NLRB representation procedures and unfair labor practice doctrines, including remedies, was established in the decades following the passage of Taft-Hartley. The law developed at a time when employer hostility to unions was much less vehement. In the 1950s and 60s, employers did not routinely engage in the massive legal and illegal sabotage of employee Section 7 rights that are commonplace today. Despite these changes, the NLRB has taken no serious measures to ensure that its representation and unfair labor practice procedures effectively protect employee free choice in today's context.

The representation process is flawed in three fundamental respects. First, an employer can delay the representation process so that it can either dissipate the union's majority before the election or destroy the union's bargaining power before it is required to bargain.[17] My union, for example, endured a delay while an employer litigated a single issue–whether UNITE was a labor organization under the Act. Many other hearings have little more merit than this. Moreover, even after a union has won an election, no enforceable court order will issue requiring bargaining until three or four years have passed.[18] The effects on employees are well-documented and disastrous. One study found that the unionization rate drops by 2.5% for each additional month between petition and election,[19] while another found a drop of 0.29% for each day of delay.[20]

Second, even if the employer limits its campaign to lawful activity, the volume and vehemence of the employer's campaign can terrorize workers. Employers often drown workers in a tidal wave of predictions about the calamities that will befall any workplace so unwise as to unionize. The incessant pounding of captive audience meetings and one-on-one meetings has nothing to do with a rational exchange of opinions in the free marketplace of ideas, but is intended to intimidate. The ALJ in *Parts Depot, Inc.*,[21] which upheld UNITE's claim of several employer unfair labor practices, discussed the employer's captive audience meetings, which he found completely lawful:

> If phrased in terms of war, [the company's] response was equivalent to America's B-52 carpet bombing of the Iraqi front line forces at the 1991 opening of 'Desert Storm' in the Persian Gulf War. As the Iraqis stumbled from their trenches begging the advancing United States soldiers to accept their surrender, so too, figuratively, the [company's] employees, shell shocked from the long series of verbal "carpet bombing" speeches and videos, would have stumbled toward the voting booths, begging for the chance to vote against the Union.... This is not to say that the speeches and videotapes ... constitute a threat ...[22]

Third, employer unfair labor practices during NLRB election campaigns have become routine.[23] All available statistics tell the same story: employer unfair labor practices have soared since the 1950s and 1960s, devastating Section 7 rights. One study showed that, in 1969-1976, the number of workers receiving back pay under Section 8(a)(3) of the Act totaled approximately 1.2% of voters in representation elections. In 1984-1997, that figure increased by almost 800%, to a level of 9.5%.[24] LaBlonde and Meltzer, who criticized figures in earlier studies as being exaggerated, nevertheless found a 600% increase in the relative incidence of discriminatory discharges from the late 1960s to late 1980s,[25] while another study revealed a 14-fold increase in employer discrimination against union activists during organizing drives between the 1950s and the late 1980s.[26] Yet another report found that 31% of all employers illegally fire at least one worker for union activity during organizing campaigns.[27] The former president of the National Academy of Arbitrators, the nation's leading organization of labor-management neutrals, stated in 1996 that "[t]he intensity of opposition to unionization which is exhibited by American employers has no parallel in the western industrial world."[28]

The rising tide of employer unfair labor practices, and particularly discriminatory discharges, against union supporters has contributed directly to the erosion of union win rates in elections.[29] Equally significant, continuing employer hostility results in only a narrow majority of election victories leading to the achievement of collective bargaining agreements. From 1975 to 1993, the success rate for obtaining first contracts fell from 78% to 55.7%.[30]

The remedies available to workers coerced in exercising their Section 7 rights (including postings and reinstatement with back pay) are insufficient both to deter such abuses or to erase their undermining of employee free choice. Postings are not likely to dissipate the effect of employer

threats.[31] Reinstated workers often are "so scarred by the discharge experience that they do not resume union activities," and studies show most reinstated workers are gone within a year, many reporting bad company treatment.[32] More than two-thirds of rerun elections produce the same result as the election overturned due to objectionable conduct.[33]

2. VRAs Further Employee Free Choice

VRAs protect employee free choice by eliminating crippling delay and employer coercion. Typically, representation issues are definitively resolved through VRAs in weeks or months rather than years. VRAs severely restrict delay prior to determining the union's majority support. The parties agree to a definition of the bargaining unit, eliminating the lengthy NLRB process of a hearing and appeal to Washington. Disagreements are typically resolved through arbitration, often with expedited procedures. Because the elimination of delay at the "front end" of the process is of great importance to defending employee free choice, VRAs often limit the campaign period to further produce a speedy result.[34]

For example, one SEIU agreement stated that the parties would jointly choose an election officer, who would both direct an election within five working days following the union's presentation of cards from at least 30% of the employees and oversee the election within 35 days in accordance with NLRB guidelines for assessing the validity of election results.[35] OtherVRAs may provide for NLRB elections, but contain commitments by the employer not to cause delay.[36]

VRAs may also minimize the delay between recognition, if attained, and the completion of a first contract. Many VRAs allow for decision by an arbitrator or similar neutral in the event that a party to the agreement fails in its duty to bargain. As discussed below, unions may obtain court orders under Section 301 enforcing arbitration decisions. Such a process is far quicker than an unfair labor practice proceeding through the Board to the Court of Appeals. An intransigent employer may, of course, appeal the district court's enforcement of an arbitration award, but this is unlikely to be successful.

VRAs also can help curb employer intimidation, through the variety of campaign limitations discussed above. Not only are coercive employer actions less likely in such an environment, but arbitration or other dispute resolution processes in VRAs can resolve potential violations much more expeditiously, and impose a wider array of remedies, than NLRB proceedings.[37] For example, one UNITE agreement provided for one of a panel of arbitrators to hold a hearing on complaints of campaign misconduct within 24 hours of the complaint and for a bench decision to issue.

3. VRAs Do Not Interfere With Employee Free Choice

Employer advocates claim that VRAs hamper employee free choice by limiting the ability of employees to hear the employer's "vote no" campaign and because card check recognition as a mechanism for assessing employee desires is less reliable than an NLRB secret-ballot election.

However, VRAs must be based on employee free choice. Enforcement of VRAs by the federal courts hinges upon the union's demonstration of a "fair opportunity" for employees to freely decide whether to accept it as a representative.[38] The Second Circuit summarized the requirement in no uncertain terms: "[c]ritical to the validity of such a private contract is whether the employees were given an opportunity to decide whether to have a labor organization represent them."[39]

Employer advocates claim that campaign limitation clauses undemocratically limit the ability of employees to hear both sides.[40] The Yale University Office of Public Affairs' statement on the issue is typical: "[E]mployees lose the benefit of a full and open debate that would occur prior to a union election."[41] Similarly, the employer in *Dana*[42] argued that the VRA it signed should not be enforced because limits on employer campaigning violate public policy; it "effectively silence[d]" the company, and thereby violated the statutory rights of its employees.[43] Rejecting the employer's argument, the court stressed two pertinent themes.

First, the court stressed that Section 8(c)[44] merely limits what employer speech may constitute evidence of an unfair labor practice, but does not require an employer to express its views.[45] "In fact, far from recognizing § 8(c) as codifying 'an absolute right' of an employer to convey its view regarding unionization to its employees . . . we have stated that an expression of an employer's views or opinion under § 8(c) is merely 'permissible.'"[46] Thus, Dana's "voluntary agreement to silence itself during union organizing campaigns does not violate federal labor policy."[47]

Second, the court held that limits on the employer's campaign could not interfere with the employees' Section 7 rights. "As Section 7 grants employees the right to organize or to refrain from organizing it is unclear how any limitation on Dana's behavior during a UAW organizational campaign could affect Dana's employees' Section 7 rights."[48]

This understanding of the limited relevance of Section 8(c) to Section 7 rights is consistent with *Linn v. United Plant Guard Workers of America, Local 114*,[49] in which the Court protected union members' speech against state law defamation claims absent actual malice. While stating that Section 8(c) reflected an "intent to encourage free debate on issues dividing labor and management,"[50] the Court also stated that

> [i]t is more likely that Congress adopted this section for a narrower purpose, i.e., to prevent the Board from attributing anti-union motive to an employer on the basis of his past statements.... Comparison with the express protection given union members to criticize the management of their unions and the conduct of their officers ... strengthens this interpretation of congressional intent.[51]

Additionally, most VRAs do not "silence" employers, but rather limit their campaigning, often with restrictions on

the unions' campaigns as well. The arbitrator's decision reviewed in the Dana decision concluded that "what the parties appear to have had in mind is that Dana argue its case in an objective high-minded fashion without resort to the kind of threats and innuendos which have often accompanied employer speech in organizing campaigns."[52] In today's climate, it is hard to imagine that employees in any case will not get an opportunity to hear and fairly evaluate anti-union arguments.

Employers also claim that card check recognition is less reliable than an NLRB election because they are susceptible to fraud and coercion.[53] These arguments are unavailing for two reasons. VRAs provide mechanisms for preventing these problems, and the possibility of coercion in obtaining cards is in actuality far less of a threat to employee self-determination than employer coercion.

Card check procedures remain the primary mechanism for recognition within VRAs,[54] and labor law–as well as the terms of most VRAs themselves–require that any recognition following a VRA be free from coercion. If a union is accused of obtaining card support through fraud or coercion, an employer could refuse to recognize a union's claim of majority support. Such a refusal would trigger arbitration procedures, if provided by the VRA, or direct recourse under Section 301 to federal court. As noted above, the federal courts will not enforce VRAs if the union cannot demonstrate that employees had a "fair opportunity" to freely decide whether to accept it as a representative. If an arbitrator ever failed to require majority support, such failure would give the employer recourse at the Board.[55]

J.P Morgan, however, demonstrates that arbitration is fully capable of taking irregularities into account in determining majority status. The employer alleged that the union had coerced employees into signing authorization cards. In response, the arbitrator ordered a delay in the card count "until coercion charges were resolved because authorization cards obtained through coercion were invalid." After the arbitrator found no union coercion, the employer continued to fight recognition unsuccessfully in the Second Circuit, which upheld the arbitrator's decision.

Thus, the Board's existing case law governing card check irregularities will stand as a safeguard–whether enforced through arbitration, the courts, or the Board–against recognition of a union who has engaged in unfair labor practices.

B. VRAs Promote Industrial Peace and Stability

VRAs also curtail the industrial strife common in organizing drives. Indeed, one prerequisite for the enforcement of such contract through Section 301 suits is that they "forward labor peace."[56] The receptivity of federal courts to enforcing such agreements[57] indicates that those agreement have generally met this test.

That organizing campaigns often produce bitterness and divisiveness is uncontested. *J.P. Morgan* refers to "those tensions inevitably flowing from a union organizing effort."[58] Similarly, "intensive workplace discussions and arguments are common. After several weeks of such campaigning, the final days before an election usually reach a high level of tension."[59] In a typical campaign, the employer bombards employees with the message that, if the facility unionizes, the employees "may" lose their jobs, suffer reductions in wages and benefits due to collective bargaining, or face strikes and violence, and the union counters with greater promises in addressing the last attack and in anticipation of the next. Not surprisingly, such a campaign spirals into enormous division and bitterness among employees. The hostility in the workplace generated by a hard-fought and prolonged organizing campaign hurts employers, employees, and the general public.

VRAs dramatically ameliorate the strife and tension of organizing drives by changing their character. Most VRAs commit the employer (and typically also the union) to what the arbitrator in the *Dana* dispute called a "high-minded" campaign, in which the parties agree not to disparage each other but rather to promote themselves. Most often, campaign limitation clauses do not 'silence' the employer, but rather require of the parties "a civil atmosphere for the discussion of the issues surrounding the question of union representation."[60] Indeed, the clause to which Dana agreed permitted the corporation to "communicate with employees, not in an anti-UAW manner, but in a positive pro-Dana manner."[61] In interpreting the clause, the parties' arbitrator concluded that "what the parties appear to have had in mind is that Dana argue its case in an objective high-minded fashion without resort to the kind of threats and innuendos which have often accompanied employer speech in organizing campaigns."[62] The agreement reached between AK Steel Corporation and United Steelworkers of America provides another example.[63] Eliminating the fear-mongering common in "vote no" campaigns is a huge step toward furthering labor peace and stability.

SEIU's agreement with one health care employer committed the parties "to a process that resolves issues between [them] in a manner that not only reduces conflict, but also fosters a growing appreciation for [their] respective missions"[64] In a situation involving UNITE, the employer and union were locked in a bitter dispute for many months, with many NLRB charges and accusations flying back and forth. The parties entered into a VRA which provided for an expedited arbitration process to resolve complaints of campaign misconduct. Significantly, neither side invoked the process. Instead, the level of tension decreased dramatically after the VRA, and the communication between the parties improved so that disputes were settled without the need for arbitration.

Moreover, VRAs provide for expedited campaigns and dispute resolution, if and when charges arise. In addition to committing the employer not to engage in delaying tactics, many agreements impose time limits on the union for organizing.[65] Shortening the campaign process helps minimize tension. Moreover, arbitration provisions[66] allow for quick resolution of charges of coercion, which also minimize tension.

As noted above, a UNITE agreement permitted arbitration of alleged campaign conduct violations within 24 hours with a bench decision.

More than three-quarters of Eaton and Kriesky's sample of agreements set limits on the union's behavior.[67] Analyzing one such agreement, in which the union agreed to refrain from picketing and the employer agreed to card-check recognition, the Sixth Circuit concluded that "each gave up rights under the Act ¼ in an effort to make the union recognition process less burdensome for both."[68] VRAs leave the representation process itself far freer from strife and tension than the usual NLRB election.

C. Promoting VRAs Advances Party Resolution in Labor Relations

Encouraging private party solutions to labor disputes is a cornerstone of federal labor policy. *American National Insurance Company* stated that "[t]he [NLRA] is designed to promote industrial peace by encouraging the making of voluntary agreement governing relations between unions and employers."[69] Specifically, "voluntary recognition is a favored element of national labor policy."[70]

Arms-length bargaining will create better, more specifically tailored solutions to particular disputes than standard Board processes. "[I]t is incumbent upon the Board," the Board held in a recent case, "to recognize and encourage the efforts expended by [the parties] in attempting innovative bargaining structures and processes and novel contractual provisions."[71]

VRAs can solve problems in ways in which the Board cannot. Clearly, constitutional and statutory concerns of free speech and due process affect the Board's ability to limit campaigning and to provide expedited representation processes. VRAs are not so limited.

III. Adjudicating and Implementing VRAs

A. VRAs are Enforceable Under Section 301

Courts will enforce VRAs under Section 301[72] of the Act.[73] Given the importance national labor policy places in promoting voluntary agreements, this trend is positive and should be embraced.

In *J.P. Morgan*, the Second Circuit articulated a three-part test for determining whether a contract that resolves representational issues should be enforced. The contract must guarantee employee free choice, forward labor peace, and govern the employer's relationship with its employees.[74] The court found that the VRA satisfied each of the three criteria.

As noted above, the decision in *Dana Corp.* found that the VRA did not violate public policy. The Sixth Circuit held that Dana's contractual commitment to regulate its speech was permissible because it was certainly allowed to restrain itself in the absence of such agreement.[75] Section 301 jurisdiction over representation issues has been challenged also as an abridgement of the Board's authority. Nonetheless, the courts have noted that the Board's primary jurisdiction "does not deprive the courts of jurisdiction, rather, it raises prudential concerns about whether to exercise it."[76] Thus, "while the courts may not resolve representational issues, the parties may resolve these issues contractually."[77] In short, the concerns raised by court adjudication of representation issues–including the lack of experience in that area and the historic hostility of federal court to labor rights–are not present when the parties have formed private contracts that resolve them.

The Supreme Court has stated that arbitrators–who typically adjudicate labor disputes under VRAs–bring special expertise to the resolution of labor disputes, and that arbitration is particularly desirable when the parties have committed to such arbitration "as a substitute for labor strife."[78] On that basis, the Second Circuit in *J.P. Morgan* found a VRA's inclusion of an arbitration provision strengthened its conclusion that the contract was within its jurisdiction under Section 301. As a word of advice, VRAs should include arbitration clauses, since courts are comfortable with enforcing such decisions under Section 301.

B. Parties Cannot Use Board Processes to Evade Complying with VRAs

In *Central Parking* and *Verizon Information Systems*, the Board correctly determined that VRAs preclude the use of the Board's representation processes.[79] The Board concluded that parties to VRAs should be held to their bargains, and that Board processes should not be used to avoid or undermine a bargain. Dissents offered in the two cases suggest that the law on this point is not well-established.

In *Central Parking*, the VRA in question contained an "after-acquired" clause. The provision called for employees in subsequently-purchased parking facilities to be added to the existing unit upon a showing of majority support. When the company purchased a competitor's facilities, the union organized employees at those facilities via card check and demanded recognition. The employer argued that the employees were ineligible, as it believed the agreement covered only newly-created facilities. The union sued to compel arbitration according to the VRA's terms, and the employer filed an RM petition at the Board.

The Board rejected the RM petition, stating that the employer waived its right to an election by agreeing to card check recognition in the VRA. The meaning of the clause and the overall fairness of the parties' bargain could be maintained only by holding the parties to it:

> Interpreting these [card check] clauses to mean that the employer can...demand an election renders them totally meaningless and without effect ... [T]o permit the Employer to claim the very right which it has foregone, perhaps in return for concessions in other areas, would violate the basic national labor policy requiring the Board to respect the integrity of collective-bargaining agreements."[80]

Chairman Hurtgen's dissent in *Central Parking* argued that the uncertainty surrounding the terms of the after-acquired clause meant that the employer had not given a "clear and unmistakable" waiver of its right to an election. Under these circumstances, the dissent claimed that the issues presented in the case should be decided exclusively by the Board and not by arbitration because they concerned representation.[81]

Chairman Hurtgen's conclusion that the Board should be the exclusive forum for resolving representation issues, however, stands in marked contrast to the Board's deferral to private agreements in at least two notably comparable situations. First, the Board "has long held that a stipulated bargaining unit will not be cast aside solely because it designates a unit [it] might find inappropriate had resolution of the issue not been agreed upon by the parties."[82] Why should such voluntary agreements generally be upheld, but unit determinations made by arbitrators under VRAs not?[83] Second, the Board defers in non-representation disputes, and the explanation for treating representation cases differently is unpersuasive. The Board has stated that "'the determination of questions of representation ¼ do [sic] not depend upon contract interpretation but involve the application of statutory policy, standards, and criteria. These are matters for decision of the Board rather than the arbitrator.' But, in fact, every question of deferral involves application of" such factors.[84]

In *Verizon Information Systems*, a union sought a Board unit determination notwithstanding the terms of a VRA. After the union began organizing employees, it and the employer were unable to agree on the scope of the bargaining unit. The union filed for arbitration, and subsequently filed an RC petition seeking Board resolution of the same issue.

The majority found a "narrow exception to [the] rule" articulated in the *Central Parking* dissent that the Board would not defer its representation processes to private arbitration.[85] The Board ruled that the exception lay in the union's enjoyment of "the benefits of the arbitration agreement" and its reservation of "the right to go back to that agreement"[86] by virtue of its preceding arbitration filing. Thus deference to arbitration was essentially grounded in estoppel.[87] Had the union filed a petition at the Board initially, the Board would not find that the parties' VRA barred the petition, because the parties had not clearly and unmistakably waived their right to NLRB procedures.[88] As in *Central Parking*, the majority recognized the importance of holding parties to a VRA to their contract. Once the union invoked the agreement, "the fundamental policies of the Act [could] best be effectuated by holding the [union] to its bargain."[89] The Board concluded that "[t]o do otherwise would permit the Petitioner to take advantage of the benefits accruing from its valid contract while avoiding its commitment by petitioning to the Board ..."[90]

Member Walsh's dissent in *Verizon* argued that the VRA's omission of a "clear and unmistakable" waiver of the union's statutory right to file a representation petition meant that the petition from it should not be barred.[91] Nonetheless, on these facts, the *Verizon* majority's willingness to hold the union to its bargain correctly prevents the use of Board processes to undermine the party's agreement.

As mentioned above, the Board's treatment of "reverse neutrality agreements"–which commit union to not organize particular groups of employees–is similar to that of VRAs.[92] The seminal *Briggs Indiana* decision equally applies to VRAs:

> The question here is not whether we should enforce the agreement so as to deny an individual Briggs ... employee the right to select a UAW affiliate as his representative ... It is merely whether it is the proper function of the [NLRB] to expend its energies and public funds to confirm a result which the Union agreed it would refrain, temporarily, from seeking to achieve.... The International [of the UAW] may have good reason to regret the original commitment or to decline hereafter to renew it. But this Board should not take affirmative action to facilitate its avoidance. That is not the business of the Government of the United States.[93]

Indeed, *Verizon* emphasized that "[i]f there is an express promise, we will enforce it, for a party ought to be bound by its promise."[94]

In another word of advice, parties negotiating a VRA should expressly waive the right to utilize Board processes to avoid needless litigation.

C. VRAs as Mandatory Subjects of Bargaining

Differences within the Board and between the Board and the courts of appeals shows the categorization of VRAs as mandatory or permissive subjects to be an unsettled area of law. The distinction is critical for several reasons. Bargaining parties can violate agreements on permissive subjects without violating the NLRA, and union-employer agreements regarding permissive subjects may be enforced only via Section 301 suits or arbitration.[95] More importantly, parties engaged in bargaining may not insist to impasse on permissive subjects, and strikes over such demands are unlawful and unprotected.[96]

Mandatory subjects settle an aspect of the relationship between an employer and its employees.[97] In *Pittsburgh Plate Glass*, the Court ruled that matters involving individuals outside the employment relationship will be mandatory subjects if they "vitally affect the 'terms and conditions' of employment" for the unit.[98] By holding that an employer's breach of an "after-acquired store" VRA[99] violated its duty to bargain under Section 8(a)(5), the Board's decision in *Kroger II* implied that such agreements were mandatory subjects of bargaining.[100] In *Lone Star Steel*,[101] the Board ruled that an "application-of-contract" VRA[102] was also a mandatory subject of bargaining. The Tenth Circuit overruled the Board in *Lone Star*, however, arguing that the clause was "much broader than necessary to accomplish the

legitimate Union goal of protecting" wages and jobs of employees in the existing unit.[103]

The Board recently revisited the mandatory/permissive debate in *Pall Biomedical*.[104] The scope of the VRA in *Pall Biomedical* was extremely limited. It applied only to work performed at one other facility in the same geographic area and of the same type performed by bargaining unit employees, and would be activated only in the event that the other facility began performing bargaining unit work. Bargaining unit employees were so worried about the transfer of unit work to the other facility that they struck to obtain the VRA. Although they originally had sought a VRA that would apply the collective bargaining agreement to the facility upon recognition, the employees ultimately compromised with the employer in securing it (by agreeing that the parties would negotiate a new contract upon recognition), and simultaneously settled the strike. The Board, with Chairman Hurtgen dissenting, concluded without difficulty that the VRA "vitally affect[ed]" the unit and was thus a mandatory subject.

The D.C. Circuit in *Pall Corporation*,[105] arguably misapplying a two-prong test it found in *Oliver*,[106] reversed. Insofar as it "vitally affect[ed]" the terms and conditions of employment of bargaining unit employees, the Pall VRA passed the first prong of *Oliver*. The court said that it did not pass the second prong, which asks whether the matter constitutes "a direct frontal attack upon a problem thought to threaten" the interests of bargaining unit employees.[107] The court noted the "modest reach" of the agreement merely put the union "in a position" to address the prospect of transferred bargain unit work. "The Union would still have to negotiate a CBA, which might or might not equalize labor costs between the new and old plants. Thus, even expedited recognition is only the first step ..."[108] *Pall Corp.* concluded that "prescribing the manner of recognition at a new facility is not 'a direct frontal attack'... [and] therefore the [VRA] does not concern a mandatory subject of bargaining."[109]

Pall Corporation is deeply problematic. As both union and management attorneys agree, the decision threatens to complicate collective bargaining with unnecessary tension and strife.[110] Because more extensive VRAs (requiring application of the collective bargaining agreement to newly-organized employees) are more likely mandatory subjects under *Pall Corporations*'s analysis, unions and employers are less likely to compromise and avoid destructive, but protected, strikes or lockouts.[111] The willingness of Pall's employees to settle their strike for a lesser VRA meant that the strike (had it not settled) might become unprotected and the resulting VRA unenforceable. Kane notes that "the paradox created ... in *Pall* also hinders the Act's overriding goal of stability in labor-management relations, good faith in collective bargaining, and the quick, efficient disposition of the organizing process."[112] If compromise solutions are not mandatory subjects, compromise will be impeded and unnecessary strikes will result.

Aside from its probable consequences for the collective bargaining process, *Pall Corporation* takes an unpersuasively narrow view of what types of VRAs should be mandatory. It is illogical to conclude, as did the D.C. Circuit by application of the "direct frontal attack" standard, that a compromise agreement that poorly defends an existing unit (as the *Pall* VRA may have, by including recognition, but not contract extension, provisions) is not nonetheless capable of furthering the interests of the unit. The VRA in Pall Biomedical did not "clog up"[113] the bargaining process, as the dissent suggests, but was rather a vital concern of the existing unit.

Moreover, increasing union members throughout an employer, even if in unrelated divisions, may vitally increase the union's bargaining power on behalf of existing units. The recent *Meijer*[114] decision suggests the relevance of broader organizing efforts (which VRAs aim to further) to the bargaining strength of existing units. In that case, the Ninth Circuit held that unions may charge non-member employees, as a part of agency fees, costs associated with organizing non-unit employees in the relevant market. The court ruled that such costs were "germane to collective bargaining" because they "may ultimately inure to the benefit of the members of the local union..."[115] *Meijer*'s commonsense "germane to collective bargaining" standard–which, unlike the paradoxical result of *Pall Corporation*, promotes such bargaining and implicitly recognizes the broader role VRAs play in strengthening existing bargaining units–should be the test for determining the mandatory or permissive character of VRAs.

The General Counsel Memorandum in *Sahara Hotel*[116] presents another approach to the mandatory/permissive debate. *Sahara Hotel* suggests that a VRA's constituent parts should be analyzed piecemeal, with various provisions (including after-acquired clauses, access to employee contact information and to company facilities, and employer speech clauses) labeled individually as mandatory or permissive.[117] The memo's treatment of the "employer speech clause," however, deserves further attention. Such clauses are central to many agreements, and crucial–given the prevalence of legal and illegal employer coercion during organizing campaigns–for promoting employee Section 7 rights.

Despite the importance of such clauses, the memo argued that they are permissive subjects because "they require the Employer to waive its Section 8(c) right," and noted that proposals requiring a party's waiver of statutory rights have been found permissive subjects of bargaining in "a wide variety of situations."[118] This assessment is misguided for several reasons. First, as noted above, Section 8(c) does not confer a statutory right, but rather merely exempts from regulation a category of speech. Second, waivers of putative statutory rights are not necessarily permissive subjects. Employers may insist to impasse on no-strike clauses, despite the fact that the ability to engage in primary strikes is expressly protected in Section 13 of the NLRA.[119]

D. Demands for VRAs Do Not Justify RM Petitions

In three recent cases–*New Otani Hotel & Garden*,[120] *Rapera, Inc.*,[121] *and Brylane, L.P.*[122] –the Board has properly

found that a union's campaigning for a VRA including a card check recognition process did not justify an employer-filed representation petition ("RM petition"). Dissents in each case highlight the unsettled nature of the law in this area.

Only an "actual present demand for recognition" suffices for an RM petition, not organizational efforts which are designed to lead toward a demand for recognition. As the *New Otani* decision noted, "It would be contrary to the Congressional intent underlying Section 9(c)(1)(B) to find that any conduct with a representational objective, which falls short of an actual, present demand for recognition, will support an election petition filed by an employer."[123]

This rule stems from Congress's desire to protect Section 7 rights from employer manipulation. "Congress sought to prevent employers from utilizing such [RM] petitions as a means to undermine employee free choice,"[124] and from obtaining "a vote rejecting the union before the union had a reasonable opportunity to organize."[125] Congress did not wish to allow employers to "short-circuit the process or immunize itself from recognitional picketing by precipitating a premature election."[126]

The Board has never found the basis for an RM petition in situations in which unions have waged a campaign for campaign limitations and a card-check recognition process. To the contrary, the Board has found RM-petitions justified only when a union requests that an employer sign a contract or immediately recognize the union.[127]

Chairman Hurtgen dissented in *New Otani* and Member Cowan dissented in *Brylane*. *Rapera* upheld the Regional Director's dismissal of the RM petition by a vote of two (Members Liebman and Walsh affirming the dismissal) to two (Members Hurtgen and Chairman Truesdale voting to reverse). The Hurtgen/Truesdale opinion found that the union's requesting a card check recognition process combined with a sworn statement submitted to district court[128] that the union enjoyed majority status constituted a "present demand for recognition." The Liebman/Walsh opinion stressed that statements made to third parties could not constitute a demand made to the employer. We, needless to say, agree with Liebman and Walsh. The Board should maintain its precedent and not permit employers to preclude union campaigns for VRAs by expanding the basis for RM petitions.

* Brent Garren is Senior Associate General Counsel for UNITE HERE. Great thanks goes to Pat Lavelle, a law clerk at UNITE, who provided invaluable assistance in the research and writing of this article. This article originally appeared in Volume 54 of the CCH Labor Law Journal (2003), and was reprinted with permission.

Footnotes

[1] One study found that the rates of success across organizing campaigns governed by card check recognition and card check recognition with so-called "neutrality" provisions were 62.5% and 78.2%, respectively, as compared with the NLRB election win rate for 1983-98 of 45.64%. Adrienne E. Eaton and Jill Kriesky, *Union Organizing Under Neutrality and Card Check Agreements*, 55 IND. & LAB. REL. REV. 42, 51-52. *See also* David E. Weisblatt, *Neutrality Agreements are Neither Neutral Nor Very Good for Employers*, McDonald Hopkins, at *http://www.mhbh.com/topics/business/neutrality.html* (citing percentages of union victories in card check recognition campaigns [78%] and secret ballot elections [53%]).

[2] Many thanks to Guerino J. Calemine, III, of Zwerdling, Paul, Leibig, Kahn & Wolly, P.C., and Larry Engelstein, of SEIU Local 32B-32J, for their unpublished scholarship on various provisions available in drafting VRAs and on VRAs more generally.

[3] Eaton and Kriesky, *supra* note 2, at 48. In one common variation, over 65% cards signed leads to card check recognition, 50-65% triggers a non-NLRB election, and between 33%-50% leads to a Board election.

[4] *International Union v. Dana Corp.*, 278 F.3d 548, 551 (6th Cir. 2002) (quoting Joint Agreement at 92).

[5] Roger C. Hartley, *Non-Legislative Labor Law Reform and Pre-Recognition Labor Neutrality Agreements: The Newest Civil Rights Movement*, 22 BERKELEY J. EMP. & LAB. L. 369, 380 n.59 (2001) (quoting Kerri J. Selland, *AK Propaganda War Erupts*, Am. Mtl. Mkt., May 18, 1995, at 2, available in 1995 WL 8070195).

[6] Eaton and Kriesky, *supra* note 2, at 47.

[7] *Id.* at 48.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *See Fall River Dyeing & Finishing Corp. v. N.L.R.B.*, 482 U.S. 27, 38 (1987); National Labor Relations Board, *The NLRB: What It Is, What It Does*, available at *http://www.nlrb.gov/publications/whatitis.html*.

[15] *See N.L.R.B. v. American National Ins. Co.*, 343 U.S. 395 (1952); Stanley D. Henderson, LABOR LAW: CASES AND COMMENT 90 (Foundation Press 2001).

[16] "I wonder why the Unions were unwilling to go to elections to avoid this result. Was it because they doubted that the employees who signed cards would vote the same way in secret elections?" Jonathan Kane and James P. Thomas, *Pall Corp. v. NLRB–What About Section 7?* 7 (2003) (unpublished paper presented to ABA Labor and Employment Law Section Sub-Committee on Practice and Procedure under the NLRA, Pepper Hamilton LLP). (quoting *Houston Div. of the Kroger Co.* (*Kroger II*), 219 N.L.R.B. 388, 391 (1975) (Kennedy, M., dissenting)). *See also* Weisblatt, *supra* note 2.

[17] *See* Hartley, *supra* note 6, at 381-82; Andrew Strom, *Rethinking the NLRB's Approach to Union Recognition Agreements,* 15 BERKELEY J. EMP. & LAB. L. 50, 53-55 n.59 (1994)

[18] *See Parts Depot, Inc.*, 332 N.L.R.B. No. 64, slip. op. at 7 (2000) (citing *Garvey Marine*, 328 N.L.R.B. No. 147, slip. op. at 7 (1999)).

[19] Paul C. Weiler, *Promises to Keep: Securing Workers' Rights to Self Organization under the NLRA*, 96 HARV. L. REV. 1769, 1777 (1983)

(citing Prosten, *The Longest Season: Union Organizing in the Last Decade, a/k/a How Come One Team Has to Play with its Shoelaces Tied Together?*, 31 PROC. ANN. MEETING INDUS. REL. RESEARCH A. 240, 243 (1978)).

[20] *Id.* (citing Roomkin & Juris, *Unions in the Traditional Sectors: The Mid-Life Passage of the Labor Movement*, 31 PROC. ANN. MEETING INDUS. REL. RESEARCH A. 212, 217-18 (1978)).

[21] *Parts Depot, Inc.*, 332 N.L.R.B. No. 64 (2000).

[22] *Id.*, slip op. at 14.

[23] *See* Brent Garren, *When the Solution is the Problem: NLRB Remedies and Organizing Drives*, 51 LAB. L.J. 76, 76-8 (2000) (surveying numerous studies).

[24] *Id.* at 77 (citing Charles J. Morris, *A Tale of Two Statutes: Discrimination for Union Activity Under the NLRA and RLA*, 2 EMP. RTS. EMP. POL. J. 317, 329-30 (1998)).

[25] *Id.* (citing Robert J. LaBlonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. CHI. L. REV. 953 (1991)).

[26] Garren, *supra* note 21, at 77 (citing Commission on the Future of Worker-Management Relations, *Fact Finding Report*, issued by the Commission on the Future of Worker-Management Relations, June 2, 1994, as reprinted in the Daily Labor Report, June 3, 1994 at WL * 191).

[27] Kate Bronfenbrenner, *The Effects of Plant Closings or Threats of Plant Closing on the Rights of Workers to Organize*, Labor Secretariat of the North American Commission for Labor Cooperation (1996).

[28] Human Rights Watch, *Unfair Advantage: Workers' Freedom of Association in the United States Under International Human Rights Standards* (2000) (quoting Theodore St. Antoine, *Federal Regulation of the Workplace in the Next Half Century*, 61 CHI.-KENT L. REV. 631, 639 (1985).

[29] *See* Garren, *supra* note 21, at 77-78 (citing Paul C. Weiler, *Hard Times for Unions: Challenging Time for Scholars*, 58 U. CHI. L. REV. 1015, 1029-30 (1991); William Dickens, *The Effect of Company Campaigns On Certification Elections: Law and Reality Once Again*, 36 IND. AND LAB. R. 560, 574 (1983)); Eaton and Kriesky, *supra* note 2, at 43.

[30] *Id.* at 78 (citing Benjamin W. Wolkinson, et. al., *The Remedial Efficacy of Gissel Bargaining Orders*, 10 IND. REL. L.J. 509-10 n.3 (1989); Dunlop Commission Report, *supra* note 24, at WL * 197-98).

[31] In light of the findings of a 1991 poll (that 59% of workers believed they would lose favor with their employer for supporting a union and 79 % agreed that workers and 'very' or 'somewhat' likely to be fired for trying to organize a union), "the idea that a piece of paper on the wall dissipates the effect of employer threats borders on the absurd." *Id.* at 78.

[32] *See id.* at 80 (citing Les Aspin, *Legal Remedies under the NLRA Under 8(a)(3)*, (1970), as reprinted in Julius G. Getman & Jerry R. Andersen, 6 LABOR RELATIONS AND SOCIAL PROBLEMS 133, 134 (1972)).

[33] *Id.* at 81 (citing Daniel Pollitt, *NLRB Re-run Elections: A Study*, 41 N.C. L. REV. 209, 212 (1963)).

[34] For example, UNITE has entered into agreements limiting the campaign period to 15 days.

[35] *Agreement*, [Employer] and Service Emp. Int'l Union (1991) (on file with author).

[36] Hartley, *supra* note 6, at 382.

[37] Despite this flexibility, however, "arbitrators arguably have been quite conservative in the remedies they have, in practice, ordered." Eaton and Kriesky, *supra* note 2, at 54 (citing Adrienne Eaton and Debra Casey, *Bargaining to Organize: Disputes and Their Resolution*, unpublished manuscript, Rutgers University (2001)). *But see* George N. Davies, *Neutrality Agreements: Basic Principles of Enforcement and Available Remedies*, 16 LAB. LAW. 215, 220-221 (2000) (highlighting the strong remedies awarded by arbitrators and subsequently challenged unsuccessfully in *United Steelworkers of American v. AK Steel Corp.*, 163 F.3d 403 (6th Cir. 1998) and *International Union v. Dana Corp.*, 278 F.3d 548 (6th Cir. 2002)).

[38] *See, e.g. Pall Biomedical Products Corp.*, 331 N.L.R.B. 1674, 1676 (2000); *Hotel Emp., Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1468-69 (9th Cir. 1992); *Hotel & Restaurant Emp. Union v. J.P. Morgan*, 996 F.2d 561, 566 (2nd Cir. 1993); *Local 3-193 Int'l Woodworkers v. Ketchikan Pulp Co.*, 611 F.2d 1295, 1299-1301 (9th Cir. 1980); Strom, *supra* note 18, at 62 (citing *Advice Memorandum of the NLRB General Counsel, General Motors Corp., Saturn Corp., and UAW*, 122 L.R.R.M. 1187, 1190-91 (1986)).

Even if VRAs do not explicitly condition recognition on the showing of majority support, since the Board will read the requirement into such contracts. *Houston Div. of the Kroger Co.* (*Kroger II*), 219 N.L.R.B. 388, 389 (1975).

[39] *J.P. Morgan*, 996 F.2d at 566.

[40] *See* Eaton and Kriesky, *supra* note 2, at 59 n.1 (citing two articles arguing that VRAs prevent employees from "getting the full story"); Kane and Thomas, *supra* note 17, at 6-7.

[41] Yale University Office of Public Affairs, *Labor Negotiations at Yale University: Frequently Asked Questions about Union Neutrality*, at *http://www.yale.edu/opa/labor/faq_neutrality.html*.

[42] 278 F.3d 548 (6th Cir. 2002).

[43] *Id.* at 558.

[44] Section 8(c) of the NLRA states: "The expression of any views, arguments or opinions or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any provision of this...[law], if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

[45] *Dana*, 275 F.3d at 558 (citing *Hotel Emp., Local 2 v. Marriott Corp.*, 961 F.2d 1464, 1470 (9th Cir. 1992)).

[46] *Id.* at 559-60 (citing *N.L.R.B. v. St. Francis Healthcare Ctr.*, 212 F.3d 945, 954 (6th Cir. 2002).

[47] *Id.*

[48] *Id.* at 559.

[49] 383 U.S. 53 (1966).

[50] *Id.* at 62.

[51] *Id.* at 62 n.5.

[52] *Dana,* 275 F.3d at 552.

[53] *See* Eaton and Kriesky, *supra* note 2, at n.1; Kane and Thomas, *supra* note 17, at 6-7; Yale University Office of Public Affairs, *supra* note 38.

[54] Eaton and Kriesky found that 73% of the sample of 118 agreements they collected from a wide variety of sources called for card

check arrangements. Eaton and Kriesky, *supra* note 2, at 48.

[55] *Central Parking System, Inc.*, 335 N.L.R.B. No. 34, slip op. at 2 n.5 (2001). As Strom notes, adopting a policy of deference to arbitration awards resulting from disputes in voluntary recognition situations would not preclude the Board from stepping in to curb genuine Section 8(a)(2) violations. Strom, *supra* note 18, at 81.

[56] *Id.* at 566.

[57] For further discussion on the question of Section 301 enforceability, see Part III.A, *infra*.

[58] 996 F.2d at 566 (citing *N..L.R.B. v. Drivers, Chauffeurs, Helpers, Local Union No. 639*, 362 U.S. 274 (1960)).

[59] Commission for Labor Cooperation, *Union Organizing Systems in the Three NAALC Countries*, available at *http://www.naalc.org/english/publications/nalmcp_7.htm*.

[60] Hartley, *supra* note 6, at 380. For a discussion of the content of various VRAs, *see supra* Part I.

[61] *International Union v. Dana Corp.*, 278 F.3d 548, 551 (6th Cir. 2002) at 551-52.

[62] *Id.* at 552.

[63] "Neutrality means that the Company shall neither help nor hinder the Union's conduct of an organizing campaign, nor shall it demean the Union as an organization or its representatives as individuals¼. [T]he Company reserves the right ¼ [t]o communicate fairly and factually to employees ¼ concerning the terms and conditions of their employment with the Company and concerning legitimate issues in the campaign. For its part, the Union agrees that all facets of its organizing campaign will be conducted in a constructive and positive manner which does not misrepresent their employment and in a manner which neither demeans the Company as an organization nor its representatives as individuals." *AK Steel Corp. v. United Steelworkers of America*, 163 F.3d 403, 410-11 (6th Cir. 1998) (Appendix A).

[64] *Agreement* (on file with author).

[65] Eaton and Kriesky, *supra* note 2, at 48.

[66] *Id.* (reporting that more than 90% of the agreements they studied called for dispute resolution, and that the process most frequently outlined was arbitration).

[67] *Supra* note 2, at 48.

[68] 996 F.2d at 566.

[69] *N.L.R.B. v. American National Ins. Co.*, 343 U.S. 395, 401 (1952).

[70] *N.L.R.B. v. Broadmoor Lumber Co.*, 578 F.2d 238, 241 (9th Cir. 1978).

[71] *MGM Grand Hotel*, 329 N.L.R.B. 464, 467 (1999).

[72] "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act ... may be brought in any district court of the United States ..." NLRA Section 301, 29 U.S.C. § 185(a) (1998).

[73] *See* SEIU Local 1199 v. NYU Hospitals Center, 2003 U.S. Dist. LEXIS 4343 (S.D.N.Y. 2003); *International Union v. Dana Corp.*, 278 F.3d 548, 554 (6th Cir. 2002); *United Steelworkers of American v. AK Steel Corp.*, 163 F.3d 403 (6th Cir. 1998); *Hotel & Restaurant Emp. Union v. J.P. Morgan*, 996 F.2d 561 (2nd Cir. 1993); *Hotel Emp., Local 2 v. Marriott Corp.*, 961 F.2d 1464 (9th Cir. 1992).

[74] 996 F.2d at 566.

75 *See International Union v. Dana Corp.*, 278 F.3d 548, 558 (6th Cir. 2002).

[76] 996 F.2d at 565 (quoting 1 *The Developing Labor Law* 975 (Patrick Hardin et al. eds., 3d ed. 1992).

[77] *Marriott Corp.*, 961 F.2d at 1468-9. In that case, the court concluded that "it is the NLRB, not the courts, that should determine policy" regarding whether card check agreements imply an employer obligation to grant a union access to its property and a list of its employees.

[78] *See Hotel & Restaurant Emp. Union v. J.P. Morgan*, 996 F.2d 561, 567 (2nd Cir. 1993).

[79] *See Central Parking*, 335 N.L.R.B. No. 34 (2001); *Verizon Information Systems*, 335 N.L.R.B. No. 44 (2001).

[80] 335 N.L.R.B. No. 34, slip op. at 5 (quoting *Houston Division of the Kroger Co.*, 219 N.L.R.B. 388, 389 (1975)).

[81] 335 N.L.R.B. No. 34, slip op. at 3 (citing *Hershey Foods*, 208 N.L.R.B. 452 (1974); *Commonwealth Gas*, 218 N.L.R.B. 857 (1975)).

[82] *Hampton Inn and Suites*, 331 N.L.R.B. 238, 239 (2000) (citing *Otis Hospital*, 219 N.L.R.B. 164, 165 (1975); *The Leonard Hospital*, 220 N.L.R.B. 1042 (1975)).

[83] *See* Strom, *supra* note 18, at 81.

[84] *Id.* at 79 (quoting, in part, *Marion Power Shovel Co.*, 230 N.L.R.B. 576, 577 (1977)).

Strom suggest that the degree of deference given to different types of voluntary agreements should be rooted in an assessment of the degree to which such agreements threaten to undermine employee free choice under Section 7. Examining such representation questions as accretions and the scope of bargaining units, Strom argues that the arguments against Board deferral to private representation processes apply more strongly in the case of accretions; in such cases, it is conceivable that a union and an employer could agree that a contract will cover workers at a facility without adequately determining whether the workers want the union to represent them. Id. at 80. Such an agreement would clearly violate Sections 8(a)(2) and 8(b)(1) of the NLRA.

Arguments against deferral to private processes are weaker in unit determinations, where, "in contrast to cases of accretions, there are only minimal concerns about limiting employee self-determination"; in even inappropriate, privately-created units, employees will have a chance to express their desires regarding unionization. *Id.* at 80-81.

[85] 335 N.L.R.B. No. 44, slip op. at fn.11.

[86] *Id.*

[87] 335 N.L.R.B. No. 44 at 5.

[88] *See id.* at 3 fn.8.

[89] *Id.* at 3.

[90] *Id.*, slip op. at 4. (quoting *Lexington House*, 328 N.L.R.B. 894, 897 (1999)).

[91] *See id.* at 3.

[92] *See*, e.g., *Briggs Indiana Corp.*, 63 N.L.R.B. 1270 (1945); *Cessna Aircraft Co.*, 123 N.L.R.B. 855 (1959)); *Lexington Health Care Group*, 328 NLRB 894 (1999).

[93] *Verizon*, 335 N.L.R.B. No. 44, slip op. at 3 (quoting *Briggs Indiana*, 63 N.L.R.B. 1270 (1945)).

[94] *Id.* (quoting *Lexington House*, 328 N.L.R.B. 894, 896 (1999)).

[95] "The remedy for a unilateral mid-term modification to a permissive term lies in an action for breach of contract ... not in an unfair practice proceeding." *Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Division*, 404 U.S. 157, 188 (1971).

[96] *N.L.R.B. v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342, 349 (1958); *Nassau Insurance Co.*, 280 N.L.R.B. 878, fn. 3 and 891-92 (1986).

[97] 404 U.S. at 179.

[98] *Id.*

[99] Such an agreement places employees in a company's newly-acquired stores in the existing bargaining unit upon recognition.

[100] *Pall Biomedical Products Corp.*, 331 N.L.R.B. 1674 (2002), *rev'd*, 275 F.3d 116 (2002).

[101] *Lone Star Steel*, 231 N.L.R.B. 573 (1973), *rev'd*, 639 F.2d 545 (10th Cir. 1980).

[102] Such an agreement places a company's employees in new bargaining units and extends the existing collective bargaining agreement to those new groups of employees.

[103] 639 F.2d at 558.

[104] 331 N.L.R.B. 1674 (2002).

[105] *Pall Corp. v. N.L.R.B.*, 275 F.3d 116 (D.C. Cir. 2002).

[106] *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 294 (1959). In *Oliver*, the Court held that a collective bargaining agreement's provision of a minimum wage was exempt from a state antitrust law because it constituted "a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure" in the collective bargaining agreement.

Subsequent Court decisions suggest that *Oliver*'s supposed "direct frontal attack" prong is merely a different formulation of the more common "vitally affects" test. In *Pittsburgh Plate Glass*, for example, the Court said that the subjects in both *Oliver* and *Fibreboard*–which, like Pall, addressed loss of unit work to third parties–were mandatory because they were "integral to th establishment [of benefits] for clearly covered employee[s]." 404 U.S. at 178 (quoting *United States v. Drum*, 368 U.S. 370, 382-83, n.26 (1962)). In both *Oliver* and *Fibreboard*, the *Pittsburgh* decision concluded, "the question ... [is] whether [the third-party concern] vitally affects the 'terms and conditions' of active employees." *Id.* at 179.

[107] *Id.* at 294.

[108] 275 F.3d at 122.

[109] *Id.*

[110] Calemine*;* Cohen, *supra* note 22, at 5-6.

[111] Calemine: "It is not difficult to imagine a bargaining scenario where, thanks to *Pall Corporation*, compromise is now less likely and a strike or lockout is more likely. For instance, a union might open negotiations with a *Kroger*-type 'after-acquired stores' proposal, perhaps confident that it is tailored as a 'direct frontal attack' on job security issues for the existing bargaining unit and therefore a mandatory subject of bargaining. The employer might reject the proposal. Now, the union has a difficult choice. Does it counter with a new, watered-down proposal that would render the matter a permissive subject–with all th implications that entails–or does it dig in its heels and insist on the original, mandatory proposal in order to better protect its right to strike over the matter? On the other side of the table, an employer now has an extra incentive to push for recognition-only type clauses, *sans* contract extensions, if any clause at all, in order to, for example, retain the option of repudiating it without violating Section 8(a)(5). In short, *Pall Corporation* may affect bargaining dynamics in ways which do not bode well for negotiating compromises and avoiding strikes or lockouts."

[112] Kane, *supra* note 18, at 6.

[113] *Pall Biomedical Products Corp.*, 331 N.L.R.B. 1674, 1681 (2000) (Hurtgen, C., dissenting).

[114] *UFCW, Local 1036 v. N.L.R.B. (Meijer)*, 284 F.3d 1099 (9th Cir.), *cert. denied sub nom. Mulder v. N.L.R.B.*, 123 S.Ct. 551 (2002).

[115] Cohen, *supra* note 22, at 212 (citing *Meijer*, 329 N.L.R.B. No. 69 at 6).

[116] General Counsel Memorandum, *Sahara Hotel & Casino*, Case 28-CB-4349, 1995 WL 937191 (November 30, 1995).

[117] *Id.*

[118] *Id.* These situations include waivers of the union's right to file Board charges alleging that the employees engaged in an unfair labor practice or of the right to select union stewards, withdrawals of Board charges, settlements of backpay liability, adoption of an industry promotion program where such adoption would effectively compel the employer to designate an employer association as its bargaining representative.

[119] "Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike ..." NLRA Section 13, 29 U.S.C. § 163.

[120] 331 N.L.R.B. No. 159 (2000).

[121] 333 N.L.R.B. No. 150 (2001).

[122] 338 N.L.R.B. No. 65 (2002).

[123] *New Otani*, 331 N.L.R.B. No. 159, slip op. at 7-8 (citing *Windee's Metal Industries*, 309 N.L.R.B. 1074, 1075 (1992)).

[124] *PSM Steel Construction*, 309 N.L.R.B. 1302, 1304 (1992).

[125] *New Otani*, 331 NLRB No. 159, slip op. at 5.

[126] *Id.* at 7 (citing *Albuquerque Insulation*, 256 N.L.R.B. 61, 63 (1981)).

The legislative history stresses this important policy concern. As stated in Senate Report No. 105 on S. 1126 (1 Leg. Hist. 417): "If an employer could petition at any time, he could effectively frustrate the desire of his employees to organize by asking for an election on the first day that a union organizer distributed leaflets at his plant." Similarly Senator Morse expressed concern that the employers' right to petition "may be subject to abuse, in that employers may seek an election at the earliest possible moment in an organizational campaign and thereby obtain a vote rejecting the union before it had a reasonable opportunity to organize." House Report No. 245 on H.R. 3020, 2 Legislative History of the Labor Management Relations Act 983.

[127] *Windee's Metal Industries, Inc.*, 309 N.L.R.B. 1074 (1992).

[128] The opinion contrasted the sworn statement to other statements that might be dismissed as "campaign puffery."

LITIGATION

STOPPING ASBESTOS LITIGATION ABUSE

*BY MARK A. BEHRENS & PHIL S. GOLDBERG**

Widespread abuse and even fraud have long been rumored to be a part of asbestos litigation. A recent study, published in *Academic Radiology*, is the latest confirmation that over-diagnosis of asbestos-related conditions is a major problem. The study suggests that x-ray readers used by plaintiffs' lawyers in asbestos cases are not detached medical experts, but hired guns retained because they will reach conclusions that support the lawyers' cases.

In conducting the study, Drs. Joseph Gitlin and Elizabeth Garrett-Mayer of the Johns Hopkins School of Medicine had six independent experts evaluate 492 x-rays used by plaintiffs' lawyers as a basis for asbestos claims. The study's authors did not tell the experts the source of the x-rays or that the films already had been entered into evidence in litigation. The x-ray readers hired by plaintiffs' lawyers found evidence of possible asbestos-related abnormalities in a staggering 95.9% of the cases, but the independent radiologists found abnormalities in just 4.5% of the cases. As Drs. Gitlin and Garret-Mayer concluded, this enormous disparity is too great to be explained by a reasonable difference of opinion.[1]

Previous attempts to assess the scope of unreliable x-ray readings in asbestos cases resulted in similar findings. For example, in 1990, an independent panel of radiologists studied 439 tire worker claimants "diagnosed" by plaintiffs' doctors as having an asbestos-related disease. The researchers, however, found that only 2.5% of the claimants had conditions consistent with asbestos exposure, leading them to conclude that "the plaintiffs' doctors' diagnoses of asbestos related conditions was 'mistakenly high.'"[2]

United States District Court Judge Carl Rubin of the Southern District of Ohio studied the merits of sixty-five asbestos bodily injury cases by appointing medical experts to evaluate the claims. All of the plaintiffs had claimed some asbestos-related condition, but the court-appointed experts found that sixty-five percent of the claimants had no asbestos-related conditions at all. Of the remaining thirty-five percent of claimants, approximately fifteen percent had asbestosis, and the rest presented only pleural conditions.[3]

In another study, neutral academics appointed by the Manville Personal Injury Settlement Trust evaluated the results of more than 6,400 audited claims of alleged asbestosis and pleural disease. In approximately forty-one percent of the cases, the Trust's physicians disagreed with the plaintiff experts, finding that the claimant had either no disease or a less severe condition than alleged.[4]

Mass Screening Mischief

X-rays like those reviewed in the Johns Hopkins study typically result from mass screenings conducted by plaintiff lawyers and their agents. Such screenings are frequently conducted in areas with high concentrations of workers who may have worked in jobs where they were exposed to asbestos.

The lawyers and the screening firms recruit plaintiffs through exaggerated claims, such as "Find out if YOU have MILLION DOLLAR LUNGS!"[5] Senior United States District Court Judge Jack Weinstein and Bankruptcy Court Judge Burton Lifland have explained: "Claimants today are diagnosed largely through plaintiff-lawyer arranged mass screenings programs targeting possible exposed asbestos-workers and attraction of potential claimants through the mass media."[6] Former United States Attorney General Griffin Bell has pointed out that "[t]hese screenings often do not comply with federal or state health or safety law. There often is no medical purpose for these screenings and claimants receive no medical follow-up."[7]

The Association of Occupational and Environmental Clinics has stated its concern that "medically inadequate screening tests are being conducted to identify cases of asbestos-related disease for legal action. These tests do not conform to the necessary standards for screening programs conducted for patient care and protection."[8] Dr. Michael Harbut, an occupational health specialist in Michigan, expressed particular outrage at this practice, saying that any lawyer who "degrades the value of human health by relying only on x-rays for making a diagnosis of asbestosis is certainly morally corrupt, if not criminally corrupt."[9]

In 2003, the American Bar Association's Board of Governors authorized the formation of a commission to study the issue. With the assistance of the American Medical Association, the ABA Commission on Asbestos Litigation consulted some of the Nation's most prominent physicians in the field of occupational medicine and pulmonary disease. The Commission's report confirmed that a large percentage of asbestos claimants are recruited through litigation screenings:

> For-profit litigation "screening" companies have developed that actively solicit asymptomatic workers who may have been occupationally exposed to asbestos to have "free" testing done – usually only chest x-rays. Promotional ads declare that "You May Have Million $ Lungs" and urge the workers to be screened even if they have no breathing problems because "you may be sick with no feeling of illness." The x-rays are usually taken in "x-ray mobiles" that are driven to union halls or hotel parking lots. There is evidence that many litigation-screening companies commonly administer the x-rays in violation of state and federal safety regulations. In order

> to get an x-ray taken, workers are ordinarily required to sign a retainer agreement authorizing a lawsuit if the results are "positive."
>
> The x-rays are generally read by doctors who are not on site and who may not even be licensed to practice medicine in the state where the x-rays are taken or have malpractice insurance for these activities. According to these doctors, no doctor/patient relationship is formed with the screened workers and no medical diagnoses are provided. Rather, the doctor purports only to be acting as a litigation consultant and only to be looking for x-ray evidence that is "consistent with" asbestos-related disease. Some x-ray readers spend only minutes to make these findings, but are paid hundreds of thousands of dollars – in some cases, millions – in the aggregate by the litigation screening companies due to the volume of films read. [10]

In the wake of these studies, "considerable doubt" has been placed on the reliability of claims generated through mass screenings.[11] As one physician has explained, "the chest x-rays are not read blindly, but always with the knowledge of some asbestos exposure and that the lawyer wants to file litigation on the worker's behalf."[12] Moreover, some attorneys reportedly pass an x-ray around to numerous radiologists until they find one who is willing to say that the film shows symptoms of an asbestos-related disease – a practice strongly suggesting unreliable scientific evidence.[13] One plaintiffs' expert medical witness has remarked that he "was amazed to discover that, in some of the screenings, the worker's x-ray had been 'shopped around' to as many as six radiologists until a slightly positive reading was reported by the last one."[14]

The result is "the epidemic of asbestosis observed . . . in numbers which are inconceivable and among industries where the disease has never been previously recognized by medical investigation."[15] In fact, in 2003, more than 100,000 new asbestos claims were filed – "the most in a single year."[16]

Impact on Compensation for the Truly Sick

Given the abuse of mass screenings and the unreliable medical reports generated as a result of the screening process, it should not be surprising that most new asbestos claimants – up to ninety percent – have no medically cognizable injury or impairment.[17] These claimants "continue to lead active, normal lives, with no pain or suffering, no loss of the use of an organ or disfigurement due to scarring."[18] Cardozo Law School Professor Lester Brickman, an expert on asbestos litigation, has said that "the 'asbestos litigation crisis' would never have arisen and would not exist today" if not for the claims filed by unimpaired claimants.[19]

The presence of unimpaired claimants on court dockets and in settlement negotiations "inevitably diverts legal attention and economic resources away from the claimants with severe asbestos disabilities who need help right now."[20] Consider, for example, the litigation involving Johns-Manville, which filed for bankruptcy in 1982. It took six years for the company's bankruptcy plan to be confirmed. Payments to Manville Trust claimants were halted in 1990, and did not resume until 1995. According to the Manville trustees, a "disproportionate amount of Trust settlement dollars have gone to the least injured claimants—many with no discernible asbestos-related physical impairment whatsoever."[21] The Trust is now paying out just *five cents on the dollar* to asbestos claimants.[22] The trusts created through the Celotex and Eagle-Picher bankruptcies have similarly reduced payments to claimants.[23]

The same injustice can be seen on an individual level. For example, the widow of a Washington State man who died from mesothelioma has been told that she should expect to receive only fifteen percent of the $1 million she might have received if her husband had filed suit before the companies he sued went bankrupt.[24] The widow of an Ohio mechanic will recover at most $150,000 of the $4.4 million award that she received for her husband's death.[25]

For these reasons, lawyers who represent cancer victims have been highly critical of mass screenings and the filings they generate. They appreciate that payments to the non-sick, and transaction costs spent litigating their claims, are depleting scarce resources that should go to "the sick and the dying, their widows and survivors."[26] Here is what some of the lawyers have said:

> - Richard Scruggs of Mississippi: "Flooding the courts with asbestos cases filed by people who are not sick against defendants who have not been shown to be at fault is not sound public policy."[27]
>
> - Matthew Bergman of Seattle: "Victims of mesothelioma, the most deadly form of asbestos-related illness, suffer the most from the current system … the genuinely sick and dying are often deprived of adequate compensation as more and more funds are diverted into settlements of the non-impaired claims."[28]
>
> - Peter Kraus of Dallas has said that plaintiffs' lawyers who file suits on behalf of the non-sick are "sucking the money away from the truly impaired."[29]
>
> - Steve Kazan of Oakland, California has testified that recoveries by the unimpaired may result in his clients being left uncompensated.[30]
>
> - Terrence Lavin, an Illinois State Bar President and Chicago plaintiffs' lawyer: "Members of the asbestos bar have made a mockery of our civil justice system and have inflicted financial ruin on corporate America by representing people with nothing more than an arguable finding on an x-ray."[31]

Filings by unimpaired claimants not only threaten payments to the truly sick, they also have serious consequences for defendants. Asbestos litigation has already forced more than seventy companies into bankruptcy.[32]

As a result, "the net has spread. . . to companies far removed from the scene of any putative wrongdoing."[33] Peripheral defendants are being dragged into the litigation to make up for the "traditional defendants" that are no longer around to pay their full share.[34] The RAND Institute for Civil Justice has now identified more than 8,500 asbestos defendants,[35] up from only 300 in 1982.[36] Asbestos litigation now touches firms in industries engaged in almost every form of economic activity that takes place in the economy.

Solutions

The United States Supreme Court has said that this country is in the midst of an "asbestos-litigation crisis."[37] Efforts need to be made now to police abuse in the litigation and help preserve resources needed to compensate the sick.[38]

First, state courts should dismiss claims initiated through mass screenings. This has been the practice in federal asbestos cases since January 2002. The judge who issued that order, Senior United States District Judge Charles Weiner of the Eastern District of Pennsylvania, observed that "the filing of mass screening cases is tantamount to a race to the courthouse and has the effect of depleting funds, some already stretched to the limit, which would otherwise be available for compensation to deserving plaintiffs."[39]

Second, courts should use objective medical criteria to ensure that claimants who are sick with an asbestos-related illness can have their cases tried first. The claims of the unimpaired should be suspended and preserved so they can file claims in the future should they become sick.[40] This practice is the trend in state court asbestos litigation.[41]

For example, courts in New York City, Chicago, Boston, Baltimore, Seattle, Syracuse, Portsmouth (Virginia), and Madison County (Illinois), have ordered the claims of individuals with no present asbestos-related impairment to be placed on an inactive docket (also called a pleural registry or deferred docket).[42] Statutes of limitations are tolled and discovery is stayed with respect to claims placed on the inactive docket. A case may be removed to the active docket and set for trial when the claimant presents the court with credible medical evidence of asbestos-related impairment. Unimpaired dockets relieve the pressure on courts to decide "claims that are premature (because there is not yet any impairment) or actually meritless (because there never will be)."[43]

Other courts have entered orders requiring potential plaintiffs to meet certain objective medical criteria in order to proceed with a claim in that court.[44] Claimants not able to demonstrate functional impairment will have their claims administratively dismissed until an impairing condition develops. Should a claimant develop such an impairing condition, he or she would be permitted to re-file a claim.[45]

Third, courts should exercise their "gatekeeper function" to ensure that only sound science is presented at trial.[46] The recent Johns Hopkins study suggests that courts should view x-ray evidence skeptically.

Fourth, courts should not join dissimilar cases for trial. Some courts have tried to address the overabundance of asbestos claims on their dockets by joining asbestos claims for resolution, either in mass consolidations or in clusters. In such proceedings, people with serious illnesses are often lumped together with claimants having different alleged harms or no illness at all; frequently, multiple defendants are named.[47] The cases generally involve aggressive management of the docket by the trial judge and pressure on the defendants to settle.

The motivation for case consolidation seems logical. If asbestos claims are crowding court dockets, then it would seem sensible to resolve the claims as efficiently as possible and to reduce the transaction costs in doing so. Unfortunately, in lowering the barriers to litigation, these courts have unintentionally encouraged the filing of more claims.[48] As Duke Law Professor Francis McGovern has explained: "Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. They increase demand for new cases by their high resolution rates and low transaction costs. If you build a superhighway, there will be a traffic jam."[49]

Fifth, courts should preserve assets for sick asbestos claimants by severing, deferring, or staying punitive damage claims.[50] As the United States Court of Appeals for the Third Circuit concluded when it approved a decision by Judge Weiner to sever all punitive damages claims from federal asbestos cases: "It is responsible public policy to give priority to compensatory claims over exemplary punitive damage windfalls . . ."[51] Repeated punitive damages awards serve no constitutionally justifiable or sound public policy goal in asbestos cases.[52]

Finally, courts should impose *ad hoc* public policy limitations on joint liability in asbestos and other appropriate cases. As Pepperdine Law Professor Richard Cupp, Jr. has written: "unlimited and unrestrained joint liability represents unsound public policy in the current asbestos litigation environment."[53]

Conclusion

The current asbestos litigation system is not working for sick claimants, defendants, or society as a whole. Changes are needed. As Senior Judge Joseph F. Weis, Jr. of the Third Circuit Court of Appeals has stated:

> It is time—perhaps past due—to stop the hemorrhaging so as to protect future claimants…. [A]t some point, some jurisdiction must face up to the realities of the asbestos crisis and take a step that might, perhaps, lead others to adopt a broader view. Courts should no longer wait for

> congressional or legislative action to correct common law errors made by the courts themselves. Mistakes created by courts can be corrected by courts without engaging in judicial activism. It is judicial paralysis, not activism, that is the problem in this area.[54]

The sound and fair reforms we suggest would be a good place to start for courts interested in solving serious problems in the litigation and helping sick claimants.

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Footnotes

[1] *See* Joseph N. Gitlin et al., *Comparison of "B" Readers' Interpretations of Chest Radiographs for Asbestos Related Changes*, 11 ACAD. RADIOLOGY 843 (2004).

[2] Lester Brickman, *On The Theory Class's Theories of Asbestos Litigation: The Disconnnect Between Scholarship and Reality?*, 31 PEPP. L. REV. 33, 105 (2004) (citation omitted); *see also* Raymark Indus., Inc. v. Stemple, 1990 WL 72588, *10 (D. Kan. May 30, 1990) (unpublished decision).

[3] *See* Hon. Carl Rubin & Laura Ringenbach, *The Use of Court Experts in Asbestos Litigation*, 137 F.R.D. 35, 37-39 (1991).

[4] Hon. Griffin B. Bell, *Asbestos Litigation and Judicial Leadership: The Courts' Duty to Help Solve The Asbestos Litigation Crisis*, BRIEFLY, Vol. 6, No. 6, June 2002, at 18 (Nat'l Legal Center for the Pub. Interest monograph), *available at* <http://www.nlcpi.org> (last visited Dec. 1, 2004).

[5] Roger Parloff, *The $200 Billion Miscarriage of Justice; Asbestos Lawyers are Pitting Plaintiffs Who Aren't Sick Against Companies that Never Made the Stuff and Extracting Billions for Themselves*, FORTUNE, Mar. 4, 2002, at 154, *available at* 2002 WL 2190334.

[6] *In re* Joint E. & S. Dists. Asbestos Litig., 237 F. Supp. 2d 297, 309 (E. & S.D.N.Y. 2002).

[7] Griffin B. Bell, *Asbestos & The Sleeping Constitution*, 31 PEPP. L. REV. 1 (2004); *see also* Letter from U.S. Senator Don Nickles, Chairman, Committee on Budget, to Hon. Timothy J. Muris, Chairman, Federal Trade Commission and Lester M. Crawford, D.V.M., Ph.D., Acting Commissioner, Food and Drug Administration 1 (Apr. 28, 2004) (on file with authors) (calling for a Federal inquiry into the "widespread use of for-profit mass X-ray screening vans and trucks to generate lawsuits by claimants, many of whom are not sick.").

[8] ASS'N OF OCCUPATIONAL & ENVTL. CLINICS, ASBESTOS SCREENING (2002), *available at* <http://www.aoec.org/asbestos-screen.htm> (last visited Dec. 1, 2004).

[9] Greg Gordon, *Have Asbestos Diagnoses Been Exaggerated?*, STAR-TRIB. (Minneapolis–St. Paul), Aug. 5, 2004, at 3A, *available at* 2004 WL 83077304.

[10] *See* American Bar Association, Commission on Asbestos Litigation, *Report to the House of Delegates* 8 (Feb. 2003). As a result of its findings, the ABA Commission proposed the enactment of federal medical criteria standards for nonmalignant claims. The ABA's House of Delegates adopted the proposal in February 2003. *See Asbestos Litigation: Hearing Before the Sen. Comm. on the Judiciary*, 107th Cong. (Mar. 5, 2003) (statement of the Hon. Dennis Archer, President-elect, American Bar Association).

[11] Editorial, *X-Raying an Asbestos Quagmire*, CHI. TRIB., Aug. 16, 2004, at 16, *available at* 2004 WL 89474404; *see also* Murray L. Janower & Leonard Berlin, Editorial, *"B" Readers' Radiographic Interpretations in Asbestos Litigation: Is Something Rotten in the Courtroom?*, 11 ACAD. RADIOLOGY 842 (2004).

[12] *See* David E. Bernstein, *Keeping Junk Science Out of Asbestos Litigation*, 31 PEPP. L. REV. 11, 13 (2003) (quoting Lawrence Martin, M.D.) [hereinafter "Bernstein"].

[13] *See* David Egilman, *Asbestos Screenings*, 42 AM. J. OF INDUS. MED. 163 (2002).

[14] Stephen Hudak & John F. Hagan, *Asbestos Litigation Overwhelms Courts*, CLEVELAND PLAIN DEALER, Nov. 5, 2002, at A1, *available at* 2002 WL 6382801 [hereinafter "Hudak & Hagan"].

[15] Andrew J. Ghio, M.D., Editorial, *Asbestosis: Over Diagnosed?*, THE NEWS & OBSERVER (Charlotte, North Carolina), Apr. 12, 2004, at A11, *available at* 2004 WL 56033533.

[16] Editorial, *The Asbestos Blob, Cont.*, WALL ST. J., Apr. 6, 2004, at A16, *available at* 2004 WL-WSJ 56925100.

[17] *See* Stephen Carroll et al., *Asbestos Litigation Costs and Compensation (Draft)* 11 (RAND Inst. for Civil Justice, Feb. 2004); Jennifer Biggs et al., *Overview of Asbestos Issues and Trends* 1 (Dec. 2001), *available at* <http://www.actuary.org/mono.htm> (last visited Dec. 1, 2004); Roger Parloff, *Asbestos*, FORTUNE, Sept. 6, 2004, at 186, *available at* 2004 WL 55184416.

[18] *In re* Hawaii Fed. Asbestos Cases, 734 F. Supp. 1563, 1567 (D. Haw. 1990); *see also* Simmons v. Pacor, Inc., 674 A.2d 236 (Pa. 1996) ("When the pleural thickening is asymptomatic, individuals are able to lead active, normal lives, with no pain or suffering, no loss of an organ function, and no disfigurement due to scarring.").

[19] *See* Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in The Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 243, 273 (2001).

[20] Christopher F. Edley, Jr. & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 30 HARV. J. ON LEGIS. 383, 393 (1993).

[21] Quenna Sook Kim, *Asbestos Trust Says Assets Are Reduced As the Medically Unimpaired File Claims*, WALL ST. J., Dec. 14, 2001, at B6, *available at* 2001 WL-WSJ 29680683.

[22] *See id.*

[23] *See* Mark Goodman et al., Editorial, *Plaintiffs' Bar Now Opposes Unimpaired Asbestos Suits*, NAT'l L.J., Apr. 1, 2002, at B14.

[24] *See* Albert B. Crenshaw, *For Asbestos Victims, Compensation Remains Elusive*, WASH. POST., Sept. 25, 2002, at E1, *available at* 2002 WL 100084407.

[25] *See* Hudak & Hagan, *supra* note 14.

[26] *In re* Collins, 233 F.3d 809, 812 (3d Cir. 2000), *cert. denied sub nom.* Collins v. Mac-Millan Bloedel, Inc., 532 U.S. 1066 (2001) (internal citation omitted).

[27] *'Medical Monitoring and Asbestos Litigation'—A Discussion with Richard Scruggs and Victor Schwartz*, Vol. 17, No. 3 MEALEY'S LITIG.

REP.: ASBESTOS 39 (Mar. 1, 2002).

[28] Matthew Bergman & Jackson Schmidt, Editorial, *Change Rules on Asbestos Lawsuits*, SEATTLE POST-INTELLIGENCER, May 30, 2002, at B7, *available at* 2002 WL-STLPI 5934774.

[29] Susan Warren, *Competing Claims: As Asbestos Mess Spreads, Sickest See Payouts Shrink*, WALL ST. J., Apr. 25, 2002, at A1, *available at* 2002 WL-WSJ 3392934. Mark Iola of the same Dallas firm has said that unimpaired asbestos claimants are "stealing money from the very sick." Thomas Korosec, *Enough to Make You Sick*, DALLAS OBSERVER, Sept. 26, 2002, *available at* <www.dallasobserver.com/issues/2002-09-26/feature.html/1/index.html> (Last visited Dec. 1, 2004).

[30] *See Asbestos Litigation: Hearing Before the Sen. Comm. on the Judiciary*, 107th Cong. (Mar. 5, 2003) (statement of Steven Kazan, partner, Kazan, McClain, Edises, Abrams, Fernandez, Lyons & Farrise).

[31] Editorial, *ABA Backs Asbestos Reform*, WASH. TIMES, Feb. 16, 2003, at B2, *available at* 2003 WL-WATIMES 7706224; *see also* Terrence J. Lavin, Editorial, *Those 'Sick and Dying' From Asbestos Exposure Deserve Top Priority,* CHI. DAILY L. BULL., Feb. 13, 2003, at 2.

[32] *See* Mark A. Behrens & Rochelle M. Tedesco, *Two Forks in the Road of Asbestos Litigation*, MEALEY'S LITIG. REP.: ASBESTOS, Vol. 18, No. 3, Mar. 7, 2003, at 1. Nobel Prize-winning economist Joseph Stiglitz and two colleagues found that asbestos-related bankruptcies cost nearly 60,000 people their jobs and up to $200 million in wages between 1997 and 2000. *See* Joseph E. Stiglitz et al., *The Impact of Asbestos Liabilities on Workers in Bankrupt Firms* 12 J. BANKR. L. & PRAC. 51, 73-74 (2003). National Economic Research Associates (NERA) found that workers, communities, and taxpayers will bear as much as $2 billion in additional costs, due to indirect and induced impacts of company closings related to asbestos. *See* Jesse David, *The Secondary Impacts of Asbestos Liabilities* (Nat'l Econ. Research Assocs., Jan. 23, 2003. NERA also found that for every ten jobs lost directly, communities tend to lose eight additional jobs, leading to a decline in per capita income, real estate values, and lower tax receipts. Additional costs brought upon workers and communities include up to $76 million in worker retraining, $30 million in increased healthcare costs and $80 million in payment of unemployment benefits. *See id*. at 11-15.

[33] Editorial, *Lawyers Torch the Economy*, WALL ST. J., Apr. 6, 2001, at A14, *available at* 2001 WL-WSJ 2859560.

[34] *See also* Richard B. Schmitt*, Burning Issue: How Plaintiffs' Lawyers Have Turned Asbestos Into a Court Perennial*, WALL ST. J., Mar. 5, 2001, at A1, *available at* 2001 WL-WSJ 2856111; *see also* The Congress of the U.S., Congressional Budget Office*, The Economics of U.S. Tort Liability: A Primer*, at 8 (Oct. 2003) (stating that asbestos suits have expanded "from the original manufacturers of asbestos-related products to include customers who may have used those products in their facilities.").

[35] *See* Deborah R. Hensler*, California Asbestos Litigation – The Big Picture*, COLUMNS – RAISING THE BAR IN ASBESTOS LITIG., Aug. 2004, at 5.

[36] *See* James S. Kakalik et al., *Variation in Asbestos Litigation Compensation and Expenses* 5 (RAND Inst. for Civil Justice, 1984).

[37] *Amchem Prods. Inc. v. Windsor* 521 U.S. 591, 597 (1997).

[38] *See* Richard O. Faulk, *Dispelling the Myths of Asbestos Litigation: Solutions for Common Law Courts*, 44 S. TEX. L. REV. 945, 951-52 (2003); Mark A. Behrens, *Some Proposals for Courts Interested in Helping Sick Claimants and Solving Serious Problems in Asbestos Litigation*, 54 Baylor L. Rev. 331 (2002).

[39] *In re* Asbestos Prod. Liab. Litig. (No. VI), MDL 875, Admin. Order No. 8 (E.D. Pa. Jan. 14, 2002).

[40] *See* Mark A. Behrens & Monica G. Parham, *Stewardship for the Sick: Preserving Assets For Asbestos Victims Through Inactive Docket Programs*, 33 TEX. TECH. L. REV. 1 (2001).

[41] *See* Victor E. Schwartz et al., *Addressing the "Elephantine Mass" of Asbestos Cases: Consolidation Versus Inactive Dockets (Pleural Registries) and Case Management Plans that Defer Claims Filed by the Non-Sick*, 31 PEPP. L. REV. 271 (2004) [hereinafter "Schwartz et al."].

[42] *See In re* Massachusetts State Ct. Asbestos Pers. Injury Litig., Order Establishing an Inactive Docket for Asbestos Pers. Injury Cases, Consol. Docket (Middlesex Super. Ct. Sept. 1986) (as amended Sept. 22, 1994); *In re* Asbestos Cases, Order to Establish Registry for Certain Asbestos Matters (Cir. Ct., Cook County, Ill. Mar. 26, 1991); *In re* Asbestos Pers. Injury and Wrongful Death Asbestos Cases, Order Establishing an Inactive Docket for Asbestos Pers. Injury Cases, No. 92344501 (Cir. Ct. Baltimore City, Md. Dec. 9, 1992); *In re* All Asbestos Cases, Order Establishing an Inactive Docket for Cases Filed by the Law Offices of Peter T. Nicholl Involving Asbestos-Related Claims (Cir. Ct. Portsmouth, Va. Aug. 4, 2004); *In re* All Asbestos Litig. Filed in Madison County, Order Establishing Asbestos Deferred Registry (Madison County Cir. Ct., Ill. Jan. 23, 2004); *In re* Fifth Jud. Dist. Asbestos Litig., Am. to Am. Case Mgmt. Order No. 1 (N.Y. Sup. Ct. Jan. 31, 2003); *In re* New York City Asbestos Litig., Order Amending Case Mgmt. Orders dated Sept. 20, 1996 and amended as of July 23, 2001 (S. Ct. N.Y. City., N.Y. Dec. 19, 2002); Letter from Judge Sharon S. Armstrong, King County, Wash., to Counsel of Record, Moving and Responding Parties (Dec. 3, 2002).

[43] Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL'Y 541, 555 (1992).

[44] *See In re* Wallace & Graham Asbestos-Related Cases, Case Mgmt. Order (Greenville County, S.C. 2002) (dismissing asbestos-related cases that do not meet the specified criteria.); *In* re Cuyahoga County Asbestos Cases, Special Docket No. 73958 (Ct. Com. Pl. Cuyahoga County, Ohio Sept. 16, 2004) (dismissing "the cases of those plaintiffs who have been diagnosed with pleural plaques or with a condition 'consistent with asbestosis' and who have not failed a pulmonary function test."); *In re* Cuyahoga County Asbestos Cases, Special Docket No. 73958 (Ct. Com. Pl. Cuyahoga County, Ohio Nov. 18, 2004) (amending September 2004 order to clarify that "screening reports alone" and a statement that a condition is "consistent with asbestosis" are not sufficient for reinstatement).

[45] In June 2004, Ohio became the first state to enact legislation requiring claimants to demonstrate asbestos-related impairment in order to bring a claim. *See* H.B. 292, 125th Gen. Assem., Reg. Sess. (Ohio 2004); *see also* Kurtis A. Tunnell et al., Commentary, *New Ohio Asbestos Reform Law Protects Victims and State Economy*, ANDREWS ASBESTOS LITIG. REP., Vol. 26, No. 22, Aug. 26, 2004, at 10. The Ohio legislature appreciated the enormous strain upon the tort system caused by plaintiffs who cannot establish impairment caused by asbestos exposure.

[46] *See* Bernstein, *supra* note 12; *see also* David M. Setter et al., *Why We Have to Defend Against Screened Cases: Now is the Time for a Change*, 2-4 MEALEY'S LITIG. REP.: SILICA 11 (2003).

[47] Senior United States District Court Judge Charles Weiner has explained that "[o]nly a very small percentage of the cases filed have

serious asbestos-related afflictions, but they are prone to be lost in the shuffle with pleural and other non-malignancy cases." *In re* Asbestos Prods. Liab. Litig. (No. VI), No. Civ. A. MDL 875, 1996 WL 539589, at *1 (E.D. Pa. Sept. 16, 1996).

[48] *See* Schwartz et al., *supra* note 41; Victor E. Schwartz & Rochelle M. Tedesco, *The Law of Unintended Consequences in Asbestos Litigation: How Efforts to Streamline The Litigation Have Fueled More Claims*, 71 Miss. L.J. 531 (2001).

[49] Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997).

[50] *See* Mark A. Behrens & Barry M. Parsons, *Responsible Public Policy Demands an End to the Hemorrhaging Effect of Punitive Damages in Asbestos Cases*, 6 Tex. Rev. L. & Pol. 137, 158 (2001); Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1, 26 (2001).

[51] *Collins*, 233 F.3d at 812.

[52] *See* Walter Dellinger III & Victor Schwartz, *Asbestos Litigation Today–A Discussion of Recent Trends*, Columns–Asbestos Raising the Bar in Asbestos Litig. 5 (Jan. 2002) (statement of Walter E. Dellinger III, former Solicitor General of the United States under President Clinton).

[53] Richard L. Cupp, Jr., *Asbestos Litigation and Bankruptcy: A Case Study for Ad Hoc Public Policy Limitations on Joint and Several Liability*, 31 Pepp. L. Rev. 203, 204 (2004).

[54] Dunn v. Hovic, 1 F.3d 1371, 1399 (3d Cir.) (Weis, J., dissenting), *modified in part*, 13 F.3d 58, *cert. denied sub nom.* Owens-Corning Fiberglas Corp. v. Dunn, 510 U.S. 1031 (1993).

New York District Court Dismisses Major Rights Suit on Apartheid

*By Christopher Wang**

In *In re South African Apartheid Litig.*[1], the district court for the Southern District of New York (Sprizzo, J.) recently considered whether multinational corporations that did business in apartheid South Africa violated international law, and therefore could be held subject to suit under the Alien Tort Claims Act (ATCA),[2] and other jurisdictional provisions.

The human-rights abuses of the South African apartheid regime have been well-documented. Under this system, established in 1948 upon the rise to power of the National Party, the white minority, which accounted for fourteen percent of the population, completely ruled over the country and controlled all aspects of life. By law, black Africans were relegated to certain lands called "bantustans," which were characterized by disease, malnourishment, and lack of basic amenities, and could gain access to urban areas only by carrying a passbook that contained information as to the person's identity, ethnic group, and employer. Once employment was terminated, it would be noted on the passbook and the individual would be sent back to life on the bantustan until called upon again to serve the white economy. As a result of this exploitation, the white minority earned on average four times as much income and suffered far less from diseases and lack of resources. The apartheid regime enforced this gross disparity by brutally cracking down on African demonstrations and resistance movements.

Defendants in the suit at bar are multinational corporations that did business in South Africa during the apartheid period. Defendants both benefited from the cheap labor that the apartheid system provided and supplied resources to the South African government or to entities controlled by the government. Many of those resources were used by the apartheid regime to further its policies of oppression and persecution of the African majority. Defendants whose sites of operations were deemed key points under the National Key Points Act of 1980 were required to provide high levels of security to protect against civil unrest and African uprisings, and the owners of those sites were required to provide storage facilities for arms and to cooperate with the South African Defense Force to provide local defense of the area. Following several United Nations resolutions denouncing the South African government's apartheid policy, many defendants publicly withdrew from South Africa while maintaining profitable entities within the country that continued to provide goods and services that assisted the regime.

Three different sets of plaintiffs brought actions in eight federal district courts in mid- to late 2002 on behalf of individuals who lived in South Africa between 1948 and the present and who suffered damages as a result of the crimes of apartheid. Plaintiffs sought equitable, injunctive, and monetary relief from defendants, alleging, *inter alia*, that violations of international law -- including forced labor, genocide, torture, sexual assault, unlawful detention, extrajudicial killings, war crimes, and racial discrimination -- rendered defendants subject to suit in United States federal district court under the ATCA and other jurisdictional provisions. Specifically, plaintiffs alleged that (1) defendants engaged in state action by acting under color of law in perpetrating these international law violations; (2) defendants aided and abetted the apartheid regime in the commission of these violations; and (3) defendants' business activities alone are sufficient to make out an international law violation. The actions were transferred to the district court by the Judicial Panel on Multidistrict Litigation. Defendants brought Rule 12(b)(1) and 12(b)(6) motions to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, respectively.

The district court granted defendants' motion to dismiss for lack of subject matter jurisdiction under the ATCA upon finding that the various complaints did not sufficiently allege that defendants violated international law. In so holding, the court first described the scope of the ATCA. The ATCA provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." [3] Recently, in *Sosa v. Alvarez-Machain*,[4] the Supreme Court set forth the following considerations for courts to use in determining whether conduct should be found to be encompassed by the ATCA: (1) the claim must "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized"; (2) courts should be averse to innovating without legislative guidance, particularly when making the decision to "[e]xercise a jurisdiction that remained largely in shadow for much of the prior two centuries"; (3) courts should be wary of creating private rights of action from international norms because of the collateral consequence such a decision would have; (4) courts must consider that ATCA suits can impinge on the discretion of the legislative and executive branches of this country as well as those of other nations; and (5) courts must be mindful of the absence of a "congressional mandate to seek out and define new and debatable violations of the law of nations." [5] Applying these standards, the district court concluded that "it is clear that none of the theories pleaded by plaintiffs support jurisdiction under the ATCA."[6]

First, with regard to plaintiffs' state-action theory, the court observed that Second Circuit case law requires that state action under the ATCA involve a private individual "act[ing] together with state officials or with significant state aid."[7] In this case, however, plaintiffs at most allege that by engaging in business with the South African regime, defendants benefited from the unlawful state action of the apartheid government.[8] The court rejected the plaintiffs' reliance on *Wiwa v. Royal Dutch Petroleum Co.*,[9] a case that found state action where defendants actively cooperated with Nigerian officials in the suppression of a group that was in

opposition to the defendants' activities in the region, as inapplicable because such activities were not present in this case.[10] Instead, plaintiffs at most "allege that defendants followed the National Key Points Act and made the necessary preparations to defend their premises from uprisings," an action that "alone does not constitute the joint action with the apartheid regime to commit the slew of international law violations that are complained of."[11] Because the court found no state action, it declined to consider "whether the actions of the apartheid regime violated the law of nations so as to support jurisdiction under the ATCA."[12]

Second, the court considered plaintiffs' argument that aiding and abetting international law violations or doing business in apartheid South Africa constituted conduct actionable under the ATCA pursuant to *Sosa*. In rejecting this argument, the court first noted that Second Circuit case law requires a showing that defendants violated a legal obligation, not simply a moral or political one, and that plaintiffs' citations failed to show that aiding and abetting international law violations "is itself an international law violation that is universally accepted as a legal obligation."[13] The court found support for its finding in the Supreme Court's opinion in *Central Bank v. Denver v. First Interstate Bank of Denver*,[14] in which the Court held that aider and abettor liability in civil cases should not be inferred where Congress did not explicitly provide it. Noting that "*Central Bank* applies with special force here," the court concluded that "the ATCA presently does not provide for aider and abettor liability, and this Court will not write it into the statute," consistent with *Sosa*'s admonition that "Congress should be deferred to with respect to innovative interpretations of that statute" and with its mandate that courts "engage in 'vigilant doorkeepking.'"[15] The court also observed that "allowing courts in this country to hear civil suits for the aiding and abetting of violations of international norms across the globe . . . would not be consistent with the 'restrained conception' of new international law violations that the Supreme Court has mandated for the lower federal courts."[16]

Finally, the court considered the theory that defendants violated the law of nations by doing business in apartheid South Africa. In support of this theory, plaintiffs cited several treaties and a number of General Assembly and Security Council declarations and resolutions.[17] In holding these citations inapplicable, the court concluded that several of them are not self-executing, and thus created no private liability in United States courts, while others "simply do not create binding international law."[18] The court found the only possible ground of liability to be a series of non-binding General Assembly resolutions condemning defendants' business activities in South Africa, but concluded that "the opinions expressed by these resolutions never matured into customary international law actionable under the ATCA."[19] Moreover, imposing ATCA liability for doing business in South Africa would pose a host of negative collateral consequences for international commerce, "expand precipitously the jurisdiction of the federal courts [contrary to] the 'extraordinary care and restraint' that [courts] must exercise in recognizing new violations of customary international law," and be inconsistent with the policy of Congress and many world powers to encourage business investment in apartheid South Africa as a means of bringing about change.[20] Accordingly, because the court found no subject matter jurisdiction under the ATCA, it dismissed all claims thereunder.[21]

*Christopher Wang is an attorney at the U.S. Department of Justice. The views expressed are those of the author alone.

Footnotes

[1]*In re South African Apartheid Litig.*, 2004 WL 2722204 (S.D.N.Y. Nov. 29, 2004).

[2]28 U.S.C. § 1350.

[3]28 U.S.C. § 1350.

[4]Sosa v. Alvarez-Machain, 124 S. Ct. 2739 (2004).

[5]*Id.* at 2761-63, 2766 n.1.

[6] 2004 WL 2722204, at *6.

[7]2004 WL 2722204, at *6.

[8]*Ibid.*

[9]Wiwa v. Royal Dutch Petroleum Co., 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002).

[10]*Id.* at *7.

[11]*Ibid.*

[12] *Ibid.*

[13]2004 WL 2722204, at *7-*8.

[14]Central Bank v. Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994).

[15]2004 WL 2722204, at *8.

[16]*Id.* at *9.

[17]2004 WL 2722204, at *9.

[18]*Id.* at *9-*10.

[19]*Id.* at *11.

[20]*Ibid.*

[21] The court also dismissed claims brought under the Torture Victim Protection Act of 1991 (TVPA) for many of the same reasons it dismissed claims brought under the ATCA, and dismissed claims brought under the Racketeer Influenced and Corrupt Organizations Act (RICO) because plaintiffs failed to demonstrate that Congress intended RICO to apply extraterritorially to the conduct at issue or to show a racketeering enterprise. 2004 WL 2722204, at *12-*14.

A Comment on California's Proposition 64

*By Raymond Tittman**

For California trial lawyers, Proposition 64's passage brings the "judgment day" Gov. Arnold Schwarzenegger promised in his now-famous "girlie man" speech. But "judgment day" is not over, as the proposition should by no means be seen as a total victory for tort reform advocates. Proposition 64, however, may have set the pace for reform in other areas that these advocates highlight as priorities.

Proposition 64, winning with 59% support, will limit certain civil lawsuits to plaintiffs actually injured in some way. California voters responded overwhelmingly to Gov. Schwarzenegger's election-eve rallies and commercials describing the serious damage to businesses under the status quo, where trial attorneys are alleged to "stalk innocent small businesses that create jobs."[1] Nor is there much doubt Gov. Schwarzenegger deserves credit for the measure's passage. A Field Poll three weeks before the election, before the governor fully engaged, showed Prop. 64 stymied at only 26% support.[2] Like another popular actor-turned-Governor from this state, Gov. Schwarzenegger did not just talk tough, he delivered.

Yet, when compared with some other states, California is by no means leading the pack when it comes to tort reform.

Ohio Gov. Bob Taft, for example, signed legislation this year limiting asbestos claims to plaintiffs with actual injuries. Mississippi, previously rated the country's worst legal system, corrected venue laws, reined in punitive damages, and limited a seller's liability when the manufacturer should be responsible. Arkansas, Oklahoma, Texas, West Virginia, Kansas, Arizona and Idaho all passed significant reform in the last two years, not to mention the dozens of states passing reform even earlier. These reforms regulate abusive class actions, reform product liability laws, and correct forum-shopping.

It will not be easy for California to catch up, as illustrated by recent legislation to moderate excessive punitive damage awards. Gov. Schwarzenegger sought the legislation as part of his economic reform agenda. Nineteen states have already enacted punitive damage reform. Even the United States Supreme Court, in *State Farm* v. *Campbell* (2003), curbed what it had called "skyrocketing" punitive damages "run wild."

Gov. Schwarzenegger's punitive damages measure would have addressed the plaintiffs' lawyers' incentive to seek punitive damages by giving 75% to the state and limiting trial attorneys' fees to a portion of the remaining 25%. But legislators removed key measures, letting plaintiffs' attorneys continue recover from the full 100%. As enacted, reform experts believe jurors tempted to satisfy benevolent or self-interests might actually award punitive damages more frequently and in larger amounts.

Notwithstanding, Proposition 64 puts trial lawyers on the defensive, an advantage tort reform advocates will likely press. Legislation to address skyrocketing asbestos litigation would mark a significant step forward. Over seventy companies have declared bankruptcy due to asbestos-related liabilities. Even the United States Supreme Court has recognized the asbestos litigation "crisis." Trial attorneys filed over 100,000 new claims in 2003, "the most in a single year." Estimates suggest 90% of precious assets are exhausted paying uninjured plaintiffs, leaving fewer funds for truly injured plaintiffs.

An evident solution to this situation has already been enacted in jurisdictions most familiar with the problem, including Ohio, where Cuyahoga County alone counts 40,000 of the country's 300,000 pending cases. These jurisdictions reformed the system by prioritizing claims for truly injured plaintiffs, preserving claims by uninjured or "unimpaired" plaintiffs for if and when they become sick. The solution has proven effective and many reformers consider it to be just.

Asbestos litigation reform would turn the clock sharply forward on the "judgment day" Gov. Schwarzenegger promised. Advocates of tort reform argue that, more importantly, such measures wil improve California's business climate. But, given the trial attorneys' resources and vigorous opposition, Gov. Schwarzenegger will have to make tort reform a priority in order to effect continued progress in this arena. Ultimately, the success of further tort reform efforts in California will depend on whether or not California voters resist the temptation to watch this unfold passively, as we watched Sarah Connor save the human race from the terminator, and perceive the litigation status quo as a genuine threat.

*Raymond Tittman is an attorney with Carroll, Burdick & McDonough LLP in San Francisco. The opinions expressed are solely those of the author.

Footnotes

[1] Steve Lawrence, *Schwarzenegger Sides with Business Groups on Two November Props*, Associated Press, Sept. 10, 2004.

[2] Press Release, Field Research Corporation, ...Plurality Intends to Vote No on Prop. 64 (Oct. 16, 2004)

PROFESSIONAL RESPONSIBILITY

REYNOLDS v. *DEPARTMENT OF TRANSPORTATION, STATE OF ALABAMA, ET AL.*

*BY CHRISTOPHER WELLER**

Case No. 03-13681 (11TH Cir. Oct. 13, 2004) – Communications Between Plaintiffs' Class Counsel and Managerial Class Member Employees.

For years courts have struggled with the scope of an attorney's right to communicate with an opposing party's employees. Many of the cases are determined by the status of the employee, *e.g.,* whether the individual is a managerial employee or member of the so-called "control group." Recently, however, in an unpublished opinion that merits greater attention, the Eleventh Circuit Court of Appeals added a further layer of complexity to this vexing ethical dilemma in the context of class actions. In particular, the court found that, consistent with Rule 4.2 of the Model Rules of Professional Conduct, a plaintiffs' class counsel may communicate with an individual who is both (1) a managerial employee of the opposing party and (2) a member of the plaintiff class.

1. The Provisions of Rule 4.2

A review of Rule 4.2 of the Model Rules of Professional Conduct is the starting point for addressing the permitted scope of communications with a represented party in the context of institutional litigation. Rule 4.2 of the ABA Model Rules of Professional Conduct provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Courts and commentators have noted that Rule 4.2 is designed "to prevent situations in which a represented party may be taken advantage of by adverse counsel; the presence of the party's attorney theoretically neutralizes the contact."[1]

As the court observed in *Public Serv. Elec. & Gas Co. v. AEGIS*:

> [Rule 4.2] "serves two distinct but related purposes. It preserves the integrity of the lawyer/client relationship by prohibiting contact, absent consent or express legal authorization, with the represented party. It also recognizes that without such a bar the professionally trained lawyer may, in many cases, be able to win, or in the extreme case, coerce damaging concessions from the unshielded layman.[2]

The Official Comment to Rule 4.2, which explains the definition of "party" in the context of institutional defendants, provides in relevant part,

> In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization.

The test for determining whether an employee falls within the prohibitions of Rule 4.2 "is not a pure one for attorney/client privilege as it would be if we were dealing with a single individual defendant, but rather is much broader than that. The crucial question is the relationship of the employee to the agency which is represented and does have an attorney/client privilege."[3]

The ABA has also endorsed a broader definition of "control group" for determining which corporate employees are off-limits to opposing counsel. For example, Formal Opinion 95-396 provides in relevant part:

> The bar against [*ex parte*] communication covers not only the "control group" - those who manage and speak for the corporation - but in addition anyone "whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." (citing Comment to Rule 4.2).[4]

In other words, according to the committee, "if an employee cannot by statement, act or omission, bind the organization with respect to the particular matter, then that employee may ethically be contacted by opposing counsel without the consent of in-house counsel."[5] By utilizing a broader definition of "control group" in conjunction with the language from the Comment to Rule 4.2, the committee appears to have repudiated effectively the "control group" test in favor of the "managing-speaking" test.[6]

With respect to the case discussed herein, Alabama adopted the "managing-speaking agent" test in 1983 and has specifically held that *ex parte* contacts with current employees who are in a position to bind the employer by their testimony are forbidden.[7]

Rule 4.2 and the corresponding Comment recognize that just as an adversary's attorney may take advantage of an individual party either by extracting uncounseled admissions or damaging statements from him, by dissuading him

from pursuing his claim, or by negatively influencing his expectation of succeeding on the merits, the same may occur in the case of an institutional or corporate party.[8] In other words, Rule 4.2 is necessary to prevent major capitulation of a legal position on the part of a momentarily uncounseled, but represented party.[9]

In sum, the underlying policy and Official Comment to Rule 4.2 firmly establish that the rule is intended to forbid *ex parte* communications with all institutional employees whose acts or omissions could bind or impute liability to the organization or whose statements could be used as admissions against the organization, presumably pursuant to Federal Rule of Evidence 801(d)(2)(D).[10] As the court in *McCallum v. CSX Transp., Inc.* cogently stated:

> [I]f the employee is somehow involved in a matter which is the subject of dispute between the parties, the employee's statements may constitute an employer admission and an attorney should not interview the employee without permission. This may even include employees who have not been directly involved in the decision, but are involved in similar decisions.[11]

But what if the managerial employee is also a member of a plaintiff class? Does the plaintiff class counsel have the right to communicate with his client about his/her individual claim even if that class member is a managerial employee of the defendant? What is the scope of that right? Can class counsel discuss with the class member/managerial employee the inner workings of the defendant's company or the defendant's litigation strategy? What protections against uncounseled disclosures does an institutional defendant have when its managerial employee is also a class member? The Eleventh Circuit addressed those issues to some extent in the *Reynolds* decision.

2. The *Reynolds* Decision

A. Background of the Underlying Lawsuit.

In 1985, African American employees and former employees of the Alabama Department of Transportation ("ALDOT") commenced a racial discrimination class action against ALDOT, the Department of Personnel ("SPD") and various state officials. The lawsuit alleged ALDOT and SPD had racially discriminated against current and former ALDOT employees through the use of discriminatory hiring and promotions procedures as well as through the use of other discriminatory practices designed to prevent the advancement of African-Americans in the workforce. After litigating the case for almost a decade, the parties entered into an extensive and complex consent decree that mandated, among other things, implementation of a temporary special training program for African-American ALDOT employees.

Roslyn Cook-Deyampert, an African American, was the Chief of ALDOT's Training Bureau and was responsible for overseeing the development and implementation of the training program mandated by the decree. Ms. Cook-Deyampert also was a member of the plaintiff class.[12] As part of her duties, she was responsible for demonstrating to the district court and the parties ALDOT's compliance with the training requirement. In furtherance of her obligations, she prepared reports that were submitted to the court and the parties and met with counsel for the parties to address questions about the progress of the training program.

B. The June 2001 Compliance Hearing and The Discovery of Deception.

The problem arose in June 2001 when Ms. Cook-Deyampert testified before the district court at a compliance hearing to determine whether ALDOT had complied with the training mandate. During the course of her direct testimony, Ms. Cook-Deyampert testified about ALDOT's creation of programs designed to provide training opportunities. During cross-examination by the plaintiffs' counsel, however, much to ALDOT's surprise, she testified that ALDOT had not fully complied with the training requirements.

Several months after the hearing, ALDOT discovered that Ms. Cook-Deyampert had engaged in substantial communications with the plaintiffs' counsel prior to the June 2001 hearing without ALDOT's knowledge or presence. Furthermore, ALDOT discovered a list of talking points entitled "Points for Roslyn" prepared by the plaintiffs' counsel and provided to Ms. Cook-Deyampert. Those talking points included the damaging testimony that plaintiffs' counsel elicited during his cross-examination of Ms. Cook-Deyampert during her purported cross-examination at the June 2001 compliance hearing. In sum, the plaintiffs' counsel met with Ms. Cook-Deyampert without ALDOT's consent or knowledge; prepared (or coached) her to present binding testimony in her managerial capacity that would be damaging to ALDOT's claim that it had complied with the mandated training requirement; and then presented that testimony as if it had been begrudgingly elicited from her during her cross-examination.

On learning of these objectionable contacts, ALDOT moved to disqualify plaintiffs' counsel from the case and for a permanent injunction enjoining plaintiffs' counsel from violating the Alabama Rules of Professional Conduct. In particular, ALDOT asserted that plaintiffs' counsel had violated Rule 4.2 of the Alabama Rule of Professional Conduct[13] by communicating with a managerial employee whose acts or omissions could be imputed to ALDOT. Plaintiffs' counsel argued, however, that their communication with Ms. Cook-Deyampert was not subject to the restrictions of Rule 4.2 because, as a member of the class, she was their client; that as their client, they had the right to communicate with Ms. Cook-Deyampert about any ALDOT-related issue.

3. The District Court Holding

The district court agreed with ALDOT, that plaintiffs' counsel had communicated with Ms. Cook-Deyampert, prepared her testimony, and presented that testimony as if it had been elicited through a proper and adverse cross-examination. The court described Ms. Cook-Deyampert as a "Fifth

Column" within ALDOT, secretly passing documents to plaintiffs' counsel. The court further criticized the conduct of plaintiffs' counsel as an "affront" to it and a deception and betrayal. Moreover, the district court stated that it had given particular weight to Ms. Cook-Deyampert's June 2001 testimony because the court was under the impression that she was ALDOT's employee who was highly critical of ALDOT despite her managerial responsibility. The district court further stated that it "would have had a different impression if it had been informed that [Ms. Cook-Deyampert's testimony] was critical because of coaching from the plaintiffs' attorneys."

On the other hand, the district court recognized the added layer of complexity in determining the limits of Rule 4.2 because of Ms. Cook-Deyampert's dual role as (1) a member of the plaintiff class and, therefore, plaintiffs' client, and (2) a managerial ALDOT employee who could bind ALDOT through her testimony. The district court rejected positions of both parties as extreme. In rejecting ALDOT's position that Rule 4.2 required that plaintiffs' counsel seek ALDOT's consent before communicating with a managerial employee, the district court held that the communication might be permissible under Rule 4.2 if the managerial employee communicated purely factual information. On the other hand, the district court found that the circumstances of this case established that Ms. Cook-Deyampert had conveyed more than mere facts to plaintiffs' counsel; that plaintiffs' counsel had violated the spirit if not the letter of Rule 4.2 in their contact with Cook-Deyampert. The district court chided plaintiffs' counsel for their conduct; agreed to consider drawing a negative inference from Ms. Cook-Deyampert's testimony; and established guidelines governing future communications between plaintiffs' counsel and managerial employees of ALDOT employees.[14] However, the district court denied ALDOT's motion to the extent that it sought disqualification of plaintiffs' counsel from continued representation of the class. Furthermore, the district court refused to enjoin plaintiffs' counsel from engaging in future communications with ALDOT's managerial employees, finding that any "rule the court comes up with is either too broad to be embodied in an injunction … or it is too specific (in that it does not allow for the unforeseeable circumstances of the future.") Consequently, ALDOT appealed the district court's judgment.

On appeal, the Eleventh Circuit, reviewing the district court's order under an abuse of discretion standard, affirmed the judgment. In particular, the court held that the district court did not abuse its discretion in application and interpretation of the relevant ethical standards either with respect to its denial of ALDOT's motion for disqualification and injunctive relief or in its determination that plaintiffs' counsel had violated the spirit, if not the letter of Rule 4.2.

Conclusion

Although it is obvious from the opinions that neither the district court nor the Court of Appeals approved the specific conduct engaged in by plaintiffs' class counsel, nevertheless, both courts appear to conclude that, at a minimum and consistent with the restrictions of Rule 4.2 of the Model Rules of Professional Conduct, a plaintiffs' class counsel may communicate with class members who are also managerial employees under Rule 4.2 when those communications relate to factual information in the underlying litigation. Allowing some contacts between managerial employees who are members of a certified plaintiff class and class counsel without identifying limits on those contacts, however, creates potential problems for employers. For now, the precise limit of permissible contacts remains undefined and likely will be the subject of future litigation.

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Footnotes

[1] Frey v. Department of Health & Human Servs., 106 F.R.D. 32, 34 (E.D.N.Y. 1985).

[2] 745 F. Supp. 1037, 1039 (D.N.J. 1990) (relying upon Powell v. Alabama, 287 U.S. 45 (1932)); *see also* University Patents, Inc. v. Kligman, 737 F. Supp. 325, 327 (E.D. Pa. 1990). *See also* Kurlantzik, *The Prohibition on Communication with an Adverse Party*, 51 CONN. B.J. 136, 145-46 (1977); Leubsdorf, *Communications with Another Lawyer's Client: The Lawyer's Veto and the Client's Interest*, 127 U. PA. L. REV. 683 (1979).

[3] Butta-Brinkman v. Financial Collection Agencies, Inc., 1996 WL 5194 *4 (N.D. Ill. 1996). *See also* ABA Formal Opinion 91-359.

[4] In ABA Formal Opinion 95-396, the Standing Committee on Ethics and Professional Responsibility submitted a proposed amendment to Rule 4.2, which was adopted by the ABA House of Delegates, to substitute the word "person" for the word "party." Significantly, this amendment, paired with a corresponding amendment to the comment, extends the rule's scope beyond named parties to the litigation or proceeding to include any persons known to be represented by counsel with respect to the subject matter of the intended communications. In this case, amended Rule 4.2 was effective because the Middle District and the Eleventh Circuit have adopted the Model Rules as promulgated by the ABA. *See* USCS Ct. App. 11th Cir., R. 1(A)(1995) (unless otherwise provided by a specific rule of the Court, attorneys practicing before the Court shall be governed by the American Bar Association Rules of Professional Conduct and the Rules of Professional Conduct adopted by the highest court of the state(s) in which the attorney is admitted to practice to the extent that they do not conflict with the Model Rules in which case the Model Rules shall govern).

[5] *Id.*

[6] In Massa v. Eaton Corp., 109 F.R.D. 312 (W.D. Mich. 1985), which extended the applications of *ex parte* prohibition to communications with any managerial level employee of a corporate party, the court criticized the "control group" test, applying the logic of Upjohn Co. v. United States, 449 U.S. 383 (1981). In *Upjohn*, the Supreme Court held that the "control group" test in the context of attorney-client privilege considerations was too narrow and concluded that communications between corporate counsel and employees of the corporation for the purpose of determining the potential civil or criminal liability of the corporation were subject to the protection of the attorney-

client privilege. The court in *Massa* reasoned that the logic of *Upjohn* carried over to the circumstances involving *ex parte* contacts.

[7] *See* Alabama State Bar Ass'n, Ethics Opinion No. RO-83-81 (1983); *see also* Alabama State Bar Ass'n, Ethics Opinion No. RO-02-03 (holding that Rule 4.2 prohibits *ex parte* communications with employees who exercise managerial responsibility in the matter, who are alleged to have committed the wrongful acts at issue in the litigation, or who have authority on behalf of the corporation to make decisions about the course of the litigation); Alabama State Bar Ass'n, Ethics Opinion No. RO-92-12 ("There can be no *ex parte* contact when the employee is an executive officer of the adverse party or could otherwise legally bind the adverse party by his/her testimony, or if the employee was the actual tortfeasor or person whose conduct gave rise to the cause of action. In any of these situations, prior consent of counsel for the adverse party would be required."); *see also Rentclub, Inc. v. Transamerica Rental Fin. Corp.*, 43 F.3d 1439 (11th Cir. 1995) (under the managing-speaking test, *ex parte* communications are prohibited with employees who have managerial responsibility, whose acts or omissions in connection with the matter in litigation may be imputed to the corporation for purposes of civil or criminal liability, or whose statements may be an admission on the part of the corporation).

[8] *University Patents*, 737 F. Supp. at 327-28.

[9] *See* McCallum v. CSX Transp., Inc., 149 F.R.D. 104, 110 (M.D.N.C. 1993) (ethical rules have the purpose of preventing counsel from overreaching and exploiting uncounseled employees into making ill-considered statements or admissions).

[10] *Id. See also* Chancellor v. Boeing Co., 678 F. Supp. 250, 251-53 (D. Kan. 1988).

[11] 149 F.R.D. 104, 111 (M.D.N.C. 1993); *see also* Carter-Herman v. City of Philadelphia, 897 F. Supp. 899 (E.D. Pa. 1995) (holding that there could be no *ex parte* communications with any current employee or member of the police department having managerial responsibility).

[12] In the Defendants' view, Ms. Cook-Deyampert had no remaining claims for relief at the time she conferred with plaintiffs' counsel because she had already attained the highest classification possible for her position and, therefore, could not obtain equitable relief in the form of a promotion or instatement.

[13] Rule 4.2 of the Alabama Rules of Professional Conduct provides that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." The commentary to Rule 4.2 explains that the rule prohibits communications with the employee of an adverse party if (1) the employee exercises managerial responsibility for the employer, (2) the employee's acts or omissions may impute liability to the employer, or (3) the employee's statements would constitute an admission.

[14] The district court directed plaintiffs' counsel to inform ALDOT's counsel of the fact, but not the content, of contacts between plaintiffs' counsel and any managerial level employee of ALDOT. Additionally, the district court required that although plaintiffs' counsel could meet with a managerial plaintiff class member who had confidential information relating to an individual or class matter without revealing the contact to ALDOT, they would be required to document carefully such contact for review by the district court to assure that plaintiffs' counsel engaged in the confidential contact in good faith.

OATH-BREAKERS

BY MATTHEW STOWE*

"Oath-breaker." In the mystical and now-familiar world of J.R.R. Tolkien's fantasy, a person's word was his bond. An oath, once uttered, could gain a transcendent power of its own, bonding the oath taker to the oath's object. Men and women ignored that power only at their extreme peril; a broken oath could even condemn the swearer to living death—an eternity of wandering the earth, pursued by furies, unable to find final rest until the swearer atoned, and the broken oath was ultimately fulfilled. "Oath-breaker" was accordingly one of the harshest insults that could be leveled against an individual, an invective spat out against people the speaker deemed to be the truly lowest of the low.

In the real world, however, has "oath breaker" become no more than an archaic insult, as likely to elicit laughter from the object of the curse as to cause them any real offense? In today's society, are oaths literally "made to be broken?"

That is essentially the upshot of the argument of an anonymous group of Supreme Court law clerks. The individuals in question expressly and intentionally broke the oath of secrecy they took when they accepted their positions as law clerks not to reveal the inner workings of the Supreme Court, by purporting to tell the "real story" of the Florida Recount litigation to David Margolick, Evgenia Peretz, and Michael Shnayerson, all authors of a recent article in Vanity Fair.[1] According to *Vanity Fair's* cutting-edge journalists, the "real" story of the Florida recount litigation was that it was a "crassly partisan" affair, in which the Supreme Court, divided into two warring liberal and conservative factions of law clerks and Justices, each tried to politically out-maneuver the other to reach a particular outcome, running roughshod over the law (at least whenever they encountered it) in the process. According to *Vanity Fair*, individual law clerks engaged in rows in which curse words were exchanged, and individual Justices, who were too politically "naive," were "taken to the cleaners."[2] In short, during *Bush v. Gore,* the Supreme Court as an institution was on the brink, tearing itself apart in a partisan battle in an attempt to steal democracy and an election away from the American people.

No doubt, that version of the Supreme Court (which even the authors acknowledge is "lopsided, partisan, speculative, and incomplete," albeit burying that confession in a footnote) is the one that sells the most magazines.

However, the Supreme Court described in the article is not the entity with which I am familiar. The *Vanity Fair* authors, and their anonymous law clerk sources, seem to think that *Bush v. Gore* was the first important and politically-charged case ever to darken the steps to the Supreme Court chambers. Nothing could be farther from the truth. Every few terms, the Supreme Court decides redistricting or ballot access cases that may impact, or entirely determine, which political party controls Congress, or who may win a given governorship, Senate seat, or even the Presidency. In these cases, the Justices' votes rarely, if ever, break along "party" lines. And determining the identity of the next president is hardly the most important political or social decision undertaken by the Supreme Court in recent memory. Presidents come and go every four years or so. The Supreme Court is in the business of deciding things like the legality of abortion, affirmative action, and the death penalty—things which, once decided, are decided for all time. The system that has meticulously dealt with the legality of these weighty issues for over a century did not suddenly collapse under the strain of *Bush v. Gore*—no matter what you may read in *Vanity Fair*.

Of course, in that respect, you'll have to take my word for it. Like many of my colleagues, I will not break my bond by revealing any of the inner workings of the Court. I cannot respond to their specific factual allegations.

Perhaps the defenders of the Court, with necessarily broad and vague denials, are less compelling to any listener than an anonymous account that contains specific details. This difficulty is illustrated poignantly by the case of Kevin Martin, a former Scalia clerk mentioned in the *Vanity Fair* piece and accused of uttering curse words in the course of discussing the case—by an anonymous co-worker.[3] I'm personally familiar with Kevin Martin, and as I know him, he's an honest, even-tempered, and hardworking man. Asked to confirm or deny the story, Kevin properly refused to comment (either choice would reveal something of the Court's workings), and the authors were quick to hint that his failure to issue a denial was an indication that the allegations were true. This is perhaps the most pernicious effect of their decision to reveal confidences; there is no way for the faithful to undo the harm done by specifically correcting any erroneous factual statements they make.

The harm here is great, though neither the oath-breakers nor the authors of the article seem to appreciate it. They disagreed with the duly deliberated decision of the Justices of the Supreme Court. So what? By undermining the legitimacy of the Supreme Court, they directly assaulted one of the most basic institutions of democracy. They sought to threaten the independent nature of the Court by bringing the pressure of public opinion against it; to have the outcry over the "partisan" nature of the Court's decision force the Court to jettison its chosen approach and adopt their preferred outcome instead. The very reason the Supreme Court exists is to protect against the tyranny of the majority, and to protect the minority against the very sways of temporary public opinion that the oath-breakers sought to use as a weapon to destroy it. Fortunately, the Supreme Court has endured—this time. But will the precedent they have set provide the incentive for future such acts by everyone who perceives themselves aggrieved by a Supreme Court decision? Because one thing is for sure — in the world of law, as in the world of politics, there will never be any shortage of sore and bitter losers.

In a footnote, the authors of the article acknowledged the existence of the clerks' oath, and the fact that the clerks broke that oath intentionally, and offered this justification – "by taking on *Bush v. Gore* and deciding the case as it did, the Court broke its promise to them." [4] Reading that, I can't help but think back to my time working in the prosecutor's office in Dorchester, Mass., where I often heard a less elegantly-articulated version of the same defense: "I didn't want to hit her, officer, but the *@#!$ just wouldn't listen!"

Not only was their response entirely disproportionate and inappropriate in light of the wrong that they perceive was done to them, but the fact is the Supreme Court never made, much less broke, any promise to them or anyone else in the first place. The Supreme Court is an institution, and as such it doesn't make promises. The Justices' thereof have taken only one oath: To protect and defend the Constitution, which, even accepting as true all the attacks contained in the article, was a promise they undeniably kept.

In reflecting on the issue, consider that every important government official, in this country and others, has helpers who, in the course of assisting them, become privy to confidential communications and conversations—many of which would be damaging if disclosed to the public. President Bush has chauffeurs that no doubt overhear his phone calls with foreign leaders on occasion, even during times of foreign crisis. But has Bush's disgruntled driver ever spilled the beans to the press when he disagreed, say, with the decision to go to war in Iraq? Each day, bodyguards, cooks, waiters, housekeepers, secretaries, file clerks, janitors, interns, and thousands of others manage to work with or around important government officials. Yet all of these individuals get up, do their job, and go home without divulging any of the important government secrets they may have stumbled across in the course of their day—and all without having ever taken any oath to do so.

What would motivate one to set aside this oath? The answer, to quote Al Pacino from *Devil's Advocate*, is "[v]anity . . . my favorite sin." When they go to work, President Bush's drivers probably always remember that they are the President's drivers, not the President himself. The same apparently cannot be said of some law clerks, who take their jobs and seem to believe that they are the most qualified people to be making the decisions. One would think that their very job title, "clerk," ought suffice to disabuse them of this notion.

If the precedent set by this incident spreads, it will be up to the legal community to fashion a response. Certainly, it seems to me that evidence that an attorney broke an oath made to a Supreme Court Justice would be strong evidence that the person in question does not have the character and fitness to join a state bar, or if they are already a member, I think such evidence should suffice to support the filing of a complaint relating to the attorney's character and fitness. Perhaps soon, states or state bar associations will step in to provide teeth for the oath the Supreme Court is currently unable to enforce with anything other than unofficial censure.

The reaction of the mainstream Supreme Court legal community to the oath-breakers' actions was one of uniform outrage, and, for now, that may be the only remedy available. Dozens of former Supreme Court clerks and practitioners, including such respected legal minds as Jan Baran and former Solicitors General Ken Starr and Ted Olsen, signed a response that was printed in the *Legal Times* on September 28, 2004. The response explained that:

> Although the signatories below have differing views on the merits of the Supreme Court's decisions in the election cases of 2000, they are unanimous in their belief that it is inappropriate for a Supreme Court clerk to disclose confidential information, received in the course of the law clerk's duties, pertaining to the work of the Court. Personal disagreement with the substance of a decision of the Court (including the decision to grant a writ of certiorari) does not give any law clerk license to breach his or her duty of confidentiality or "justif[y] breaking an obligation [he or she would] otherwise honor." "Path to Florida," *Vanity Fair*, at 320.

I don't think I could put it better myself.

*Matthew Stowe is the Deputy Solicitor General of Texas. He clerked on the United States Supreme Court during the October 1997 Term.

Footnotes

[1] *See* David Margolick, Evgenia Peretz, and Michael Shnayerson, *The Path to Florida*, VANITY FAIR, Oct. 2004, at 310.

[2] *Id.*, at 357.

[3] *Id.*, at 322.

[4] *Id.*, at 320 n.*.

RELIGIOUS LIBERTIES

HUMAN RIGHTS EDUCATION, RELIGION, AND PARENTAL CHOICE IN EDUCATION

BY JAMES P. KELLY, III

Introduction

On December 10, 2004, the United Nations General Assembly adopted a resolution proclaiming the World Programme for Human Rights Education beginning January 1, 2005 and noting with appreciation the draft Plan of Action for its first three years.[1] The promotion of the World Programme for Human Rights Education among nations is an attempt on the part of the United Nations, its affiliated agencies, and non-governmental organizations to indoctrinate school children in a global ethical religion. Unlike values-neutral secular education, the UN's global ethical religion is expressly geared toward developing values and reinforcing attitudes and behaviors in children.

By encouraging national education authorities to teach an ethical religion in their government-run schools, the United Nations risks promoting discrimination against parents who choose to send their children to private religious schools that, for decades, have been educating their pupils in human rights and a culture of peace. In pursuing its human rights education agenda, the United Nations should encourage national governments to make public education funds available to parents for the human rights education of their children in accordance with the dictates of their consciences at the public, private, and religious schools of their choice.

Background on United Nations Human Rights Education Efforts

In the opinion of the United Nations, member states are obligated under the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and other international human rights instruments "to ensure that education is aimed at strengthening the respect of human rights and fundamental freedoms."[2]

The International Covenant on Economic, Social and Cultural Rights promotes the right to gain a living by work; to have safe and healthy working conditions; to enjoy trade union rights; to receive social security; to have protection for the family; to possess adequate housing and clothing; to be free from hunger; to receive health care; to obtain free public education; and to participate in cultural life, creative activity, and scientific research.

The International Covenant on Civil and Political Rights ensures the rights of self-determination; legal redress; equality; life; liberty; freedom of movement; fair, public, and speedy trial of criminal charges; privacy; freedom of expression, thought, conscience, and religion; peaceful assembly; freedom of association (including trade union rights), family; and participation in public affairs.

The Vienna Declaration and Programme of Action as adopted at the 1993 World Conference on Human Rights (the "Vienna Declaration") (the "World Conference") provided the first detailed explanation of the human rights education agenda. The Vienna Declaration considers human rights education, training and public information "essential for the promotion and achievement of stable and harmonious relations among communities and for fostering mutual understanding, tolerance and peace."[3]

Pursuant to a suggestion made at the World Conference in 1994, the United Nations General Assembly proclaimed the ten-year period beginning on January 1, 1995 the United Nations Decade for Human Rights Education (the "HRE Decade"), and adopted a Plan of Action for the Decade (the "HRE Decade Plan").

The HRE Decade Plan had five objectives: assessing needs and formulating strategy for human rights education, building and strengthening human rights education programs, developing educational materials, strengthening mass media attention to the need for human rights education, and disseminating globally the Universal Declaration of Human Rights.

The HRE Decade Plan contained the following definition of human rights education:

> Training, dissemination and information efforts aimed at the building of a universal culture of human rights through the imparting of knowledge and skills and the moulding of attitudes directed to:
>
> (a) The strengthening of respect for human rights and fundamental freedoms;
>
> (b) The full development of the human personality and the sense of its dignity;
>
> (c) The promotion of understanding, tolerance, gender equality and friendship among all nations, indigenous peoples and racial, national, ethnic, religious and linguistic groups;
>
> (d) The enabling of all persons to participate effectively in a free society; and
>
> (e) The furtherance of the activities of the United Nations for the maintenance of peace.[4]

Many perceived weaknesses of the HRE Decade Plan inspired later efforts on the part of human rights education advocates to pursue more aggressively the global HRE agenda:

1. Because it represented the first coordinated global HRE effort, the HRE Decade Plan focused more on needs assessment, institutional capacity building, human rights education curriculum and materials development, and information dissemination than it did on actually changing attitudes and behaviors through education;

2. The HRE Decade Plan placed primary responsibility for human rights education within the Office of the United Nations High Commissioner for Human Rights ("OHCHR") and its affiliated Centre for Human Rights, an arrangement that favored an information-based approach to human rights education rather than an education-based approach;

3. Under the HRE Decade Plan, the United Nations Educational, Scientific and Cultural Organization ("UNESCO"), the main educational unit of the United Nations with long-standing relationships with national education ministries throughout the world, was to serve in a mere consultative, not joint, capacity to the OHCHR;

4. Because of the infancy of the global human rights education movement, the HRE Decade Plan minimized the role of non-governmental human rights education organizations;

5. Reflecting the belief that national focal points for human rights education should be designated in each state according to national conditions, the HRE Decade Plan emphasized the role of national and local agencies with little direct involvement of, or ultimate accountability to, international human rights education agencies;

6. The HRE Decade Plan did not emphasize the importance of securing sources of financing in support of the HRE Decade or individual state human rights education initiatives;

7. Adopted in 1994, the HRE Decade Plan did not sufficiently articulate the degree to which human rights education could serve as a means of building a culture of peace in an age of global terrorism; and

8. The HRE Decade Plan did not adequately address the need to coordinate with international development agencies, international development financial institutions, and transnational corporations for including human rights education initiatives within their development, development financing, and commercial undertakings.

As the HRE Decade came to a close in 2004, human rights education advocates, including officials within the OHCHR, UNESCO, and supportive non-governmental organizations ("NGOs"), were concerned about, specifically, the failure to realize the limited goals of the HRE Decade Plan and, in general, the future of formal United Nations support for the global human rights education movement. During the 2004 annual meeting of the United Nations Human Rights Commission (the "Commission") in Geneva, Switzerland, human rights education advocates submitted for consideration a draft Convention on Human Rights Education (the "Convention"). The Convention represented an attempt on the part of human rights education advocates to offer to interested States a formal international treaty that would institutionalize the global human rights education movement, create a permanent Committee on Human Rights Education to hold States accountable for complying with the Convention, and attract long-term financial support for global human rights education.[5]

The Commission never considered the Convention. Instead, the Commission adopted a resolution calling for the United Nations General Assembly to approve a World Programme for Human Rights Education, to be enacted in three phases. On December 10, 2004, the United Nations adopted resolution A/RES/59/113 proclaiming the World Programme for Human Rights Education to start on January 1, 2005 (the "World Programme for HRE") and noting with appreciation the draft Plan of Action for its first three years (the "First Phase Plan"). The General Assembly directed that the First Phase Plan be circulated to Member States for comments. Once approved comments are integrated in the text, the final version of the First Phase Plan will be re-submitted to the General Assembly for adoption.

Human Rights Education Under the First Phase Plan of the World Programme for HRE

The First Phase Plan focuses on human rights education in primary and secondary schools; however, it does so in a way that transforms the global human rights education movement from one concerned with the dissemination of information about human rights values to one concerned with ensuring that States use their government education systems to indoctrinate children in human rights values sanctioned by the international community. This transformation is evidenced by a comparison between certain features of the HRE Decade Plan (1995-2004) and the First Phase Plan (2005-2007).

The First Phase Plan makes several significant changes to the definition of human rights education:

1. The focus of human rights education is changed from "training, dissemination and information efforts" to "*education*, training and information." (emphasis added). This change reflects a telling shift in emphasis from providing information about human rights to professional educators and national education officials to the religious indoctrination of children in human rights values.

2. One of the stated goals of human rights education is changed from "The furtherance of the activities of the United Nations for the maintenance of peace" to "[t]he *building* and maintenance of peace" (emphasis added).

This change evidences a desire on the part of human rights education advocates to move from a procedural, secular law-based approach to human rights education to a constructive, religious values-based approach.

3. An additional goal of human rights education is added, *to wit:* "The promotion of people-centered sustainable development and social justice." The addition of this goal represents an attempt by human rights education advocates to hold international development agencies and transnational corporations accountable for promoting and financing human rights education efforts as part of their development and commercial undertakings.

The First Phase Plan sets forth objectives of the World Programme for HRE that evidence the religious nature of human rights education, including "to promote the development of a *culture* of human rights;" "to promote a *common understanding*, based on international instruments, of *basic principles* and methodologies for human rights education;" and "to provide a *common collective framework* for action by all relevant actors" (emphasis added).

With respect to the specific subject of primary and secondary school education, the First Phase Plan sets forth the following objectives:

1. To promote the inclusion and practice of human rights in the primary and secondary school systems;

2. To support the development, adoption and implementation of comprehensive, effective and sustainable national human rights education strategies in school systems, and/or the review and improvement of existing initiatives;

3. To provide guidelines on key components of human rights education in the school system;

4. To facilitate the provision of support to Member States by international, regional, national and local organizations; and

5. To support networking and cooperation among local, national, regional and international institutions.

The First Phase Plan sets forth a more detailed approach to national human rights education practices than was provided for in the HRE Decade Plan. The First Phase Plan encourages Member States to enact national legislation mandating the implementation of the human rights education agenda; to produce national reports on the outcomes of the national implementation strategy; and to closely collaborate with national teachers' colleges, teachers' unions, national and local human rights resource and training centers, National Commissions for UNESCO, and national branches of non-governmental organizations.

Although the First Phase Plan vests the ministry of education in each country with main responsibility for the implementation of the Plan of Action, under the First Phase Plan, international organizations and human rights education consultants and NGOs play a much larger role than the limited information dissemination function they served under the HRE Decade Plan. The First Phase Plan places responsibility for the international coordination of human rights education activities in the hands of a United Nations inter-agency coordinating committee, composed of representatives from the OHCHR, UNESCO, the United Nations Children's Fund, the United Nations Development Programme, and other relevant international agencies, including the World Bank. The inclusion of UNESCO (education expertise and national education ministry contacts), UNICEF (expertise on children's issues), and the World Bank (financial support) on the inter-agency coordinating committee evidences the nature and degree to which the involvement of international organizations has been expanded well beyond the limited areas set forth under the HRE Decade Plan.

Under the HRE Decade Plan, the primary function of the OHCHR and the Centre for Human Rights with respect to national education ministries was to respond to requests for information about human rights education best practices and implementation strategies. It is likely that the lack of inquiries for assistance and apathy in the implementation of human rights education at the national level prompted the OHCHR and international human rights education advocates to pursue the more active role contemplated by the First Phase Plan.

Under the First Phase Plan, the new United Nations inter-agency coordinating committee, in addition to responding to requests for assistance, "will be responsible for liaising with United Nations country teams or international agencies represented in the country to ensure the follow-up of the plan of action and United Nations system-wide support to the national implementation strategy."[6] United Nations treaty bodies responsible for reviewing State compliance with international treaty provisions protecting human rights are called upon "to place emphasis on the obligation of States parties to implement human rights education in the school systems."[7] Member States are encouraged to cooperate with human rights education NGOs and specialists in preparing national reports that are required to be filed with relevant international monitoring mechanisms, such as the Committee on the Rights of the Child and the Committee on Economic, Social and Cultural Rights. At the end of the first phase (2005-2007), States will be required to provide a final national evaluation report to the United Nations inter-agency coordinating committee.

Human Rights Education as a New Religion of Humanity

The re-orientation of the United Nations human rights education agenda from one of information dissemination to values indoctrination reflects a dilemma faced by social planners since the advent of social science—the need to supplement the secular pursuit of social order with religion.

The French social scientist Count Claude Henri de Rouvroy de Saint-Simon was the first person to attempt the synthesis of religion and social science. Late in his career, Saint-Simon realized that, absent a religious instinct on the part of the masses, a purely scientific approach to restoring social order in early nineteenth-century France was doomed to failure. Convinced that historic Christianity had run its course and would be unable to adapt itself to the needs of the new society, Saint-Simon proposed his New Christianity to remind men "of the interests common to all members of society, of the common interests of the human race."[8]

The key features of Saint-Simon's New Christianity included:

> 1. New Christianity is to direct humanity toward the rapid betterment of the condition of the poorest and most numerous class of society.
>
> 2. Worship should be regarded only as a means of reminding men of philanthropic feelings and ideas; and dogma should consist only as a collection of commentaries aimed at the general application of these feelings and ideas to political developments, or encouraging the faithful to apply moral principles in their daily relationships;
>
> 3. Nations must abandon their own interests and adhere to principles of a universal morality which promotes the good of the whole human race;
>
> 4. Scientists, artists, and industrialists should be made the managing directors of the human race; and
>
> 5. Any theology that tries to teach men that there is any other way of obtaining eternal life except that of working for the improvement of the conditions of human life should be condemned.

In 1825, Saint-Simon died before fully articulating his vision for New Christianity. Nevertheless, his followers, the Saint-Simonians, spent the seven years following Saint-Simon's death advancing his vision for a scientifically-planned society the members of which would be inspired by New Christianity. On June 1, 1825, a group of young French technocrats formed the Saint-Simonian Society and began to publish a weekly journal, *Le Producteur*, the focus of which was to apply the scientific knowledge of competent experts to the solution of social problems. After suspension of the *Producteur* in October, 1826, the members of the Saint-Simonian Society engaged in a more precise formulation of Saint-Simonian theory which was expounded in a series of public lectures held biweekly after December 17, 1828. These lectures became known as the *Doctrine of Saint-Simon: An Exposition: First Year, 1828-29*.

The *Doctrine* critically examined the structure of contemporary European society and proposed a program for total social reorganization. The later lectures contained in the *Doctrine* tended to subordinate the earlier scientific and industrial interests to religious and political interests. As the Saint-Simonians expressed in the Tenth Session (May 6, 1829):

> Without those sympathies that unite man with his fellow-men and that make him suffer their sorrows, enjoy their joys, and live their lives, it would be impossible to see in societies anything but aggregations of individuals without bonds, having no motive for their actions but the impulses of egoism.[9]

In the second series of lectures, the *Second Year*, the primacy of religion and politics over science and industry was complete. By 1829, Saint-Simon's followers established a hierarchically organized Saint-Simonian church for the practice of a religion of humanity.

But it was the social scientist Auguste Comte, a former assistant and silent collaborator of Saint-Simon, who developed what came to be known as the Religion of Humanity. After Saint-Simon's death, Comte briefly contributed to the work of the Saint-Simonian movement; however, he quickly separated himself from the movement as it took on a religious nature. During 1830 to 1842, Comte produced his six volume *Cours de philosophie positive*. The *Cours* attempted to synthesize the studies of individual scientists by identifying the essence of each branch of science and arranging it into a hierarchy of complexity. The hierarchy was designed to prove that each branch of science had progressed from a theological state into a metaphysical and, then, into a positive state. Religion and sentiment were banished from Comte's new body of positive knowledge. During this stage of his career, Comte was recognized as the ultimate fulfillment of the eighteenth-century ideal of materialism.[10]

Ultimately, however, Comte followed the pattern of other social scientists, who, when frustrated by the apathy shown by the general population toward their secular theories for the material improvement of humanity, ultimately resort to coercive religious systems and values to inspire the social sentiments of mankind. In his *Système de politique positive* produced from 1851 through 1854, Comte proclaimed love as the motive force of mankind. He developed a special calendar for his Religion of Humanity complete with earthly saints and ritual observances in celebration of human progress. In his view, sentiments and the imagination moved mankind to action; and religious faith was the force that would bring intellectual and moral unity to humanity. In 1852, he produced his *Catéchisme positiviste* that reduced his system of positive religion into principles of faith that could be referred to by the masses.

Roots of a Christian Approach to Human Rights Education

Nineteenth century French social scientists were not the only ones cognizant of the fact that the secular society arising from the French Revolution was in need of religious values. In the mid-nineteenth century, three French-Catholics, Félicité Robert de La Mennais, Jean Baptiste Henri Lacordaire, and Charles Count de Montalembert, attempted

to reconcile Catholicism with the French liberal democratic values of liberty, equality, and fraternity. Of the three, Lamennais most aggressively articulated a vision of human rights rooted in the Christian gospel.

Lamennais' book, *Words of a Believer* (1834), constitutes one of the earliest attempts at human rights education. It provided a Christian justification for the right to a fair and public hearing for criminals; the right to a presumption of innocence; the right to food; the right to work; the right to be free of slavery; the right to property; the need for solidarity; the right to equality; the right to life, liberty, and security; the right to education; the right of parents to choose the moral education of their children; the right to form and join trade unions; the right to freedom of thought, conscience, and religion; and the right to a nationality.

Lamennais' book, *The Past and Future of the People* (1841), educates its readers about the right to freedom of association; the right to marry and found a family; the right to participate in government; the right to equal access to public service; the right to periodic and genuine elections; and the right to universal and equal suffrage.

Lamennais, Lacordaire, and Montalembert pioneered a Christian approach to human rights education that is comparable to the non-theistic ethical approach promoted by the United Nations. The question is whether the United Nations will pursue its human rights education agenda in a coercive manner that discriminates against parents who desire to secure a human rights education for their children at the private religious schools of their choice.

The Potential for Discrimination in Human Rights Education

As the United Nations and its agencies seek to hold national education authorities accountable for implementing the First Phase Plan and subsequent phases of the World Programme for HRE, respect must be shown for the rights of parents who send their children to private religious schools that teach values consistent with those contained within the First Phase Plan. For instance, far more than government-run schools, Catholic schools worldwide have been teaching the values, knowledge, skills, and attitudes respecting human rights principles. Yet, except in limited cases, parents sending their children to Catholic schools have been denied equal access to public funds for the education of their children on the grounds that the government cannot support religious instruction. Now that the United Nations and cooperating national governments will be teaching a full-fledged human rights ethical religion in public schools, the continued withholding of public education funds from Catholic and other private religious school parents will constitute unlawful viewpoint discrimination.

The United States Supreme Court has expressed its disapproval over the regulation of speech in a manner that is designed to penalize viewpoints deemed by government officials to be "quintessentially religious" or "decidedly religious in nature." In *Good News Club v. Milford Central Schools*, 533 U.S. 98 (2001), the Court held that a municipality, which had opened its public school classrooms to the Boy Scouts and 4-H Clubs for the moral and character development of children from a non-theistic religious perspective, unconstitutionally abridged free speech when it denied such access to a Christian Good News Club developing moral character through theistic religious instruction. The Court chose to "reaffirm our holdings in *Lamb's Chapel* and *Rosenberger* that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint."[11] Under the Free Speech Clause, the Court found no logical difference in kind between the invocation of Christianity by a Christian youth organization and the invocation of teamwork, loyalty, or patriotism by secular youth organizations to provide a foundation for their lessons. The Court rejected the conclusion of the Second Circuit Court of Appeals that reliance on Christian principles taints moral and character instruction in a way that other foundations for thought or viewpoints do not.

The Court's finding that there is no logical difference between non-theistic and theistic moral education is consistent with international law. Section 1 of Article 18 of the International Covenant on Civil and Political Rights (1966) (the "ICCPR") provides that everyone shall have the right to freedom of thought, conscience and religion. The Human Rights Committee established by the ICCPR has commented that Article 18 protects theistic, non-theistic and atheistic beliefs.

The equal treatment afforded to non-theistic and theistic beliefs under international law dictates that national government education authorities not discriminate against traditional religious viewpoints in the education of children for human rights. Section 4 of Article 18 of the ICCPR requires State Parties to the ICCPR "to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."[12] The Human Rights Committee has commented that: "public education that includes instruction in a particular religion or belief is inconsistent with article 18.4 unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians."[13] The Human Rights Committee particularly warns against government discrimination in the granting of economic privileges to persons subscribing to different religious beliefs or non-beliefs.[14]

Under Article 5(1)(b) of the UNESCO Convention Against Discrimination in Education (1960) (the "UNESCO Convention"), the State Parties agree to respect the liberty of parents to choose to educate their children in schools other than those maintained by the public authorities and to ensure the religious and moral education of their children in conformity with their own convictions. The States Parties also agree that no person or group of persons should be compelled to receive religious instruction inconsistent with his or their convictions.

Similarly, Article 5 of the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (1981) (the "Declaration") provides that parents or legal guardians of a child have "the right to organize the life within the family in accordance with their religion or belief and bearing in mind the moral education in which they believe the child should be brought up."Article 1 of the Declaration provides that "no one shall be subject to coercion which would impair his freedom to have a religion or belief of his choice."[15] Such coercion would occur in cases where national government education authorities choose to exclusively fund non-theistic human rights education to the exclusion of theistic human rights education.

Under Article 9 of the European Convention on Human Rights (the "ECHR"), everyone has the right to freedom of thought, conscience and religion. Under Article 2 of the First Protocol to the ECHR, "in the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."[16] According to the European Court of Human Rights (the "European Court"): "The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions."[17] The European Commission on Human Rights (the "European Commission") defined "philosophical convictions" as being:

> those ideas based on human knowledge and reasoning concerning the world, life, society, etc., which a person adopts and professes according to the dictates of his or her conscience. These ideas can more briefly be characterized as a person's outlook on life including, in particular, a concept of human behavior in society.[18]

The European Court has determined that, to rise to the level of a philosophical conviction, the ideas put forward have to "attain a certain level of cogency, seriousness, cohesion and importance."[19]

Human rights values are ideas based on human knowledge and reasoning concerning the world, life, and society. Human rights education indoctrinates children in a specific outlook on life including, in particular, a concept of human behavior in society. The human rights ideas promulgated pursuant to the World Programme for HRE and the First Phase Plan attain the level of cogency, seriousness, cohesion and importance necessary to be treated as philosophical convictions under Article 2 of the First Protocol to the ECHR. Therefore, States may not discriminate in favor of a non-theistic human rights philosophical belief system by withholding public education funds from parents who choose to secure a theistic human rights education for their children at private religious schools.

Parental Choice in Human Rights Education

To avoid coercive and unlawful discrimination against theistic human rights instruction, national education authorities must provide parents with equal access to public funds for the moral education of their children at the public or private schools of their choice.

Article 14 of the ECHR provides that the enjoyment of the rights and freedoms set forth in the ECHR, including the right to education under Article 2 of the First Protocol, shall be secured without discrimination on the basis of religion. The European Commission has determined that, in some cases, a difference in the amount of the government education subsidy offered to State schools and voluntary private schools may constitute a breach of Article 14 of the ECHR in conjunction with Article 2 of the First Protocol to the ECHR. In such cases, "Article 14 would require that the authorities do not discriminate in the provision of available subsidies."[20]

Under Article 7 of the UNESCO Convention, the States Parties are to include in their periodic reports submitted to the General Conference of UNESCO information on the legislative and administrative provisions they have adopted or other action they have taken to enforce the anti-discrimination provisions of the UNESCO Convention. As national education authorities implement human rights education in government-run schools pursuant to the First Phase Plan, national governments who are parties to the UNESCO Convention will be required to report on what legislative, administrative, or other actions they have taken to prevent discrimination against parents who choose to secure theistic human rights education at private religious schools.

Although several European nations provide state subsidies to parents who educate their children at religious schools, the United States Supreme Court only recently approved such a practice in a case where the Ohio legislature enacted a school choice plan for Cleveland parents.[21] However, in a subsequent case, the Court permitted the State of Washington to exclude students engaged in the study of devotional theology from receiving state-funded college scholarships that were available to all other students.[22] The Court accepted the State of Washington's argument that the devotional theology program of study, which trains students to become pastoral ministers, is purely religious in comparison to the non-devotional study of theology. An argument can be made that no such distinction exists between the theistic approach to human rights education that occurs in religious schools and the non-theistic approach to human rights education that will occur in government-run schools under the World Programme for HRE. As was the case in *Good News Club*, there is no difference in kind between the two approaches to human rights education that would justify viewpoint discrimination against parents who choose to secure a theistic human rights education for their children.

Conclusion

International human rights education advocates have determined that a culture of peace cannot be realized in a completely secularized public education system, void of any

teaching of human rights knowledge, skills, attitudes, and beliefs. The First Phase Plan and subsequent phases of the World Programme for HRE contemplate the indoctrination of children in non-theistic philosophical convictions that are the legal equivalent of a religion. Domestic, regional, and international laws dictate that national government education authorities not discriminate between the teaching of human rights from a non-theistic ethical perspective and the teaching of human rights from a theistic religious perspective. To prevent the coercive indoctrination of children in a non-theistic human rights religion, national education authorities must provide parents with the financial resources to secure a moral education for human rights that conforms to their personal religious convictions. Otherwise, in the interest of teaching human rights knowledge, skills, and attitudes, international human rights education advocates will be violating the very human rights that they profess to be promoting.

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Footnotes

[1] *Draft Plan of Action for the First Phase (2005-2007) of the Proposed World Programme for Human Rights Education*, 59th. Sess., Agenda Item 105(b), at __, U.N. Doc. A/59/526 (2004).

[2] *Vienna Declaration and Programme of Action*, World Conference on Human Rights, pt. I, 33, U.N. Doc. A/CONF.157/23 (1993).

[3] *Id.*, Part II.D, para. 78.

[4] *Report of the United Nations High Commissioner for Human Rights on the Implementation of the Plan of Action for the United Nations Decade for Human Rights Education*, U.N. GAOR 51st Sess., Annex, Agenda Item 110(b), at __, U.N. Doc. A/51/506/Add.1 (1996).

[5] *See* James P. Kelly, *Commentary on Proposed Convention on Human Rights Education*, NGO WATCH (2004), *at* http://www.ngowatch.org/CHRE.pdf.

[6] *Draft Plan of Action for the First Phase (2005-2007) of the Proposed World Programme for Human Rights Education*, 59th Sess., Agenda Item 105(b), at __, U.N. Doc. A/59/526 (2004).

[7] *Id.*

[8] Henri de Saint-Simon, *New Christianity, in* SOCIAL ORGANIZATION, THE SCIENCE OF MAN AND OTHER WRITINGS, 81, 81-116 (F. Markham, ed. and trans., Harper & Row 1964) (1825).

[9] GEORG, G. IGGERS, THE DOCTRINE OF SAINT-SIMON: AN EXPOSITION. FIRST YEAR, 1828-1829, 154 (1958)

[10] FRANK E. MANUEL, THE PROPHETS OF PARIS 264 (1962).

[11] Good News Club v. Milford Central School, 533 U.S. 98, 111 (2001).

[12] *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies: General Comment 22, Article 18*, U.N. GAOR, Hum. Rts. Comm., 48th Sess., at 35, 2, U.N. Doc. HRI\GEN\1\Rev.1 (1994).

[13] *Id*, para. 6.

[14] *Id*, para. 9.

[15] *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, G.A. Res. 36-55. U.N. GAOR, (1981).

[16] The European Convention on Human Rights, Nov. 4, 1950.

[17] *K*jeldsen, Busk Madsen and Pedersen v. Denmark, Ser. A, no. 23, p. 26, para. 53 (1976).

[18] Campbell and Cosans v. UK, Report of Commission, Ser. B, no. 42, p. 37, para. 92 (1980).

[19] *Campbell and Cosans v. UK*, Ser. A, no. 48, para. 36 (1982).

[20] *X v. UK*, No. 7782/77, 14 DR 179, 182 (1978).

[21] Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

[22] Locke v. Davey, ___ U.S. ___, 124 S. Ct. 1307 (2004).

It's Not Just the Test That's a *Lemon*, It's How Some Judges Apply It

By Robert D. Alt and Larry J. Obhof

On March 2, 2005, the United States Supreme Court heard two cases involving public displays of the Ten Commandments. These cases, appeals from *ACLU of Kentucky* v. *McCreary County*[1] and *Van Orden* v. *Perry*,[2] were the first time that the Supreme Court has specifically considered displays of the Ten Commandments on public property since 1980, and the first time that the Court has ever heard oral arguments on the issue. The Court will also address the continued vitality of the much-maligned *Lemon* test,[3] the frequently criticized and sometimes ignored framework that courts generally follow when determining whether governmental conduct is permissible under the Establishment Clause. Because the Court will consider not only whether the disputed displays are constitutional, but also the appropriateness of the analysis used in answering such questions, *McCreary County* and *Van Orden* could prove to be two of the most important Establishment Clause cases of the past 30 years.

The so-called "*Lemon* test" requires a court to determine that (1) a challenged government action has a secular purpose; (2) the action's primary effect neither advances nor inhibits religion; and (3) the action does not foster an excessive entanglement with religion.[4] A governmental action violates the Establishment Clause if it fails to satisfy any of these prongs.[5] Some have lamented that the three-prong *Lemon* analysis is ambiguous and subjective, and that the lower courts have consequently given the test "widely different and seemingly contradictory interpretations."[6] Nowhere is this better illustrated than the two cases currently before the Court.

In *Van Orden* v. *Perry*, the Fifth Circuit permitted the public display of a six-foot-tall granite monument displaying the Ten Commandments. The Fraternal Order of the Eagles donated the monument to the state. The Fifth Circuit accepted the state's asserted secular purpose of honoring the contributions of the Eagles,[7] and it found that a reasonable observer would not see the display as a state endorsement of the Commandments' religious message.[8] By contrast, in *McCreary County*, the Sixth Circuit purported to apply the same constitutional analysis, but it forbade the inclusion of the Ten Commandments—found on a single sheet of normal-sized paper—as part of a larger public display about the origins of American law and government.

What explains this rift? Some lay blame directly on the *Lemon* test itself. The petitioners in *McCreary County* have explicitly asked the Supreme Court to do away with *Lemon*'s "purpose prong," which they argue "focuses too much on subjective motives when the focus should be on the objective effects of an activity."[9] More than a dozen states have argued as amici that the Supreme Court should analyze government conduct under the "coercion test" first articulated by Justice Kennedy in his concurrence in *County of Allegheny v. ACLU*.[10] This view seems to have also found favor with Justice Thomas, who just last year stated that a policy is constitutionally permissible where "the State has not created or maintained any religious establishment" and the policy "does not expose anyone to the legal coercion associated with an established religion."[11]

While we agree that a shift away from the subjective factors would be more consistent with constitutional principles, we are reluctant to put the blame solely on *Lemon*. Why are the decisions in *Van Orden* and *McCreary County* so different? The subjectivity of the purpose prong is not the sole or even the primary problem. There is little doubt that the historical displays in *McCreary County* pass muster under the *Lemon* test, if that test is properly applied. Rather, the displays in McCreary and Pulaski Counties were found unconstitutional because the Sixth Circuit panel ignored direct, on-point precedent of the Supreme Court, and either misstated or misapplied numerous legal rules throughout its analysis.

Facts

In 1999, officials in McCreary County and Pulaski County, Kentucky posted framed copies of the Ten Commandments in their respective courthouses. The ACLU and several individuals sued, alleging that the displays violated the Establishment Clause of the First Amendment. The counties thereafter erected new displays including secular historical and legal documents, some of which were excerpted and included references to God or the Bible.[12] The district court enjoined the second set of displays and ordered that no similar displays be erected.[13]

County officials later erected historical displays in each courthouse, consisting of a series of foundational historical documents and patriotic texts and symbols that had an impact on the development of our system of law and government. The displays were prominently identified as "The Foundations of American Law and Government Display," and were accompanied by an explanatory sign informing viewers that the displays presented "documents that played a significant role in the foundation of our system of law and government."[14] Among the documents and symbols included were (1) the Star Spangled Banner; (2) the Declaration of Independence; (3) the Mayflower Compact; (4) the Bill of Rights; (5) the Magna Carta; (6) the National Motto; (7) the Preamble to the Kentucky Constitution; (8) the Ten Commandments; and (9) Lady Justice.[15]

Each courthouse contained numerous other displays further demonstrating the counties' commitment to illustrating their historical heritage. In the McCreary County courthouse, there were *hundreds* of historical documents displayed throughout the building, including 58 in the judge's office, 41 in the waiting room, 124 near the side entrance to the courthouse, 33 in the fiscal courthouse, and 28 in a conference

room.[16] The Pulaski County courthouse posted similar displays throughout the building.[17]

Upon plaintiffs' motion for a supplemental preliminary injunction, the district court held that the historical displays lacked a secular purpose and had the effect of endorsing religion.[18] The court also offered the disturbing conclusion that "educat[ing] the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government" was *not* a legitimate secular purpose.[19] Although the court had enjoined prior displays because the religious content was not sufficiently diluted by a larger secular display, the court now held that the new displays were unconstitutional because the use of secular documents accentuated the religious nature of the Ten Commandments.[20]

On appeal, the Sixth Circuit affirmed the district court on the basis *Lemon*'s purpose prong. Judge Eric Clay, writing only for himself, suggested that the courthouse displays would violate the second prong as well.[21] Both conclusions were erroneous, and both were based on improper applications of governing law. Due to space limitations, we will focus on the majority's analysis under the purpose prong, which was based almost entirely on misstatements or misapplications of controlling Supreme Court precedent.[22]

The Sixth Circuit applied an erroneous legal standard in its analysis of the defendants' purpose for posting the courthouse displays.

Government action will be invalidated under *Lemon*'s purpose prong only if it is entirely motivated by a religious purpose. In *Lynch v. Donnelly*, the Supreme Court held that the purpose prong is satisfied so long as the government can articulate "a" secular purpose. "The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but *only* when it has concluded there was *no question* that the statute or activity was motivated *wholly by religious considerations*."[23] Lest there be any doubt about this rule, the Supreme Court reiterated in *Wallace v. Jaffree* that an action violates the purpose prong only where the action is "*entirely* motivated by a purpose to advance religion,"[24] and stated in *Bowen v. Kendrick* that a statute or government action fails "only if it is motivated *wholly* by an impermissible purpose."[25]

The *McCreary County* defendants steadfastly maintained that their purpose was to display documents that affected the development of American law and government. Consistent with that secular purpose, the displays exhibited foundational historical documents and patriotic texts and symbols; offered an explanatory theme, "The Foundations of American Law and Government Display;" and plainly stated that the displays "contain[] documents that played a significant role in the foundation of our system of law and government."[26] The displays also included an explanation that firmly placed the Ten Commandments in the context of secular traditions:

> The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence . . . . The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.[27]

Even the Sixth Circuit itself acknowledged that "the displays did not provide undue physical emphasis to the Ten Commandments. . . . [T]he Ten Commandments appeared on a single piece of paper, the same size as that containing the secular documents."[28]

In the district court, the defendants articulated the animating reasons for the displays and for the inclusion of the Ten Commandments. The defendants explained that the displays were intended, among other things, to illustrate "that the Ten Commandments were part of the foundation of American Law and Government;" to provide the "moral background of the Declaration of Independence and the foundation of our legal tradition;" and to "educate the citizens of the county regarding some of the documents that played a significant role in the foundation of our system of law and government."[29] These reasons meet the threshold requirement of articulating *some* secular purpose. As Justice Scalia has noted, the Supreme Court almost invariably discovers a secular purpose for actions challenged under the Establishment Clause, and typically devotes only a few sentences to the issue.[30]

The Sixth Circuit was unable to find that the displays were motivated wholly by religious considerations, and instead simply ignored *Lynch*, *Wallace*, and *Bowen*, and applied its own erroneous "predominate purpose" standard. According to the panel, "[t]o satisfy this prong of the *Lemon* test, plaintiffs must show that defendants' *predominate purpose* for the displays was religious."[31] The majority later added that "the district court correctly concluded that Defendants' *primary purpose* was religious."[32] This "predominate purpose" or "primary purpose" standard is not merely incorrect—it directly conflicts with the plain holdings of the Supreme Court.

In her concurrence to *Lynch v. Donnelly*, Justice O'Connor stated that the secular purpose requirement is not satisfied "by the mere existence of some secular purpose, however dominated by religious purposes."[33] The Sixth Circuit has repeatedly relied on Justice O'Connor's statement for the erroneous proposition that defendants' actions violate the Establishment Clause where their primary purpose is non-secular.[34] That standard is *not* the standard articulated by the majority in *Lynch*. It is directly at odds with the majority's holding that governmental action is invalid only where it is motivated "*wholly by religious considerations*."[35] It is also at odds with the Supreme Court's restatements of the *Lynch* standard in *Wallace v. Jaffree* and *Bowen v. Kendrick*.[36]

The standard followed by the Sixth Circuit in *McCreary County* (and, prior to that, in *Adland v. Russ*) is simply an incorrect statement of the law which disregards not only *Lynch* but also the Sixth Circuit's own binding case law.[37] Importantly, it is also not the standard enunciated by Justice O'Connor, who wrote in *Lynch* that the proper inquiry "is whether the government intends to convey a message of endorsement or disapproval of religion."[38] It is one thing to find, as the Sixth Circuit did in *McCreary*, that the government's primary purpose was religious.[39] It is something altogether different to find that defendants' actions were "dominated by religious purposes," or were intended to endorse religion. The Supreme Court has spoken clearly on this issue several times, and it is not the prerogative of lower courts to ignore or chip away at the proper analysis by applying selective readings of only those precedents with which they agree.[40]

The courthouse displays had a secular purpose.

The *McCreary County* defendants articulated a legitimate secular purpose for their actions: displaying documents and symbols that had an impact on the development of our system of law and government. The validity of displaying the Ten Commandments in this manner flows naturally from the Supreme Court's decision in *Lynch v. Donnelly.* In *Lynch*, the Court recognized a valid secular purpose for including a nativity scene—an indisputably religious symbol—in a holiday display with Santa's house and sleigh, reindeer, candy-striped poles, and the like. The *Lynch* Court did not evaluate the nativity scene in isolation, but rather considered the display as a whole. When "viewed in the proper context," the inclusion of a religious symbol with secular symbols did not evince an intent to promote religion.[41] Importantly, the Supreme Court specifically addressed the religious origins of the holiday:

> The City . . . has principally taken note of a significant historical religious event long celebrated in the Western World. The crèche in the display depicts the historical origins of this traditional event long recognized as a National Holiday. . . . The display is sponsored by the City to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes.[42]

Like the nativity scene in *Lynch*, the Ten Commandments appeared in the context of broader displays that also included secular documents and symbols. The displays reflected the historical origins of the law in a clear, unmistakable manner. If the Constitution permits the display of a crèche to celebrate and reflect the religious origins of Christmas, then surely the Constitution permits the display of the Ten Commandments to celebrate and reflect the origins of our secular law.

The Sixth Circuit incorrectly applied controlling precedent from the Supreme Court.

The government's assertion of a legitimate secular purpose is entitled to deference, unless the proffered purpose is merely a "sham."[43] The Sixth Circuit and district court each found that the *McCreary County* defendants' stated purpose in posting the displays was a "sham," and concluded that the defendants included the Ten Commandments for predominantly religious reasons.[44] The Sixth Circuit rested its holding on a series of rather glaring misapplications of Supreme Court precedents.

First, the Sixth Circuit gave insufficient weight to the full context of the displays. The court barely mentioned the fact that approximately 90% of each display was purely secular, or that the title of the displays, "The Foundations of American Law and Government Display," evinced a facially secular purpose. The court also gave little weight to the explanatory signs that accompanied the displays, which specifically noted the permissible secular purpose of presenting documents that affected the development of American law and government. Rather than focusing on the displays as a whole, the Sixth Circuit "plainly erred by focusing almost exclusively" on the Ten Commandments.[45]

Second, although the Sixth Circuit noted that the displays did not unduly emphasize the Ten Commandments, the court nevertheless rejected the defendants' proffered secular purpose because of the "blatantly religious" content of the displays.[46] In its attempt to distinguish *Lynch*, the Sixth Circuit seemingly held that the Ten Commandments are different in kind from a nativity scene, at least for constitutional purposes: "The displays do not present a 'passive symbol' of religion like a crèche, which, when accompanied by secular reminders of the holiday season, has come to be associated more with the public celebration of Christmas, rather than that holiday's religious origins."[47] The court misstated the Supreme Court's holding in *Lynch*. The Supreme Court did not approve the display of a nativity scene *despite* the "holiday's religious origins," as the Sixth Circuit suggested.[48] To the contrary, the *Lynch* Court squarely held that acknowledging the origins of the holiday was a valid secular purpose, even if those origins were religious. The Supreme Court upheld the display of the crèche in *Lynch* specifically because "celebrat[ing] the Holiday and . . . *depict[ing] the origins of that Holiday* . . . are legitimate secular purposes."[49] The Sixth Circuit's opinion stands *Lynch* on its head and cites its holding for a nearly opposite proposition, as it must in order to reach the incredible conclusion that depicting the religious origins of the Christmas holiday is a permissible secular purpose, but celebrating the origins and development of American secular law is not.

The *McCreary County* majority also incorrectly applied *Lynch* to the facts of the case. The crèche upheld in *Lynch*—a nativity scene including the figures of Jesus, Mary, Joseph, angels, shepherds, and kings—was obviously neither more passive nor more secular than the Ten Commandments. Unlike the Ten Commandments, the crèche is a purely religious symbol.[50] The *Lynch* Court upheld the government's display of the crèche, even though its sectarian significance was *not* negated by the setting, because the defendant had served a legitimate secular purpose by "tak[ing] note of a significant historical religious event long celebrated in the Western World."[51] If anything, the principle in *Lynch* is

even more compelling when applied to the facts of *McCreary County*. The Ten Commandments have undeniably religious origins but are *not* purely religious. To the contrary, it is well recognized by jurists and scholars alike that the Commandments have played a significant role in the development of secular law and institutions.[52] Whether or not the Decalogue is "the most influential law code in history,"[53] it is certainly not *more* sectarian than the figures of Mary, Joseph, Jesus, and angels in the nativity display permitted in *Lynch*, or the 18-foot Chanukah menorah upheld in *County of Allegheny v. ACLU*.[54]

The Sixth Circuit also gave excessive weight to selected quotations from the Supreme Court's decision in *Stone v. Graham*, which rejected a Kentucky statute requiring the posting of the Ten Commandments, *standing alone*, in all public schoolrooms.[55] The circuit court relied on *Stone* for the proposition that the Ten Commandments, unlike the nativity scene upheld in *Lynch*, are an "active symbol of religion" because several of the Commandments allegedly concern only the religious duties of believers.[56] In particular, the court referenced the Commandments mandating "worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day."[57]

Nothing in *Stone* requires the omission of the Ten Commandments from a historical display. In fact, the *Stone* Court expressly noted that the Ten Commandments could be "integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization . . . or the like."[58] That observation readily applies to the displays at issue in *McCreary County*. The Ten Commandments did not appear alone, but rather were integrated with secular documents in an educational display about secular law. In any event, a finding that the Decalogue necessarily has *some* religious purpose is not the same as a finding that it serves a *wholly* religious purpose or even that the government intends to convey a message of endorsement.[59] Following *Stone*, moreover, the Supreme Court reiterated that the Ten Commandments can serve both religious *and* secular purposes. "[*Stone*] did not mean that no use could ever be made of the Ten Commandments, or that the Ten Commandments played an exclusively religious role in the history of Western Civilization."[60]

The Sixth Circuit's conclusion that several Commandments concern only the religious duties of believers is plainly false when viewed in the context of a historical display. The government defendants debunked this claim in their initial appellate brief, which noted that "[t]welve of the thirteen original colonies adopted the *entire* Decalogue into their civil and criminal laws."[61] Lest there be any doubt, the defendants proceeded to offer examples of each Commandment's enactment as law by one or more of the colonies or states.[62]

Although the circuit court was provided ample evidence undermining its thesis, it failed to even acknowledge—let alone dispute—the role that the first four Commandments played in the development of American law. That error is critical when one considers that defendants' stated secular purpose was to post historical displays presenting significant influences on American law. Indeed, as Judge Batchelder recently noted in dissent from another Sixth Circuit case with nearly identical facts, the "oft-repeated truism that the first three or four Commandments are 'exclusively religious' is simply not true. Including these rules as part of a historical display about the development of American law is accurate, appropriate . . . and legally permissible."[63]

The Sixth Circuit also erred by scrutinizing the accuracy of the prefatory description of the Ten Commandments, which stated, in relevant part:

> The Ten Commandments have profoundly influenced the formation of Western legal thought and the formation of our country. That influence is clearly seen in the Declaration of Independence . . . . The Ten Commandments provide the moral background of the Declaration of Independence and the foundation of our legal tradition.[64]

According to the *McCreary County* panel, this explanation presented two problems. First, the court stated that "the evidence [that the Ten Commandments influenced Western legal thought] does not appear in the actual display . . . so an observer would not actually be made aware of these facts."[65] This is irrelevant to the question of defendants' *purpose*. Whether an observer is aware of the historical connection between the Ten Commandments and the law is a separate question from what the defendants' motivations were in posting the displays. Indeed, the Supreme Court upheld the display of a crèche in *Lynch* without requiring any explanatory documents whatsoever.[66] The McCreary County and Pulaski County officials did not have to include any explanatory sign at all—let alone the extensive historical exegesis apparently required by the Sixth Circuit—in order to demonstrate their purpose. Whether the displays could have been more thorough, or could have better explained the historical impact of the Ten Commandments, is distinct from the question of whether the displays were motivated by a religious purpose.

The second "problem" noted by the Sixth Circuit is likewise constitutionally irrelevant. The court went to great lengths to demonstrate that the Ten Commandments did not inspire the drafting of the Declaration of Independence.[67] That claim, however, was not made in either display. The displays made a much more modest assertion, stating only that the Ten Commandments provided the "moral background" of the Declaration and of our legal tradition—a proposition that is far less stark than the straw man created and then critiqued by the Sixth Circuit. Nor would it be dispositive if the explanatory documents *had* made the claims of which they were accused. The accuracy of the displays is a separate and distinct issue from the defendants' purpose in posting them. As its moniker indicates, the "purpose prong" of the *Lemon* test focuses on the defendants' motivations, not on the relative educational merits of viewing the displays.[68] The issue before the court was whether the govern-

ment posted the displays for the sole purpose of endorsing religion. The answer to that question is "no."

The Sixth Circuit erred in finding that the "evolution" of the displays demonstrates a non-secular purpose.

Both the district court and the court of appeals made much of the fact that the defendants changed the content of the displays several times, ostensibly for the purpose of making them permissible under the Establishment Clause. Because the initial displays consisted of the Ten Commandments standing alone, the courts inferred that the earlier displays had "imprinted the defendants' purpose . . . with an unconstitutional taint."[69] According to the Sixth Circuit, this permanent taint "strongly indicate[s] that the primary purpose was religious."[70]

The lower courts' assumption of "unconstitutional taint" is not supported by the case law. The Sixth Circuit relied heavily on *Santa Fe Independent School District v. Doe*[71] for the proposition that prior noncompliance with the Establishment Clause had to be considered in determining whether the defendants' courthouse displays were constitutional.[72] Nothing in *Santa Fe*, however, requires the result reached by the circuit court. In that case, plaintiffs challenged a school district's practice of allowing students to deliver invocations and benedictions at graduation ceremonies and at football games. In the face of litigation, the district altered the policy several times, ultimately arriving at a policy that permitted students to vote on whether they wanted to have student-led prayers at football games.[73] The policy remained substantially unchanged from its original version. Although the *Santa Fe* majority considered the text and history of the school policy at issue in that case, the Court made clear that the policy was invalid on its face. According to the Court, "the text of the [] policy alone" demonstrated its unconstitutional purpose.[74]

As the United States points out in its amicus brief in *McCreary County*, *Santa Fe* "bears no resemblance to this case."[75] The historical displays at issue in *McCreary County* contained numerous secular documents and symbols and were accompanied by explanatory documents setting forth their secular purpose. They bore little resemblance to their predecessors. Whereas the policy struck down by the Supreme Court in *Santa Fe* was scarcely more than a recycled version of earlier unconstitutional policies, the displays at issue in *McCreary County* had little in common with the initial courthouse displays and did not evince a facially religious purpose.[76]

Under the Sixth Circuit's analysis, the government can seemingly never cure the unconstitutionality of its prior conduct. This simply cannot be the case, unless we are to assume that all constitutional violations continue in perpetuity. "[G]overnmental bodies, like other litigants, should be free to take instruction from prior decisions or arguments, and thus to eschew, or move away from, practices that are contrary to law."[77] Indeed, for exactly this reason, the Third Circuit, Seventh Circuit, and (before this case) the Sixth Circuit have explicitly rejected such arguments.[78] As the Sixth Circuit itself stated in *Granzeier v. Middleton*, "the fact that a particular [policy] was once constitutionally suspect does not prevent it from being reinstated in a constitutional form."[79]

The *McCreary County* panel misapplied the Sixth Circuit's own case law regarding the effects of past conduct. The court relied heavily upon selected quotes from *Adland v. Russ* for the proposition that the defendants' earlier policies or practices demonstrate a non-secular purpose for defendants' present actions.[80] In contrast to the *McCreary County* panel, however, the *Adland* court specifically stated that the defendants *could cure their constitutional defects by changing the composition of the display*: "While we cannot pass on the merits [of proposals to amend the display], we are nevertheless confident that with careful planning and deliberation . . . the Commonwealth can permissibly display the monument in question."[81] The *McCreary County* court not only ignored this language but in fact incorrectly relied on *Adland* for the opposite conclusion.

In contrast to the Sixth Circuit's interpretation of *Santa Fe*, Supreme Court precedent actually undermines the inference of an improper religious intent based on prior conduct. In *McGowan v. Maryland*,[82] a group of defendants charged with violating Maryland's Sunday closing laws challenged the laws as an unconstitutional establishment of religion. The Court acknowledged that "the original laws which dealt with Sunday labor were motivated by religious forces,"[83] but it nevertheless upheld the laws because they had later taken on a secular purpose. The *McGowan* Court explicitly rejected the reasoning that underlies the Sixth Circuit's theory of "unconstitutional taint."

> The present purpose and effect [of Sunday closing laws] is to provide a uniform day of rest for all citizens . . . . To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because . . . such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare . . .[84]

Conclusion

Although this discussion has been limited to only one prong of the *Lemon* analysis, it demonstrates how lower courts misstate or misapply Supreme Court precedent under the guise of being faithful to the *Lemon* test. In *McCreary County*, the Sixth Circuit set a higher bar for the defendants than that either required or permitted by the Supreme Court. The panel ignored multiple holdings of the Supreme Court and required a primarily secular purpose for the courthouse displays where, as a matter of law, only some discernible secular purpose was required. Despite a direct admonition from the Supreme Court,[85] the court of appeals also failed to show any deference to the government's assertion of a legitimate secular purpose.

The Sixth Circuit not only ignored the central holding in *Lynch v. Donnelly*—that acknowledging the religious origins of a practice is a valid secular purpose—but in fact cited that case for a contrary assertion. The court also errone-

ously scrutinized the accuracy of the displays rather than focusing on the question of the defendants' purpose. Lastly, the *McCreary County* panel adopted the district court's theory of "unconstitutional taint," even though that theory conflicts with the Supreme Court's holding in *McGowan v. Maryland* and the Sixth Circuit's own unambiguous statements in *Adland v. Russ*. In short, as Judge Ryan noted in his dissent, "the majority's analysis fails to properly apply the relevant Supreme Court precedent" at nearly every step of the way.[86]

We agree that the *Lemon* test is too subjective. Like the *McCreary County* petitioners and numerous amici, we hope that the Supreme Court will replace this analysis with one that focuses more on objective outcomes and less on subjective factors such as intent. We all must recognize, however, that the schizophrenic nature of Establishment Clause jurisprudence is not merely the result of applying imperfect standards. It is also the natural outgrowth of outcome-oriented jurisprudence. So long as lower courts are willing to misstate or disregard controlling Supreme Court case law, a new test will only put a band-aid on a gaping wound.

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Footnotes

[1] 354 F.3d 438 (6th Cir. 2003) [hereinafter "*McCreary III*"].

[2] 351 F.3d 173 (5th Cir. 2003).

[3] *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

[4] *Id.*

[5] Edwards v. Aguillard, 482 U.S. 578, 583 (1987).

[6] Michael W. McConnell, *Stuck with a* Lemon*: A New Test for Establishment Clause Cases Would Help Ease Current Confusion*, 83 A.B.A. J. 46 (1997).

[7] *Van Orden*, 351 F.3d at 179.

[8] *Id.* at 181.

[9] Br. for Petitioners at 7, McCreary County v. ACLU of Kentucky (Sup. Ct., Case No. 03-1693).

[10] *See* Br. for the States of Alabama, et al., as Amici Curiae, in Support of Petitioners at 9, McCreary County v. ACLU of Kentucky (Sup. Ct., Case No. 03-1693) ("[T]he amici States respectfully submit that this case should be analyzed under the 'coercion test' articulated by Justice Kennedy. . . focus[ing] on government coercion or compulsion in matters of religion . . . ."). In his concurrence in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), Justice Kennedy emphasized the coercive nature of state establishment of religion:

> [I]t would be difficult indeed to establish a religion without some measure of more or less subtle coercion . . . . It is no surprise that without exception we have invalidated actions that further the interests of religion through the coercive power of government. Forbidden involvements include compelling or coercing participation or attendance at a religious activity, . . . requiring religious oaths to obtain government office or benefits, . . . or delegating government power to religious groups . . . .

Id. at 659-60 (Kennedy, J., concurring in part and dissenting in part).

Justice Kennedy again emphasized coercion when he was writing for the majority in *Lee v. Weisman*, 505 U.S. 577 (1992). "[T]he Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . . ." *Id.* at 587.

[11] *See* Elk Grove Unified School District v. Newdow, 124 S.Ct. 2301, 2333 (2004) (Thomas, J., concurring). For additional discussion of this theory, see Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 Wm. & Mary L. Rev. 933 (1986).

[12] *See* ACLU of Kentucky v. McCreary County, 96 F.Supp.2d 679, 684 (E.D. Ky. 2000) [hereinafter "*McCreary I*"].

[13] *Id.* at 691.

[14] *McCreary III*, 354 F.3d at 443.

[15] *Id.*

[16] *See* Initial Br. of Appellants at 7, *McCreary III*, 354 F.3d 438 (6th Cir. 2003) (Case No. 01-5935).

[17] *Id.*

[18] *See generally* ACLU of Kentucky v. McCreary County, 145 F.Supp.2d 845 (E.D. Ky. 2001) [hereinafter "*McCreary II*"].

[19] *Id.* at 848-49.

[20] *Compare McCreary I*, 96 F. Supp. 2d at 689 ("Here, the Ten Commandments display is not . . . incorporated as part of a larger, secular sculpture or display."), *with McCreary II*, 145 F. Supp. 2d at 851 ("The composition of the current set of displays accentuates the religious nature of the Ten Commandments by placing them alongside American historical documents."). The district court provided no explanation for this glaring inconsistency in its decisions.

[21] The Sixth Circuit limited its holding to the conclusion that the defendants had a non-secular purpose for posting the Ten Commandments, and did not reach the effects prong of the *Lemon* test. *See McCreary III*, 354 F.3d at 462 (Gibbons, J., concurring) ("I express no opinion as to whether the displays violate the 'effect/endorsement' prong of the *Lemon* test."); *id.* at 479 (Ryan, J., dissenting) ("[T]he opinions of my brother, Judge Clay, on this issue, are his own and do not represent those of the majority of the panel.").

[22] For a critique of Judge Clay's analysis under *Lemon*'s "effects prong," see Br. of Amici Curiae Ashbrook Center for Public Affairs and Ohio Senator Bill Harris in Support of Petitioners at 22-28, McCreary County v. ACLU of Kentucky (Sup. Ct., Case No. 03-1693).

[23] Lynch v. Donnelly, 465 U.S. 668, 680 (1984) (emphasis added).

[24] Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (emphasis added).

[25] Bowen v. Kendrick, 487 U.S. 589, 602 (1988) (emphasis added).

[26] *McCreary III*, 354 F.3d at 443.

[27] *Id.* (citation omitted).

[28] *Id.* at 454.

[29] *Id.* at 446-47.

[30] *See* Edwards v. Aguillard, 482 U.S. 578, 613 (1987) (Scalia, J., dissenting); *see also Lynch*, 465 U.S. at 680 ("Even where the benefits to religion were *substantial*, . . . we saw *a* secular purpose and no conflict with the Establishment Clause.") (emphasis added and internal citations omitted).

[31] *McCreary III*, 354 F.3d at 446 (emphasis added).

[32] *Id.* at 454 (emphasis added); *see also id.* at 447 ("We agree . . . that the predominate purpose of the displays was religious.").

[33] *Lynch*, 465 U.S. at 690-91 (O'Connor, J., concurring).

[34] *See McCreary III*, 354 F.3d at 446, 447, 454; ACLU of Ohio v. Ashbrook, 375 F.3d 484, 491 (6th Cir. 2004); Adland v. Russ, 307 F.3d 471, 480 (6th Cir. 2002).

[35] *Lynch*, 465 U.S. at 680 (emphasis added).

[36] *See Wallace*, 472 U.S. at 56; *Bowen*, 487 U.S. at 602.

[37] *See* ACLU v. City of Birmingham, 791 F.2d 1561, 1565 (6th Cir. 1986) ("A statute or practice that is motivated in part by a religious purpose may satisfy the first *Lemon* criterion so long as it is not motivated entirely by a purpose to advance religion.").

[38] *Lynch*, 465 U.S. at 691 (O'Connor, J., concurring).

[39] *See McCreary III*, 354 F.3d at 454.

[40] *See* Agostini v. Felton, 521 U.S. 203, 237 (1997) ("[I]f a precedent of this Court has direct application in a case . . . the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.") (quoting Rodriguez de Quijas v. Shearson/American Express Inc., 490 U.S. 477, 484 (1989)).

[41] *Lynch*, 465 U.S. at 680.

[42] *Id.* at 680-81.

[43] Edwards v. Aguillard, 482 U.S. 578, 586-87 (1987); *see also Wallace*, 472 U.S. at 74 (O'Connor, J., concurring).

[44] *See McCreary III*, 354 F.3d at 446-47; *McCreary II*, 145 F. Supp. 2d at 848-49.

[45] *Lynch*, 465 U.S. at 680; *see id.* (noting that "[f]ocus[ing] exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause").

[46] *McCreary III*, 354 F.3d at 455.

[47] *Id.*

[48] *See id.*

[49] *Lynch*, 465 U.S. at 681 (emphasis added).

[50] *See id.* at 691 (O'Connor, J., concurring) (noting that the crèche is "an unarguably religious symbol").

[51] *Id.* at 680.

[52] *See, e.g., Edwards*, 482 U.S. at 593-94 (stating that the Ten Commandments did not play an exclusively religious role in the history of Western civilization); *Griswold v. Connecticut*, 381 U.S. 479, 529 n.2 (1965) (Stewart, J., concurring) (stating that most criminal prohibitions coincide with the prohibitions contained in the Ten Commandments); *McGowan v. Maryland*, 366 U.S. 420, 462 (1961) (Frankfurter, J., concurring) ("Innumerable civil regulations enforce conduct which harmonizes with religious canons. State prohibitions . . . reinforce commands of the decalogue."); *Stone v. Graham*, 449 U.S. 39, 45 (1980) (Rehnquist, J., dissenting) ("It is equally undeniable . . . that the Ten Commandments have had a significant impact on the development of secular legal codes of the Western World.").

[53] John T. Noonan, Jr., The Believer and the Powers that Are 4 (1987).

[54] *See* 492 U.S. 573 (1989).

[55] *See Stone*, 449 U.S. 39.

[56] *McCreary III*, 354 F.3d at 455 (citing *Stone*, 449 U.S. at 42).

[57] *Id.* (quoting *Stone*, 449 U.S. at 42).

[58] *Stone*, 449 U.S. at 42.

[59] S*ee Lynch*, 465 U.S. at 680; *id.* at 691 (O'Connor, J., concurring).

[60] *Edwards*, 482 U.S. at 593-94.

[61] Initial Br. of Appellants at 19, *McCreary III*, 354 F.3d 438 (6th Cir. 2003) (Case No. 01-5935).

[62] *See id.* at 20-30.

[63] *See* ACLU of Ohio v. Ashbrook, 375 F.3d 484, 507 (6th Cir. 2004) (Batchelder, J., dissenting).

[64] *McCreary III*, 354 F.3d at 451.

[65] *Id.* at 452.

[66] *See Lynch*, 465 U.S. at 671. The Supreme Court's failure to require an explanatory plaque in *Lynch* was certainly not because the Court had not considered the issue. Indeed, in his dissent from *Lynch*, Justice Brennan suggested that he would have required such a document. "[T]he City has done nothing to disclaim government approval of the religious significance of the crèche . . . Pawtucket has made no effort whatever to provide a . . . cautionary message." *Lynch*, 465 U.S. at 706-07 (Brennan, J., dissenting).

[67] *See McCreary III*, 354 F.3d at 452-53.

[68] In a moment of candor, the *McCreary County* majority also acknowledged that "this Court has neither the ability nor the authority to determine the 'correct' view of American history." *Id.* at 453. Despite this admission, however, the court's determination did just that, and substituted the judges' understanding of history for that of the defendants.

[69] *Id.* at 457 (quoting *McCreary II*, 145 F. Supp. 2d at 850).

[70] *Id.* at 458.

[71] 530 U.S. 290 (2000).

[72] *See McCreary III*, 354 F.3d at 455-56.

[73] *See Santa* Fe, 530 U.S. at 298 and n.6.

[74] *Id.* at 314.

[75] Br. for the United States as Amicus Curiae Supporting Petitioners at 25, McCreary County v. ACLU of Kentucky (Sup. Ct., Case No. 03-1693).

[76] It is worth noting, moreover, that it is not clear that even the first set of courthouse displays of the Ten Commandments were impermissible. The United States emphasizes this in its amicus brief:

> While a closely divided . . . [Supreme] Court previously had struck down a display of the Ten Commandments in public school classrooms, Stone v. Graham, supra, that holding does not necessarily extend to courthouses because the Court "has been particularly vigilant in monitoring compliance with the Establishment Clause in [public] elementary and secondary schools." . . . The constitutionality of a display of the Ten Commandments in non-school settings—*especially in courthouses where historic symbols are commonplace* and where the Ten Commandments' character as a code of conduct is accentuated—remains an open question.

Id. at 23 (citations omitted) (emphasis added).

[77] ACLU of Kentucky v. McCreary County, 361 F.3d 928, 933 (2004) (Boggs, C.J., dissenting from the denial of rehearing en banc).

[78] *See* ACLU of New Jersey v. Schundler, 168 F.3d 92, 105 (3d Cir. 1999) ("The mere fact that Jersey City's first display was held to violate the Establishment Clause is plainly insufficient to show that the second display lacked a secular legislative purpose . . . .") (quotation omitted); Granzeier v. Middleton, 173 F.3d 568, 574 (6th Cir. 1999) (holding that the state defendants could continue with the Good Friday holiday closing by adopting a secular rationale for the closing); Metzl v. Leininger, 57 F.3d 618, 623-24 (7th Cir. 1995) (same).

[79] *Granzeier*, 173 F.3d at 574.

[80] *See McCreary III*, 354 F.3d at 456 (citing Adland v. Russ, 307 F.3d 471, 480 (6th Cir. 2002)).

[81] *Adland*, 307 F.3d at 490.

[82] 366 U.S. 420 (1961).

[83] *Id.* at 431.

[84] *Id.* at 445.

[85] *See* Edwards v. Aguillard, 482 U.S. 578, 586-87 (1987) (stating that the government's assertion of a legitimate secular purpose is entitled to deference).

[86] *McCreary III*, 354 F.3d at 463 (Ryan, J., dissenting).

TELECOMMUNICATIONS

"PRIVATE COMMONS" IN RADIO SPECTRUM: THE FCC AVOIDS A TRAGIC RESULT

*BY WILLIAM SAYLE CARNELL**

In September, 2004, the Federal Communications Commission (FCC) refined and expanded its spectrum leasing rules, further removing barriers to the transfer of spectrum rights among private parties.[1] One of the most intriguing aspects of this order was its establishment of a novel form of spectrum rights management referred to as a spectrum "commons."

The initial spectrum leasing rules were themselves a pathbreaking departure for the FCC.[2] For decades, the agency had treated license transfers as an all-or-nothing proposition.[3] Spectrum rights could not be borrowed or leased, and a party that needed spectrum rights less than permanently was forced into a circuitous "management agreement" or similar device in order to permit that party access to a licensee's spectrum. But as a continuation of its general move towards more flexible rules, such as the ability to partition or disaggregate certain licenses,[4] the FCC in 2003 amended its rules to permit leasehold interests in spectrum licenses.

The new 2004 Order generally provides tweaks and clarifications to the leasing regime established by the 2003 Order. And, as a practical matter, its most important development may be the institution of "instant approval" processing for most wireless applications.[5] But perhaps the most intriguing development in the 2004 Order is its establishment of an altogether new form of spectrum rights, which it calls "private commons."

In contrast to the traditional conception of licensing, where a single party holds and controls the use of licensed spectrum rights, a private commons would permit "non-hierarchical" and "peer-to-peer" communications among users and devices that are outside the active control of the licensee. This Order represents a significant policy shift for the FCC, which has always retained a command-and-control approach to licensing and spectrum management, and the new regime may prove to have major practical implications, potentially enabling a new generation of networked wireless communications technologies.

The Commons - Property Debate

The notion of a spectrum "commons" is not new, but has arisen gradually even as the FCC has moved towards a more property-like regime for spectrum management.[6] The FCC now allocates most new licenses by auction; it generally allows unfettered transfers among parties; it typically permits flexible use by licensees of their spectrum; and generally provides a bundle of entitlements that begin to make a license feel more like a piece of property. Yet as the FCC has moved towards a more property-based approach, a critique of that approach has emerged from those who believe that spectrum should be allocated as a great "commons" for the public use, rather than parceled out in pieces for the exclusive use of individual private parties.[7]

The "spectrum commons" advocates often begin with the premise that spectrum is abundant, and that notions of spectrum scarcity are as outdated as AM radio and Sputnik. They point out that by using advanced technologies, including digital data compression, multiplexing, and "smart" radio, available radio spectrum could carry many times the throughput for which it is currently used. Spectrum scarcity is created, they say, by the award of exclusive licenses in its use, enshrining a privileged class of spectrum monopolists who preclude others from using the spectrum that they need.[8] Other critics ignore the abundance point, but argue that even if spectrum is scarce, that does not mean that it should be parceled out as a series of property-like entitlements.[9] Rather than award exclusive rights, then, they say that the FCC should simply establish one or more "spectrum commons" that are open to all, according to their needs.

Professor Lawrence Lessig, the open network guru who is famous among other things for his involvement in *U.S. v. Microsoft* and the *Eldred* case challenging the "Sonny Bono Act" extension of copyright durations, is a famous advocate of such an approach.[10] Professor Lessig analogizes his concept of open wireless networks to the development of the Internet. The Internet was built on open access, he says. Its very design is a giant shared network, created and maintained by the millions of individuals and entities that use the network. The code that harmonizes these disparate users, and that dictates who may use what facilities and in what way, is not a traditional legal regime but rather is the software code resident on the PCs and servers of those millions of users; code that instantly routes trillions of data packets through the network, around obstacles, and to their intended destination.[11]

Few lawyers or economists, however, can hear the word "commons" without thinking "tragedy of the."[12] Just as the English commons in land encouraged overgrazing and discouraged capital improvements, a spectrum commons could lead to overuse and underinvestment. Spectrum *is* a finite resource, says the property rights crowd, and there is little incentive to optimize one's use so long as unlimited quantities are available.

It is too easy to dismiss the "commons" advocates as vaguely collectivist idealists who ignore basic economic principles. But they have the benefit of good technology: There is no doubt that spectrum could be used far more efficiently than it is today. And they have several on-point examples apart from Professor Lessig's Internet. The success of unlicensed devices in the 2.4 GHz band, for example, has facilitated great developments in technology and commerce. Engineers are wont to paraphrase Churchill in their conclusion that we shape network architecture, and network architec-

ture shapes us. When the network is simple and open to all, they say, it will generally permit the greatest innovation; anything less than open access will tend to stifle entry and innovation.[13] The question, though, is how to obtain the benefits of a commons approach – how to permit the establishment of an open network to which end users may connect without restriction except that which is inherent in the network itself – while avoiding the tragedy that often attends a move away from individual property rights.

"Private Commons"

The FCC's most recent spectrum leasing order attempts to amalgamate the "spectrum commons" theory with the property rights theory, and marry both to the statutory mandate of the Communications Act. In essence, a private commons allows a licensee to set aside all or part of a spectrum allocation held by that licensee to be a "commons," for the use of the licensee's permittees. The licensee is the lord of the commons; it dictates who may use the spectrum and on what terms, and generally polices and regulates the commoners.

The spectrum commons is intended to permit "peer-to-peer communications between devices in a non-hierarchical network arrangement that does not utilize the network infrastructure of the licensee."[14] This arrangement stands in contrast to the traditional model of licensed spectrum usage, where the network facilities remain wholly within the control of the licensee.

The "commons" concept more closely resembles the model of unlicensed spectrum usage under Part 15 of the FCC's rules.[15] The FCC has reserved bands of spectrum for unlicensed devices under that rule part, which may be used so long as the use complies with certain emissions limits and other fairly minimal technical requirements, and so long as the use does not interfere with a licensed use. A manufacturer of cordless telephones, garage door openers, or similar devices obtains a certification from the FCC that a piece of equipment complies with the Part 15 rules, whereupon it may sell, and consumers may use, that equipment without any further authorization. Part 15 is a national park, or a freeway perhaps, that is available for all to use, subject to some fairly general rules (no littering, no driving above the speed limit) designed to preserve and promote the mutual enjoyment of that shared resource.

A private commons could follow much the same approach. But instead of a national park, it is a private park – Disneyworld instead of Yosemite. Just as Uncle Walt transformed his acres of orange groves into a Magic Kingdom with its own rules of access and behavior (children under 3 free; no alcohol consumption), a licensee may create his own private commons, governed by the licensee. Though just as Disney could not permit otherwise unlawful behavior on its property, the use of a private commons is likewise subject in aggregate to the terms and conditions of the licensee's underlying authorization. Broadcast licensees typically cannot convert their spectrum into two-way data services, for example, and everyone remains subject to emissions and interference limits dictated by the underlying authorization.

The details of the FCC's commons rules remain sketchy. The FCC has issued a notice asking for further comment on the details of its implementation, and as of this writing the (extended) comment date for that notice had not passed.[16] But the nature of the concept – do what you want within the parameters of the underlying license grant, so long as you do not interfere – may belie detailed definition.

Benefits of the Commons

Plainly, the problem with a pure commons approach arises in the chronic issue of overconsumption and underinvestment. Not even the Internet is immune to this problem. Most email users regard email as a tool to communicate with family, friends, and business associates. Yet a tiny few use the network to hawk their discount pharmaceuticals, "urgent business proposals" or physical enhancement devices. Spammers, then, have appropriated the public domain for their own purposes, and by clogging inboxes and jamming servers they interfere with more socially constructive uses of the Internet. Spam is the overgrazing of the Internet; any open network or similar commons would almost certainly lead to a comparable tragedy.

But the benefits of open wireless networks are undeniable. Engineers dream of a kind of inter-wireless-net. Their vision is well beyond wi-fi hotspots at Starbucks and in the Admirals Club, or 3G wide area networks. In this new network, the airwaves are not used simply to provide a connection between a device and the wired network; in this world the airwaves *are* the network. Devices able to communicate directly with each other form ad-hoc networks that mesh themselves together, and in concert with the older wireline-based infrastructure. My home computer talks to my neighbor's laptop; we both talk to a third neighbor, who talks to the public library, and so on; and each of us also talks to our own printers, home theater systems, and household appliances. Hardware that uses modulation techniques such as orthogonal frequency division multiplexing (OFDM), combines with software that enables both spectrum and network management to facilitate this ubiquitous open access wireless net. Engineers tell us that this vision is not some utopian pipe dream, any more than buying groceries and watching TV over the Internet was a decade ago.[17]

The question, then, is how to harness the benefits of the open access network, while avoiding the tragedy of the commons. Two methods present themselves: traditional command-and-control regulation, or private management. Command-and-control regulation may work to a point: The FCC has had some success with its Part 15 regime under which Wi-Fi and other technologies have come to flourish. But much more is called for in order to realize the benefits of open access wireless networks. The very notion of software defined radio is incompatible with the fixed standards required by Part 15. Open wireless networks depend on intelligent devices that will constantly modify the network architecture – modifying power levels and bandwidth used as necessary to transfer data, and to accommodate competing users. As Professor Lessig famously pointed out, the software code, rather than any legal code, establishes the rules

under which these networks operate.[18]

Rather than attempt to write a code for software defined radio, then, the FCC's private commons will permit private parties to write their own rules. A licensee (or a lessee) may establish its own code in its own spectrum. Intel or Qualcomm or whomever may obtain a spectrum license (through a lease or an outright acquisition), and then create or license the equipment that uses that spectrum. The end user would be buying a wireless device that incorporates a physical chipset, software code that governs its operations, and a limited right (limited in accordance with the code baked into that chipset) to use Intel's or Qualcomm's licensed spectrum.

In theory, this should properly align incentives and induce an optimal result. The licensee/equipment maker should be incentivized by the lure of profit maximization to create an optimized product: one that squeezes an optimal number of users onto the available bandwidth, with an optimal signal quality and data rate (and an optimal level of congestion or interference potential), at an optimal price point. And it will create a product, including a set of software-defined sharing rules that best achieve this result. Consumers, in turn will decide whether the product is worth the money, or whether those technical and/or spectrum resources should be allocated to a different use.

Whether the private commons will ever be developed is, of course, unknowable. Practical implementation of the concept will require parties to identify and acquire the rights to nationwide blocks of useful spectrum, the cost and scarcity of which may prove the ultimate stumbling block for the private commons. But in establishing this novel model of spectrum usage, the FCC has taken an intriguing step towards enabling the wireless utopia that the future may hold.

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Footnotes

[1] Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Second Report and Order*, WT Dkt. No. 00-230 (rel. Sept. 2, 2004) (the "2004 Order").

[2] Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, *Report and Order*, WT Dkt. No. 00-230 (rel. Oct. 6, 2003) (the "2003 Order"). The 2003 Order was the subject of an earlier article in this journal. *See* R. Edward Price, *The FCC Issues a Groundbreaking Decision to Allow Spectrum Leasing*, ENGAGE vol. 5 issue 1 at 148 (2004).

[3] *See generally, e.g.*, Stephen F. Sewell, *Assignments and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934*, 43 FED. COMM. L.J. 277 (2004).

[4] *See* 47 CFR § 24.714 (partitioning is a division along geographic lines; disaggregation is a division of the authorized frequencies).

[5] 2004 Order ¶¶ 100-101.

[6] The basic idea of common, versus private, ownership of property has been the subject of extensive scholarly treatment. The title of this article pays homage to Garrett Hardin's famous 1968 article in which he described the "tragic" consequences of the 18th and 19th century English commons in land, which generally led to overexploitation of, and underinvestment in, that property. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

[7] *See* Eli Noam, Sp*ectrum Auction: Yesterday's Heresy, Today's Orthodoxy, Tomorrow's Anachronism. Taking the Next Step to Open Spectrum Access*, 41 J. L. & ECON. 765 (1998).

[8] *See, e.g.*, Yochai Benkler, *Some Economics of Wireless Communications*, 16 HARV. J. L. & TECH. 25 (2002).

[9] *See, e.g.*, Noam, *op cit.*.

[10] *See generally* Lawrence Lessig, *The Future of Ideas* (2001).

[11] *Id*.

[12] *See, e.g.*, Stuart Minor Benjamin, *Spectrum Abundance and the Choice between Private and Public Control*, 78 N.Y.U. L. REV. 2007 (2003).

[13] *See generally, e.g.*, Stuart Buck, *Replacing Spectrum Auctions with a Spectrum Commons*, 2002 STAN. TECH. L. REV. 2 (2002).

[14] 2004 Order ¶ 91.

[15] 47 C.F.R. §§ 15.1 *et seq*.

[16] *See* 2004 Order ¶¶ 159-165. *See also* Public Notice, *FCC Announces Extension of Comment Period*, WT Dkt. No. 00-230 (rel. Nov. 9, 2004) (extending comment deadline to January 17, reply deadline to February 17).

[17] *See, e.g.*, Kevin Werbach, *Supercommons: Toward a Unified Theory of Wireless Communication*, 82 TEX. L. REV. 863 (March 2004).

[18] *See* LAWRENCE LESSIG, CODE AND OTHER LAWS OF CYBERSPACE (1999).

Book Reviews

Enlightened Democracy: The Case for the Electoral College

by Tara Ross

*Reviewed by Bradley A. Smith**

To those of us who follow politics closely, it is a constant surprise that many Americans – a majority according to some – have never even heard of the Electoral College, and believe that the President is automatically the candidate who wins a popular vote plurality. At the same time, those Americans who are familiar with the Electoral College have long supported its abolition, in favor of direct popular elections, with majorities reaching as high as 81% in a 1968 Gallup poll.

Indeed, we have all read countless times that if we were to have an election in which the popular vote winner did not also win the Electoral College vote, the United States would face a "constitutional crisis." And then came the presidential election of 2000. In 2000, for the first time since 1888, the candidate winning the popular vote did not also win the Electoral College tally. Rather, George W. Bush, with 47.9% of the popular vote, defeated Al Gore, who won 48.3% of the popular vote, by a tally of 271 to 266 in the Electoral College, and assumed the presidency. And yet, as Tara Ross notes, there was no "constitutional crisis" at all. Indeed, while many controversies simmered over the 2000 election results, the Electoral College was not one of them. A Constitutional Amendment to do away with the Electoral College, introduced immediately after the election and supported by such Capitol Hill heavyweights as Senator Hillary Rodham Clinton and then-House Minority Leader Richard Gephardt, went nowhere. And while polls taken after the election continued to show that most Americans favored direct popular election of the president, only 59% favored abolishing the electoral college – a sizeable majority, but the lowest percentage since Gallup first asked the question in 1944.

How could this be? Could it possibly be that Americans are not complete democrats, but still retain some affection for constitutional, republican principles? Is it possible that there is still a belief that process and compromise matter as much as "the will of the people?" Could it be that when Americans actually give serious thought to the Electoral College, as many undoubtedly did for the first time after the 2000 election, they see that it offers many advantages over direct popular election?

If so, then things are looking up for the Electoral College. For the 2000 election, and the ensuing proposals to amend the Constitution to do away with the College, seems to have roused the Electoral College's defenders. For the most part, however, those defenses of the Electoral College have come in the form of short opinion pieces in newspapers and magazines, law review articles, and collections of essays. Thus the importance of Tara Ross's *Enlightened Democracy: The Case for the Electoral College*, which adds a reader friendly, book-length treatise to the list of pro-Electoral College writings. Better still, unlike at least some other defenses of the College, Ross's defense is no curmudgeonly conservative plea for respecting tradition. It is a full throated roar in favor of an institution she is "absolutely convinced" is of "immense value… to our republican democracy."

As is appropriate, given the general lack of public knowledge about the Electoral College, Ross begins by tracing the history of the College, especially its creation at the Constitutional Convention. Ross takes on the conventional wisdom that the Electoral College was a hurried afterthought passed with little debate in the final days of the Convention. To the contrary, she points out, the method of selecting the executive waited until the end of the Convention precisely because it was one of the thorniest issues the Convention faced. Far from being a late afterthought, the method of selecting a chief executive may have been given more thought than any other issue at the Convention, as the delegates pondered the problem for weeks while continuing to debate and draft other, less difficult provisions. Thus, unlike Electoral College detractors such as Lawrence Longley and Neal Pierce, who belittle the institution as a hurried compromise to meet immediate political needs, Ross argues that the framers' choice deserves serious study and respect before being changed or discarded.

As the Electoral College provides for what are a set of simultaneous state elections rather than a single national vote to elect the president, and given the inclusion of two senators in each state's electoral vote count, regardless of the state's population, the Electoral College is an important part of the fabric of our federalist system of government. Ross makes the case that the College is an important bulwark of federalism, but oddly, this makes for some rough going. Federalist principles and virtues are so rarely taught in school or the university these days that Ross must digress at some length to explain why this matters. A thorough discussion of the pluses of federalism, however, would require a volume of considerably greater length. *Enlightened Democracy* handles this problem as well as could be expected, but the problem shows just how much work needs to be done to educate the public on the virtues and benefits of federalism.

Ross is strongest when she argues that the Electoral College forces candidates to assemble broad national coalitions, rather than narrow, sectional ones. She skillfully uses the election of 1888, when Grover Cleveland won the popular vote by rolling up enormous margins across the south, but carried few states outside the south and so lost the electoral vote to Benjamin Harrison, as an example of how the Elec-

toral College rewards such coalition building. Ross shows that Harrison, despite losing the popular vote, was actually the candidate with greater national legitimacy. Indeed, Ross chops and dices claims that a president elect who failed to win the popular vote will lack legitimacy, and knocks aside most other objections to the College with relative ease as well. She demonstrates how the College can make fraud less likely and election outcomes more certain.

She is less convincing when arguing that absent the Electoral College, the American electorate would splinter from two parties that represent grand coalitions into numerous, rigidly ideological parties. She suggests that a strength of the college is that if a regional party began to win, or threatened to win, Electoral College votes, it would force the major parties to compromise to bring them in the fold; but then switches direction and suggests that without an electoral college, such regional parties would proliferate. It is never quite clear why they would not still be brought into the fold in a winner takes all system of voting. And Ross wrongly, in my view, accepts the argument that we should do away with the Electors themselves, and have electoral votes automatically assigned according to each state's popular vote. While electors have rarely used their discretion to vote for someone other than whom they are pledged, this seems a valuable safeguard against late breaking information or the sudden death of a candidate. Similarly, she argues that in the event no candidate wins an Electoral College majority and the election is accordingly sent to the House of Representatives, deliberation and deal-making should be replaced by automatic deference to the popular vote in each state. In each case, Ross's position runs counter to the general thrust of her book, which prefers "enlightened democracy" - deliberation and process aimed at producing refined, thoughtful results - to direct democracy.

Those steeped in the Electoral College or the benefits of federalism may find *Enlightened Democracy* a bit of a disappointment. For example, the discussions of federalism are, as noted, necessarily brief. But this is not really a drawback at all, because I suspect that for most Americans Ross's discussion of federalism will seem quite novel and different – food for thought, if you will, and as deep as they care to go at the present time. In this way, Ross's book is important for what it is not. As the author herself notes in the introduction, *Enlightened Democracy* is not a dense treatise written for election lawyers or political scientists. Rather, it is "a primer, a summary of the history of and justifications for preserving our unique presidential election system." For those who instinctively agree with Ross but haven't given the question much thought, this book should help to clarify and organize their thinking. More importantly, for those who have simply accepted the notion that of course the president should be elected by popular vote, it is just what is needed: a short, easy-to-read book that will change some minds, cause others to take a second, more serious look, and generally stir interest in further exploration of the issues involved, including federalism.

For many years, supporters of the Electoral College have been on the defensive. *Enlightened Democracy* turns the tables to press the positive case for the College. The increase in support for the Electoral College after the 2000 election indicates that the public may be more ready for that case than critics of the Electoral College believe.

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Educational Freedom in Urban America: Brown v. Board After Half a Century

by David Salisbury and Casey Lartigue Jr.

*Reviewed by Clint Bolick**

Last year our nation celebrated the 50th anniversary of *Brown* v. *Board of Education*—and lamented the appalling lack of progress in delivering on the promise of equal educational opportunities for minority schoolchildren. In a perverse sense, we are closing in on the goal of equality, because the quality of American public schooling has been worsening for everyone. But for blacks and Hispanics, who are disproportionately represented among the poor, the situation is catastrophic.

As Abigail and Stephan Thernstrom pointed out in their landmark *America in Black and White*, even in the midst of a flourishing black middle class and massive spending on public schools, the academic gap between blacks and whites has widened over the past decade, and now measures four years of academic performance between white and black high school seniors. Given that incomes of college graduates are nearly double those of high school graduates—and nearly three times higher than high school dropouts—it is alarming, as Dr. Jay Greene has reported, that nearly half of all black and Hispanic students fail to graduate. Similarly worrisome is the fact that among young black men who failed to graduate, 28 percent are today in jail.

Educational Freedom does what few others have attempted in the many recent analyses of *Brown*'s unfinished

legacy: to draw the connection between the racial academic gap and the solution of parental choice. In a series of 13 excellent articles written by a broad and bipartisan array of experts, the volume provides the outlines of a pragmatic policy strategy to confront our nation's most urgent domestic crisis.

The volume begins with an essay by Dr. Howard Fuller, former Milwaukee Public Schools Superintendent and founder of the Black Alliance for Educational Options. Fuller explains the crucial difference "between public education, which is a concept, and the system that delivers public education." The system is a means, not an end in itself; and achieving the goal of public education often requires challenging or going around the delivery system. The capacity to exit the system is paramount, Fuller says, and the absence of such power distinguishes poor from wealthier families and consigns their children to inferior schools.

Former Democratic Rep. Floyd Flake, who runs both a private school and a charter school in Jamaica, Queens, weighs in with unconventional prescriptions. Beyond school choice, he urges changes in teacher training, elimination of special education programs that serve as a "dumping bin for children whose teachers cannot or do not know how to educate," and resisting the temptation to lower academic standards.

Young scholar Gerard Robinson provides a superb historical analysis of the "choice" movement that was used to subvert school desegregation in the South in the 1960s and '70s, as contrasted to the contemporary "freedom-based" choice movement. The current movement's nefarious antecedent created cynicism about school choice that endures today among many older black Americans, while the focus today on freedom and opportunity empowers those who are the main intended beneficiaries of Brown's promise.

Harvard Professor Paul Peterson points to two main impacts of school vouchers: improved student performance coupled with improvement of public schools faced with robust competition. Choice programs do not skim the cream, he finds, but rather attract a representative cross-section of urban schoolchildren. He notes that far from draining public schools of resources, voucher programs tend to take only partial funding away when students leave, resulting in higher per-pupil expenditures in public schools.

Chaim Karczag takes on the vital issue of teacher certification as a barrier to education improvement. Despite the promising advances of alternative certification that bypasses mind-numbing university teacher training programs, Karczag laments that the No Child Left Behind Act, in a "paradigmatic example" of the "risks of trying to impose reform through regulation from above," may stifle alternative certification through its insistence on credentialing.

David Bositis of the liberal-leaning Joint Center for Political and Economic Studies presents a revealing report on the politics of school choice. A slight majority of Americans support school choice, he finds; but a strong majority of blacks (57 percent) and an even higher percentage of Hispanics (60 percent) support school choice, because their public schools are so bad and their options are few. Yet that public opinion support rarely translates into political influence among black and Hispanic leaders. Why? Bositis finds there is a generation gap—most older blacks oppose school choice, while two out of three under age 35 support it—and older blacks vote at much higher rates than younger blacks. For those same demographic reasons, however, Bositis concludes that "in the not-too-distant future, the politics of school choice could easily change."

Co-editor David Salisbury reports on the cost of average private school tuition in six cities, and finds that the average tuition nationally is $4,689. Forty-one percent of all private schools charge less than $2,500, while over three-quarters charge less than $5,000. He concludes that "[e]ven a poor child, armed with a voucher of $5,000, could obtain a quality private education."

Frederick Hess investigates the impacts of markets on public schooling. While concluding that markets are necessary to improve education, he observes that the "statutes, bureaucracy, and procedural routines that hamper school officials are central to the structure of urban districts." Without structural reform, schools will find it difficult to respond affirmatively to market forces.

Andrew Coulson rounds out the volume by analyzing market education internationally, concluding that parental choice and deregulation are key ingredients of success. Far from ideological, Educational Freedom presents a vital and practical roadmap for education-based policy reform. Indeed, if policymakers could have only a single volume on education on their bookshelves (or better yet, in front of their noses), this would be it. Having a roadmap is far easier than implementing it. Institutional inertia is rampant in the most hidebound socialist system west of Communist China and south of the United States Postal Service. But this volume illustrates powerfully the transformative promise of parental choice.

As Howard Fuller puts it, "I understand that our position is controversial. But social change is always controversial. It transfers power to people who have never had it and takes power from those who have had it. How can that not be controversial?" But, he adds, "We intend to endure to the end." This year marks the 50th anniversary of Brown II—the promise of educational opportunity "with all deliberate speed." In those five decades, we have lost the better part of three generations of disadvantaged students. Our nation's children do not have another moment to lose. We need to get on with making good on one of our nation's most sacred vows.

* Clint Bolick is president and general counsel of the Alliance for School Choice (www.allianceforchoolchoice.org); and author of Voucher Wars: Waging the Legal Battle Over School Choice (Cato Institute, 2003).

Go Directly to Jail:

The Criminalization of Almost Everything

Edited by Gene Healy

*Reviewed by Paul Rosenzweig**

"An unexamined life," the Greek philosopher Socrates said, "is not worth living." And surely this is equally true for legal doctrines – the unexamined law is probably not worth having. At a minimum, since law is the realm of reason and analysis, the unexamined legal doctrine is at least worth . . .well, examining.

For too long, the growth in the use of criminal law as a means of controlling social and economic behavior has been one of the dark corners of the legal world, unilluminated and unexplored by the general public. While nobody (save for a few law professors) was looking, for example, the Federal criminal code exploded, growing from fewer than 500 statutes at the start of the 20th century to more than 4000 today. State criminal codes are so vast that no one even hazards a guess as to their scope. Few of the more recent additions have anything to do with "criminal law" as the public understands it – prohibitions against traditional offenses like murder, rape, and robbery. Rather, the "new crimes" are a means of enforcing regulatory norms that the average American would be surprised to learn are also crimes. Who would ever think, to take but one example, that importing honey bees is a federal felony? Yet it is – and the trends that have produced this explosion of criminal prohibitions have gone largely unexamined.

Until now that is. Gene Healy's new collection of essays, "Go Directly to Jail: The Criminalization of Almost Everything" is a welcome change that aims to fill the gap in the public understanding. Healy and his co-contributors offer a chilling description of the current state of affairs – one that ought to awaken the concern of anyone who thinks that law should be morally defensible and rationally structured.

Erik Luna, of the University of Utah, begins the book by explaining the political impulses that drive the growth in the use of criminal law as a means of controlling social behavior – impulses that lead to a "crime of the month" mentality. When a legislator is faced with a choice on how to draw a new criminal statute (either narrowly and potentially underinclusive or broadly and potentially overinclusive), the politics of the situation naturally cause the legislator to be overinclusive. Few, if any, groups regularly lobby legislators regarding criminal law and those that do more commonly seek harsher penalties and more criminal laws, rather than less.

The political dynamic is exacerbated by the consideration (usually implicit) of the costs associated with the criminal justice system. Broad and overlapping statutes with minimum obstacles to criminalization and harsh penalties are easier to administer and reduce the transaction costs of resort to the legal system. They induce guilty pleas and produce high conviction rates, minimizing the necessity of using the cumbersome jury system and producing outcomes popular with the public.

The final piece of the equation is legislative reliance on the existence of prosecutorial discretion. Broader and harsher statutes may produce bad outcomes that the public dislikes, but (as Luna explains) blame for those outcomes will lie with prosecutors who exercise their discretion poorly, not the legislators who passed the underlying statute. As a consequence, every incentive exists for criminal legislation to be as expansive as possible.

James DeLong and Timothy Lynch then offer a cautionary series of tales describing the application of the new criminal paradigm to a single area of law – environmental regulation. As they outline in depressing detail, the unchecked growth of criminal environmental provisions has had a palpable effect on business. The principal manifestation of this effect has been a change in the rules for criminal liability, creating liability without fault and a new criminal class.

When criminal law was focused on punishing "traditional" crimes whose wrongfulness was known to all, the principle that "ignorance of the law is no excuse" had meaning. For there is no reason to suppose that anyone is reasonably ignorant of the prohibition against murder or robbery. But when the criminal prohibition is now contained in a plethora of environmental regulations, (or as Grace-Marie Turner details in her contribution to this volume, confusing Medicare reimbursement rules) the presumption of knowledge is invidious. It creates, in effect, "absolute liability" where those who act in the context of an economic enterprise act at their own peril.

And that's a harmful effect. The entire premise of criminal deterrence is that for traditional crimes there is no acceptable level of activity. We do not recognize a suitable societal level of murder, for example, or rape or robbery or any of the other common law crimes. Thus, there is no possibility of over-deterring these forms of conduct – we *want* to drive the murder rate down to zero if we can. Put another way, the criminal conduct at issue in traditional common law crimes is so socially unredeeming that we want actors to stay far back from the line of unacceptable behavior. And the *in terrorem* prospect of criminal sanctions, including imprisonment, is designed to achieve precisely that result. There is no "optimal" level of rape or robbery – and so we punish them in all their forms.

That paradigm changes, however, as the federal government expands the scope of criminal law. There *is* an optimal level, for example, of economic activity with collateral adverse effects. When discussing issues like environmental pollution, the law expressly recognizes that some production of waste products is necessarily the result of the manufacturing process. So to, we recognize that the provision of medical services is not an exact science – and thus, that some errors in its provision will occur. Thus, we do *not* try to drive the level of pollution or medical error to zero – rather, we recognize that some optimal balance between costs and benefits exists (while also acknowledging the difficulty of defining precisely where that balance should rest). More broadly, there are many social and economically productive acts that are good in moderation but wrong in excess. As DeLong, Lynch and Turner demonstrate, when the criminal law is applied to that category of activity its effect is likely to overdeter conduct that is otherwise socially useful – to society's general detriment.

The final piece of the over-criminalization puzzle is the federalization of criminal law. As Healy discusses in his own contribution to the volume, even those crimes (like gun violence) that ought to be crimes are not, necessarily, appropriate for federal prosecution and are best left to the States. In the late 1990s a blue-ribbon ABA Commission cataloged the over-federalization of criminal law. Its principal conclusion was that much of the growth of federal crimes was as a result of federal law taking on too many responsibilities that were best left to state law enforcement agencies. In addition to the gun violence crimes identified by Healy, a particularly good example of that trend is the Federal Carjacking statute passed in the early 1990s when concern over carjacking crimes became a brief public concern. Notwithstanding the existence of laws against both theft and violence in every State, Congress felt impelled by political expediency to craft a Federal prohibition. As might be expected, given the prevalence of effective State law enforcement tools, the Federal law has been mostly ignored, with fewer than 50 federal prosecutions every year, compared to several tens of thousands of State prosecutions annually. Given how little role the Federal law plays, one is entitled to ask (as Healy does) whether we need the law at all.

The sad truth is that nobody knows exactly how many federal criminal statutes there are – for even the Congressional Research Service (Congress' legal research arm) professes to be unable to get an exact count. All we have is an estimate.

Worse yet, neither the public nor the academy seems to have any awareness of this disturbing trend or its unintended consequences. The expansion of criminal law beyond its traditional bounds is truly an unexamined phenomenon. Any thoughtful conservative (whether a natural law traditionalist who believes that criminal law should be confined to acts involving morally wrongful conduct, or a utilitarian libertarian who believes that criminal laws should be limited to those whose costs outweigh its benefits) should be deeply troubled by the trend of applying criminal sanctions to seemingly civil wrongs.

Healy's new volume is a welcome antidote to this lack of understanding, designed to educate the public and heighten their awareness. It is a well-written, broad survey of the problem and it should be on the bookshelf of any reader concerned with the use, and misuse, of the legal system.

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Bringing Justice to the People

The Story of the Freedom-Based Public Interest Law Movement

Edited by Lee Edwards

*Reviewed by Michael Uhlmann**

To members of the mainstream media and, alas, to much of the public, the phrase "public interest law" conjures images of the ACLU fighting to remove the Ten Commandments from courthouse walls, of Ralph Nader inveighing against assorted (and seemingly endless) corporate malefactors of great wealth, or of the Sierra Club standing athwart economic development in order to protect a hitherto unidentified endangered species. Public interest law, that is to say, is widely seen as a stepchild of the political left.

There is much truth to that designation, but it is not the whole truth. The rest of the story is told in *Bringing Justice to the People*, a collection of essays by and about prominent practitioners of conservative public interest law. Herein you will learn about the birth and growth of conservative public interest law. You will learn as well about some of its signal victories — for example, securing school choice against the deep-pockets and power of the education establishment; protecting religious liberty against the effort to establish atheism as the default religion of the American regime; protecting small entrepreneurs and property owners against regulatory excess; and in general trying to secure some enduring sense of limited government and individual initiative in an era when so much legal energy pushes in the opposite direction.

As with any anthology, there is plenty to pick and choose from according to one's particular interests and preferences. And even for those who may be generally familiar with the story, the book provides riveting detail about the

virtues and promise of the freedom-based public interest law movement. It is no slight to the other contributors to note some particularly noteworthy chapters: the introduction ("The First Thirty Years") by editor Lee Edwards, who provides a splendid short history of the subject; "Life, Liberty, and Property Rights," by Ronald A. Zumbrun, the founding president of the very first conservative public interest law organization;"Equality Under the Law," by Roger Clegg, who has patiently labored for many years to prevent the imposition of racial quotas; "Following the Money," by Mark R. Levin, who traces the role of liberal foundations in creating public interest law to begin with; and "The Revival of Federalism," by John C. Eastman, who shows how conservative public interest lawyers have helped to secure a regime of limited government. Other chapters focus more specifically on particular aspects defending property rights, free speech, religious freedom, and the rights of workers. All in all, the book should dispel the myth that the left, and the left alone, has some sort of monopoly right to define what the public interest is.

No anthology, of course, can do full justice to what is after all a rich and complicated story. *Bringing Justice to the People* deals only in passing with the deeper background of public interest law. That would require a separate book altogether, one that probed beneath the surface of the 1960's counterculture. One of these days, an earnest historian will gain access to the files of the Ford Foundation, which invented public interest law pretty much *sua sponte* and *ex nihilo* four decades ago. McGeorge Bundy, the Foundation's president (fresh from his stint as John F. Kennedy's National Security advisor) invented the concept of so-called "advocacy philanthropy." Foundations, so the argument went, could no longer be mere passive observers of the social and political scene. Like government itself, they were (or should be) marked with a sense of public mission. Henceforth, they would (and should) become active proponents of social and economic change.

Inspired by this new philosophy, Ford and other large philanthropies set about to execute a broad, activist agenda, one that bore a striking resemblance to the most liberal wing of the Democratic Party. And a large part of that agenda came to reside in the public interest law movement, which almost from day one saw itself as the inspired angel of social reform and the courts as its preferred field of battle. Whether the chicken or the egg came first is hard to say, but this much seems clear: Somewhere between *Brown v. Board* (1954) and, say, *Flast v. Cohen* (1968), the federal judiciary appears to have drunk deeply from the same flagon as McGeorge Bundy and his philanthropic allies. Standing rules were deliberately relaxed to encourage ideological challenges against government policy on both the state and federal level.

Everyone has his or her favorite horror story about the expansion of federal judicial power in the 1960's and 1970's, but it's hard to beat *U.S. v. SCRAP* (1973), where the Supreme Court allowed five environmentally concerned law students to challenge an ICC rate order. In an opinion that makes the commerce power rationale of *Wickard v. Filburn* look like an amateur warm-up act, the Court found that the plaintiffs were likely to suffer injury if the rate increase went through. And why was that? Follow the bouncing ball carefully: Increased rates would result in fewer goods being shipped, a disproportionate percentage of which would be recycled goods. With fewer goods reaching their happy hunting ground in recycling plants around the nation, the plaintiff students would suffer injury by encountering more litter on their nature walks in the greater District of Columbia area.

Thirty-two years later, such examples seem ludicrous, but they serve to underscore an important point that is too often ignored: The expansion of judicial power in the 'Sixties and 'Seventies – and the radical social change that followed in its wake — went hand-in-hand with the rise of the public interest law movement. Each served the other's institutional and ideological interests, and would be still be doing so today but for Ronald Reagan. That story is told in *Bringing Justice to the People* as well, and it begins long before his election as President.

Lee Edwards has rendered a public service by bringing these diverse materials together in one place. Veterans of the early struggles will enjoy revisiting some of the heroic tales of success. Those who may be unfamiliar with the variety and energy of the contemporary conservative public interest movement will find the book instructive and inspiring.

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The Freedom of Faith-Based Organizations to Staff on a Religious Basis

by Carl H. Esbeck, Stanley W. Carlson-Thies, and Ronald J. Sider

*Reviewed by James A. Sonne**

As the French historian Alexis de Tocqueville once wrote of America in the mid-nineteenth century, "[t]he religious atmosphere of the country was the first thing that struck me on arrival in the United States."[1] Interestingly, Tocqueville did not credit any national orthodoxy as the cause of such fervor, but rather an abiding tradition of freedom that makes both church and state strong, healthy, and mutually supportive.[2] To be sure, such a tradition continues to this day, notwithstanding a steady debate on its scope that runs from prayer in public school to President George W. Bush's "faith-based initiative." Indeed, throughout our nation's history, religious liberty, whatever its contours, has truly been our "first freedom," and not simply because of its primal order in the Bill of Rights.[3]

Nowhere has this tradition of religious freedom been stronger than in the notion that government should not interfere with the internal functions of religious institutions. As the Supreme Court opined in *Kedroff v. St. Nicolas Cathedral*,[4] religious institutions should have "the power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[5] Although not absolute, this freedom, whether by statute or constitutional mandate, generally extends to employment decisions made by such organizations. The nature of this protection, particularly as it is affected (or not) by the President's faith-based initiative is the subject of the new, much-needed work by Carl Esbeck, Stanley Carlson-Thies, and Ronald Sider, *The Freedom of Faith-Based Organizations to Staff on a Religious Basis*.[6]

This slim, yet effective book carefully summarizes the current state of religious freedom in the context of employment decisions by faith-based groups, primarily in the context of hiring those of like-minded faith. As the authors write in introduction, "[t]he purpose of this monograph is to set forth the applicable legislative and constitutional law and the rationale that undergirds it, as well as the important public policy reasons that support religious staffing by faith-based providers."[7] This goal, which is in keeping with the book's title, is somewhat overbroad in that the bulk of the text, together with its rather expansive appendices of related legislative and executive materials, concerns the relevant issues more in the light of the faith-based initiative than in any generic sense of religious employer guidance – a task otherwise served by such publications as the American Bar Association's *Religion in the Workplace* (which the authors cite).[8] In any event, the book does an excellent job articulating and clarifying the various statutory, constitutional, and policy challenges facing religious employers who wish to retain hire/fire freedom while contributing to the social service needs of the nation. In so doing, the authors posit that such challenges are resolved largely in favor of a wide range of freedom for these groups.

The Freedom of Faith-Based Organizations to Staff on a Religious Basis, which is divided into six sections with nine helpful appendices, treats the issue of religious hiring, largely in the context of federal funds, from both legal and policy perspectives. It begins by challenging the "controversy over religious staffing" and stressing the importance of Charitable Choice, which is both the name of a legal rule for many federal programs (first adopted under President Clinton)[9] and its underlying principle of equal access for faith-based groups to provide social services without regard to hiring practices.[10] The book then summarizes existing (i.e., without reference to public funds) protections for religious entities, most notably their exemptions from religious discrimination prohibitions in Title VII of the Civil Rights Act of 1964[11] and what the authors call that Act's corresponding "acknowledgement . . . of the First Amendment autonomy of religious organizations."[12] In their later discussion of state law, the authors note that analogous laws at that level similarly exempt religious employers in religious discrimination "[a]lmost without fail."[13]

Proceeding from this summary of the rights of religious employers in the absence of public funds, the authors next discuss the status of these rights in light of the receipt of such funds. This is the heart of their book, and will likely prove its most enduring aspect. Here, the authors urge the continued legal vitality of faith-based hiring freedom based on the following: 1) the lack of any funds-based restriction in either Title VII or its relevant exemptions,[14] 2) the constitutionality of offering public funds to religious groups in other contexts,[15] 3) Charitable Choice rules, if they apply,[16] and, if they do not, 4) the Religious Freedom Restoration Act for direct federal aid,[17] and, arguably, the "hybrid" right of Free Speech/Free Exercise for federal aid passing through state agencies[18] or, better yet, a state religious freedom restoration act, if it exists.[19] As the authors confess, the matters here are "complex,"[20] and, at times, following the relevant law and policy can be a challenge. In response, however, their book does a remarkable job in offering a helpful and concise analytical map to navigate what can undoubtedly be a confusing legal landscape.

The book closes with a set of policy arguments and recommendations in support of the rights of religious groups in the faith-based initiative.[21] One of the more powerful points begins, somewhat ironically, with a quote from the liberal Supreme Court Justice William Brennan calling faith-based hiring "a means by which a religious community defines itself."[22] Restricting this right, the authors argue, "would harm

not only the faith-based organizations but the millions of people and thousands of neighborhoods that count on their services."[23] This section of the book, like some of the discussion before it, casts the work more in the mode of a persuasive piece than a neutral overview, which can lead to fairly aggressive policy and legal arguments. And yet, the authors are free to take this line because, frankly, almost all of their conclusions are correct. The book opens with a caveat "encourag[ing]" religious groups "to seek legal counsel,"[24] although through this book, such groups (and their lawyers) are offered invaluable support in their cause.

There is no question that the authors lend a professional gravitas to the discussion provided in their book. Professor Esbeck, now a law professor at University of Missouri-Columbia, was a senior Justice Department official and a primary drafter of faith-based legislation. Dr. Carlson-Thies, now Director of Social Policy Studies at the Center for Public Justice, was a key member of President Bush's White House Office of Faith-Based and Community Initiatives. Dr. Sider, now President of Evangelicals for Social Action, is a prolific scholar on faith in the public arena. This latest contribution will only enhance their reputation in their respective fields. This thoughtful, well-researched work is a welcomed addition to understanding the continuing tradition of religious freedom in America. Mr. Tocqueville would be impressed.

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Footnotes

[1] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 295 (J.P. Mayer, ed., Harper & Row 1969).

[2] *See id.* at 287-95 (describing mutual strength of church and state in American experiment of freedom).

[3] *See generally* Michael W. McConnell, *Why is Religious Liberty the "First Freedom"?*, 21 CARDOZO L. REV. 1243 (2000) (discussing the historical and theoretical dimensions of American religious freedom).

[4] 344 U.S. 94 (1952).

[5] *Id*. at 116.

[6] CARL H. ESBECK ET AL., THE FREEDOM OF FAITH-BASED ORGANIZATIONS TO STAFF ON A RELIGIOUS BASIS (The Center for Public Justice 2004).

[7] *Id*. at 22-23.

[8] MICHAEL WOLF ET AL., RELIGION IN THE WORKPLACE: A COMPREHENSIVE GUIDE TO LEGAL RIGHTS AND RESPONSIBILITIES (American Bar Association 1998).

[9] *See* 42 U.S.C. § 604a (effective July 1, 1997) (2000).

[10] *See* ESBECK ET AL., *supra* note 7, at 15-23 (describing Charitable Choice and its implications).

[11] *See* 42 U.S.C. § 2000e-1(a) (2000) (religious employers generally); *and id*. at § 2000e-2(e)(2) (religious schools and colleges).

[12] ESBECK ET AL., *supra* note 7, at 35. It is an open question whether the constitutional autonomy described as grounds for the Title VII exemption extends to "generally applicable" state non-discrimination laws in light of the Supreme Court's holding in *Employment Div. v. Smith*, 494 U.S. 872 (1990), though the authors appear to reject such a limit. *See* ESBECK ET AL., *supra* note 7, at 79 n.128 (discussing *Smith*).

[13] *Id*. at 67.

[14] *See id*. at 34-35 (discussing the lack of a public funds condition in Title VII's religious exemption).

[15] *See id*. at 35-47 (addressing constitutionality of public funding of religious institutions for various secular purposes in other contexts, including school vouchers in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) and school materials and equipment in *Mitchell v. Helms*, 530 U.S. 793 (2000)).

[16] *See id*. at 70-77 (describing role of Charitable Choice where funds pass through state and local agencies).

[17] *See id*. at 58-64 (positing the continued vitality of the Religious Freedom Restoration Act of 1993, which requires a "compelling interest" if imposing a "substantial burden" on religion (*see* 42 U.S.C. § 2000bb-1 (2000)), despite its lack of application to states (*see* City of Boerne v. Flores, 521 U.S. 507 (1997)).

[18] *See id*. at 78-85 (discussing the free speech and free exercise dimensions of neutral state treatment). *See also generally* Julie Manning Magid & Jamie Darin Prenkert, *The Religious and Associational Freedoms of Business Owners*, 7 U. PA. J. LAB. & EMP. L. 191 (2005) (addressing similar arguments).

[19] *See* ESBECK ET AL., *supra* note 7, at 78 n.125.

[20] *Id*. at 25.

[21] *See id*. at 87-102.

[22] *Id*. at 90 (citing Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring)).

[23] *Id*. at 98.

[24] *Id*. at 26.